

MEDIATION IN CRIMINAL CASES*
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ABSTRACT

In prosecuting offenders, the Public Prosecutor is the final decider whether an offender should be charged and for what offence(s) the accused is to be charged with. In deciding whether the accused should be charged for any offence, the investigation papers should as a matter of prudence disclose a *prima facie* case. However, there may well arise situations during the prosecution stage when the evidence adduced would not disclose a probable chance of establishing a *prima facie* case. This is so because under the adversarial trial, trial is oral in nature. The witness statements taken by the police during investigation may not be indicative of all relevant facts that a witness could say during trial. It is trite under common law that the Prosecution bear the legal burden of proving their case beyond all reasonable doubt, and the accused is presumed innocence until the Prosecution establish a *prima facie* case at the close of their case. Until then, an accused shall not be called to enter upon his defence. This criminal standard of proof required from the Prosecution to prove their case beyond all reasonable doubt against the accused is not without hurdles and bumps, and is also time consuming. Accordingly, it makes sense for the Prosecution to secure a conviction on a reduced charge by mediating with the accused to plead guilty on a reduced charge with lesser punishment, and upon the accused doing so, to withdraw against the accused the charge with the heavier punishment. At times, a co-accused is made to be the Prosecution's witness to at least secure a conviction against one of the offenders if it appears to the Prosecution that charging all of the accused together runs the risk that all of accused may be acquitted. It must be made known that as far as sentencing is concerned, that is the domain and discretion of the trial judge. This paper, therefore, limit itself to the power of the Public Prosecutor on the charge he might prefers against an accused and his power to withdraw the same. Further, the effects of the charge so withdrawn, and the effect of the withdrawn charge on the charge pleaded guilty by the accused will be discussed in the light of the Malaysian Criminal Procedure Code and decided cases.

Introduction

Article 145 (3) of the Federal Constitution states that the Attorney General shall have power exercisable at his discretion to institute, conduct or discontinue any proceedings for an offence in any court other than the Syariah Court, native court and the court-martial. Section 376(1) and (2) of the CPC clarify by stating that the Attorney General, who shall be the Public Prosecutor, shall have the control and direction of all criminal prosecutions and proceedings under the Code. Be that as it may, Article 145 (2) of the Federal Constitution also provides that it shall be the duty of the Attorney General to advise the Yang Di Pertuan Agong or the Cabinet or any Minister upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the Yang Di Pertuan Agong or the Cabinet, and to discharge the functions conferred on him by or under the constitution or any other written

law. Thus, the Attorney General or for that matter the Public Prosecutor is quite bound by the Cabinet.

Prima Facie Case

It is plain and clear from decided cases that the Public Prosecutor determines whether any person is to be prosecuted of any offence, which he is alleged to have committed. It is only right to charge a suspect when the evidence from the police investigation discloses a *prima facie* case. The Human Rights Commission of Malaysia recommends that prosecution should only proceed when a case is well founded upon evidence reasonably believed to be reliable and admissible.¹ To start with, there must first be a *prima facie* case against the accused if the case against him is to succeed at the prosecution stage. At the close of the defence, which may also be said to be the conclusion of the trial, the prosecution must prove beyond all reasonable doubt that the accused did the offence, or the charge is not proven.² Thus, whether, an accused should be charged depends on whether there is a *prima facie* case which means upon well founded evidence believed to be reliable and admissible. On this Lord Devlin in the Privy Council case of *Shaaban & Ors v Chong Fook Kam & Anor*, said:³

“Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: “I suspect but I cannot prove.” Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end. When such proof has been obtained, the police case is complete; it is ready for trial and passes to the next stage ...”

What is *prima facie* case is now settled under the new amendment made to section 173 (h) (iii) and 180(4) of the Criminal Procedure Code vide Act A1274 Criminal Procedure Code (Amendment) Act 2006 which reads a ‘*prima facie* case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.’ What this means could be illustrated with decided cases decided as early as 1930s before the ‘upheaval’ as to what is *prima facie* case, and the ‘ridiculous idea’ between what is minimal or maximum evaluation beginning late 80’s.⁴

In *Yeo Tse Soon*, Mc Mullin Commissioner, delivering the judgment of the Court of Appeal said that to make out a case is not the same thing as to prove it beyond all reasonable doubt.⁵ In *PP v Saimin & Ors*, Sharma J said that evidence discloses a *prima facie* case when it is such that if uncontradicted and if believed it will be sufficient to prove the case against the accused.⁶

In *PP v Goo Kian*, the Public Prosecutor had appealed against the acquittal of the respondent on a charge of theft. Raja Musa J said that at the close of the case for the prosecution, the evidence disclosed that the respondent took away the complainant’s

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¹ Read Human Rights Commission of Malaysia, *Report: Forum On The Right To An Expeditious And Fair Trial*, 7 – 8 April 2005, at pg 20 -21

² See both section 173 (m) & 182A CPC

³ [1969] 2 MLJ 219 at pg 221

⁴ Read Dr Farah Nini’s article to follow the ‘confusion’ as to what is *prima facie* case.

