HWA TUA TAU V. *PUBLIC PROSECUTOR* – DUTY OF COURT AT END OF PROSECUTION CASE – MUST WE FOLLOW THE PRIVY COUNCIL?

In *Haw Tua Tau* v. *Public Prosecutor* [1981] 2 MLJ 49 the Privy Council in an appeal from Singapore dealt with the conditions precedent to the right and duty of a judge to call on the accused to enter on his defence. The Privy Council in that case was concerned with a criminal trial before the High Court and in particular with section 188 of the Singapore Criminal Procedure Code. As will be submitted later the views of Lord Diplock in that case were not strictly necessary for the decision, as the Privy Council was concerned with the question whether the amendments to section 195 of the Criminal Procedure Code were consistent with the Constitution of SIngapore. It will also be submitted with respect that Lord Diplock did not have to consider the statutory provisions relating to trial before a judge and jury which had been repealed in Singapore. Finally it will be submitted that despite what is said in *Ragunatban* v. *Public Prosecutor* [1982] 1 MLJ 139 the decision should not be accepted as a binding authority for summary trials in Malaysia.

It might be useful before considering the case of *Haw Tua Tau* in detail to look at the statutory provisions and the earlier cases in Malaysia.

The relevant statutory provisions are:–

(a) *Section 173(f), (h) and (j) Criminal Procedure Code (Sumary Trial before Magistrates).*

(f) "If upon taking all the evidence hereinbefore referred to the court finds that no case against the accused has been made out which if unrebutted would warrant his conviction the Court shall record an order of acquittal.

(h) if when such evidence has been taken, the Court is of opinion that there are grounds for presuming that the accused has committed the offence charged or some other offence which such court is competent to try, it shall consider the charge recorded against the accused and de-

cide whether it is sufficient and if necessary, shall amend the same;

(j) if the accused does not plead guilty to the charge as amended or if no amendment is made the accused shall then be called upon to enter upon his defence and to produce his evidence –

(b) *S. 180 Criminal Procedure Code (Trial before Judge)*

When the case for the prosecution is concluded, the Court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction shall record an order of acquittal, or if it does not so find, shall call on the accused to enter on his defence.

(c) *S. 190 (Trial before judge and assessors)*

– same as for trial before a judge alone –

(d) *S, 124 (Trial before judge and jury)*

(i) When the case for the prosecution is concluded the Court, if it considers that there is no evidence that the accused committed the offence, shall direct the jury to return a verdict of not guilty.

(ii) if the court considers that there is evidence that the accused committed the offence the court shall call on the accused to enter on his defence.

(iii) The jury may return a verdict of not guilty either unanimously or by a majority at any time after the conclusion of the evidence for the prosecution if they consider the case to be one in which they could not safely convict.

In *Public Prosecutor* v. *Man bin Abas* (1935) 1 M.C. 169, at the close of the prosecution counsel for the accused submitted that the prosecution had failed to establish the charges against the accused. The Magistrate heard the prosecution in reply and then called on the accused to enter upon his defence. The accused then through his counsel said that he was "not putting up any defence". The Magistrate reserved judgment and in a written judgment delivered later acquitted the accused. On an

appeal by the Public Prosecutor, Howes J. held that in view of the fact that the Magistrate had called on the accused to enter on his defence which showed that in his opinion a *prima facie* case had been made out against the accused the acquittal was against the weight of the evidence and should be set aside. Howes J. said that "otherwise under section 171(f) of the Criminal Procedure Code if the Magistrate had found no case against the accused had been made out "which if unrebutted would warrant his conviction" he would have acquitted the accused at that stage.

In *Public Prosecutor* v. *Lee Yee Heng* [1938] MLJ 117 the accused a clerk in charge of the Government Chandu Shop in Ampang, Selangor, was charged with abetment of possession of chandu by another person. At the close of the case for the prosecution counsel for the accused submitted no case to meet. The learned Magistrate called upon the defence. Counsel for the accused stated that the accused did not wish to give evidence and the learned Magistrate than reserved judgment till the following day. The next day counsel for the accused asked the Magistrate that the accused be asked to state himself whether he wished to make any defence. The usual warning was given to the accused and he stated that he did not wish to make a statement. The Court thereupon recorded its finding "that from the evidence produced before the court, I find that it is not strong enough to record a conviction although it is highly suspicious against the accused. I accordingly acquit the accused." The Public Prosecutor appealed and Cussen J. allowed the appeal. The learned judge pointed out that when the Magistrate rejected the submission of counsel at the close of the prosecution case and called upon the defence it must be taken that the Magistrate considered that a case had been made out which if unrebutted, warranted his conviction. In view of the defence being called upon, the Magistrate must then, said the learned judge, under section 173(h) of the Criminal Procedure Code, have been of opinion that there are grounds for presuming that the accused had committed the offence charged. When no defence was offered it might have been expected that the learned Magistrate would then and there have convicted the accused. However he in fact acquitted the accused.

Cussen J. said –

"Now in the first place it may be that although at the close of the Prosecution case, the Magistrate was of opinion that a case as required by section 173(f) of the Criminal Procedure Code, has been made out and so rightly called upon the defence, yet having reserved judgment until the next day he on further consideration concluded that his first opinion was wrong, and decided that a case under section 173(f) had not been made out. That, though perhaps unusual, is in no way improper, although the correct procedure, if the Magistrate felt in any way doubtful and in need of consideration at the close of the Prosecution case, was, after hearing the submission and argument thereon of Counsel, to have then taken time to consider and decide whether or not a case had been made out against the accused.

But, on the next day of the trial, it must be considered that the Magistrate had, on consideration overnight, decided that there was not a case, and that the evidence of the Prosecution did not establish anything more than a case of grave suspicion. But if that was so he should have so recorded it and acquitted the accused, without again calling upon him to answer the charge.

It is difficult to understand the logic or lack of logic which dictated these proceedings.

But, while I do not say that it is what happened, although what I have recounted above of the proceedings might very well suggest it, I would like to state that it is wrong and contrary to the provisions of the Criminal Procedure Code for a Magistrate, if at the close of the Prosecution case he in fact considers that only a highly suspicious case has been made out against the accused, to proceed to call upon the defence in the possible hope that the defence, if one is made, may resolve his doubts.

Without examining in detail the evidence given for the Prosecution in this case I have no doubt whatever that this was a case which strongly warranted a conviction if unrebutted and that the accused should have been convicted. There is no suggestion that any of the evidence given by the Prosecution witnesses was not believed by the Court. In his grounds of judgment what the learned Magistrate finds is that the evidence, even if fully accepted, is not sufficient to establish more than a case of suspicion. Since, therefore, the credibility of the witness is not in question, which is peculiarly a matter for the trial Court, I am free to reverse the decision of the Lower Court."

