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Ghosts of Arulpragasan and Khoo Hi Chiang should vanish

Harun Hashim

THE Prime Minister, Datuk Seri Dr Mahathir Mohamad, expressed grave concern at the prospect of more than 400 persons convicted by the courts walking away free after their appeals are heard following the decision of the Federal Court in Arulpragasan's case in July last year.

To be sure, some of them will win their appeals anyway depending on the merits of each individual case on grounds other than the legal ground held in Arulpragasan's case but certainly not all of them.

In our criminal justice system, an accused person is presumed to be innocent until proven guilty.

Under the system, the court will hear the evidence of the prosecution first and determine at the close of the case for the prosecution whether it has established a prima facie case against the accused.

If the prosecution has not made out a prima facie case at that stage, the court's duty is to acquit the accused then and there.

If and only if the court is of the opinion that the prosecution has made out a prima facie case against the accused and not otherwise, the court shall call on the accused to enter his defence.

It is also a cardinal principle of our law that the burden to prove the guilt of the accused is on the prosecution and that burden never shifts from the start to the end of the case.

The burden of proof, however, is not so heavy on the accused. He does not even have to prove his innocence. All the accused needs to do in his defence is to raise a reasonable doubt as to the truth of the prosecution's case.

Thus, at the close of the case for the defence, the court has to consider the case as a whole, that is both the prosecution and defence cases, and determine whether the prosecution has proved its case beyond reasonable doubt.

If it has, the court shall find the accused guilty of the offence charged, convict the accused and pass sentence according to law.

That was the law of this country for a hundred years until the Supreme Court in the case of Khoo Hi Chiang in 1993 held that the duty of the prosecution was to prove the case beyond reasonable doubt at the close of the case for the prosecution.

Two years later, the Federal Court in Tan Boon Kean's case held that the duty of the prosecution at the close of its case was to establish a prima facie case and not beyond reasonable doubt.

In 1996, the Federal Court of seven judges in a majority decision in Arulpragasan's case held that the decision in Khoo Hi Chiang was correct, namely that the standard of proof required at the close of the case for the prosecution was proof beyond reasonable doubt.

Logically, if the prosecution has proved its case beyond reasonable doubt at the close of the case for the prosecution, then really there is nothing left for the accused to defend his case! He is already guilty before his side of the story is heard. That can never be a fair trial.

This brings us to the more than 400 appeal cases pending in the courts where the trial judges and magistrates have applied the prima facie case test before calling upon the accused to enter the defence.

If the proof beyond reasonable doubt test is required at that stage, then there is a distinct possibility that they will succeed in their appeals and walk away free. It is precisely this possibility that gave

rise to the Prime Minister's concern.

Parliament has since amended the Criminal Procedure Code by restoring the law as it had always been, namely at the end of the prosecution's case, the court has to consider whether the prosecution has made out a prima facie case against the accused and at the conclusion of the trial whether the prosecution has proved its case beyond reasonable doubt.

Last week, according to Press reports, the Chief Justice of the Federal Court was purported to have said that the 400-odd appeal cases will be decided according to the beyond reasonable doubt test.

He has also purportedly said the prima facie case test will only apply to cases to be heard or completed on or after Feb 1, 1997.

If so, has the Prime Minister been defeated or has the Attorney-General done a bad job when amending the Criminal Procedure Code? I think not on both counts.

The Criminal Procedure Code, as the name suggests, is a procedural law and it has long been established as a matter of law that amendments in procedure are retrospective unless specifically stated to be otherwise.

It would seem to follow that the ghosts of Khoo Hi Chian gand Arulpragasan should have vanished a long time ago.

We await the learned judgments of the appellate courts on the 400-odd appeals as to whether the Prime Minister's fears are still justified.

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