⁵ [1995] 3 MLJ 255

⁶ [1971] 2 MLJ 17

bicycle which undoubtedly was in the complainant's possession, out of his possession by riding it away to Seremban, without the complainant's consent, hence had *prima facie* caused wrongful loss to the complainant in that he was deprived without his consent of the use of his own bicycle causing wrongful loss to him.⁷

In *PP v Mahmud*, the accused had driven his car without due care and attention which was an offence under section 366(1) of the Driving Ordinance to which he pleaded guilty. However, having heard the facts as narrated by the Public Prosecutor, the Magistrate held that the facts disclosed no offence and acquitted the accused. On appeal, Ong Hock Sim FJ set aside the order of acquittal and held that the fact of knocking into the telephone post unexplained by mechanical defect or other reasonable cause is *prima facie* evidence that the respondent had failed to exercise the due care and attention.⁸

Obviously, a *prima facie* case is not adducing evidence beyond all reasonable doubt nor could it be a maximum evaluation because the accused have yet to adduce his part of the evidence.⁹ Likewise, it could also not be minimal for the Prosecution need to adduce sufficient evidence to succeed in their submission that there is a case to answer. *Prima facie* case simply means that the accused has a case to answer upon the evidence adduced by the Prosecution i.e. there is evidence not inherently incredible that goes towards establishing the elements or ingredients of the offence

A submission of no case to answer by the defence counsel at the close of the case for the prosecution simply means that he is submitting (an opinion) that from the evidence adduced at the trial, there has been no evidence to prove an essential element in the alleged offence, or that the evidence adduced by the prosecution has been so discredited as a result of cross-examination, or is so manifestly unreliable that no reasonable tribunal could safely convict on it.¹⁰ There is no case to answer if the prosecution has failed to adduce evidence on which the magistrate/ judge could properly convict. In other words, *prima facie* case is where the prosecution has succeeded in discharging its evidential burden in relation to the charge against the accused person.

II. Public Prosecutor to Act with Fairness and Sagacity

The question is how he decides whether any person should be prosecuted with any offence? In this, the Attorney General is assisted by the prosecution division in the Attorney General Department and by senior deputy public prosecutors in every state who oversees for him criminal cases. The Attorney General or his deputies would need to fall back on the investigation papers and the report submitted to him by the investigating police officer under section 120 of the CPC. The report would need to include among others the nature of the information, and the names of the person who appear to be acquainted with the circumstances of the case. The information would refer to statements made under section 107 of the CPC (First Information Report), and statements taken from witnesses under section 112 of the CPC, the accused under section 113 of the CPC, and the facts and circumstances of the case gathered by the investigating police officers whether this evidence is oral, documentary (medical reports, forensic reports, chemist reports), physical or circumstantial. The Attorney General would also need to consider

⁷ [1939] MLJ 291

⁸ [1974] 1 MLJ 85 (FC)

⁹ Section 173 (h) (i) & (iii), 180 (3) and 257CPC

¹⁰ Practice Note [1962] 1 All ER 448 of the Divisional Court, Lord Parker CJ presiding.

not just the public interest, but the national interest and at other interest (could it be the Cabinet?). The Attorney General Tan Sri Gani Patail explained¹¹;

