

PRIMA FACIE UNDER COMMON LAW AND THE SHARI'AH LAW IN CRIMINAL CASES

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The word 'prima facie' is integral in criminal proceedings of Malaysia (Criminal Procedure Code – Act 593 – hereinafter referred to as CPC) which means that the prosecution has adduced credible evidence proving each ingredient of the offence which if un rebutted or unexplained would warrant a conviction (ss. 173(h)(iii) & 180(3) CPC). The accused shall be ordered to enter upon his defence provided the prosecution first successfully establish a prima facie case against the accused on the charge or on the amended charge or the accused is entitled to be acquitted of the charge (s. 173(h)(i) & (ii); s. 180(2) & (3) CPC). Under the Shari'ah, the Islamic criminal procedures of the States in Malaysia, the term 'prima facie' is not stated hence there is also no definition on 'prima facie'. This article seeks to discuss prima facie and to determine whether prima facie is also no less relevant under the Islamic criminal justice system.

PRIMA FACIE: THE COMMON LAW

The Oxford English Dictionary (2010) defines “prima facie” as: “At first sight; on the face of it; as appears at first without investigation; arising at first sight; based or founded on the first impression”. In common parlance, the term prima facie is used to describe the apparent nature of something upon initial observation. In law, it is used both as an adjective and as an adverb. As an adjective - as in the term “prima facie evidence” - it means “sufficient to establish a fact or raise a presumption unless disproved or rebutted.” As an adverb – as in the term “prima facie case” - it means “on first appearance but subject to further evidence or information”.

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Gordon-Smith Ag. J.A. said in *Public Prosecutor v Chin Yoke* [1940] MLJ Rep 37 @ p 38, by adopting the definition given in Mozley and Whiteley's Law Dictionary (5th Ed.): "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". Hence, it is only appropriate to charge a suspect when the evidence from the police investigation discloses a prima facie case. The Human Rights Commission of Malaysia in its forum on the right to an expeditious trial in 2005 recommended that prosecution should only proceed when a case is well founded upon evidence reasonably believed to be reliable and admissible.

In *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at p 63, Augustine Paul J. made the following observation which has since received approval sub silentio from the Federal Court (see [2002] 3 MLJ 193): "A prima facie case arises when the evidence in favor of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence 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 existed or did happen. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of witnesses must be done at the close of the case for the prosecution before the court can rule that a prima facie case has been made out in order to call for the defence".

The Federal Court in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 also applied the maximum evaluation test (similarly decided by Court of Appeal in *Looi Kow Chai v PP* [2003] 1 CLJ 734). In this case, Augustine Paul FCJ, speaking on behalf of the Federal Court, held that at the close of the prosecution's case, the

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court must undertake a positive evaluation of the credibility and reliability of all evidence adduced by the prosecution.

In *Yeo Tse Soon v Public Prosecutor* [1995] 3 MLJ 255, 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. In *PP v Mahmud* [1974] 1 MLJ 85 (FC), 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 was prima facie evidence that the respondent had failed to exercise the due care and attention.

Lord Devlin in *Jayasena v R* [1970] 1 ALL ER 219, described it as “such evidence as, if believed and left uncontradicted and unexplained could be accepted as proof”. It is an evidential burden that the prosecution have to discharge on a maximum evaluation though what maximum evaluation amounts still lack clarity as much as what is minimal evaluation. However, neither has the prosecution proved their case. The legal burden can only be discharged on the totality of the evidence because the accused's evidence may put the prosecution's evidence in different light (s. 101 Evidence Act 1950 and s. 173(m) & 182A CPC).

The discharge of the evidential burden means that the claimant/prosecution had adduced enough evidence of evidential facts to establish a prima facie case as to the facts in issue and thereby defeat a submission of no case to answer.¹ Thus, the accused is accordingly given the opportunity of explaining the principal points in the evidence which tell against him (s.102 Evidence Act 1950 & ss. 173(ha) & 257 CPC). What can be deduced is that prima facie simply means that there is a case for the accused to answer upon the evidence that had been adduced by the prosecution. The accused is ordered to enter upon his defence to

rebut or explain otherwise would warrant a conviction as there is credible evidence proving each ingredient of the offence (ss. 173(h)(iii) & 180(4) CPC).

