PP v. YEOH OON THEAM

HIGH COURT MALAYA, PULAU PINANG
WONG TECK MENG JC
[CRIMINAL APPEAL NO: 41-42-06-2013]
17 JUNE 2015

CRIMINAL LAW: *Giving false evidence – Penal Code – Section 199 – Accused affirming false affidavit and statutory declaration – Elements to be proved – Whether accused had reasons to believe that contents were untrue – Whether failure to attach exhibits in charge fatal to prosecution's case – Whether statutory declaration was defective and fell outside ambit of s. 199 of Penal Code – Considerations for sentencing for offence under of s. 199 of Penal Code*

CRIMINAL PROCEDURE: *Sentencing – Concurrent or consecutive – Offence of giving false evidence – Offences committed on different times, dates and for different purposes – Offences not committed in same transaction – Whether consecutive sentences should be imposed*

CRIMINAL PROCEDURE: *Sentencing – Principles – Offence of giving false evidence – Whether public interest demands custodial sentence*

The respondent was charged with two separate offences under s. 199 of the Penal Code read together with s. 193 for having had made false declarations in relation to material facts in a petition and in a statutory declaration ('SD'). The SD dated 28 March 1992 had been used by the respondent to support an application for a private caveat ('exh. P6') and a Petition No. 31-177-1993 dated 10 August 1993 ('exh. P8') for the purpose of obtaining letter of administration *de bonis non* for the estate of Lim Mah Ee @ Baba Mahee. P8 was lodged at the Penang High Court and the respondent was subsequently appointed as the administrator for the estate of Baba Mahee. Hence, P8 had been lodged in a 'judicial proceeding'. P6 was lodged at the Penang Land Office for the purpose of entering a private caveat on Lot 3475, Seksyen 5 Pulau Pinang. P6 was affirmed before a commissioner for oaths, *ie*, a person bound by law to receive such declaration as evidence. The respondent had no blood ties with Baba Mahee. The property in question was vested to the respondent as administrator of the Estate of Baba Mahee. The respondent was initially acquitted and discharged by the Magistrates Court without calling upon him to enter his defence. However, upon appeal to the High Court, the respondent was ordered to enter his defence. The respondent was then again acquitted and discharged of both charges at the end of the defence case. The prosecution brought this appeal against the decision of the Magistrates Court in acquitting and discharging the respondent. The respondent raised the following issues: (i) that the charge was defective due to failure to attach relevant exh. in P8 to the charge; and (ii) that P6 was not a proper statutory declaration as it was non-compliant with the Statutory

A Declaration Act 1960 on the ground that the words 'and I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Statutory Declarations Act 1960', were not stated in P6.

Held, allowing appeal and convicting respondent on both charges:

B **(1)** The previous High Court had decided that a *prima facie* case had been proved against the respondent and he was the called upon to enter his defence. The present court was in no position to review the decision of the previous High Court. In any event, there was overwhelming evidence proving the two charges against the accused person at the prosecution stage. (para 25)

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(2) The Magistrate had erred in fact and in law when she decided that the respondent had reasons to believe that the content of P8 and P6 were true. There was ample evidence which clearly indicated that the contents of P8 and P6 were not true and the respondent knew about it. (para 36)

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(3) The defence of the respondent was clearly a bare denial, wilful blindness and totally unacceptable. The respondent did not raise any reasonable doubt on the prosecution's case. (para 38)

E **(4)** Throughout the trial, the respondent was represented by an able counsel. Thus the failure to attach the exh. of P8 in the charge did not occasion a miscarriage of justice or was not prejudicial to the respondent as the respondent had clearly exhibited to the court what his defence was and the court had been given the opportunity to examine the said exhibits in deciding the appeal. The respondent knew exactly what the charge

F was against him. (para 44)

(5) A senior lawyer had prepared P6. P6 was meant to be a SD for use to file a caveat with the land office. They must have intentionally left out those important words in order to circumvent any future proceedings if what they had done was discovered subsequently. The respondent could

G not now use what he called a defective SD as his defence. He could not now be heard to say it was not a SD in this criminal proceedings but was on the other hand considered it as a proper SD used by him to enter a caveat on the subject land. It was in fact and in law a SD as P6 was meant to be. Furthermore, s. 114(e) of the Evidence Act 1950 could be

H invoked to regularise P6's defects if any. As such, P6 was a document that was made under the Statutory Declarations Act 1960 and thus came within the ambit of s. 199 of the Penal Code. (para 46)

(6) Public interest demanded that the respondent be put into prison as no amount of fine could replace the loss suffered by the real beneficiaries

I as a result of the respondent's wrongdoing which was a scam to steal the land with the abetment of various parties. A deterrent sentence had to

be imposed and a custodial sentence was most appropriate as the false evidence perpetrated by the respondent had undermined the judicial system where orders (letters of administration) were granted based on it. The respondent being a doctor was educated enough to know what was right and what was wrong but he chose to be on the dark side in order to participate in a land scam. (para 58)

(7) The respondent was sentenced to four years imprisonment for the first charge and one and a half years imprisonment for the second charge, both sentences consecutively as the offences were committed on different times and dates and for different purposes. They were not committed in the same transaction. (paras 61 & 62)