We look for 90 per cent chances of conviction, not *prima facie* – then we'll go to court. When we prosecute, we depend on evidence on paper. We all know witnesses will say this and that. All witnesses have given accounts of different things. The best we can do is produce evidence of what is given to us. But witnesses may change the story. We don't fix people and we don't coach the witness on what to say. We are purely professional and very fair. The fact that we lose a case does not automatically prove that the prosecution is just charging people for no reason. That is wrong. We charge a person based on investigation papers. Once we are convinced, we go after them. But in court, the story may change. Or the story may have some other evidence which was not made available to us – things might come up. And for these reasons alone, the person can be acquitted. A person may be acquitted based on just one reasonable doubt. I on the other hand, have to prove to a very high degree – beyond reasonable doubt! So there are cases where people think that the person is guilty, but I cannot think of him as guilty. If it is expected that every case I bring to court I win all the time, then there's no need for a judge. ... We explain, sometimes, if there are no cases. We keep people abreast of the investigations. And if we are not going to charge a person, we explain. And if we are going to charge, we charge. If you look at other jurisdictions, even in UK, the moment you don't charge a person, you don't explain.The principle of the law is that all discretion must be exercised judiciously. I must have reason and grounds otherwise I will resign from my post for the simple reason that I have not exercised my powers properly. There is no such thing as dropping a case. The moment there is enough evidence, I want to charge a person. Then I look at the public interest, at the national interest and at other interest. Then I exercise that discretion to charge or not. ...The decision to charge is not my alone. Every time in big cases, there is a group of us. There are at least two or three of my officers sitting with me, giving their ideas, and we go on consensus.... The only way is to have a collective decision, where everybody sits down, and discusses the matter thoroughly, openly, transparently and seriously. ...I have only said that that the moment the case is referred to me, and if there is a case, I will charge. You do not presume and you do not assume. Until I see the investigation papers, with all the facts, only then would I say "yes". For all I know, 10 might come to me, and if I see they all have a case, I will charge all 10. If it is 100, I will charge 100.I don't make a distinction between ..."big fish" and "small fish" – everybody is equal before the law. ..If papers are sent to me, then we look at them, and if there is a case, we charge. If there is insufficient investigation, then we push it backfor further investigation. ...On prosecution, I'm not answerable to anybody. I only answer to my conscience and the Law. The Constitution says the powers are within us, the only thing is exercise it properly. I do not seek instruction – there's no instruction given. I'll be the first one to go out of this office if I have to be instructed on what to do.As the A-G, I am the Chief Legal Adviser to the government. ...On civil matters and advisory matters, I'm just like any lawyer in town. I give my advice. If the Government wants to follow, they will follow. If they don't want to, then they will give instructions. I have to comply with them. .. I do not have the powers to investigate. I can only look at a file and decide whether to charge or not. And if I am not happy, I will then ask the police, and say that I don't have a case at the moment, if you investigate further, then I can re-look it.

¹¹ Parts of Aniza Damis interview with the Attorney General Tan Sri Gani Patail, New Sunday Times, July 25, 2004 at pg 4.

In the case of *Johnson Tan Han Seng*, Suffian L.P. explained why it was not prudent for the Attorney-General to charge three persons under the same Act because their circumstances or background may not necessarily be the same. The Lord President said that it would suffice to charge A who had delayed to renew his licence to possession of a gun under the Arms Act 1960. However, a person (B) who had no licence to possess the same, and has a criminal record, it would not suffice to have B charged under the Arms Act 1960, rather under the Firearms (Increased Penalties) Act 1971. Likewise, a person (C) who had no licence to possess firearm, having criminal records and who had killed and terrorised people and witnesses, should he (C) also be charged under the Arms Act simply because his fellow criminal colleague is charged under the Arms Act 1960, or under the Firearms (Increased Penalties) Act 1971 like B, or under the Internal Security Act 1960? His Lordship held that the choice is entirely up to the Attorney General.¹² This would imply that the Public Prosecutor has to exercise his discretion sagaciously, no more and no less.

In *Long Bin Samat v PP*, the accused was charged with the offence of causing simple hurt when there is evidence of causing grievous hurt. Again Suffian LP reiterated the position that Article 145(3) of the Federal Constitution gave the Public Prosecutor wide discretion over the control and direction of all criminal proceedings, and can in particular decide to prefer a charge for a less serious offence when there is evidence of a more serious offence.¹³

