SUMMARY TRIAL PROCEDURE IN SUBORDINATE COURTS IN MALAYSIA: SPECIAL EMPHASIS ON S.173 (f) OF CRIMINAL PROCEDURE CODE

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A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENT FOR THE DEGREE OF MASTER OF COMPARATIVE LAWS

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ABSTRACT OF THE DISSERTATION

The Criminal Procedure Code is one of the basic laws relating to the Criminal Justice System. The law of criminal procedure is actually to oversee the administration of substantive criminal laws, which includes the manner punishments are to be enforced on the offender. On the other hand, the law of criminal procedure ensures that the interest of the offender is protected from unjust prosecution and unjustified punishment.

The main objective of the law of criminal procedure is to compliment the substantive criminal law as the substantive criminal law could not function properly on its own, however comprehensive it might be. Thus, the Criminal Procedure Code provides for mechanism for the arrest of suspected criminals, investigation on the arrestee, collection of evidence, preparation of charge, manner of trial, determination of the guilt of the accused person and the imposition of punishment. The administration of justice can only be properly served with steadfast adherence to the strict procedural safeguards under the law.

The accused is entitled to be accorded with a fair trial in accordance with the principles of natural justice. This is quite in harmony with the legal maxim that, "the accused person is presumed to be innocent unless proven otherwise". It is through proper trials that criminal justice can be upheld and to achieve this, it is essential that there should be a proper understanding on the procedures in summary trials.

The underlying aim of this study is basically to examine the procedure in summary trial in Subordinate Courts under section 173 of the Criminal Procedure Code (Act 593) with special reference to section 173 (f) of the same. The major principles in summary trial procedure as expounded through the many cases on this subject will be discussed. The study is more of an academic discussion through the interpretation of various provisions on summary trial procedure and the case law.

The dissertation begins with introduction in which the introductory remarks pertaining to the Criminal Procedure Code is stated in brief. This chapter also contains the background of study, statement of problem, literature review and the methodology used in the research.

Chapter two dwells on the topic of summary trials procedure. Each paragraph under section 173 of the Criminal Procedure Code is critically examined and analysed. Comparisons were made between the old and amended paragraph under the section and from these comparisons, we can see that under the amended paragraph, the procedures become more explicit and clear.

Chapter three touches on the topic of *prima facie* case and it is the most important chapter. The issue on what is the correct standard of proof at the conclusion of the prosecution's case has been of great controversy for a number of years. It has now finally come to rest with the amendment of section 173 (f) of the Criminal Procedure Code vide Act A979. The meaning of *prima facie* case under the amended section and what does it require to make out a case are discussed based on recent and latest cases decided on the subject.

Chapter four delves into the subject of criminal procedures as applied in the Syariah Court pertaining to the standard of proof at the conclusion of the prosecution's case. The study goes on to consider the burden of proof by the prosecution at the end of trial. The discussion under this chapter is confined to reference under the Syariah Criminal Procedure (Federal Territories) Act 1997 [Act 560] and other similar States' Enactments are also referred to when necessary.

Chapter five is the conclusion chapter, and in this chapter the discussion is on whether the amendment to the Criminal Procedure Code especially section 173(f) on the standard of proof reflects a fair trial in the Malaysian adversarial system of criminal justice. Some findings are made on this issue. Besides, some comments and recommendations are given in view of improving the administration of justice in the Malaysian legal system.

Finally, it is hoped that, this study can be used as an additional reference on the subject of summary trials procedure observed by Subordinate Courts, besides the existing materials currently available. It is also hoped that, the findings in this study on the concept of *prima facie* case after the amendment of section 173(f) can be a useful guideline and assistance to those who are sitting on the bench in arriving at a right decision.

The law is as stated at 28th February, 2001.