In *Public Prosecutor* v. *Goo Kian* [1939] MLJ 291 the Public Prosecutor appealed against the acquittal of the respondent on a charge of theft. In that case as Raja Musa J. said at the close of the prosecution case the evidence disclosed that the respondent

took away the complainant's bicycle which undoubtedly was in the complainant's possession, out of his possession by riding it away to Seremban, without the complainant's consent and by such taking he without doubt *prima facie* caused wrongful loss to the complainant in that he was deprived, without his consent, of the use of his own bicycle. Thus said the learned Judge –

> "The position therefore was that the prosecution had disclosed a prima facie case which if unrebutted would have warranted the respondent's conviction. The respondent should therefore have been called on his defence. It was open to him to rebut the inference as to his intent and the Court would then have been in a position to apply the law. In this case however the learned Magistrate appears to have anticipated the defence without calling upon it. I consider that was irregular.
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> With the learned Magistrate's exposition of the law I have no reason to quarrel but he must have all the facts before he can apply the law, for instance illustration (m) upon which the learned Magistrate relied, opens with the words "A being on friendly terms with Z". There must be evidence of such friendly relationship. Here there was no such evidence at all".

In *Public Prosecutor* v. *Chin Yoke* [1940] MLJ 47 the Public Prosecutor appealed against the acquittal of the respondent on charges of offences of driving a motor cycle without a licence and taking away a motor cycle without the consent of the owner under the Road Traffic Enactment. After recording the evidence of a Police Sergeant and a police constable and also the owner of the motor cycle in question, and after an adjournment the Magistrate without calling on the accused for his defence acquitted and discharged the accused. In his grounds of judgment the learned Magistrate stated that the identification of the rider of the motor cycle was extremely weak, that the licensing officer should have been called to prove the non-issue of the licence to the accused and that he was of opinion that no *prima facie* case had been made out. He therefore acted under section 173(f) of the Criminal Procedure Code and acquitted and discharged the accused. Gordon-Smith Ag. J.A. allowed the appeal, as he held that in view of the evidence of the Sergeant and the Constable, it was difficult to agree with the Magistrate's opinion that the evidence as to identity was extremely weak. Gordon-Smith Ag. J.A. said –

"The [next]point is as to when a Magistrate is justified in acting under section 173(f) of the Criminal Procedure Code. This paragraph reads as follows:—

> "If, upon taking all the evidence hereinbefore referred to" (i.e. the evidence for the prosecution) "the court finds that no case against the accused has been made out which if unrebutted would warrant his conviction, the Court shall record an order of acquittal."

Similar provision is also made by section 180, in the case of a trial by a Judge without Assessors, by section 190 in the case of a trial by a Judge with Assessors and by section 214 in the case of a trial by Jury. There is, however, a distinction to be drawn in respect of the last instance, to which I will refer later. A Magistrate is, therefore, in the same position as a Judge in the exercise of the powers conferred respectively by section 173(f), 180 and 190, the relevant wording of all three provisions being identical.

One is quite familiar with the course often adopted by Counsel for the Defence at the close of the case for the Prosecution (particularly in a trial with a Jury), when he submits that he has no case to answer, or in other words, that the Prosecution has failed to make out a *prima facie* case against the accused and it is submitted that accused should not be called on for his defence.

It is then that it is the duty of the Magistrate or Judge to consider the evidence already led and decide whether or not to call on the accused for his defence, and the question arises what is a prima facie case. In Mozley and Whiteley's Law Dictionary (5th Ed.) it states:

> "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."

This follows very closely the actual wording of the sections referred to but it does not follow, in my opinion, that the Magistrate or Judge must necessarily accept the whole of the evidence for the prosecution at its face value. There may be good grounds for rejecting some part, or all of it and, therefore, it is necessary to weigh up this evidence and on so doing one may be satisfied that, if unrebutted, it would warrant the accused's conviction. In such case the accused is then called upon to answer the prima facie case which has thus been made out against him. If, however, on the other hand, after weighing up such evidence for the prosecution one is satisfied that it would be wholly unsafe to convict

upon such evidence standing alone, then no *prima facie* case has been made out and the accused should not be called on for his defence.
This is a question for decision by the Magistrate, and the Judge alone, even though the latter is sitting with Assessors.
In the case of a trial with a jury, the matter is slight different and the relevant section is worded differently. Section 214 of the Criminal Procedure Code is worded precisely the same as section 204 of the Colony Criminal Procedure Code, and sub-section (1) provides that the Court "if it considers that there is no evidence that the accused committed the offence shall direct the Jury to return a verdict of not guilty," but the words "no evidence" in this instance do not mean "no sufficient satisfactory, trusworthy or conclusive evidence" and it means what it says, i.e. that even if all the evidence given were perfectly true, it does not amount to legal proof that the accused committed the offence charged. It is, however, provided by sub-section (3) that at any time after the conclusion of the evidence for the prosecution the Jury may stop a case and find an accused not guilty if they consider the case to be one in which they could not safely convict. This is a power vested in the Jury which can be acted upon irrespective of the views held by the presiding Judge, and it is usually under this sub-section that Counsel for an accused makes such submission. Whether Counsel can address the Jury on the point, does not appear to have been definitely decided but if he does, then no doubt Counsel for the Prosecution would be entitled to reply, apart from the Judge also expressing his views. It is, however, a power specifically conferred upon Juries and in the exercise of which they have an unfettered dicretion."

In *Public Prosecutor* v. *Jessa Singh* [1940] MLJ 56 the respondent was charged with theft. It was proved that the respondent had removed the metals the subject of the charge without permission but the Magistrate acquitted him.

Murray-Aynsley C.J. said —

"In this case the Magistrate acquitted the respondent at the close of the case for the prosecution. I think he acted prematurely. There was evidence which if unrebutted would have justified a conviction. When the respondent has been heard it is quite possible that a satisfactory explanation may be given, but it is not part of the duty of the court at an early stage in the proceedings to anticipate possible defences and then to act as though those defences had been established."