In *Dato Seri Anwar bin Ibrahim v Public Prosecutor*, the accused was convicted on 4 amended charges of corrupt practise under section 2(1) of the Emergency (Essential Powers) Ordinance no. 22 of 1970. He was sentenced to 6 years imprisonment on each of the charge to run concurrently from the date of conviction. One of the grounds of appeal was that the charge under the 1970 Ordinance was an abuse of the process considering that the Federal Government had expressed a clear intention to have it annulled because Anti Corruption Act 1997 is already in place making the 1970 Ordinance redundant when it was consolidated into the 1997 Act together with Prevention of Corruption Act 1961 and Anti Corruption Agency Act 1982. Unlike the two corruption Acts of 1961 and 1982 that were automatically repealed, the 1970 Ordinance requires a resolution to be passed by both Houses of Parliament to annul it. The Lower House had passed a resolution to that effect, but it had yet to be laid before the Upper House. Hence, it was argued by the accused's counsel, that there was legitimate expectation by the public that the 1970 Ordinance is a spent force. It was held by the Court of Appeal that the question of oppression or vexatious on the part of the Attorney General to prosecute the accused under the 1970 Ordinance did not arise. The Court of Appeal also held that the Federal Constitution gives the Attorney General (Public Prosecutor: section 376(1) of the CPC) the power exercisable at his discretion 'to institute, conduct or discontinue any proceedings for an offence in any court other than a Syariah court, a native court or a court martial.' In this case, the Court of Appeal noted that prosecution was instituted after a full police investigation, and it cannot be said that the Attorney General could have acted in bad faith. This discretion vested in the AG is unfettered and cannot be

¹² [1977] 2 MLJ 66 – Federal Court

¹³ [1974] 2 MLJ 152

challenged and substituted by that of the Court's.¹⁴ The case went up for appeal before the Federal Court, which upheld the entrenched view that it is a matter entirely within the discretion of the attorney-general under art. 145(3) of the Constitution to prefer any charges for offences under any law he deems fit depending on the facts of the case and taking into account the public interest element into consideration. The Federal Court said that it is not the business of the court to speculate whether a resolution would be passed in the Dewan Negara as a matter of course. With the Ordinance continuing in force, the question of vexatious or oppression on the part of the Attorney General does not arise nor would the same be invidious or oppressive to the accused to be prosecuted under a law that is still valid. The Federal Court, however, accepted that it should not be impotent when it comes to abuse of its process and would intervene.¹⁵ It must be noted that the House of Representative had already passed a resolution to annul it. In other words, the annulling process was already half way in process and for the Public prosecutor to charge him under the law against the wish of those who had the peoples' mandate would not, it is submitted, be acting sagaciously and in public interest.

In *Tan Sri Abdul Rahim bin Mohd Noor v Public Prosecutor*, the appellant, an Inspector General of Police was charged with causing simple hurt under section 323 of the Penal Code, instead of the original charge of causing grievous hurt to the former deputy prime minister Dato Seri Anwar Ibrahim, even though, there was evidence of causing grievous hurt. Four medical reports were tendered by the prosecution on the extensive injuries sustained by Dato Seri Anwar Ibrahim, including the infamous black-eye. The appellant pleaded guilty, and after the facts were given and admitted to by the appellant, and after hearing the mitigating submission, the learned Session's court judge convicted the appellant and sentenced him to two months imprisonment and a fine of RM2,000, and in default, a further two months imprisonment. The appellant appealed against the whole sentence and the prosecution cross-appeal against the inadequacy of the sentence. The learned judge upheld the imprisonment sentence of two years but allowed the appeal against the fine and quashed it. The Public Prosecutor's cross appeal was dismissed. The appellant appealed to the Court of Appeal. At this juncture, the Public Prosecutor ironically did not cross appeal against the learned High Court judge's decision which was even more inadequate than that of the learned session's court judge which the Public prosecutor, earlier on in his cross-appeal to the judge of the High Court contended as grossly inadequate. As a matter of fact, the Public Prosecutor even went to urge the Court of Appeal not to disturb the sentence of the learned judge, as the learned judge had applied the correct principles. The Public Prosecutor probably had a change of mind with the inadequacy of the learned judge's sentence, namely the accused's long service in the police force, his clean record, and somehow realised then that there were numbers of authorities where courts had imposed fines or binding over orders for an offence under section 323 of the Penal Code. The Court of Appeal dismissed the appellant's appeal and upheld the learned sessions court judge's sentence. However, the Court of Appeal acknowledged that the law and the constitution give the Public Prosecutor absolute power, and it is his discretion to file an appeal or not, though the community expect him to exercise it fairly, honestly and professionally.¹⁶

¹⁴ [2000] 2 MLJ 487 – KL Court of Appeal - Lamin JCA; See also the Supreme Court cases of *Karpal Singh & Anor v PP* [1991] 2 MLJ 544 which held that the Attorney General discretion is unfettered and cannot be challenged and substituted by that of the courts.