الملخص

يعتبر قانون الإجراءات الجنائية أحد القوانين الأساسية المتعلقة بنظام العدالة الجنائية الذي شرع من أجل الإشراف على سير وإقامة القانون الجنائي الموضوعي خصوصا فيما يتعلق بالعقوبات التي ستفرض على المجرم وطرق تطبيق العقوبات.ومن ناحية أخرى يحمى هذا القانون حقوق المتهم من الاتهامات الباطلة والعقوبات بدون تبرير.

إن الهدف الرئيسي من قانون الإجراءات الجنائية هو كمكمل للقانون الجنائي الموضوعي لأن هذا الأخير لم تسر فعاليته على وجه مناسب بانفراده مهما بلغ من الشمول. من هنا يعد قانون الإجراءات قواعد وسبل لضبط المشتبه والتحقيق معه وتجميع الأدلة والبينات , وكذلك يعد آلية لتوجيه الاتهام وكيفية المحاكمة وإدانة المتهم وفرض العقوبة عليه. ولا يمكن تحقيق العدالة إلا بالتمسك على الإجراءات الوقائية التي ينص عليها القانون.

يتمتع المتهم طبقا لمبادئ العدالة الطبيعية بالمحاكمة العادلة, وهذا إلى حد كبير يتفق مع القاعدة القانونية التي تنص على براءة المتهم إلا بعد ثبوت إدانته أمام القضاء.

هذه الرسالة وضعت أساسا لدراسة الإجراءات المتبعة في المحاكمة المستعجلة المتبعة في المحاكم الابتدائية طبقا للمادة ١٧٣ من قانون الإجراءات الجنائية وعلى وجه الخصوص ما تحويه الفقرة (ح) من المادة المذكورة. وتشرح المبادئ الأساسية لإجراءات المحاكمة المستعجلة من خلال قضايا قضائية ويتم تركيز هذه الدراسة على جانب المناقشة العلمية لتفسير وإيضاح المواد والبنود الواردة في القانون المذكور وعلى الحالة القضائية.

وتصدر هذه الرسالة بمقدمة تشتمل على التعريف الموجز بقانون الإجراءات الجنائية وخلفية الدراسة وموضوعها والدراسات السابقة لها وكذلك المنهج المستخدم فيها.

ويأتي الباب الثاني للكلام عن إجراءات المحاكمة المستعجلة حيث تم النقاش والتحليل لكل الفقرات الواردة في المادة ١٧٣ من قانون الإجراءات الجنائية وكذلك عقد المقارنة بين الفقرات الأصلية والمعدلة في نفس المادة ويستبين بعد المقارنة أن الإجراءات تحت الفقرات المعدلة أكثر وضوحا وجلاء.

ويشتمل الباب الثالث على صلب البحث وهو ما يتصل بموضوع دعوى ظاهرة الوجاهة**prima facie case** .والجدل المثار منذ السنين حول مستوى الأدلة والبينات فى نهاية دعوى المدعى قد حسم بعد تعديل الفقرة (ح) من المادة ١٧٣ من قانون الإجراءات الجنائية .ويتم البحث عن معانى دعوى ظاهرة الوجاهة فى ظل المادة المعدلة بالرجوع إلىعدة القضايا المتأخرة المعنية.

ويخص الباب الرابع للكلام عن الإجراءات الجنائية المطبقة فى المحاكم الشرعية خاصة ما يتعلق بمستوى البينات في نهاية دعوى المدعى وعبء الإثبات عليه. ويقتصر البحث فى هذا الصدد بالرجوع إلى قانون الإجراءات الجنائية الشرعية للولايات الفدرالية لسنة ١٩٩٧ ونظيره من الولايات الأخرى إذا لزم الأمر.

