

THE RIGHT OF AN ACCUSED TO DEFENCE UNDER THE CRIMINAL JUSTICE SYSTEM IN MALAYSIA

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ABSTRACT

Background and Purpose: Under the criminal justice system, the burden lies on the prosecution to prove the guilt of the accused. It is worth noting that a criminal trial is not one-sided; it also allows the accused to raise his defence to prove his innocence. The research aims to analyse the right of the accused to raise a defence and when the defence should be raised in a criminal trial process in Malaysia.

Methodology: This research adopts a legal research approach involving a detailed analysis of the relevant legal provisions, case law and scholarly writing related to this area.

Findings: The research found that the Criminal Procedure Code (CPC) (Act 593) is silent as to when the defence should be raised. That being said, with reference to the Supreme Court's case of *Lin Lian Chen v. Public Prosecutor* [1992] 1 CLJ 285 (Rep), the accused should introduce his defence at the earliest stage as possible. Failing this may give rise to the presumption that the defence raised was a mere invention. Although the principle has been regarded as a law in raising defence, there are still cases where the accused did not present the defence at an earlier stage.

Contributions: This research contributes to the corpus of legal knowledge of criminal defence, particularly on raising criminal defence in a criminal trial with the aim of providing better protection for the accused in the criminal justice system.

Keywords: Criminal justice system, criminally liable, defence, right of the accused, & criminal trial.

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1.0 INTRODUCTION

Criminal law does not operate on its own. Pakes (2010) stated that it is enforced through a system known as the criminal justice system. The criminal justice system is part of the processes and agencies aimed at maintaining social control. Dignan and Cavadino (2007) explained that it is a term used to describe the agencies that respond to the commission of offences. This implies that the process runs systemically and is coordinated with the relevant agencies in the process. The main criminal justice agencies are the police, the prosecution, the court, and prison (Bernard, Paoline III, & Pare, 2005). It is important to note that merely committing an offence does not invariably make the individual criminally liable. To be criminally liable, there is a legal process for the accused to go through, which is known as the criminal process. Thus, it can be argued that the criminal process is central in determining the guilt or innocence of the accused.

In a criminal trial, the burden lies on the prosecution to prove the guilt of the accused throughout the trial. It is worth noting that a trial is not one-sided. The accused is also equipped with a number of rights to defend himself, which include the right to present his defence in a trial. The right to defence in this context means that if the accused is charged in court for committing a particular offence and does not plead guilty, then the accused has the right to present his defence against the charge framed against him in the course of trial. Such defence can either be adduced by himself if he is unrepresented or through his lawyer (if represented). Legally, there is no limitation to the number of defences that can be invoked by an accused in a trial. It depends mostly on the suitability and relevance of the defence to the offence. Pham (2016) emphasised that the defence is a salient point in criminal justice on the grounds that it guarantees a fair and just trial, and protects the human rights of those who are tried. In Malaysia, the right to defence is constitutionally protected and further explained in the CPC. That being said, the CPC is silent as to when exactly the defence should be raised. Thus, reference to case law is necessary to know the legal position on this matter. This research aims to analyse the right of the accused to raise a defence, when exactly the defence should be raised in a criminal trial process, and the implications of not introducing a defence at the prosecution stage.

2.0 LITERATURE REVIEW

Defence serves as a shield protecting the accused from conviction (Allen, 2013). It means that in a criminal trial, the law allows an accused person to raise a defence to absolve the accused of criminal liability or at least to reduce the seriousness of the offence he has been charged with. While one of the functions of criminal law is to punish a criminal for his crime (Monaghan, 2016), it is important to note that criminal law also recognises that certain acts should not lead to a conviction because of the presence of some explanation, such as the right of a person to defend oneself against an unlawful attack. Lanham, Wood, Bartal, and Evans (2006) claimed that in general, the basic structure of a crime is not only limited to *actus reus* (guilty act) and *mens rea* (guilty mind), but also includes the absence of a relevant defence. The defence, therefore, is seen as an integral part of criminal law, without which it would result in injustice. That is to say, the defence is central to a determination of criminal liability. As emphasised by Husak (1989), “*To regard the offense as subsisting independently, of its limitations and qualifications is unrealistic. The defence is a negative condition of the offence, and is therefore an integral part of it*” (p. 492). This protection has been recognised at international level as embodied in Article 11(1) of the Universal Declaration of Human Rights, which safeguards the rights of everyone “*charged with a penal offence ... until proven guilty according to the law in a public trial at which he has had all the guarantees necessary for his defence.*” Article 14(2) of the International Covenant on Civil and Political Rights also provides that “*Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law.*”