¹⁵ *Dato Seri Anwar Bin Ibrahim v PP* [2002] 3 MLJ 193 (FC)

¹⁶ [2001] 3 MLJ 1 (CA); *PP v Zaimuddin & Anor* [1986] 2 MLJ 100

In *PP v Dato Seri Anwar Ibrahim & Anor (Sukma Darmawan Sasmitaat Madja)*, Dato Seri Anwar was charged under section 377B of the Penal Code for committing carnal intercourse against the order of nature with Azizan Bin Abu Bakr. Sukma was charged for both abetting Dato Seri Anwar to commit it with Azizan and in committing it with Azizan. The offences were alleged to have been committed between January and March 1993. They were both produced and charged separately at the Sessions Court. Both cases were transferred to the High Court by the Public Prosecutor in the exercise of his power under section 418A (1) of the CPC. In this case, the co-perpetrator Azizan was made as Prosecution's witness against both the accused.¹⁷ Under Malaysian law, it is not illegal to convict upon the evidence of an accomplice, though there is a rule of practice that has hardened into a rule of law that it is not safe to do so without the judge giving himself the necessary caution on the danger of relying on the evidence of an accomplice to convict the accused. The reason for that believes should be recorded.¹⁸

III. The Discretion of the Chief Syariah Prosecutor

Section 181 of the Syariah Criminal Procedure provides that the Chief Syariah Prosecutor shall have the control and direction of all criminal proceedings in the Shariah Courts.¹⁹ In the case of *Dato Seri Anwar Bin Ibrahim* who was charged with gross indecency under section 337B of the Penal Code, he was not, however, charged with sodomy in the Syariah Court probably because it would be duplicitous to do so. Dato Seri Anwar was already detained in lawful custody on two charges of gross indecency and corruption providing heftier sentences if convicted when compared to the Syariah Enactment. To charge him with sodomy under the Syariah Criminal Enactment would, therefore, be imprudent. On the other hand, Azizan who claimed he was sodomized by both Dato Seri Anwar Bin Ibrahim and Sukma Darmawan Samitaat Madja was charged and convicted in the Syariah Subordinate Court in Alor Gajah, Melaka. Azizan admitted that he committed the offences and he pleaded guilty at the hearing of the case on 28 September 1999. He was accordingly convicted on two charges of close proximity (khalwat) ('the first charge') and attempting to commit sexual intercourse (cuba melakukan persetubuhan haram) ('the second charge') under sections 53(1) and 52 respectively of the Enakmen Kesalahan Syariah Negeri Melaka 1991. He was fined RM2,500 in default six months imprisonment on the first charge and RM4,500 in default 12 months imprisonment and also to a sentence of imprisonment for a term of three months on the second charge.²⁰

The discretion to prosecute must of course be done sagaciously. It was narrated that a Bedouin urinated in the mosque and the companions rose to rebuke and prevent him, the Prophet (pbuh) said, "Do not prevent him. Leave him alone."²¹ One of the higher objectives or the purpose of the law is to punish transgressor, hence the Quran says;

He has forbidden to you only carrion, and blood, and the flesh of swine, and that over which any name other than god's has been invoked; but if one is driven by necessity –

¹⁷ [2001] 3 MLJ 193 (HC) – Arrifin Jaka J.

¹⁸ Section 133 & 114 (b) Evidence Act 1950; Read the case of *Dato Seri Anwar v PP* [2004] 3 MLJ 405

¹⁹ See also section 78 Administration of the Religion of Islam (State of Selangor) Enactment 2003

²⁰ Reported in *PP v Dato Seri Anwar Bin Ibrahim & Anor* [2001] 3 MLJ 193 (HC)

²¹ Narrated by Muslim, al-Bukhari and others – cited by Dr. Ahmad al-Rasyuni (2006) *Imam Al-Shatibi's Theory of the Higher Objectives and Intents of Islamic Law* (Translated from the Arabic by Nancy Roberts), at pg 359, The International Institute of Islamic Thought – Islamic Book Trust: Kuala Lumpur.

neither coveting it nor exceeding his immediate need – no sin shall be upon him; for behold, God is much-Forgiving, a dispenser of Grace²²

And why should you not eat of that over which God's name has been pronounced, seeing that He has so clearly spelled out to you what He has forbidden you (to eat) unless you are compelled (to do so)²³