In *Public Prosecutor* v. *Fong Ah Tong* [1940]M.L.J. 240 Laville J. had to deal with the position where the trial was before a judge with the aid of assessors. The accused was charged with murder. At the end of the prosecution case counsel for the accused made a submission that there was no case for the accused to answer. Laville J. gave the following ruling –

> "A submission has been made to me by counsel for the defence that the Court should under section 190 of the Criminal Procedure Code hold that no case has been made out against the accused, which, if unrebutted, would warrant their conviction and should acquit them.
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> In my view in that section the word Court means the Judge sitting to try a criminal case and excludes the assessors: under Chapter XXI, Criminal Procedure Code, the use of the word Court throughout makes it clear that the assessors do not form part thereof but are rather aiders and helpers of the Court on matters of fact whose opinions the Court may use to confirm it in its final judgment.
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> But by section 190 it would appear that there is an onus cast on the presiding judge at a trial with the aid of assessors to decide at the end of the prosecution evidence, not as in jury cases whether there is any evidence at all of the guilt of the accused, to go to the jury, but a greater onus namely whether the prosecution evidence, if no evidence is given at all by accused, would justify a conviction. "Warrant" in my view is a strong word and excludes any doubts by the Court.
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> The evidence which would warrant a conviction if unrebutted, is evidence that satisfies the Court beyond all reasonable doubt that the accused is guilty of the offence charged or some lesser offence. The criterion therefore on which the Court must work is, if there is no more evidence has the prosecution proved its case beyond all reasonable doubt."

In *Public Prosecutor* v. *Lim Teong Seng and others* [1946] MLJ 108 Laville J. was concerned with a trial before a judge sitting alone. The accused were charged with housebreaking and at the close of the prosecution case counsel for the accused submitted that no case had been made out against the accused which if unrebutted would warrant a conviction. The learned Crown Counsel submitted that if there was any reasonable evidence offered by the prosecution the court ought to hear the defence. Counsel for the accused referred to the case of *P.P.* v. *Fong Ah Tong* (supra) and Laville J. said –

"In that case I was the trial judge. The wording of section 180, which is concerned with the procedure at the end of a prosecution before a judge sitting alone is word for word the same as that of section 190, and cannot in my opinion have any other meaning than that I have already given to the wording of section 190. I have considered the sections that cover procedure at the end of the prosecution evidence in the Magistrate's Court, in the court of a judge sitting alone, and also sitting with assessors, and in the court of a judge sitting with a jury. The relevant sections are respectively section 173(f), Section 180, section 190 and section 214 of the Criminal Procedure Code. The wording in the first three cited sections is the same, the meaning to be applied to it cannot be differentiated.

In my view the basis of this direction in S. 173(f), S. 180 and S. 190 is two-fold. Firstly that the onus is on the prosecution and never shifts to prove its case. Secondly that the circumstances of each of the three forms of trial are the same. The presiding officer is sitting not only as judge but as a jury. If therefore at the close of the prosecution he as a jury comes to the conclusion, not that there is no evidence, but that the evidence produced is not strong enough to warrant a conviction, and only evidence beyond all reasonable doubt is of that nature, he is not by the spirit of English law entitled to say: "I am doubful of this evidence but let me see if it can be supplemented and improved by what can be elicited from the defence." The prosecution who have to prove their case beyond all reasonable doubt have produced all the evidence they have, and it is on this evidence the conviction, if any, must rest, even if the accused calls no evidence. What the prosecution can elicit for its view from them is either supplementary or redundant or goes to lessen the credibility of the defence evidence. It cannot be the basis of a conviction. If therefore at the close of the prosecution the Court is of opinion that on that evidence it cannot, as a jury, hold the allegations proved beyond all reasonable doubt, there is nothing left for it to do but to acquit the accused. This view point is set out by the sections cited above.

Even in a trial by jury where the judge is merely a director on the law, and the jury are judges of fact the rule as to acquittal at the end of the prosecution case is substantially the same. Section 214(iii) of the Criminal Procedure Code lays down that the jury may return a verdict of not guilty – at any time after the conclusion of the evidence for the prosecution if they consider the case to be one in which they could not safely convict. Such a case is one where the jury are not convinced beyond all reasonable doubt on the prosecution evidence that the accused is, as far as the prosecution evidence goes, guilty of the offence charged."

It is submitted with respect that Laville J. was not correct in stating that the rule is substantially the same in a trial by jury and in a trial before a judge sitting alone. In any case he was concerned with the power of the jury under Section 214(iii) and not the power of the judge under Section 214(i).

In *Public Prosecutor* v. *Annuar bin Ali* [1948]MLJ 38 the accused was charged with murder and the trial was before a judge and assessors. Counsel for the defence made a submission under section 190 of the Criminal Procedure Code that no case had been made out which would warrant a conviction and argued that this section had not only the same meaning but also the same effect as Section 180 of the Criminal Procedure Code. Spenser-Wilkinson J. referred to the decision of Laville J. in *Public Prosecutor Johore* v. *Fong Ah Tong & Anor (supra)* and said that he was unable to agree that the assessors are merely aiders and helpers of the court on matters of fact whose opinions the Court may use to confirm it in its final judgment, as stated by Laville J. In his opinion the assessors are normally the sole judges of fact and the trial judge in a trial with the aid of assessors only becomes a judge of fact if either the assessors disagree or if, when both assessors agree, he is unable to agree with them. Spenser-Wilkinson J. then said –

> "If I am right in thinking that the assessors are the judges of fact, then, although the wording of Sections 180 and 190 is exactly the same, and although the actual words no doubt have the same meaning in both sections, in my view, the practical effect of the two sections in their context is different. In each case the Court has to acquit "if it finds" that no case against the accused has been made out which if unrebutted would warrant a conviction. When a Judge is sitting alone, it is easy for him to reach this finding, because he is the sole judge of law and of fact, and he is the person who has to be satisfied beyond a reasonable doubt of the accused's guilt and must know at that stage whether or not he has believed the witnesses; but where the Judge is sitting with the assessors, he is unable to know at the close of the case for the prosecution what view the assessors will take of the evidence which has up to that point been produced. The Judge himself may not be altogether satisfied beyond all doubt, but the assessors may; unless therefore, it is clear to the Judge at the close of the case for the prosecution that the assessors could not reasonably find the accused guilty on the evidence adduced if full weight were given to it, then it seems to me that the accused must be called upon for his defence.

I derive no assistance from the wording of Section 214 which deals with the position when the trial is by jury. There, at the close of the case for the prosecution, the Court directs a verdict of not guilty if there is no evidence that the accused committed the offence. This is strong language, and I do not think that a Judge trying a case with the aid of assessors need to go so far under Section 190 as to decide that there is no evidence that the accused committed the offence. I read Section 190, in its context as part of Chapter XXI of the Criminal Procedure Code, as meaning that if, at the close of the case for the prosecution, the Judge finds that there is insufficient evidence then before the Court upon which reasonable assessors could find the accused guilty if no more is heard, then he must acquit the accused, but not otherwise. Except in exceptional circumstances, such as a principal witness being obviously unreliable, I do not think that a Judge, trying a case with the aid of assessors, can properly, on a submission of "no case", go into such question as the weight of the evidence or the credinility of witnesses, which are matters to be dealt with by the Assessors at the conclusion of the whole case.