In Malaysia, the right to defence is constitutionally protected and explained in detail in the CPC. Section 173(h)(i) of the CPC states that if the court finds that a *prima facie* case has been made out against the accused, the court shall call upon the accused to enter his defence. A cursory reading of this section implies that when a *prima facie* case has been made out by the prosecution, the defence will be called for the accused to defend himself. This may give the perception that the defence is only required to be introduced at the defence stage once a *prima facie* case has been proved. This perception may be supported by the presumption that no one is guilty unless proven otherwise. That is to say, the accused need not prove his innocence first. This is because, in Malaysia, the law places the burden on the prosecution to prove a *prima facie* case first against the accused as embodied in section 101 of the Evidence Act 1950. That being said, it is worth noting that in addition to section 173(h)(i) of the CPC, reference must also be made to sections 137 and 138 of the Evidence Act 1950 (Act 56), which allows a prosecution witness to be cross-examined by the accused. The importance of cross-examination

has been emphasised by Bowden, Henning, and Plater (2014) as an essential part of the adversarial criminal trial. Notably, in section 138(2) of the same Act, it states that “... *the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.*” This gives more power to the accused during cross-examination to not only challenge the facts that were testified in the examination-in-chief, but can also be construed as permission for the accused to put his relevant defence to the witness. According to Arslan (2018), the criterion for equality of arms is met if the accused has the opportunity to examine the witness or challenge him before the trial court with his version of the case, indicating his line of defence.

While the right to defence is provided for in the CPC, but the CPC is silent as to when the defence should be raised in a trial and more importantly, what will be the legal implication if the defence is not raised during prosecution stage but only at defence stage?

3.0 RESEARCH DESIGN

This research adopts the legal research approach. This research is classified as doctrinal legal research because the research involved a detailed analysis of the legal provisions such as the Federal Constitution, Penal Code (Act 574), the CPC and the Evidence Act 1950 and case law as the primary sources. In addition to that, this research makes reference to secondary sources. Examples are textbooks, journal articles and scholarly writings related to this area. Library research was employed to search for the relevant sources. The sources were also searched online such as UiTM Libraries e-Resources, which contain various online databases, namely Scopus, HeinOnline International Core Collection, Lexis Advance Malaysia and CLJLaw. The data collected were examined analytically and critically to deliberate the right of the accused to raise a defence and when the defence should be raised in a criminal trial process in Malaysia.

4.0 ANALYSIS

4.1 Definition and Types of Defence

It is important to first know the meaning of defence. There are several definitions given to the term “defence”. Robinson (1982) defined defence as “*any set of identifiable conditions or circumstances which may prevent a conviction for an offence*” (p. 203). It has been argued, however, that Robinson’s definition has several deficiencies. The definition was criticized by Husak (1992) because it was too general, and if accepted, might attract undesirable circumstances such as bribing a judge or murdering a witness that can result in the conviction being barred. Due to the ambiguity of the definition, Leverick (2006) proposed an improved

definition of defence to mean “*any identifiable set of conditions or circumstances that provide sufficient reason why the accused ought not to be convicted of a particular offence*” (p. 14). This definition excludes any unreasonable circumstances that may preclude the accused from being found guilty. Ferguson (2015) defined defence to include “*all legally recognized factors or rules that prevent a person from being convicted of an offence*” (p. 219). Further, the word ‘defence’ has also been described by Cross (2010) as “*ways in which people can avoid criminal liability even though there is actus reus and mens rea for the offence with which they have been charged*” (p. 50). These definitions show that although the elements of the offence have been satisfied, the offence will not make one automatically guilty; if a proper explanation is given, then criminal liability can be avoided. Hence, defence negates criminal liability, either fully or, in some cases, partially.

Under the Penal Code, defences in Malaysia can be divided into two, which are general defence or specifically mentioned as (general exceptions) in chapter IV of the Penal Code. There are also specific defences, which are prescribed in a number of Exceptions, for example those found in section 300 of the Penal Code. Examples of defence which fall under the former category are a mistake of fact (section 79 of the Penal Code), accident (section 80 of the Penal Code), unsoundness of mind (section 84 of the Penal Code), intoxication (section 85 of the Penal Code), and private defence (sections 96 to 106 of the Penal Code). Meanwhile, examples of defence which fall under the latter category are killing on grave and sudden provocation (Exception 1 of section 300 of the Penal Code), killing on excessive private defence (Exception 2 of section 300 of the Penal Code), and killing without premeditation in a sudden fight (Exception 4 of section 300 of the Penal Code). A successful plea of the first category of defences will result in full acquittal. On the other hand, a successful plea of the second category of defence merely reduces the charge without absolving criminal liability. It is worth noting that, based on the definitions given by the aforementioned scholars, it can be inferred that the term defence is not limited to the legal defences provided by the law, but also includes any reasonable explanations given to prevent the accused from being convicted of an offence.