IV. Discretion to Discontinue Prosecution

The Public Prosecutor at any stage of the trial, before the delivery of the judgment may, if it thinks fit, inform the Court that he will not further prosecute the accused upon the charge, and thereupon, all proceedings on the charge against the accused shall be stayed, and the accused shall be discharged of and from the same. The discharge shall not amount to an acquittal unless the court so directs.²⁴ In *Poh Choo Ching v PP*, charges of corruption were brought against two persons, one for giving the bribe, and the other for accepting it. The charge against the giver was withdrawn. The acceptor of the bribe was duly convicted and sentenced. At the High Court, he alleged that the withdrawal of the charge against the other person had affected the legality of the charge against him. In essence, the offence of receiving gratification involves two parties, and if there was no giver, there could be no acceptor. Wan Yahya J. referred to section 254 of the CPC, which allows a charge against any person to be withdrawn and proceedings to be discontinued. The Judge observed that this power undoubtedly confers on the Public Prosecutor an unrestricted discretion in respect of which he is expected to exercise extreme fairness and sagacity. But whether he does so or not, it is not for the court to decide.²⁵

In the case of *PP v H.L.S. Pereira*, Harun J. (as he then was) held that the learned Magistrate should not have discharged the accused amounting to an acquittal without the consent of the prosecutions, who in this case had requested for an adjournment. Only the Attorney General has the power to institute, conduct or discontinue any proceedings for an offence. Until he makes up his mind, the courts have to wait.²⁶

In *PP v Toha & 3 Ors*, 4 accused were arrested on 24th April 2004 were charged with trafficking in dangerous drugs under section 39B(1)(a) of the Dangerous Drugs Act 1952 on 7th May 2004 which carry the mandatory death penalty. The accused finally were produced before the Judge of the High Court on 6th January 2006 and they were all not represented. They were, however, charged not with trafficking under section 39B(1) but for a lesser charge under section 39A(2) for possession of larger quantity of dangerous drugs. The charge was read to all of them and they claimed trial. A short mentioned date to 13th January 2006 was granted on the request of the learned Deputy Public Prosecutor who wanted to get further instructions, and to explore the possibility for any of the accused offering to plead guilty and the charge against the remaining accused withdrawn. On 13th January 2006, all the accused appeared and were represented by one counsel. The four accused were granted adjournment to 17th January 2006 to discuss with counsel their plea to the charge. On 17th January, the accused appeared with the same counsel and all the accused claimed trial except one (M.Ali Bin Osman) who pleaded guilty to the

²² Surah al-Baqara [chapter 2: the Heifer] in verse 173

²³ Surah al-An'am [chapter 6: the Cattle] in verse 119

²⁴ Section 254 CPC; See section 103 Syariah Criminal Procedure

²⁵ [1982] 1 MLJ 86

²⁶ [1977] 1 MLJ 12

charge and he understood the nature and consequences of his plea. The learned Deputy Public Prosecutor then informed the Court that he would withdraw the charge against the accused who claimed trial only after the 3rd accused who pleaded guilty to the charge has been convicted and sentenced. The Court fixed the case for disposal to 19th January 2006 to hear the facts and sentence against the 3rd accused. On that day, the 3rd accused still maintained his plea of guilty despite knowing the nature and consequences of his plea, and even after the Court explained to him that the maximum sentence may be imposed notwithstanding his plea should he be convicted after the facts were tendered and admitted by him unequivocally. The 3rd accused admitted the facts and the exhibits tendered by the Deputy Public Prosecutor. He was found guilty and convicted for the offence charge on his own plea of guilty. The sentence was 18 years imprisonment from the date of arrest and 10 strokes of the whip. The learned Deputy Public Prosecutor then applied to withdraw the charge against the three remaining accused who claimed trial. The Judge accordingly acquitted them.²⁷ The Federal Court in *Long Bin Samat & Ors* had held;

“...the supreme law clearly gives the Attorney-General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has institute, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue.... Still less then would the court have the power to compel him to enhance a charge when he is content to go on with a charge of a less serious nature.²⁸”

In *Repeco Holdings Bhd v PP*, Gopal Sri Ram JCA sitting as a High court Judge held that section 126(2) of the Securities Commission Act 1993 providing that any prosecution under the Act may be conducted by the Registrar or by any person he authorised in writing or by any officer authorised in writing by the Chairman of the Commission as *ultra vires* Article 145(3) of the Federal Constitution.²⁹ From this case, it can be said that all persons who prosecutes an offence must be authorised by him whether they be his deputies Public Prosecutor or prosecution officers. As these prosecutors are his alter ego, any distinction with respect to them in the event prosecutions are withdrawn is unwarranted. The relevant factor is whether the case is withdrawn at the prosecution stage or at the defence stage. If the case is withdrawn at the defence stage, the discharge should amount to an acquittal.