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Khow Ngee Sun v. PP [2014] 8 CLJ 1 CA ***(refd)***
Manimaran Amas v. PP & Another Cases [2014] 1 LNS 1412 CA ***(refd)***
Mohd Azrin Che Meh lwn. PP [2011] 1 LNS 1304 CA ***(refd)***
Mohd Nazir Badar Shair v. Timbalan Menteri Dalam Negeri & Ors [2000] 2 CLJ 805 HC ***(refd)***
Sia Geok Hee & Ors v. PP [1995] 2 CLJ 841 HC ***(refd)***
Yong Yow Chee v. PP [1998] 1 SLR 273 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 2, 156
Evidence Act 1950, s. 114(e)
Oaths And Affirmations Act 1949, ss. 7, 13
Penal Code, ss. 193, 199

Other source(s) referred to:
Ratanlal & Dhirajlal's Law of Crimes, 24th edn, p 854

For the appellant - Syed Faisal; DPP
For the respondent - Gobind Singh Deo; M/s Gobind Singh Deo & Co

Reported by Amutha Suppayah

JUDGMENT

Wong Teck Meng JC:

Introduction

[1] This in an appeal against the decision of the Magistrate's Court, Pulau Pinang, acquitting and discharging the respondent on two separate charges under s. 199 read together with s. 193 of the Penal Code at the end of his defence.

Background

[2] The accused was charged with two separate offences. They read as follows:

(i) First Charge: 83-696-2007

Bahawa kamu pada 10 Ogos 1993 di Mahkamah Tinggi Sivil 3 Pulau Pinang dalam Negeri Pulau Pinang, di dalam satu petisyen yang diikrarkan oleh kamu di hadapan Pesuruhjaya Sumpah Encik Gong Ngie Hoong yang boleh diterima sebagai keterangan iaitu satu petisyen yang didaftarkan di Mahkamah tersebut, telah membuat pernyataan palsu dalam petisyen tersebut sepertimana yang digariskan dalam Lampiran 'A' yang dilampirkan bersama dan pernyataan palsu tersebut adalah berkenaan dengan satu perkara material kepada tujuan petisyen tersebut dan pernyataan palsu tersebut kamu tahu atau percaya adalah palsu atau tidak percaya sebagai benar. Oleh itu kamu telah melakukan satu kesalahan di bawah Seksyen 199 Kanun Keseksaan yang boleh dihukum di bawah cabang pertama kepada Seksyen 193 Kanun yang sama. (Petisyen No. 31-177-1993 marked as P8 at page 528 Appeal Record Jillid 2)

(ii) Second Charge: 83-697-2007

Bahawa kamu pada 28 Mac 1992 di No. 25 Lebuh Light di Daerah Timur Laut di dalam Negeri Pulau Pinang, di dalam satu Akuan Berkanun yang diikrarkan oleh kamu di hadapan Pesuruhjaya Sumpah Encik Paul Thong, yang mana seorang penjawat awam dibenarkan di sisi undang-undang untuk menerima sebagai keterangan apa-apa nyataan, telah membuat pernyataan palsu dalam Akuan Berkanun tersebut sepertimana yang digariskan dalam Lampiran 'A' yang dilampirkan bersama dan pernyataan palsu tersebut adalah berkenaan dengan satu perkara material kepada tujuan Akuan Berkanun tersebut dan pernyataan palsu tersebut kamu tahu atau percaya adalah palsu atau tidak percaya sebagai benar. Oleh itu kamu telah melakukan satu kesalahan di bawah Seksyen 199 Kanun Keseksaan yang boleh dihukum di bawah cabang kedua kepada Seksyen 193 Kanun yang sama. (Respondent's Statutory Declaration marked as P6 at page 520 Appeal Record Jillid 2)

[3] On 5 August 2011 the respondent was acquitted and discharged by the Magistrate's Court Pulau Pinang without calling upon him to enter his defence.

[4] On appeal to the High Court, the respondent was ordered to enter his defence by YA Dato' Zamani J (now JCA) and on 10 June 2013 the respondent was again acquitted and discharged of both charges.

Burden Of Proof At The End Of Defence

[5] In this case, the High Court had decided that a *prima facie* case had been proved against the respondent. This would simply mean that the respondent can be convicted on *prima facie* case if he fails to rebut the prosecution's case. The respondent had the duty of raising a reasonable doubt against the prosecution's case. The reasonable doubt is a doubt arising from the evidence adduced or doubt which arise for reasons of lack of evidence.

Reasonable doubt must have reasonable basis and should not be speculative in nature. It is not a doubt which happens to someone with fickle mind. (see *Mohd Azrin Che Meh lwn. PP* [2011] 1 LNS 1304; [2012] 1 MLJ 450).

[6] In this context, the Federal Court in *Balachandran v. PP* [2005] 1 CLJ 85; [2005] 2 MLJ 301 at pp. 99-100 (CLJ) had stated that:

> A *prima facie* case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase '*prima facie* case' is defined in similar terms in *Mozley and Whiteley's Law Dictionary*, (11th Ed) as:
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> > A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.
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> The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen.
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> ... As the accused can be convicted on the *prima facie* evidence it must have reached a standard which is capable of supporting a conviction beyond reasonable doubt.