وفى الباب الخامس يدور البحث عن مدى انعكاس عدالة المحاكمة فى نظام العدالة الجنائية الماليزي بتعديل الفقرة (ح) من المادة ١٧٣ من قانون الإجراءات الجنائية المتعلقة بمستوى الأدلة والبينات. وإلى جانب ذلك قدمت عدة اقراحات وتوصيات من أجل الارتقاء بمستوى العدالة فى النظام القانون الماليزى

وفى الختام ترجو الدراسة أنها قد أسهمت فى إثراء المكتبة بمرجع إضافي يتعلق بالإجراءات فى المحاكمة المستعجلة المتبعة فى المحاكم الابتدائية كما ترجو أن تكون نتائجها خاصة ما يتعلق بنظرية دعاوى ظاهرة الوجاهة مرشدا وعونا للقضاة فى إصدار الحكم والقرار الصائب.

القوانين المذكورة في هذا البحث هي كما كانت بتاريخ ٢٨ فبراير ٢٠٠١

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Comparative Laws.

Mohd. Baharuddin Harun
Supervisor

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Comparative Laws.

Harun Mahmud Hashim
Examiner

This dissertation was submitted to Ahmad Ibrahim Kulliyyah of Laws and is accepted as partial fulfillment of the requirements for the degree of Master of Comparative Laws.

Nik Ahmad Kamal Nik Mahmood
Dean, Ahmad Ibrahim Kulliyyah of Laws.

DECLARATION

I hereby declare that this dissertation is the result of my own investigations except where otherwise stated. Other sources are acknowledged by footnotes giving explicit references and bibliography is appended.

Name: Alwi Bin Abdul Wahab

Signature: ..... Date: 9/5/2001

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May Allah s.w.t. reward all of you with the best of rewards.

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Syariah Criminal Procedure (Federal Territories) Act, 1997 [Act 560]

LIST OF ABBREVIATIONS

A.C.	Appeal Cases
Ag.	Acting
All E.R.	All England Law Reports
A.M.R.	All Malaya Reporter
Anor	Another
©	Copyright
Cap.	Chapter
cf	Compare
C.J.	Chief Justice
C.L.J.	Current Law Journal
C.P.C.	Criminal Procedure Code
D.P.P.	Deputy Public Prosecutor
e.g.	(exempligrana) For example
F.C.J.	Federal Court Judge
F.M.S.	Federated Malay States
Ibid	(ibidem) As cited above
Id.	(idem) As cited above at different page
i.e.	That is
J.	Judge
JC	Judicial Commissioner
J.C.A.	Judge of the Court of Appeal
JH	Jurnal Hukum
J.M.C.L.	Journal of Malaysian and Comparative Law
Jr.	Junior
JT	Judgment Today
K.B.	King's Bench
Ky.	Kyshe's Report
L.J.	Lord Justice
L.P.	Lord President
M.C.	Malayan Cases
M.L.J.	Malayan Law Journal
n.	Footnote
Ors.	Others
p.	Page
pp.	Pages
P.C.	Privy Council
P.P.	Public Prosecutor
R.	Rex
Reg.	Regina
S.C.J.	Supreme Court Judge
S.L.R.	Singapore Law Reports
s.	Section
ss.	Sections
Supp.	Supplement
Supra	As cited earlier
v.	Versus

viz.	(videlicet): namely
Vol.	Volume
W.A.L.R.	West Australia Law Reports
w.e.f.	With effect from

CHAPTER ONE

INTRODUCTION

1.1. The Criminal Procedure Code

Criminal Procedure in Malaysia is governed by one single Code namely the Criminal Procedure Code (hereinafter referred to as "CPC"). Prior to this, there were at least four different Codes, such as, Code for the Federated Malay States, Code of Strait Settlements and one each for Sabah and Sarawak. Finally, by the Criminal Procedure Code (Amendment and Extension) Act 1976 (Act A 324), all the above Codes were repealed and replaced by the Criminal Procedure Code (FMS Cap. 6), which has been used throughout Malaysia effective from 10th. of January 1976. CPC (Cap. 6) was revised by the Commissioner of the Law Revision, Malaysia, under the Authority of the Revision of Laws Act 1968 and it was gazetted as Criminal Procedure Code (revised 1999) [Act 593], which is currently being used.[1]

The CPC does not lay down one common procedure for all offences because the Code itself specifies that it provides for offences under the Penal Code only. As for offences in statutes other than the Penal Code, the procedure in the CPC may also apply except that if the provisions in the statutes provide for special mode of trial for such offences, then the procedure in the statutes must be applied. For that matter, the principle *generalia specialibus non derogant* therefore applies i.e., specific provision in a specific statute overrides a general provision in a general statute.