V. Judicial Power Is Not Subjected To Public Prosecutor

Although the AG has the discretion `to conduct` criminal proceedings, it does not include the regulation of criminal procedure or of the jurisdiction of the courts or the power or discretion to do so.³⁰ In other words, the AG is not empowered to have the case tried contrary to section 121 or contrary to the criminal jurisdiction of the courts. Therefore, an offence committed in Kuala Lumpur should be tried in Kuala Lumpur, and not in Johore. Likewise, in murder case, the case must be tried before the High Court, and not at the subordinate courts. In *Jayaraman v PP*, it was held by the Judge that under section 170 of the CPC, it is for the court (as it thinks fit) and not the Public Prosecutor to decide

²⁷ Criminal Case No. 45-187-2005, High Court of Malaya - Shah Alam, Selangor by Dato K.N. Segaran J.

²⁸ [1974] 2 MLJ 152 (FC) at pg 158

²⁹ [1997] 3 MLJ 681 (HC)

³⁰ *PP v Datuk Haji Harun bin Haji Idris* [1976] 2 MLJ 116

whether the trial should be conducted jointly or separately.³¹ In *PP v Dato Sharifah Aini*, the trial Magistrate held that he had no jurisdiction to take cognisance of the offence because the complaint was made by a third party, and not by the aggrieved party (Siti Norhaliza) or the Public Prosecutor as required by section 131 of the CPC. The learned Magistrate held that a charge and a complaint are two different things, and the fact that the case was conducted by the Public Prosecutor does not change the legal position that he cannot take cognisance of the case. In the case, the accused was charged with criminal defamation against Siti Norhaliza.³²

VI. Public Prosecutor Alter-Ego

Section 376(3) read with section 376 (4) of the CPC provide that the Deputy Public Prosecutor may exercise all or any of the rights and powers vested in or exercisable by the Public Prosecutor, or as empowered by the Code or any other written law except any rights or powers expressed to be exercisable by the Public Prosecutor personally.³³ In *PP v Mohamed Halipah*³⁴ and *PP v Datuk Hj Dzulkifli*,³⁵ it was held that the Deputy Public Prosecutor is the alter ego of the Public Prosecutor.

Going by *Repro's* case, every person who prosecutes under his order are to be considered his alter ego.³⁶ This is so because section 377(b) of the CPC stipulates that the person authorised in writing by him to prosecute are under his control and direction. These persons are an advocate, police inspector or above, any officer of any government department, or an officer of any local authority, statutory authority or body or any person employed or retained by them. An authorised officer from the local authorities, municipal council, income tax department, customs officer, immigration officers or from the Ministry may prosecute etc, if they have been authorised in writing by the Public Prosecutor. However, no person shall appear on behalf of the Public Prosecutor on any criminal appeal other than the Public Prosecutor, Senior Deputy Public Prosecutor or a Deputy Public Prosecutor.³⁷ In lower courts, the reality is that direct involvement of the Deputy Public Prosecutors or officers from the Attorney General's Department would only occur at certain stages of a case or when their advice is sought on specific matters.³⁸

In *PP v Mat Radi*, the accused was charged with corruption, and a police inspector and an assistant superintendent of police conducted the prosecution. The Magistrate discharged the accused because the Deputy Public Prosecutor 'did not heed' to his instruction that the case should be conducted by a Deputy Public Prosecutor, not by the police officers, as the case involved personnel of the armed forces and the police force. On appeal by the Public Prosecutor, it was held that section 377 of the CPC authorises a Police Inspector and Assistant Superintendent of Police to prosecute in seizable (arrestable) cases.³⁹ A police officer below the rank of inspector may conduct prosecution from time to time by notification in the gazette, if in that district to conduct

³¹ [1979] 2 MLJ 88

³² Both Dato Sharifah Aini & Siti Norhaliza are celebrities, and their case received wide media coverage in 2005 when their dispute became public.

³³ See section 376 (4) & 418A (1) & (2) CPC

³⁴ [1982] 1 MLJ 155

³⁵ [1982] 1 MLJ 340

³⁶ [1997] 3 MLJ 681 (HC)

³⁷ Section 378 CPC

³⁸ Human Rights Commission Of Malaysia, *Report: Forum On The Right To An Expedient And Fair Trial – 7th – 8th April 2005*, at pg 5-6.