I would add that in this case there was ample evidence in my opinion to convict the accused at the close of the case for the prosecution, provided that the witnesses who deposed to the dying declaration were believed and that there was reasonable ground for assuming that the deceased spoke the truth when he made that declaration. I was of opinion – although I felt in improper to express any opinion at that stage – that both these conditions were fulfilled and there was corroboration of the deceased's statement. I therefore called upon the accused for his defence, and at the conclusion of the case both assessors found accused guilty of murder, a conclusion with which I did not disagree."

In *Public Prosecutor* v. *Lam Kim Pau & Others* [1948] MLJ 116 Laville J. reasserted his previous view that the assessors do not form part of the Court but are ancillary to it. On the procedure to be followed when a submission of no case is made he said –

"Section 190 of the Code lays down the procedure to be followed by the Judge at the close of the prosecution. It casts on him the grave onus of deciding whether the case so far made out is one which warrants a conviction, and, if he decides that it does not, he shall – the term is mandatory – record an order of acquittal.

If the matter was one for the Assessors or for their opinion at this stage, the legislature would have laid it down, as it has laid it down in regard

to the concluding stage of the trial in Section 197. But there is in Section 190 complete absence of mention as to any consultation with the Assessors or any recording of their opinion. It is difficult to see how the trial judge at this stage could effectively consult the Assessors or ask their opinion. If he does so and their opinion is contraty to his, what is he to do?Must he ignore their opinion and go on with the trial, or in the opposite case ignore their opinion and acquit the accused?Unless he is to be guided by their opinion in some way, it seems pointless to consult them at this stage, and it is impossible to see what aid they can give him then.

It is for this reason that it seems to me incumbent on the trial Judge, when a submission is made under Section 190 of the Criminal Procedure Code, and is, as it must be, argued on the facts disclosed in the evidence, to request the Assessors to leave the Court while the argument proceeds.

I hold therefore that where at the end of the prosecution a submission is made that the Court should act under Section 190 of the Criminal Procedure Code and the submission is based on facts in issue in the trial, the Assessors should not remain in Court while the submission is argued.

It is part of the duty of a Judge at the conclusion of a trial to impress on the Assessors that they must come to their own decision on the facts and must not be influenced by any opinion the Judge may express on facts.

In deciding a submission of this nature the trial Judge must necessarily disclose his opinion on the facts of the case as far as it has gone and, if the Assessors are present, they would naturally tend to be influenced by that decision in their judgment on the facts of the whole case, if it proceeds further, and for this reason they should not be in Court."

In *Public Prosecutor* v. *Balasubramaniam* [1948] MLJ 119 the accused was charged that he being the servant to the Government of Pahang wilfully with intent to defraud falsified a certain book to wit a Hospital Book by omitting to enter in such book 82 bedsheets belonging to the said Government of Pahang. He was tried before a Judge sitting alone. At the end of the case for the prosecution the learned counsel for the defence submitted that no case had been made out against the accused which if unrebutted would warrant a conviction and therefore he sought an acquittal. The learned counsel for the Crown submitted that a *prima facie* case had been made out and that there was a case although it might be answerable. Callow J. said

"I must go further and consider whether even if a prima facie case is shown, such element of doubt is removed so as to sustain a conviction if no more evidence is adduced. The onus is on the prosecution to prove the case and the burden never shifts".

He referred to the decision of Lawille J. in *Public Prosecutor v. Lim Teong Seng and others (supra).* At the end of his judgment he said —

'Lack of supervision and check in the Mentakab Hospital has been shown; incompetency and inefficiency by the accused is apparent, but on the evidence before me I cannot be sure whether the accused deliberately falsified the book or simply muddled it. Did he later try and adjust his figures and even so failed in arithmetic?Had there been evidence of *mala fide* dealings with the bedsheets the case would have assumed a different aspect. I am by no means convinced of the innocence of the accused, of which he might have satisfied me had he elected to continue, but I do not find a case by the prosecution which if unrebutted would warrant a conviction, and I am bound in law to acquit the accused of the charge."

In *Soo Sing and others* v. *Public Prosecutor* [1951]MLJ 143 the accused were charged with consorting with an armed bandit an offence under regulation 6A(1) of the Emergency Regulations, 1948. They were convicted and sentenced to five years' imprisonment. Subsequently there was an appeal to the High Court and Abbott J. referred certain questions of law to the Court of Appeal. The first question was that the decision in the case of *King* v. *Power* [1919] 1 K.B. 572 was without application in the Magistrate's Courts of the Federation of Malaya. In answer to this question Foster Sutton C.J. in giving the judgment of the Court of Appeal said —

"In the *King* v. *Power* the Court of Criminal Appeal in England held that where a submission is made at the close of the case for the prosecution that there is no case for the prisoner to answer and the submission is over-ruled and witnesses are called for the defence by whom evidence is given incriminating the prisoner, the Court of Criminal Appeal is entitled, on the appeal by the prisoner against conviction, to take into consideration the evidence given by the witnesses for the defence.

Section 173 of the Criminal Procedure Code lays down the procedure

to be followed by Magistrates in summary trials. The "evidence hereinbefore referred to" in paragraph (f) of that section has reference only to the evidence for the prosecution. That being so it is the duty of the Magistrate at the close of the case for the prosecution to determine whether or not the evidence tendered on behalf of the prosecution, if unrebutted, has established the case against the prisoner beyond all reasonable doubt. It follows therefore that in our view the answer to the first question is in the affirmative.

In *Public Prosecutor* v. *Lee Ee Teong* [1953] MLJ 244, the accused had been charged with assisting in carrying on a public lottery. At the close of the case for the prosecution the Magistrate held that there was no case to answer and accordingly acquitted and discharged the accused. The Public Prosetor appealled against the acquittal but the appeal was dismissed. Thomson J. in the course of his judgment said –

"In the absense of any direct statutory provision to the contrary the rule is that in a criminal prosecution the onus lies on the prosecution to prove every ingredient in the offence charged against the accused person. If the prosecution fail to produce evidence which is believed and which, if unrebutted, would make out every such ingredient then the case must be dismissed without the accused person being called upon to make his defence. If he is called upon to make his defence, then the court must consider the evidence as a whole and if satisfied that every ingredient of the offence has been proved, then convict".

In that case it was held in effect that it is not open to a Judge or Magistrate to import his personal knowledge on the point (that is about 1000 characters lottery) into a criminal trial so as to help out evidence for the prosecution which would otherwise be inadequate to support a conviction.