PRIMA FACIE: ISLAMIC CRIMINAL PROCEDURE ENACTMENTS OF THE STATES

The term prima facie at the close of the case for the prosecution is not used under the respective States' criminal procedure enactments but the practice is that the accused would be charged if the prosecution can establish a prima facie case at the close of the case for the prosecution.² The *Shari'ah* Courts at the close of the case for the prosecution also applied prima facie in order to acquit or to call the accused to enter upon his defence (*Pendakwa Syarie lwn Mohd Sabu dan seorang lagi* [1997] 11 JH 61; *Pendakwa Syarie lwn Jaiman Bin Masta@Mastah dan Jamidah Bte Abdul Majid* [1426h] JH XX/1 54).³ The Practice Direction Note of Chief Prosecutor of Sabah 2000 stipulated that in deciding to charge an accused person, there should be a prima facie case. Prima facie case is understood to mean sufficient credible evidence to convict the accused.⁴

THE QURAN AND SUNNAH

In the story of Prophet, Prophet Abraham (peace be upon him) as mentioned in the Quran, he was definitely against the worshipping of idols and other creations such as the planets, stars, sun and moon. To make things worse, his father himself was making idols which were the instruments of worship as gods in the society then. Allah said in the Quran: "Abraham said to his father Azar 'Takest thou idols for gods? For I see thee and thy people in manifest error. 'Thus We did show Abraham the kingdom of the heavens and the earth that he be one of those who have faith with certainty. When the night covered him over with darkness, he saw a star. He said, 'This is my Lord'. But when it set, he said, 'I like not those that set'. When he saw the moon rising up, he said, 'This is my Lord'. But when it set, he said, 'Unless my Lord guides me, I shall surely be among the erring people. When he saw the sun rising

up, he said, 'This my Lord. This is greater'. But when it set, he said, 'O my people! I am indeed free from all that you join as partners in worshipping with Allah. Verily, I have turned myself toward Him who has created the heavens and the earth and I am not of Al-Mushrikeen (those who worship others besides Allah). His people disputed with him...' (Chapter 6: 74-83).

Where Abraham said to his father and his people. "Behold! he (Abraham) said to his father and his people, 'What worship ye?' They said, 'We worship idols, and we remain constantly in attendance on them.' He (Abraham) said, 'Do they listen to you when ye call or do you good or harm?' They said, 'Nay, but we found our fathers doing...'. Abraham said, 'Ye and your fathers before you for they are enemies to me, not so the Lord and cherisher of the Worlds, who created me and it is He who guides me, Who gives me food and drink, and when I am ill, it is He Who cures me, Who will cause me to die and to live'" (Chapter 26: 72-74, 75-77). Abraham consistently ridiculed these helpless and lifeless gods despite being rebuked by his own father. Allah narrated the conversations Abraham had with his father. Abraham said, 'O my father! Why worship that which heareth not and seeth not and can profit thee nothing? O my father! Verily! There has come to me of knowledge which came not unto you. So follow me. I will guide you to a straight path. O my father! Worship not Satan. Verily! Satan has been a rebel against the Most Beneficent (Allah). O my father! Verily! I fear lest a torment from the Most Beneficent overtake you, so that you become a companion of Satan.' Abraham's father said to him, 'Do you reject my gods, O Abraham? If you stop not, I will indeed stone you. So get away from me safely before I punish you.' Abraham said, 'Peace be on you! I will ask Forgiveness of my Lord for you. Verily! He is unto me, Ever Most Gracious. And I Shall turn away from you and from those whom you invoke besides Allah' (Chapter 19: 42-48).

Abraham disdain and anger over these idols and of worshipping them by members in his society got stronger since these idols could not hear or understand them. Abraham said to his father and his people, "What are these images, to which you are devoted?"

They said, 'We found our fathers worshipping them.' He said, 'Indeed you and your fathers have been in manifest error.' They said, 'have you brought us the truth, or are you one of those who play about?' He said, 'Nay your Lord is the Lord of the heavens and the earth, who created them out and of that I am one of the witnesses. And by Allah, I have a plan for your idols after ye go away and turn your backs'" (Chapter 21: 52-57).