³⁹ [1982] 1 MLJ 221

prosecution otherwise would be impracticable without an unreasonable amount of delay or expense.⁴⁰

VII. Effects of Withdrawal of Charge

Section 171 of the CPC provides for withdrawal of the remaining charges by the prosecution officer with the Court's consent when more charges than one are made against an accused person, and the accused person had a conviction on one or more of them. The Court may also on its own motion stay the inquiry into or trial of the charge or charges. The withdrawal of the remaining charge or charges shall have the effect of an acquittal unless the aforesaid conviction is set aside. If that is the case, the Court may then proceed against the accused on the withdrawn charge or charges.

Section 171A further stipulates that any outstanding offence may be taken into consideration with the consent of both the Public Prosecutor and the accused in determining and passing sentence upon the accused who has been found guilty. When the aforesaid consent is given and an outstanding offence is taken into consideration, the Court shall enter or cause an entry to that effect to be made on the record and upon sentence being pronounced the accused shall not, unless the conviction which has been had is set aside, be liable to be charged or tried in respect of any such offence so taken into consideration.

Section 254(1) provides that the Public Prosecutor may also at any stage of the trial before the delivery of judgment, inform the court that he will further prosecute the accused upon the charge. The court shall thereupon stay all proceedings on the charge, and to then discharge the accused amounting to acquittal. It is only proper that the discharge of the accused should amount to an acquittal since the words 'will not further prosecute the accused upon the charge' and 'all charge against the accused shall be stayed and the accused shall be discharged' of the same are plain and obvious. Moreover, under section 376 of the Code, the Public Prosecutor shall have the control and direction of all criminal prosecutions and proceedings.⁴¹ The same applies, if the deputy public prosecutors were to do the same since they are the alter-ego of the Public Prosecutor.⁴² However, a mere prosecution officer, and not a Public Prosecutor or his alter-ego who informs the court that 'he does not propose further to prosecute the accused upon the charge' may have the proceedings stayed with the leave of the court. The court shall then discharge the accused of the same, if it stays the proceedings. Such discharge does not amount to an acquittal because section 376 (1) states that only the Public Prosecutor shall have control and direction of all criminal prosecutions and proceedings.⁴³ This is further provided under section 377 (b) where the prosecution officers shall be subject to the control and direction of the Public Prosecutor.

There is, however, no harm for the accused to ask the court to order that his discharge amounts to an acquittal, even though, the withdrawal of the charge is not made by the Public Prosecutor or his alter-ego. Although the Public Prosecutor has the discretion 'to

⁴⁰ Section 377 (b) CPC

⁴¹ See *Long Samat v PP* [1974] 2 MLJ 152 (FC); *Dato Seri Anwar bin Ibrahim v Public Prosecutor* [2000] 2 MLJ 486 (CA)

⁴² Section 376 (3) of the Code; *PP v Mohamed Halipah* [1982] 1 MLJ 155; *PP v Datuk Hj Dzulkifli* [1982] 1 MLJ 340.

⁴³ See section 254 (3) of the Code; See *PP v Z* [1995] 4 CLJ 383 – High Court (Mohd Hishamuddin Yunus J) – see also *PP v Lee Chan Sang* [1989] 1 MLJ 224, and *Abdul Rasheed v PP* [1985] 1 MLJ 193.

conduct' criminal proceedings, it does not include the regulation of criminal procedure or of the jurisdiction of the courts or the power or discretion to do so.⁴⁴ In other words, the Public prosecutor is not empowered to have the case tried contrary to section 121 or contrary to the criminal jurisdiction of the courts. Therefore, an offence committed in Kuala Lumpur should be tried in Kuala Lumpur, and not in Johore. Likewise, in murder case, the case must be tried before the High Court, and not at the subordinate courts. In *Jayaraman v PP*, it was held by the judge that under section 170 of the Code, it is for the court (as it thinks fit) and not the Public Prosecutor to decide whether the trial should be conducted jointly or separately.⁴⁵ If the discharge amounts to an acquittal, then the plea of autrefois acquit may be raised as provided by section 302 of the Code.

VIII. Conclusion

The Public Prosecutor role is multifarious and involves the reconciliation or the interplay of not only his power but in performing his role too. In this respect, Public Prosecutor or his alter ego has to do a balancing act between public interest to prosecute and secure conviction against offenders with prolong but probable chance of the accused obtaining an acquittal. Without mediation, the criminal justice system would not be able to cope. Accordingly, compound and parole too, it is submitted, are part of this mediation process to avoid the rigidity inherent in criminal law.

⁴⁴ *PP v Datuk Haji Harun bin Haji Idris* [1976] 2 MLJ 116

⁴⁵ [1979] 2 MLJ 88