Ingredients Of Offence

[7] The elements that are required to be proved in a charge under the section, as stated in *Ratanlal & Dhirajlal's Law of Crimes* (24th edn) at p. 854, are as follow:

(i) that the accused made, or subscribed the declaration in question;

(ii) that a court of justice, etc., was bound or authorised to receive such declaration as evidence;

(iii) that such statement was false;

(iv) that such false statement touched a point material to the object of such declaration; and

(v) that when making the statement, the accused knew that it was false, or believed it to be false or did not believe it to be true.

Evidence Of The Prosecution

[8] Evidence had been adduced that the respondent had affirmed two documents. They are a statutory declaration dated 28 March 1992 which was used to support an application for a private caveat (marked as exh. P6) and

A a Petition No. 31-177-1993 dated 10 August 1993 (marked as exh. P8) for the purpose of obtaining letter of administration *de bonis non* for the estate of Lim Mah Ee @ Baba Mahee. (see pp. 520-523, 528-531 RR Jilid II).

[9] Wahi Annuar bin Othman (SP3) had confirmed that the statutory declaration (P6) was affirmed by the respondent before the Commisioner for B Oaths, Mr Paul Thong on 28 March 1992. SP3 had also said that P6 was submitted for the purpose of entering a private caveat on Lot No. 3475, Section 5 Pulau Pinang. (see pp. 22 - 24 RR Jilid I)

[10] Chee Gin Heoh (SP5) had testified that Commissioner for Oaths, Paul C Thong was her husband who died on 30 October 1994 (see death certificate marked as exh. P9). She identified the signature of the Commissioner for Oaths on P6 as that of her husband, Paul Thong. (see p. 32 RR Jilid II)

[11] Zaharah binti Hussain (SP4), Deputy Registrar of Penang High Court testified that the petition (P8) that was affirmed by the respondent on D 10 August 1993 had been lodged as Petition No. 31-177-1993 at the Penang Civil High Court No. 3 by Messrs CS Ong & Co. (see pp. 27-28 RR Jilid I)

[12] Gong Ngie Hoong (SP9), a Commissioner for Oaths testified that the respondent had appeared before him to affirm the petition P8. He further testified that the respondent had read and understood the content of P8 before E affirming it. (see pp. 123-124 RR Jilid I)

Section 7 Oaths And Affirmations Act 1949 [Act 194] provides:

> Section 7. Where oath required affirmation may be made.
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> Where any person is required by this Act or any other written law to take F an oath the requirement shall be deemed to be complied with if an affirmation is made.

Section 13 Act 194 further provides:

> Section 13. Persons giving evidence bound to state the truth.
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> G Every person giving evidence on any subject before any court or person authorised by this Act to administer oaths and affirmations shall be bound to state the truth on such subject.

[13] SP4 testified that petition P8 had been lodged at Penang Civil High Court as Petition No. 31-177-1993 and the respondent was subsequently H appointed on 27 December 1993 as the administrator for the estate of Lim Mah Ee @ Baba Mahee. (see p. 29 RR Jilid I)

[14] SP3 testified that statutory declaration P6 was lodged at the Penang Land Office on 28 March 1992 for the purpose of entering a private caveat on Lot 3475, Seksyen 5 Pulau Pinang. (see pp. 22-23 RR Jilid I)

I Section 2 Criminal Procedure Code [Act 593] defines judicial proceeding as:

> "Judicial proceeding" means any proceeding the course of which evidence is or may be legally taken.

The evidence of SP4 confirmed that petition P8 had been lodged in a "judicial proceeding" and registered Petition No. 31-177-1993 in Penang Civil High Court No. 3.

> The evidence of SP3 and SP9 confirmed that the statutory declaration P6 was affirmed before the Commissioner for Oath Mr Paul Thong who is a person bound by law to receive such declaration as evidence. (see s. 13 Act 194)

[15] The evidence of Lee Ewe Liang (SP11) and Lee Ewe Bee (SP12) had clearly described their descendency with Tan Chye Hoon who was the administrator of the estate of Lim Mah Ee @ Baba Mahee. (pp. 151-166, RR Jilid I)

[16] In short, there are three tombstones located at Lot 56 and the reading of the three tombstones (refer to P3, P4 and P5) are as follows:

Lim Saw Chin	Tan Chye Hoon	Lim Saw Tuan
Son: Kuah Kim Kheng	Son: Lim Gim Thuan Lim Gim Beng	Son: Lee Hoo Kee
Daughter: Quah Beow Khim	Lim Gim Yong	Daughter: Lee Poh Thim
	Daughter: Lim Saw Tuan Lim Saw Chen	Grandson: Lee Kok Guan

Based on the reading of the tombstones and the evidence of Lee Ewe Liang (SP11) and Lee Ewe Bee (SP12), the descendency of Lim Mah Ee @ Baba Mahee can be summarised as follows:

(i) Tan Chye Hoon was the grandniece of Lim Mah Ee @ Baba Mahee.

(ii) Tan Chye Hoon was the mother of Lim Saw Tuan (refer to P4).

(iii) Lim Saw Tuan was the mother of Lee Hoo Kee (refer to P5).

(iv) Lee Hoo Kee was the father Lee Kok Guan (refer to P5, P34 and P35).

(v) Lee Kok Guan is the father of Lee Ewe Liang (SP11) (refer to P33).