4.2 Right of the Accused to Defence under the Malaysian Criminal Justice System

In Malaysia, the accused’s right to defence is protected and explained in several legal provisions. The starting point of this discussion is by referring to Article 5(1) of the Federal Constitution, which guarantees the right of a person to not be deprived of his life or liberty save in accordance with the law. That is to say, even if a person has been accused of committing the crime of murder, he cannot be punished straightaway without being subjected to legal process.

The accused must go through the criminal trial process which has been prescribed in the CPC. One of the rights availed to the accused during the criminal trial process is the right to raise a relevant defence against the offence charged. The right of the accused to raise the defence in a criminal trial is of great importance, and should be safeguarded to ensure a fair trial. This was echoed by the Federal Court in *Goi Ching Ang v. Public Prosecutor* [1999] 1 CLJ 829, p.855, where it was held that “*Fairness requires fair trial which, in turn, needs fair procedure. Fair process requires that the interests of both the prosecution and the defence are adequately provided for.*” This right is also consistent with Article 5(3) of the Federal Constitution, which provides that an arrested person has the right to consult and be defended by a legal practitioner of his choice. Although it is not expressly stated that the accused has the right to raise a defence in court, this right infers that an accused can be defended by his lawyer through the plea of any relevant defence or to make an application for plea bargaining or representation.

Also, such right is consistent with Article 8 of the Federal Constitution, which states that: “... *all persons are equal before the law and entitled to the equal protection of the law respectively.*” This means that not only does the law provide the power to the Public Prosecutor to conduct prosecutions and submit relevant evidence to prove the case against the accused, but at the same time legal protection should also be given to the accused, allowing him to defend himself effectively from the charge directed towards him. Therefore, the accused should be treated equally before the law and accorded with legal protection in a criminal trial process. This can be seen in *Krishnan v. Public Prosecutor* [1987] 1 MLJ 292 where the Supreme Court affirmed:

It is one of the most basic rules of justice that however heinous a crime a person is accused of, whatever the rank of the person who testifies against him, he can only be convicted on evidence produced according to the stringent requirements of the law.... But it does not mean that a person accused of one of the most serious crimes known to our law is not entitled to equal protection before the law (p. 295).

This right is also further detailed in the CPC. The gist of Article 5(3) of the Federal Constitution is reaffirmed by section 255 of the CPC, which states: “*Subject to any express provision of law to the contrary, every person accused before any criminal Court may of right be defended by an advocate.*” Moreover, the CPC stresses the right of the accused to defend himself once the Public Prosecutor has proven a *prima facie* case against him. Section 173(h)(i) of the CPC says

that: “*If the Court finds that a prima facie case has been made out against the accused on the offence charged, the Court shall call upon the accused to enter on his defence.*”

4.3 Criminal Trial Process

It is important to briefly go over the criminal trial process in Malaysia to better understand how criminal defence works. The Malaysian judiciary is based on the common law tradition and adversarial system (Ibrahim & Nambiar, 2011). Malaysia adopts the adversarial system, which was inherited as part of the legacy of British colonization. In the adversarial system, the criminal trial involves the competing parties submitting their case and presenting their arguments in the manner prescribed by the law. The parties to a criminal case are the Public Prosecutor and the accused person. The criminal trial involves a process by which the Public Prosecutor has to present evidence through its witnesses and documents to prove the guilt of the accused person, and the accused will be allowed to defend the allegation against him. The criminal trial is a contest between the state, which is represented by the Public Prosecutor and the accused. This implies that there are two levels of a criminal trial, which are the prosecution and the defence stages. At the prosecution stage, the burden of proof is placed on the prosecution to prove its case against the accused. This is embedded in section 101 of the Evidence Act 1950. This principle was applied in *Mat v. Public Prosecutor* [1963] 1 MLJ 263, where the Court emphasised that the burden of proof of the accused lies with the Public Prosecutor. The power to prosecute is exclusively vested in the Public Prosecutor as provided for in Article 145 (3) of the Federal Constitution, and reiterated in section 376 (1) of the CPC, where it reads: “*The Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code.*”