Abraham distanced himself from worshipping of idols as was done by the members in his society including his own father. Abraham got an opportunity to ridicule his people and the idols with a plan he had envisaged that was on the day of a great celebration where the members of the society would be going to a certain place, leaving the temple empty and unguarded, as the priest themselves would be going to the festival too. Abraham excused himself from attending the celebration by saying to his father that he was sick. He went into the temple with an axe and approached one of the idols and asked, 'the food in front of you is getting cold, why do not you eat?'. 'What is the matter with you that you did not speak?' (Chapter 37: 89-92). Knowing that the idols cannot do anything, Abraham wasted no time to smash the idols into pieces with his right hand except one of the biggest idol, where on its neck, he hung the axe (Chapter 21: 58-70; Chapter 37: 83-98). He then left the temple without any one witnessing his acts.

When the people returned after the celebration, they were in shock to find out that their gods had been smashed into pieces save the biggest idol, and they suspected Abraham since he was notoriously known and probably the only one speaking against worshipping the idols. They said, 'Who has done this to our `aliah (gods)? He must indeed be one of the wrongdoers.' They said, 'We heard a young man talking (against) them who is called Abraham.' They said, 'then bring him before the eyes of the people, that they may testify.' They said, 'Are you the one who has done this to our gods, O Abraham?' Abraham said, 'nay, this one, the biggest of them (idol) did it. Ask them, if they can speak!'. They said to Abraham, 'Verily! You are the Zalimun (transgressor).'

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Indeed you know well that these (idols) speak not!' Abraham then said, 'Do you then worship besides Allah, things that can neither profit you, nor harm you? Fie upon you, and upon that which you worship besides Allah! Have you then no sense?' (Chapter 21: 58-67).

CONCLUSION

Abraham was accused or charged with a sacrilegious act of breaking the idols into pieces which was an offence in the society that worshipped idols. He had a motive as he was notoriously known by his people in condemning the worshipping of those idols. He even openly said that he had a plan against the idols. Abraham too had no alibi as he was absent for the celebration. There was therefore a prima facie case made out against him. The principal points in the evidence which tell against him had been established (s. 257 CPC) and there is credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction (ss. 173(h)(iii) & 180(3) CPC).

When he was called to explain, he made a bare denial by saying the biggest idol was the one who smashed into pieces the other lesser idols, and called on his people who accused him to ask the lesser idols to testify to that fact. He also questioned them why they worshipped the idols that they themselves had sculptured. He was convicted and sentenced to death by being burnt in the fire (Chapter 21: 69; Chapter 37: 83-98). It is worth noting too that the evidence against Abraham was circumstantial evidence. However, the mode of trial could be either adversarial or inquisitorial.⁵

Notes

- 1 Mohd Akram Shair Mohamad, "The Concept of Burden of Proof at Common Law - Can Its Concepts Be Harmonised with Shari'ah Law? Some Pertinent Views", International Seminar on Syariah & Common Law 20-21 September 2006, Palace of the Golden Horses Hotel, Seri Kembangan, Selangor, Malaysia; Mohamad Akram Shair Mohamad, "Judicial Exegesis of the Term Prima Facie Case in Section 180 of the Amended Criminal Procedure Code, Chapter 5: Current Essential Issues

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- in Malaysian Law of Evidence“, IIUM Press, International Islamic University Malaysia.
- 2 Yahya Bin Md Zain, Dasar dan Pelaksanaan Penguatkuasaan dan Pendakwaan (2007).
 - 3 Afridah Binti Abas, Prinsip-prinsip Pendakwaan (2007).
 - 4 Siti Zubaidah Ismail, Dasar dan Amalan Penguatkuasaan dan Pendakwaan Jenayah Syariah diMalaysia: Satu Analisis (2007).
 - 5 Abdul Rani Kamarudin, “Between the Adversarial and the Inquisitorial Trial“, MLJ, Vol. 2 (2007), p. xi.



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