(vi) The birth certificates of Lee Kok Guan (P45), Lee Hoo Kee (P46), Lim Saw Tuan (refer to P47) and Tan Chye Hoon (refer to P48) were tendered through SP11 and it is important to note that the address of Lim Saw Tuan as stated in her death certificate was 46, Batu Lanchang Road and it is the same addressed as stated in the birth certificate of SP11 (P33).

[17] As far as the respondent is concerned, SP11 and SP12 had testified that the respondent had no blood ties with them. Both of them had never met the respondent in any family function. (see pp. 160 & 22r RR Jilid I)

[18] The respondent knew about the existence of the three tombstones on the land and he told SP7 about it. The only reason for respondent to inform SP7 about it is to convince SP7 that he was a descendant of Baba Mahee whereas there is nothing on the tombstones to relate his family to Baba Mahee.

[19] Eventhough SP11 and SP12 had put their signatures on exhs. P10 and P11, they have done so on the advise of their solicitor, Christina Siew (SP6). The content of both documents were never discussed in detail with them. They were only made to understand that if they disagree to accept the respondent as one of the beneficiary, they will receive nothing from the estate.

[20] SP8, an officer of the land office, testified that the property was originally transferred to Tan Chye Aun by virtue of an order of court in 1885. In 1988, Tan Chye Aun's name was replaced with Baba Mahee by the Commissioner of Land without any order of court. Subsequently in 1991, the land was transferred to Majlis Agama Islam Pulau Pinang. Finally, on 15 August 1995, the land was vested to the respondent as administrator of the estate of Baba Mahee @ Lim Mah Ee, deceased.

This record of ownership by Tan Chye Aun was clearly supported by the Kyshe Law Report (P14).

(SP8's evidence is supported by exh. P14 at pp. 548, P29A, P29B, P29C, P29E at pp. 582-590 and P31 at p. 592, Appeal Record Jilid III)

[21] There are substantial discrepancies between the content of the statutory declaration (P6) and the petition (P8) as follows:

(i) In P6, nowhere was it stated the identity of Kam Khean Neow as the great grandmother to the respondent but her name was mentioned in P8.

(ii) The letter of Yeow Cheow Eang to the collector of Land Revenue Penang (P20) stated that Tan Chye Hun was the sister-in-law to Kam Khean Neow and Yeow Cheow Eang was the administrator for Kam Khean Neow. The respondent claimed his descendancy to the estate of Lim Mah Ee through Kam Khean Neow.

Why is the identity of Yeow Cheow Eang which was not mentioned in P8 but only appeared in P6? The only explanation to this was that he didn't know how to relate clearly his descendancy to the estate of Lim Mah Ee. Failure on part of the respondent to mention this in P8 would simply mean that he was not able to proof his descendancy to the estate of Lim Mah Ee.

[22] There are also discrepancies between what was stated in P6, P8 and D86 and also in P14. In P14, Tan Chye Hoon was clearly described as the "grand niece" of Lim Mah Ee and letter of administration *de bonis non* was given to Tan Chye Hoon on 15 October 1883. Lim Hong Guan was stated as the son of Lim Mah Ee and not "grand nephew" as stated in exh. D86 that was referred to by the defence.

P14 states as follows:

> It appeared that the lands and title deeds aforesaid belonged to one Lim Mah Hee, deceased, who died in 1848, leaving a Will, by which he appointed one Tan Kim Neow, his Executrix. The said Tan Kim Neow, died without having proved the said will, and on the 8th September, 1856, the said will was proved by Lim Hong Guan, a son of the deceased Lim Mah Hee, and letters of administration, with the said will annexed, were granted to him ... On 15th October, 1883, letters of administration *de bonis non* to the Estate of the said Lim Mah Hee, were granted to the plaintiff, as his grand niece; who in that capacity now brought this action ...

[23] Also in P14, the name of Kam Chin Neoh which was mentioned at paras. 8 and 9 of P6, was clearly non existence.

[24] Dato' Ong Eng Kuan (SP7) the respondent's solicitors did have full knowledge of this report (P14).

[25] Based on the above evidence, the previous High Court had decided that a *prima facie* case had been proved against the respondent and he was the called upon to enter his defence. For that reason, I am in no position to review the said decision of the previous High Court but after fine combing the evidence adduced by the prosecution as found in the records of appeal, I am in total agreement with the previous High Court Judge that the prosecution had proven a *prima facie* case at the end of the prosecution's case. In fact, there is overwhelming evidence proving the two charges against the accused person at this stage. The instant appeal, in my view, should focus on whether the defence had raised a reasonable doubt on the prosecution case which should have been the duty of the Magistrate at the end of the defence stage.

[26] The Court of Appeal in *Manimaran Amas v. PP & Another Cases* [2014] 1 LNS 1412, had stated thus:

> [21] We noted that central to the submissions of learned counsel for all the appellants was whether the circumstantial evidence relied upon by the prosecution was strong enough to link all the appellants with the offence of murder. We found that the complaint of the appellants was basically that there was no *prima facie* case and that they ought not to have been called upon to enter on their defence.
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> [22] In the course of the submissions, we had sought clarification from learned counsel and it was made clear to us that what we were urged to do was to revisit the decision of the previous panel of this court in calling upon the appellants to enter on their defence.