In *Wong Tiap Long & Anor* v. *Public Prosecutor* [1955]MLJ 132 the appellant had been convicted on charges of assisting in the management of a place used as a common betting house. The appeal was allowed in the High Court. Abbott J. said –

"The only point for determination is as to whether or not the prosecution had made out a *prima facie* case before the defence was called upon. Before the prosecution closed its case, the senior police officer merely stated that he led the raid acting upon information which had been given to him by some person, orally in the street. Sections 12, 13

> and 14 (of the Betting Ordinance) empower the search of premises and the granting of search warrants by Magistrates, Justices of the Peace and Senior Police Officers. Section 14(1)(d) enables premises to be searched without delay where the object of the search would be defeated by delay. The senior police officer himself did not testify as to whether or not such delay would have defeated the ends of justice, nor did he give any reason as to why the information was not reduced to writing. At the close of the prosecution case therefore, the evidence was incomplete and no *prima facie* case had been made out."

In *Mohamed Kassim* v. *Reg.* [1956]MLJ 212, a Penang case, the accused was charged with an offence under Section 304A of the Penal Code. The facts were that the accused while driving a car knocked into a small boy as a result of which the boy died. Two prosecution witnesses said that the boy was walking close to the verge of the road. The prosecution also called the wife of the appellant who said that the boy was running across the road. The accused in his evidence confirmed the evidence of his wife. The President of the Sessions Court convicted the accused. The learned President however did not decide at the end of the prosecution case which version he accepted and after hearing the accused he said that "it would not be unreasonable for me to hold that the boy did run across the road". On appeal Spenser-Wilkinson J. said –

> "In my opinion in view of the provisions of section 182)f) the Court is bound at the conclusion of the case for the prosecution to decide definitely which of either of two possible but incompatible versions of the facts have been proved".

Despite the decision of the Court of Appeal in *Soo Sing* v. *Public Prosecutor* (supra) Magistrates continued to apply the test whether the prosecution has proved a prima facie case. Thus in *Public Prosecutor* v. *Low Yong Ping* [1961] MLJ 306 the learned Magistrate acquitted the accused as he found at the close of the prosecution case "that on the evidence adduced, no *prima facie* case had been made out on the charge, which if unrebutted would have warranted a conviction". On appeal, Ong J. did not say that the test was wrong but he said that the Magistrate acted prematurely as he had not heard all the evidence for the prosecution. In *Public Prosecutor* v. *Lai Kuit*

Scong [1968]2 MLJ 130 the main ground for appeal was that the learned Magistrate erred in holding that there was no case for the defence to answer and it was urged that since the prosecution had proved that the bus driven by the respondent had in negotiating a sharp bend veered off the road and fallen on its side, the prosecution had raised a *prima facie* case of driving without due care and attention against the respondent and it was for the defence to raise reasonable doubt that he was not driving without due care and attention. In reply counsel for the respondent sought to uphold the acquittal on the ground that the prosecution had not adduced a *prima facie* case. Chang Min Tat J. in allowing the appeal held that the prosecution had produced a prima facie against the respondent as the evidence showed that the bus had failed to negotiate a sharp right hand bend and therefore the Magistrate should have called on the defence.

In *Public Prosecutor* v. *Saimin & Others* [1971]2 MLJ 17 the accused was charged with theft of cocoanuts. At the end of the prosecution case the learned Magistrate ruled that there was a *prima facie* case for the accused to answer but he added "I am making this ruling not because I am satisfied with the case for the prosecution but because I want the accused to explain for themselves." Having called on the accused for their defence he convicted them saying "Having heard all the evidence the court is partially satisfied that the charge has been proved since the accused have not given any reasonable explanation as to the charge against them". Sharma J. quashed the conviction and said –

> "If the learned Magistrate was not satisfied with the case for the prosecution it was his duty to acquit and discharge the accused at the close of the prosecution case. The falsity of the defence does not relieve the prosecution from proving the prosecution case beyond reasonable doubt ––
>
> As the learned Magistrate seems to have ignored the very basic principle of criminal law, it may perhaps serve a useful purpose to remind those administering justice in the lower courts 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".

In *Yap Chai Chai & Anor* v. *Public Prosecutor* [1973]1 MLJ 219 the appellants were tried before a judge and jury with and convicted of murder. On appeal it was argued *inter alia* that it was mandatory for the trial judge at the close of the prosecution to enter on the record his opinion that there was a case to answer and that his failure to do so rendered the trial a nullity. The Federal Court rejected the argument. They held that it was not mandatory for the trial judge at the close of the prosecution to record his opinion that there was a case to answer. The cases referred to the court were not followed as Ong C.J. said –

> "In our opinion the provisions relating to trial with assessors, as in those cases, have no application to jury trials".

Ong C.J. also said –

> "The establisehd facts had to be faced and they did establish a *prima facie* case".It would therefore be wrong to withdraw the case at that stage from the jury."

In *Tan Ah Ting* v. *Public Prosecutor* [1974]1 MLJ 37 the defendant was charged with driving without due care attention. The learned Magistrate in convicting the accused said –

> "In order for the court to call for the defence, the court need not satisfy itself that the prosecution had proved its case beyond reasonable doubt. The court has to direct its mind to the question as to whether the prosecution had proved its case beyond reasonable doubt, only for the purpose of conviction. In order to call for the defence the court has only to consider whether the prosecution had made out a *prima facie* case."

Authorities

1) Cross on Evidence 2nd Edn. pp. 57 foot-note 4.

> "Even in a criminal case the evidence sufficient to constitute a case to answer need, at most, be such as *would satisfy a reasonable tribunal on the balance of probability R.* v. *Smith* (1865), 34 L.J.M.C. 153, cited in *Wilson* v. *Buttery* [1926]S.A.S.R. 150, which appears to be the most modern authority on the subject).

2) *Practice Note*, [1962]1 All E.R. 448

"L. Parker, C.J., Those of us who sit in the Div. Ct. have the distinct impression that justices today are being persuaded all too often to uphold a submission of no case. In the result, this court has had on many occasions to send the case back to the justices for the hearing to be continued with inevitable delay and increased expenditure.

Without attempting to lay down any principle of law, we think that as a matter of practice justices should be guided by the following considerations.

A submission that there is no case to answer may properly be made and upheld,

(a) When there has been no evidence to prove an essential element in the alleged offence,

(b) When 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.

Apart from these two situations, a tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer."

I had included this point as one of my grounds of judgment because there was a dispute between the defence counsel and P.O. as to whether in order for the court to call for the defence it must satisfy itself that the prosecution had proved its case beyond reasonable doubt, or the court need only to satisfy itself that the prosecution had made out a *prima facie* case. I held that the latter was the correct principle on the point. In the present case I found that the prosecution had made out a *prima facie* case. I then called for the defence . . . ."