[1] For the history of the Criminal Procedure Code, see Hamid Ibrahim, Hamid's Criminal Procedure, 2nd Edition, 1998 at pp. 5-6.

Apart from the reference to the local statutes, section 5 of the CPC expressly allows references to be made to English Law in the absence of special provision in the Code. The application of English Law in Malaysia is also based on the provisions of section 3 and section 5 of the Civil Law Act 1956 wherever there is a lacuna, provided no conflict arises thereon against the local condition and circumstances of the states of Malaysia.

The administration of justice is simply based on procedures upon which cases are disposed in a manner just and fair to both parties appearing before the court. Summary trial procedure in criminal cases is regulated under Chapter XIX of the CPC, with section 173 being the main provision. It lays down the procedure for criminal trial in the Subordinate Courts right from the commencement of trial i.e., when the charge is read to the accused until the end of trial, when the court makes its finding.

It is very important that the summary trial procedures in the CPC be complied with, as failure to comply, would necessarily result in the proceeding being considered a mistrial. The accused would be prejudiced and deprived of the right of fair hearing. To borrow the words of Blackstonian, "It is better that ten guilty persons escape than that one innocent suffer." Correspondingly, according to Thomas Fuller: "The judge is condemned when the criminal is absolved."

This subject of Summary Trial will cover s. 173(a) to s. 173(o) of the CPC. Special emphasis will be given to section 173(f) of the same on the standard of proof at the end of the prosecution case. The wordings of the present section 173(f) had been

amended by Criminal Procedure Code (Amendment) Act 1997 vide Act A979, to expressly include the words "*prima facie* case".

1.2. BACKGROUND OF STUDY

Looking back to the past history, an analysis of the cases shows that, in deciding what standard of proof is required by the prosecution at the conclusion of the case for the prosecution, the court generally had taken two approaches; either that, it places upon the prosecution to establish *prima facie* case i.e., a case which if unrebutted would warrant a conviction or it places on the prosecution the duty to establish its case beyond reasonable doubt.

Although the Privy Council case of **Haw Tua Tau** v. **Public Prosecutor**[2] was inclined to support the former line of authority on the standard of proof at the conclusion of the prosecution's case, it had actually changed the meaning and concept of *prima facie* often used in practice by the courts.[3]

Despite its acceptance since 1982, Haw Tua Tau[4] came under attack in Malaysia in late 1993, when the Supreme Court in **Khoo Hi Chiang** v. **Public Prosecutor**,[5] in a unanimous decision declared that Haw Tua Tau was wrong and should no longer be considered as a good precedent in Malaysia. In that case, it was held that the duty of the court at the end of the prosecution's case is to undertake, not a minimal

[2] [1982] A.C. 139; [1981] 2 M.L.J. 49
[3] This case is discussed in chapter three.
[4] Supra n. 2
[5] [1994] 1 M.L.J. 265

evaluation of the evidence tendered by the prosecution in order to determine whether or not it is inherently incredible but a maximum evaluation of such evidence, to determine whether or not the prosecution had established the charge against the accused beyond all reasonable doubt.

Later after that, another celebrated Federal Court's decision in **Tan Boon Kean v. Public Prosecutor**,[6] where an attempt was made to resurrect the effect of Haw Tua Tau.[7]

Finally, came yet another Federal Court's decision in **Arulpragasan a/l Sandaraju v. Public Prosecutor**,[8] reaffirming Khoo Hi Chiang's[9] case holding that the standard of proof required on the prosecution at all stages of the hearing is one of beyond reasonable doubt.