A [23] Whilst the appellants may, when an appeal is pursued further at the Federal Court, argue that the Court of Appeal erred in calling upon the appellants to enter on their defence, we, on our part were in no position to review the said decision of the previous panel of the Court of Appeal. The instant appeal, in our view, should focus on whether the defence had raised a reasonable doubt on the prosecution case.

B [24] We were mindful of the provision of section 182A of the Criminal Procedure Code which requires the court to consider all the evidence at the conclusion of the trial. This exercise would necessarily entail the consideration of the defence in the light of the prosecution's case as had been made clear by the Federal Court in the case of *PP v. Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393 where it is stated thus:

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> If the court, upon a maximum evaluation of the evidence placed before it at the close of the prosecution case, comes to a conclusion that a *prima facie* case has not been made out, it should acquit the accused. If, on the other hand, the court after conducting a maximum evaluation of the evidence comes to the conclusion that a *prima facie* case has been made out, it must call for the defence. If the accused then elects to remain silent, the court must proceed to convict him. It is not open to the court to then re-assess the evidence and to determine whether the prosecution had established its case beyond reasonable doubt. The absence of any evidence from the accused that casts a reasonable doubt on the prosecution's case renders the *prima facie* case one that is established beyond reasonable doubt. ...

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[25] In the instant appeal, since all the appellants were called upon by the Court of Appeal to enter on their defence, it must necessarily mean that the Court of Appeal was satisfied that the prosecution had proved all the ingredients of the charge, including the element of common intention, before concluding that a *prima facie* case had been made out by the prosecution. There was therefore no necessity for us to revisit the issues on whether a *prima facie* case had been made out. What we need to consider was whether the evidence from the defence had cast a reasonable doubt on the prosecution's case.

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[26] This approach had also been clearly stated in the case of *Pendakwa Raya lwn Sulaiman bin Saidin* [2010] 3 MLJ 383 where Sulaiman Daud JCA said:

> [27] Sebelum merumuskan isu atau isu-isu berbangkit dalam rayuan ini, kami mendapati perlu untuk mengulangi bahawa tertuduh telah dipanggil untuk membela diri setelah mahkamah ini, dalam rayuan terdahulu, mengetepikan keputusan hakim bicara di akhir kes pendakwaan. Sehubungan dengan itu, kami mendapati tiada keperluan bagi kami untuk menimbangkan semula isu-isu yang telah diputuskan oleh mahkamah ini terdahulu mengenai isu-isu yang telah dibangkitkan di akhir kes pendakwaan, kecuali jika terdapat keterangan-keterangan baru yang dibangkitkan oleh pihak pembelaan yang boleh menimbulkan keraguan yang munasabah ke atas kes pendakwaan.

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[27] The learned trial judge was therefore correct when he stated thus in his judgment (pg 563: Rekod Rayuan (Kes Pembelaan)):

> In considering the defence put forward by all the three accused persons, I have to bear in mind that the Court of Appeal which had stood in the shoes of the trial judge found that the prosecution had established a *prima facie* case against all the accused persons based on the evidence adduced at the end of the prosecution case. In other words, the evidence adduced by the prosecution has satisfied the maximum evaluation test. My duty at the end of the defence is to consider whether the defence put forward, whether believable or unbelievable has created a reasonable doubt in the prosecution case.

Defence

[27] For case No. 83-696-2007, references are made to three paragraphs in the petition (P8) that was highlighted in "lampiran A".

[28] Paragraph 5 stated:

> ... Surat kuasa mentadbir dengan wasiat telah diberikan kepada Lim Hong Guan, cucu penakan simati yang juga telah meninggal dunia dengan meninggal harta pusaka tak ditadbirkan.

The respondent claimed that para. 5 was made based in the facts contained in the letter of administration *de bonis non* of the Estate of Lim Mah Ee (D86) which stated:

> Letters of Administration with the said will annexed was granted to Lim Hong Guan the grand-nephew of the said deceased who was since died without having fully administered the said estate.

[29] Paragraph 9 stated:

> ... Kam Khean Neow adalah anak penakan kepada simati yang berhak mewarisi harta pusaka simati tersebut.

The respondent claimed that para. 9 was made based on the content of the letter written by his grandfather, Yeoh Cheow Eang dated 19 June 1959 (P20) and also the letter of administration *de bonis non* of the Estate of Lim Mah Ee which was given to Tan Chye Hun (D87). In P20, Kam Khean Neow is stated as "sister in law" to Tan Chye Hun and in D87, Tan Chye Hun is stated as "great grand niece" to Lim Mah Ee. As such Kam Khean Neow is a relative to Lim Mah Ee.

[30] Paragraph 12 stated:

> Pempetisyen memohon bahawa Surat Kuasa Mentadbir *De Bonis Non* dengan wasiat bagi harta pusaka dan harta benda kepunyaan Baba Mahee@Lim Mah Ee, simati yang tersebut boleh diberikan kepadanya sebagai salah seorang waris kadim.

The respondent claimed that he is the "waris kadim" to Baba Mahee based on the letter of his grandfather (P15B(iv)). He claimed that based on the P15B(iv), his grandfather is a descendant of Tan Chye Hun, who is the great grand niece to Lim Mah Ee.

[31] For case No. 83-697-2007, references are made to four paragraphs in the statutory declaration (P6) that was highlighted in "lampiran A".