Wan Suleiman F.J. set aside the conviction and in his judgment said –

"The first passage from the 2nd Edition of Cross on Evidence, the learned magistrate failed to note, refers to a trial by a judge and jury, and cannot apply to a summary trial before a magistrate, in this country.

This passage appears in a foot-note to a section entitled "Judicial Control of the Jury" and refers to the quantum of evidence a judge sitting with a jury would have to look for to justify leaving the case to the jury. A judge acting under section 214(ii) of our Criminal Procedure Code, would likewise be justified in leaving the case to the jury only where there is evidence on which they might reasonably conclude the facts to be established. (See *Mallal's* Criminal Procedure 4th Edn. page 307 and authorities cited therein).

The effect of section 173(f) of the Criminal Procedure Code is that it is the duty of a magistrate at the close of the case for the prosecution to determine whether or not the evidence tendered on behalf of the prosecution, if unrebutted, has established the case against the prisoner beyond all reasonable doubt – *Soo Sing & Ors.* v. *S. Public Prosecutor* [1951]MLJ 143 (See also *Sultan bin Rahmansa* v. *Regina* [1955]MLJ 75, *Public Prosecutor* v. *Lee Ee Teong* [1953]MLJ 244).

Instead of the words "no case against the accused has been made out which, if unrebutted, would warrant his conviction" used in section 173(f), it is common for defence counsel to use the words "no case has been made out against the accused", or "no *prima facie* case has been made out against the accused".

The term "*prima facie* case" or "*prima faciee evidence*" has suffered from lack of uniformity in usage, (See *Cross* on Evidence, 2nd Edition, pages 24, 25).

"*Prima facie* evidence, first sense . . where a party's evidence in support of an issue is sufficiently weighty to entitle a reasonable man to decide the issue in his favour, although, as a matter of common sense, he is not obliged to do so."

"*Prima facie* evidence, second sense (presumptive evidence) . . . where a party's evidence in support of an issue is so weighty that no reasonable man could help deciding the issue in his favour in the absense of further evidence."

It is probably in the first sense that Callow J. used the term in *Public Prosecutor* v. *R. Balasubramaniam* [1948] MLJ 119. Crown Counsel having submitted that a prima facie case had been made out, his Lordship said –

I must go further and consider whether even if a *prima facie* case is shown, such element of doubt is removed so as to sustain a conviction if no more evidence is adduced."

It appears to me that the second sense is the proper meaning to accord to this expression, and is the meaning generally accepted by our courts. Gordon-Smith Ag. J.A. said in *Public Prosecutor* v. *Chin Yoke* [1940] MLJ 37 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."

When a court has ruled that a *prima facie* case has been made out by the prosecution at the close of its case and calls upon defendant to make his defence, and defendant chooses to remain silent, then and only then is the case against him proved beyond reasonable doubt.

"The decision to uphold or reject the submission ('of no case to meet') should not depend upon whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit, but upon whether the evidence is such that a reasonable tribunal might convict." states the 1962 Practice Note ([1962]1 All E.R. 448) cited by the learned magistrate. Under section 137(f) of the Criminal Procedure Code, however, the trial court is clearly the tribunal to make such a decision, and must indeed regard itself to be a reasonable tribunal and not concern itself with how some other hypothetical reasonable tribunal might regard the evidence at that stage of proceedings. The words of the statutory provisions are clear.

The learned magistrate was correct in holding that before calling upon the defendant to make his defence, the court had only to be satisfied that the prosecution has made out a *prima facie* case.

However, I am left in doubt whether, in holding that prosecution had made out a *prima facie* case, he had because of his reliance on the passages from Cross on Evidence cited by him and the *Practice Note* of 1962, indeed determined, in the words of *Soo Sing's* case whether or not the evidence tendered on behalf of the prosecution, if unrebutted, has established the case against the prisoner beyond all reasonable doubt."

The appeal is therefore allowed, the order of conviction set aside, and the case remitted to the court below for re-trial by another magistrate."

In *Public Prosecutor* v. *Ismail bin Ishak & Ors.* [1976] 1 MLJ 183 the accused had been charged with taking part in an unlawful assembly. The learned Magistrate acquitted the accused at the end of the prosecution case. He found that although there was an assembly at the material time the prosecution had failed to prove beyond reasonable doubt that the accused did take part in it. Harun J. dismissed the appeal of the Public Prosecutor and held that the learned Magistrate was right in holding that the prosecution had failed to proved beyond

reasonable doubt that the accused took part in the assembly and in not calling on the defence.

In *Zahari bin Yeop Baai* v. *Public Prosecutor* [1980] 1 MLJ 160 the appellant was convicted of an offence under the Customs Act. On appeal Hashim Yeop A. Sani J. allowed the appeal. He said –

> "I have read and re-read the notes of evidence and the grounds of judgment of the learned President and after considering the evidence tendered on behalf of the prosecution at the close of the prosecution case and applying the rule as stated in *Public Prosecutor* v. *Chin Yoke* [1940] MLJ 37 it is my considered opinion that the defence should not have been called in the first place in respect of both the appellants. The rule is simply this. In a summary trial if the court is satisfied that, if unrebutted, the evidence adduced at the close of the prosecution case would warrant the accused's conviction, then a *prima facie* case is said to have been made out. In such a case, the accused should be called upon to state his defence. If however after weighing all the evidence adduced at the close of the prosecution case the court is satisfied that it would be wholly unsafe to convict upon such evidence standing alone, then it is said no *prima facie* case has been made out against the accused and the accused should not be called upon for his defence."

In *Public Prosecutor* v. *Sihabduin* [1980] 2 MLJ 273 the court was concerned with a trial in accordance with the Essential (Security Cases) Regulations, 1975, which provided *inter alia* that "when the case for the prosecution is closed, the court shall call on the accused to enter on his defence." The question was whether in such a trial when the prosecution has closed its case, the court is obliged to call on the accused to enter on his defence, even if the prosecution has not made out against him a case which if unrebutted would warrant his conviction. The Federal Court, by a majority, held no. Suffian L.P. said –

> "It is a cardinal principle of our system of criminal justice that an accused person is presumed to be innocent, that the onus is on the state to prove beyond reasonable doubt that he is guilty and that the practice for as long as we can remember is for the court to hear the evidence for the prosecution first and that at the end of the prosecution case the court has to consider whether or not the prosecution has made out a case against the accused which if unrebutted, would warrant his conviction, and that the court should call on the accused to enter on his

defence if and only if the court is of opinion that the prosecution has made out such a *prima facie* case against the accused and not otherwise".