These inconsistent views of Federal Court and its forerunner, i.e., Supreme Court has come to an end with the amendment of the CPC vide Act A979. The effect of this amendment is that, it overrules the decision of the Federal Court in Arulpragasan's case.[10]

The amendment to section 173(f) was made primarily with the object of setting the correct standard of proof required upon the prosecution before the court decided to call the accused to enter a defence. This section is given in two subsections;

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[6] [1995] 4 C.L.J. 456
[7] Supra n. 2
[8] [1997] 1 A.M.R. 329
[9] Supra n. 5
[10] Supra n. 8

Subsection (i) provides when the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a *prima facie* case against the accused. Subsection (ii) provides that when the court finds that the prosecution has not made out a *prima facie* case against the accused, the court shall record an order of acquittal.

1.3. STATEMENT OF THE PROBLEM

By this amendment, has this issue on the standard of proof at the conclusion of prosecution's case been well settled? Or does the amendment bring back the effect of Haw Tua Tau by using the expression "*prima facie* case"?

No doubt the Parliament has made it crystal clear of what the prosecution is supposed to make out by using the phrase "*prima facie* case" in the section, nevertheless, there still exist a lingering doubt among those who practice the law as to what is "*prima facie* case".

What then constitutes a "*prima facie* case" in the light of the amendment Act A979? What is required upon the prosecution to establish a *prima facie* case? What is the role of a judge or magistrate at this stage as a decider of law and fact in deciding whether the prosecution has made out a *prima facie* case?

When the prosecution has made out a *prima facie* case, the court would then call the accused to enter his defence. The accused may choose to remain silent and call no evidence. Does it follow that the court can convict in such situation after its finding

that the accused had a case to answer? What is the position in such situation after the amendment?

Hence, the purpose of this study is to uncover all these hypothetical issues brought up by the amendment of the CPC in particular at the conclusion of the prosecution's case. At the end of the day, the writer would like to give his evaluation and comments as to whether this amendment reflects a fair trial in the Malaysian adversarial system of criminal justice.

For the purpose of completeness, the writer would also like to delve into the position under Islamic law, on the standard of proof required upon the prosecution. Through this study, comparison would be made under both laws on the subject and how they could be reconciled, if any.

1.4. LITERATURE REVIEW

The most popular textbook sought as reference in the field of criminal procedure in Malaysia, is the one written by Professor Dato' Mimi Kamariah Majid. The latest edition of her book entitled "Criminal Procedure in Malaysia" was published after the amendment of the CPC (Act 979) and has incorporated some recent cases on this subject.

In her book, under this topic, she discusses, on the standard of proof required on the prosecution at the conclusion of its case, during the pre Haw Tua Tau,[11] post Haw

[11] Supra n. 2

Tua Tau until the standard was shifted into another standard of proof in Arulpragasan.[12] Inadvertently, the definition, concept and scope of *prima facie* after the amendment were not spelt out.

Another published text on the subject is "Mallal's Criminal Procedure (5th Edition)". This edition was published in 1998 and it provides a reference for practical guide to the criminal procedure and practice in Malaysian Courts. Similarly, this book does not explain on the concept of *prima facie* case after the amendment of CPC.

Other references on the subject were obtained from journals, articles and magazines. It is not possible to give a complete list of references but suffice to say that they dealt with specific areas of summary trial. Unfortunately, none of these articles had discussed on *prima facie* case after the amendment despite the importance of the subject.

1.5. RESEARCH METHODOLOGY

This study is basically based on doctrinal research viz. virtual library based research. As far as library work is concerned, this was done largely on the research of the decided cases on the law pertaining to the subject of the dissertation. The cases were critically analysed and examined. At the end of the day, some observations and comments were made on the cases. Besides the cases, relevant information from written literatures relating to the topic were also collected. This includes textbooks, articles, journals, magazines, periodical et cetera. However, references were more to cases as there were hardly books or articles written on the topic in issue.

[12] Supra n. 8