[32] Paragraph 1 stated:

> I am one of the descendants and beneficiaries of the estate of one Lim Mah Ee otherwise known as Baba Mahee (hereinafter referred to as the said deceased).

The respondent claimed that the statement was made based on the letter written by his grandfather, Yeoh Cheow Eang (P15B(iv)). Based on the letter he claimed that his grandfather was a descendant of Tan Chye Hun and based on D87, Tah Chye Hun was the "great grand niece" of Baba Mahee @ Lim Mah Ee. As such he now claimed that he really is a descendant of Baba Mahee and therefore entitled to the estate.

[33] Paragraph 6 stated:

> ... Lim Hong Guan, the grand nephew of the said deceased.

The respondent claimed that this statement was based on D86 which stated "Lim Hong Guan, the grand nephew of the said deceased."

[34] Paragraph 8 stated:

> ... Kam Chin Neoh, the niece of the said deceased.

The respondent claimed that this statement was based on the content of D87 which stated that "Kam Chin Neow, a niece of the deceased."

[35] Paragraph 9 stated:

> ... Tan Chye Hun, one of the great grand nieces of the said deceased.

The respondent claimed that this statement was made based on the content of D87 which stated that "Tan Chye Hun, one of the great grand nieces of the said deceased."

Findings

[36] The Magistrate had erred in fact and in law when she decided that based on D87, the respondent has reasons to believe that the content of P8 and P6 are true. There are ample evidence which clearly indicate that the contents of P8 and P6 were not true and the respondent knew about it.

[37] The evidence are as follows:

(i) In P20 ie the letter written by Yeoh Cheow Eang to the collecter of Land Revenue Penang, nowhere was it mentioned in the letter that

Kam Khean Neow is the "anak penakan" to the deceased. This clearly contradicts with the evidence of the respondent that para. 9 of P8 was based on the letter of his grandfather ie, P20.

(ii) The investigation by the investigation officer (P18) revealed that the respondent is not the descendant of Baba Mah Ee.

(iii) Lee Ewe Liang (SP11) and Lee Ewe Bee (SP12) in their evidence clearly said that the respondent has no blood ties with their family and they have never met in any family functions since young.

(iv) The letters written by Yeoh Cheow Eang to the collector of Land Revenue Penang dated 19 June 1951 (P20) and 20 June 1951 (P15B(iv)) did not mention at all that Yeoh Cheow Eang is the descendant and beneficiary of Baba Mahee @ Lim Mah Ee.

(v) In P20, Yeoh Cheow Eang only mentioned that he had been taking charge and administering the land for over 40 years. In the letter, he mentioned himself and the administrator of the late Kam Khean Neow. There is nothing in P20 which indicates that Yeoh Cheow Eang was the descendant and beneficiary of Baba Mahee @ Lim Mah Ee.

(vi) In P15B(iv), Yeoh Cheow Eang only mentioned himself and as administrator of Kam Khean Neow. He did not mentioned himself as administrator of Lim Mah Ee or Tan Chye Hun. The descendant of the deceased in P15B(iv) is referring to Kam Khean Neow.

(vii) In originating summons dated 29 April 1952 (P23) at para. 4 stated that "Yeoh Cheow Eang appeared as administrator of Kam Estate ... he had been looking after this estate for about 40 years. In the absence of letters of administration I say that there is no person competent to alienate this land". This is clear evidence that Yeoh Cheow Eang has no right as beneficiary to apply for letters of administration.

(viii) The tombstones (P2) and its translation in P3, P4 and P5 is a very clear indication that Yeoh's family has no blood ties with Baba Mahee @ Lim Mah Ee or Tan Chye Hun. In his defence, the respondent admitted this fact. He claimed to be entitled to the property through Kam Khean Neow who was the grandmother to Yeoh Cheow Eang. Respondent admitted that his claim to the property was not based on blood ties but based on the facts that Kham Khean Neow was the sister in law to Tan Chye Hun. But the respondent failed to explain how Tan Chye Hun could become the sister in law to Kham Khean Neow.

(ix) The respondent knew about the existence of the tombstones and the fact that he was not related to the Baba Mahee @ Lim Mah Ee but he chose to lie about it to SP7 when he mentioned to SP7 that he is a descendant to the family based on the tombstones located at the property. It is unfortunate that SP7 did not verify this fact.

(x) Respondent himself in his evidence admitted that apart from the two letters written by his grandfather, there are no other evidence to support his claim of descendancy to Baba Mahee. The fact that the respondent had to refer to his lawyer SP7 on these letters to find out whether he has a claim to the estate of Baba Mahee @ Lim Mah Ee shows that he does not even know that he is a descendant or beneficiary to the estate. If one is the descendant he should know about it straight away, being part of the bigger family of the said estate.

(xi) Based on the content of P15, P20 and D86 which formed the basis of the respondent's statements in P6 and P8, it clearly indicate that the respondent knew that the content of P6 and P8 to be false.

(xii) There are also discrepancies between the P6 and P8 as part of the evidence of the prosecution. There is nothing in the evidence of the respondent to rebut this evidence.

(xiii) Theere documents P6 and P8 was prepared by SP7 based on the facts given by the respondent and SP7 did not verify these facts. This clearly indicate that those facts which were not true were well within the knowledge of the respondent.