In the Singapore case of *Ong Kiang Kek* v. *Public Prosecutor* 970] 2 MLJ 283 the Court of Criminal Appeal followed the decision of the High Court of Malaysia in *Public Prosecutor* v. *Lim Teong Seng & Others* [1946] MLJ 108. No reference was made to the decision of the Malaysian Federal Court in *Soo Sing* v. *Public Prosecutor*. In what the Privy Council described as the delphic passages, Wee Chong Jin C.J. said —

"At the close of the case for the prosecution counsel for the appellant (accused) submitted that there was no case to answer on the grounds that the evidence given by the only prosecution eye-witness of the events at Sumbawa Road, the widow, was unreliable as she had contradicted herself before the court on vital matters such as the distance between her and her husband from the car in question when the hand came out of the car and she heard the two shots, and that her credibility could not be relied on because she had given evidence at the preliminary inquiry which was inconsistent and conflicted with her evidence at the trial on several vital matters.

Unfortunately, counsel for the appellant at the outset of his submission based it on the ground that the prosecution had failed to make out a prime facie case against the accused and at the close of his submission based it on the ground that on the widow's evidence the court could not safely convict at that stage.

In fact the law imposes a duty on the court, whether or not a submission of no case to answer has been made, to consider at the close of the case for the prosecution whether or not a case has been made out against the accused which if unrebutted would warrant his conviction. Section 177C of the Criminal Procedure Code reads.—

"117C. When the case for the prosecution is concluded the court, if it finds that a case has been made out which if unrebutted would warrant his conviction, shall record an order of acquittal, or if it does not so find shall call on the accused to enter on his defence."

Section 172 which prescribes the procedure to be observed by magistrates' courts and district courts in summary trials contains a paragraph, (f) which is similar in terms to section 177C. It is settled law that under section 172(f) a magistrate's court or a district court is bound to acquit an accused person if, at the close of the case for the prosecution, the court on the evidence then before it has a reasonable doubt as to the guilt of the accused of the offence charged. The reason

is because in a criminal case it is a cardinal principle that the burden is on the prosecution to prove the case against the accused beyond reasonable doubt and accordingly no conviction can be warranted unless at the close of the case for the prosecution the court is left in no reasonable doubt as to the guilt of the accused.

It has been held that a judge (of the High Court) sitting without a jury, where the relevant section is in *pari materia* with our section 177C and section 172(f), must acquit the accused if, at the close of the case for the prosecution, the court is of the opinion that on the prosecution evidence it cannot, as a jury, hold the allegations proved beyond all reasonable doubt. (*Public Prosecutor* v. *Lim Teong Seng & Ors,*). We are of the same opinion and are of the view that the trial court is required by section 177C, at the close of the case for the prosecution, to determine whether or not the evidence tendered on behalf of the prosecution, if unrebutted, has established the case against the accused beyond a reasonable doubt. If the court finds at that stage of the trial that it has not been so established there is nothing left but to acquit the accused."

In *Hua Tua Tau* v. *Public Prosecutor* [1981] 2 MLJ 49 the appellant had been charged and convicted of the offence of murder. He was tried before two judges. At the close of the prosecution case Chua J, the presiding judge addressed him in the following terms –

". . .we find that the prosecution has made out a case against you on both the charges on which you are being tried which if unrebutted would warrant your conviction. Accordingly, we call upon you to enter upon your defence on both the charges.

Before any evidence is called for the defence we have to inform you that you will be called upon by the court to give evidence in your own defence. You are not entitled to make a statement and accordingly, if you give evidence, you will do so on oath or affirmation and be liable to cross-examination. If after being called by the court to give evidence you refuse to be sworn or affirmed or having been sworn or affirmed you, without good cause, refuse to answer any question, the court in determining whether you are guilty of the offence charged, may draw such inferences from the refusal as appear proper.

There is nothing in the Criminal Procedure Code which renders you compellable to give evidence on your own behalf and you shall accordingly not be guilty of contempt of court by reason of a refusal to be sworn or affirmed when called upon by the court to give evidence in your own defence. If you have any difficulty in deciding whether or

nor you wish to give evidence on your own behalf you may consult your counsel."

The accused then gave evidence on his behalf. His appeal to the Court of Criminal Appeal was dismissed. On appeal to the Privy Council he obtained special leave to raise the question whether the Criminal Procedure Code (Amendment) Act, 1976 which introduced the new procedure, was inconsistent with the Constitution. It was argued that the amendments were contraty to the fundamental rule of natural justicc, the privilege against self-incrimination. On this point the Privy Council held that the amendments were consistent with the Constitution and were valid. In the course of his judgment Lord Diplock considered the conditions precedent to the right and duty of the judge to call on the accused to enter on his defence, although the statutory provisions relating thereto did not form part of the amendments made in 1976. He referred to sections 188 to 190 of the Singapore Criminal Procedure Code which deal with trials before the High Court. No reference was made to the provision relating to procedure before Magistrates (S. 179) nor was there any reference to the provisions for a trial before a jury, which had been repealed in Singapore. It might be noted that section 188(1) of the Singapore Criminal Procedure Code is the same as S. 180 of the Malaysian Criminal Procedure Code, while section 179(f) and (h) of the Singapore Code is the same as section 173(f) and (h) of the Malaysian Code. There is no Singapore equivalent to section 214 of the Malaysian Code. Lord Diplock said —

"Section 188(1) states the conditions precedent to the right and duty of the judge of trial to call on the accused to enter on his defence. It takes the form of a double negative, if the court does not find that no case against the accused has been made out which, if unrebutted, would warrant his conviction. For reasons that are inherent in the adversarial character of criminal trials under the common law system, it does not place upon the court a positive obligation to make up its mind at that stage of the proceedings whether the evidence adduced by the prosecution has by then already satisfied it beyond reasonable doubt that the accused is guilty. Indeed it would run counter to the concept of what is a fair trial under that system to require the court to do so.

The crucial words in section 188(1) are the words "if unrebutted",

which make the question that the court has to ask itself a purely hypothetical one. The prosecution makes out a case against the accused by adducing evidence of primary facts. It is to such evidence that the words "if unrebutted" refer. What they mean is that for the purpose of reaching the decision called for by section 188(1) the court must act on the presumptions (a) that all such evidence of primary fact is true, unless it is inherently so incredible that no reasonable person would accept it as being true, and (b) that there will be nothing to displace those inferences as to further facts or to the state of mind of the accused which would reasonably be drawn from the primary facts in the absence of any further explanation. Whoever has the function of deciding facts on the trial of a criminal offence should keep an open mind about the veracity and accuracy of recollection of any individual witness, whether called for the prosecution or the defence, until after all the evidence to be tendered in the case on behalf of either side has been heard and it is possible to assess to what extent (if any) that witness's evidence has been confirmed, explained or contradicted by the evidence of other witnesses.