(xiv) The respondent was unable to show by a family tree and documents (such as birth/death certificates) of his relevant ancestors to the estate of Baba Mahee @ Lim Mah Ee. In fact there was none to show how he is related to the ancestors.

(xv) The respondent in an unholy haste with the assistance of SP7 signed sale and purchase agreement with Wayrex Sdn Bhd to sell the subject land to Wayrex for RM450,000 (based on the valuation report of 1991) on 28 February 1992 when the respondent had not even obtained the letters of administration *de bonis non* (only obtained it on 27 December 1993). The price of RM450,000 was an under valuation as in 1992 the price should be much higher. According to SP14 Encik Zairaffi b Ramli a Government valuer, the value of the land in 1991 should be around RM2,234,931.10 and the value for 1993 was RM3,114,935.10. The respondent as at 28 February 1992 was not the registered owner of the subject land and as such no legal right to sell it. He was dishonest and he must have known what he was doing was wrong. This finding of dishonesty with knowledge of wrong doing can be inferred by this court from the facts and circumstances of the case. Then what happened to the land after that? Wayrex Sdn Bhd then transferred the subject land to their own company Hybrid Gold Sdn Bhd and in 1999 Hybrid Gold Sdn Bhd sold the subject land to Digital Way Sdn Bhd for RM11,038,000. The wrong doing of the respondent had resulted in colossal loss to the estate of Baba Mahee @ Lim Mah Ee. One can only fathom how much is the subject land worth today?

> The real beneficiaries only ended up with peanuts due to the respondent's wrong doing (they shared among themselves less than the RM450,000)

[38] Based on the evidence of the respondent, the court find that the defence of the respondent are clearly a bare denial, wilful blindness and totally unacceptable. The respondent therefore, did not raise any reasonable doubt on the prosecution's case.

[39] I will now determine two issues raised by the respondent's counsel in his submissions before me. They are as follow:

Defective Charge Due To Failure To Attach Relevant Exhibits In Petition P8 To The Charge (Case No. 83-696-2007)

[40] The defence counsel's complaint is that the said charge was defective because relevant exhibits in P8 were not attached to the charge. Eventhough the exhibit to petition P8 was not attached to the charge, the court finds that such failure does not occasion a failure of justice or prejudicial to the respondent. In the case of *Khow Ngee Sun v. PP* [2014] 8 CLJ 1; [2014] 4 MLJ 131, YA Tengku Maimun JCA had decided thus:

> [22] Hence, what needs to be considered is whether the defective charge against the appellant had occasioned a failure of justice or had caused any prejudice to the appellant.

[41] In the case of *Yong Yow Chee v. PP* [1998] 1 SLR 273, Karthigesu JA at p. 285 had decided thus:

> It is of utmost importance that the trial judge must determine that no prejudice is caused to the accused.

[42] In the case of *Sia Geok Hee & Ors v. PP* [1995] 2 CLJ 841; [1994] MLJU 392, the second charge reads as follows:

> Bahawa kamu bersama-sama pada 1.3.91 jam lebih kurang 8.40 malam hingga jam 12.00 malam, di Jalan Cangkat Bukit Bintang, di dalam Bandaraya Kuala Lumpur Wilayah Persekutuan telah didapati dengan sengaja menghalang Konst. 65114 Mohd. Nazri bin Mohd. Ariffin dan empat pejawat awam yang lain pada menjalankan kerja-kerja jawatannya dan olih yang demikian telah melakukan satu kesalahan di bawah Sek. 186 Kanun Keseksaan K/K dan boleh dihukum di bawah Seksyen yang sama.

Hashim Yusof JC had decided thus:

> The charge did not set out the manner which the appellants obstructed P.W.4 Constable 65114 Mohd Nazri b. Mohd Ariffin and other public servants in the discharge of their functions.
>
> ...
>
> In the circumstances of the instant case, I hold that the appellants were not in fact embarrassed or prejudiced and that the technical irregularity did not occasion a miscarriage of justice. They were

A never misled by the error. They defended themselves and gave their own account of what had happened at the material time. They knew what the charge was all about.

[43] Section 156 Criminal Procedure Code provides:

B No error in stating either the offence or the particulars required to be stated in the charge and no omission to state the offence or those particulars shall be regarded, as any stage of the case as material unless the Accused was in fact misled by such error or omission.

[44] In his defence, reference were made to exhs. D86 and D87 which are related to the exhibits that were not attached to P8. Reliance was also made C by the respondent to exhs. P15 and P20 in his defence. Throughout the trial, the respondent was also represented by an able counsel. Thus the failure to attached the exh. of P8 in the charge does not occasion a miscarriage of justice or prejudicial to the respondent as the respondent had clearly exhibited to the court what his defence was and the court had been given D opportunities to examine the exhs. P15, P20, D86 and D87 in deciding this appeal. In short, the respondent knew exactly what the charge was against him.

Non-compliance Of The Statutory Declaration (P6) With The Statutory Declaration Act 1960

E

[45] On this issue, the respondent's counsel complained that P6 is a defective statutory declaration as the form which should have the following words, "and I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Statutory Declarations F Act 1960", were not stated in P6. Hence, the respondent's counsel submitted that the charge against the respondent should fall as there is no statutory declaration as such affirmed by the respondent.

[46] From the evidence adduced in court, it is crystal clear that P7, a senior lawyer was the one who prepared P6 for the respondent but he blamed it on G his clerk. I am sure he must have instructed his clerk to enter into all the details in the statutory declaration and must have checked it before the respondent signed it.

[47] It is unlikely that this is an innocent omission on the part of SP7 and the respondent. The said document P6 was meant to be a statutory H declaration for use to file a caveat with the land office. They must have intentionally left out those important words in order to circumvent any future proceedings if what they have done is discovered subsequently.

[48] I am of the view that the respondent cannot now use what he called a defective statutory declaration as his defence. He cannot now be heard to I say it is not a statutory declaration in this criminal proceedings but was on the other hand considered it as a proper statutory declaration used by him to enter a caveat on the subject land.

[49] It is my finding that this is in fact and in law a statutory declaration as P6 was meant to be. Its heading is "statutory declaration". Its opening paragraph reads "I, Yeoh Oon Theam (NRIC No: 2189658) of No: 44, Ayer Rajah Gardens, Penang, do solemnly and sincerely declare and say as follows:" refers to a declaration made by the respondent and the respondent had affirmed it before a Commissioner of Oaths following the prescribed jurat, ie, "subscribed and solemnly declared by the abovenamed said Yeoh Oon Theam in Penang this 28th day of March 1992 at 10.45am."

[50] Those omitted words were merely procedural in view of the fact that the respondent meant P6 as a statutory declaration, and as such does not in any way prejudiced the respondent who knew what he was affirming and why he left out those words. There is only one Statutory Declaration Act 1960 governing statutory declarations and the respondent affirmed it under the said Act.

[51] Furthermore, s. 114(e) of the Evidence Act 1950 may be invoked to regularise P6's defects if any.

[52] Section 114(e) of the Evidence Act 1950 provides:

> 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.
>
> ILLUSTRATIONS
>
> The court may presume:
>
> ...
>
> (e) that judicial and official acts have been regularly performed;

[53] YA Augustine Paul in the case of *Mohd Nazir Badar Shair v. Timbalan Menteri Dalam Negeri & Ors* [2000] 2 CLJ 805, [2000] 2 MLJ 559 had decided thus at p. 809 (CLJ); p. 565 (MLJ):

> Be that as it may, the affirmation and filing of an affidavit are official act which attracts. 114(e) of the evidence Act which provides that the court may presume that judicial and official acts have been regularly performed.

At p. 810 (CLJ); p. 566 (MLJ) it is stated thus:

> The signature of a commissioner for oaths in an affidavit showing that it has been sworn before him is an official act and the affidavit must be presumed to have been regularly affirmed even though the jurat is on a completely new page unless the contrary is proved.

[54] As such, it is the finding of this court that P6 is a document that was made under the Statutory Declarations Act 1960 and thus comes within the ambit of s. 199 Penal Code.

A **Decision**

[55] Hence, based on the foregoing, I allowed the appeal by the appellant and found the respondent guilty and convicted him for the offences committed on the first and the second charge.

B **[56]** Before I imposed sentence, I have considered the mitigation of the Respondent who is 71 years old and is a medical doctor. He has some common-ailments such as hypertension, chronic bronchitis that requires nebulising etc but no medical records were tendered by him. He also blamed it on his lawyer for advising him on the documents to pursue the claim on the land.

C

[57] On the other hand, the appellant submitted that the offences were serious as the respondent had stolen the land from its rightful beneficiaries who suffered monumental loss in the millions of ringgit.

[58] After considering the mitigation and the request of the prosecution to D impose a custodial sentence in view of the seriousness of the case and its implications on the real beneficiaries to the estate, I am of the view that public interest demands that the respondent be put into prison as no amount of fine can replace the loss suffered by the real beneficiaries as a result of the respondent's wrongdoing which is a scam to steal the land with the abetment E of various parties involved as revealed in the evidence, including SP7, his solicitors. SP7 was involved in all the conveyancing of the subject property until the last purchaser: he was involved in sharp practice so to speak.

[59] A deterrent sentence must be imposed and a custodial sentence is most appropriate as the false evidence perpetrated by the respondent had F undermined the judicial system where orders (letters of administration) were granted based on it. The respondent being a doctor is educated enough to know what is right and what is wrong but he chose to be on the dark side in order to participate in a land scam.

G **[60]** It is noted that the letters of administration was obtained *ex parte* eventhough the respondent knew there were beneficiaries involved. He should have first traced the whereabouts of these beneficiaries and obtained consent from them to apply for letters of administration. The respondent did the reverse (read the contents of the petition) by applying first and trace the beneficiaries later. But by then, he had already sold the subject land to H Wayrex. The *ex parte* application for the letters of administration was fraudulent as the respondent intentionally did not obtain the required consent from the real beneficiaries.

[61] Hence, I sentenced the respondent to:

I First Charge

Four years imprisonment from 6 April 2015 and a fine of RM10,000 in default three months imprisonment.

Second Charge

1 1/2 years imprisonment from 6 April 2015 and fine of RM10,000 in default three months imprisonment.

[62] The accused was ordered to served both sentences consecutively as the offences were committed on different times and dates and for different purposes. Hence, they were not committed in the same transaction. I also ordered the respondent to pay RM10,000 as costs for prosecution.