The proper attitude of mind that the decider of fact ought to adopt towards the prosecution's evidence at the conclusion of the prosecution's case is most easily identified by considering a criminal trial before a judge and jury, such as occurs in England and occurred in Singapore until its final abolition in capital cases in 1969. Here the decision-making function is divided, questions of law are for the judge, questions of fact are for the jury. It is well established that in a jury trial at the conclusion of the prosecution's case it is the judge's function to decide for himself whether evidence has been adduced which, *if it were to be accepted by the jury as accurate*, would establish each essential element in the alleged offence: for what are the essential elements in any criminal offence is a question of law. If there is no evidence (or only evidence that is so inherently incredible that no reasonable person could accept it as being true) to prove any one or more of those essential elements, it is the judge's duty to direct an acquittal, for it is only upon evidence that juries are entitled to convict, but, if there is *some* evidence, the judge must let the case go on. It is not the function of the jurors, as sole deciders of fact, to make up their minds at that stage of the trial whether they are so convinced of the accuracy of the only evidence that is then before them that they have no reasonable doubt as to the guilt of the accused. If this were indeed their function, since any decision that they reach must be a collective one, it would be necessary for them to retire, consult together and bring in what in effect would be a conditional verdict of guilty before the accused had an opportunity of putting before them any evidence in his defence. On the question of the accuracy of the

evidence of any witness jurors would be instructed that it was their duty to suspend judgment until all the evidence of fact that either party wished to put before the court had been presented. Then and then only should they direct their minds to the question whether the guilt of the accused had been proved beyond reasonable doubt.

In their Lordships' view the same principle applies to criminal trials where the combined roles of decider of law and decider of fact are vested in a single judge (or in two judges trying capital cases). At the conclusion of the prosecution's case what has to be decided remains a question of law only. As decider of law, the judge must consider whether there is some evidence (not inherently incredible) which, if he were to accept it as accurate, would establish each essential element in the alleged offence. If such evidence as respects any of those essential elements is lacking, then, and then only, is he justified in finding "that no case against the accused has been made out which if unrebutted would warrant his conviction", within the meaning of section 188(1). Where he has not so found, he must call upon the accused to enter upon his defence, and as decider of fact must keep an open mind as to the accuracy of any of the prosecution's witnesses until the defence has tendered such evidence, if any, by the accused or other witnesses as it may want to call and counsel on both sides have addressed to the judge such arguments and comments on the evidence as they may wish to advance.

Although section 188(1) first became law in 1960 and so forms no part of the amendments made by Act No. 10 of 1976, their Lordships have dealt with its interpretation at some length because in the judgment of the Court of Criminal Appeal of Singapore in the case of *Ong Kiang Kek* v. *Public Prosecutor* there are certain passages that seem, upon a literal reading, to suggest that unless at the end of the prosecution's case the evidence adduced has already satisfied the judge beyond a reasonable doubt that the accused is guilty, the judge must order his acquittal. But this can hardly have been what that court intended, for it ignores the presence in the section of the crucial words "if unrebutted", to which in other passages the court refers and it coverts the hypothetical question of law which the judge has to ask himself at the stage of the proceeding "If I were to accept the prosecution's evidence as accurate *would* it establish the case against the accused beyond a reasonable doubt?" into an actual and quite different question of fact "Has the prosecution's evidence already done so?" For the reasons already discussed their Lordships consider this to be an incorrect statement of the effect of section 188(1)."

Later in his judgment Lord Diplock said –

> "Finally their Lordships would mention briefly, lest it be thought that they had overlooked it, the suggestion that at the trial of Haw Tua Tau the judges may have taken literally those delphic passages in the judgment of the Court of Criminal Appeal in *Ong Kiang Kek v. Public Prosecutor* to which their Lordships have had occasion to refer. If this be so the only effect can be that the judges applied to the prosecution's evidence a more rigorous test of credibility than they need have done before deciding to call on Haw Tua Tau to give evidence. The error, if there was one -- and there is nothing in the judges' reasons for judgment to indicate what was the standard that they did apply – can only have been in favour of the accused.

On this last point reference might be made to an article by Mr. K.S. Rajah at [1982] 2 M.L.J. xxxiii where he says –

> "Lord Diplock said that "It would run counter to the concept of what is a fair trial" if the court makes up its mind at the end of the prosecution case that it is satisfied beyond reasonable doubt that the accused is guilty. It is, therefore, a little difficult to understand how his Lordship could dismiss the dangers of being satisfied beyond reasonable doubt by saying that the only effect is that the judges (at first instance) applied to the prosecutor's evidence a more vigorous test of credibility than they need have done. The difficulty the defence would have to face in creating a reasonable doubt in that situation appears to have been overlooked. What is sauce for the "beyond a shadow of doubt" goose must also be sauce for the "beyond a reasonable doubt" gander, if we want a fair trial".

The case of *Hua Tua Tau* v. *Public Prosecutor (supra)* is undoubtedly an authority to be followed in Singapore. But the question is whether it must be followed in Malaysia in particular in relation to trials before a Magistrate. The law is certainly not in *pari materia*. Section 173 of the Malaysian Criminal Procedure Code is not the same as section 180 of the Code (whose equivalent was considered in *Hua Tua Tau's* case). In particular the words "or if he does not so find, shall call on the accused to enter on his defence" (which are referred to by Lord Diplock) are not found in section 173, which instead refers to "grounds for presuming that the accused has committed the offence". There is no longer any statutory provision for trials

before a jury in Singapore but in Malaysia we have Section 214 which certainly is quite different from section 173 or even section 180 of the Code.

In *Ragunathan* v. *Pendakwa Raya* (1982) 1 MLJ 139 Raja Azlan Shah C.J. quoted the passages from the speech of Lord Diplock in *extenso*. In that case it had been argued that the prosecution had failed to adduce any evidence that the applicant was a public officer and therefore had failed to establish a *prima facie* case against him which brings into effect section 173(f) of the Criminal Procedure Code. Raja Azlan Shah C.J. said that section 173(f) is similar to section 188 of the Singapore Criminal Procedure Code (Amendment) Act 1976 (sic.) but this is not, with respect, quite accurate. No reference was made to section 173(g) of the Code.

The learned Chief Justice however accepted the interpretation of the Privy Council and applying that principle, he said —

> "The learned magistrate at the close of the prosecution's case had to determine as a question of law whether on the evidence as adduced, and unrebutted, the applicant could lawfully be convicted, that is to say, whether there was with respect to every element in the charge some evidence which, if accepted, would either prove the element directly or enable its existence to be reasonably inferred. That is the question raised in the appeal. It must be distinguished from the question of fact for ultimate decision, which is whether on the evidence as a whole the prosecution has proved to the satisfaction of the court, as a tribunal of fact, that the applicant is guilty as charged."

Ahmad Ibrahim