At the beginning of a trial, which is also known as the prosecution stage, the accused is not required to prove his innocence. This principle is consistent with the presumption of innocence, whereby the accused is presumed innocent unless proven otherwise. Only when the Public Prosecutor succeeds in proving its case against the accused will the accused will be called to enter upon his defence. At this stage, the Public Prosecutor has to prove a *prima facie* case against the accused. This is stated in section 173(h)(i), where it connotes that: “*If the Court finds that a prima facie case has been made out against the accused on the offence charged, the Court shall call upon the accused to enter on his defence.*” The meaning of *prima facie* has been elaborated in section 173(h)(iii) as follows:

For the purpose of subparagraphs (i) and (ii), 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.

Prima facie means that all the elements or ingredients of the offence have been proven from the credible evidence given by the prosecution witnesses and relevant documents tendered by the prosecution. When all the elements of the offence have been proven, then the offence against the accused has been established. The words "... unrebutted or unexplained would warrant a conviction" indicate that after *prima facie* case has been established, the defence will then be called to give an opportunity for the accused to rebut or to provide explanation. In light of section 173(ha)(i) to (iii) of the CPC, when an accused person is called to enter upon his defence, he will be given three options: to remain silent, to give sworn or unsworn evidence. Should he opt for the second and third options, he may deny committing the offence or raise a defence to defend himself. But, if he decides to remain silent, then the accused can be convicted. This principle was applied in the Federal Court's case of *Ahmad Najib Aris v. Public Prosecutor* [2009] 2 CLJ 800 where in this case, after considering the evidence adduced by the prosecution, the High Court found that the prosecution had made out a *prima facie* case of rape and murder against the appellant, and called upon him to enter upon his defence. However, the appellant chose to remain silent. Upon the appellant choosing to remain silent, the trial judge convicted the appellant on the two charges made against him and passed sentence accordingly. On this point, the Federal Court affirmed the High Court's decision and elaborated as follows:

... when the appellant chooses to remain silent, the court is put in a situation where it has no other choice but to convict the appellant on both charges as the appellant had failed to rebut the evidence adduced by prosecution's witnesses (p. 836).

It means that the appellant's failure to give evidence to raise defence or rebut the prosecution's case leaves the court with no choice but to convict him.

At the defence stage, the burden of proof lies on the accused to prove his defence. The accused may call defence witnesses to substantiate his defence. This is consistent with the wording of section 105 of the Evidence Act 1950 and illustrations (a) and (b). This principle was confirmed in the case of *Juraimi Husin v. Public Prosecutor* [1998] 2 CLJ 383, where the court stated that: "... the burden of establishing the defence of insanity lay upon the first accused" (p. 422). The standard of proof to prove the defence can be seen from the case of

Goh Yoke v. Public Prosecutor [1970] 1 MLJ 63, where the Federal Court held that the standard of proof required from the accused person is similar to the burden which rests upon parties in civil proceedings, which is on a balance of probabilities. The same principle was also applied the Court of Appeal's case of *Syahmie Hassan v. Public Prosecutor* [2017] 1 LNS 1074. There is no mathematical formula given in the CPC to measure the standard of on a balance of probabilities. Reference to the case of *Miller v. Minister of Pensions* [1947] 2 ALL ER, is important, where Lord Denning explained the meaning of a balance of probabilities as the following:

It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden of proof is discharged, but if the probabilities are equal, it is not (p. 372).

It means that if a judge does not believe in the defence or unsure about the defence because the probabilities of the defence are equal, then the accused will lose.

It is important to note that although during the defence stage the burden is on the accused to prove his defence, it does not relieve the prosecution of its duty from cross-examining the accused with a view to challenging the truth of his defence. Hence, throughout a criminal trial (prosecution + defence), the burden of proving the guilt of the accused rests on the prosecution, and the standard of proof required is to prove beyond a reasonable doubt. This is because the failure of the prosecution to cross-examine evidence given by the defence witness including the accused will amount to acceptance, thus leaving doubt in the prosecution case. This principle was applied in the High Court's case of *Public Prosecutor v. Ee Boon Keat* [2006] 2 MLJ 633, where Augustine Paul J ruled that: "*As a matter of fact, the failure by the prosecution to have effectively cross-examined DW2 would amount to an acceptance of her testimony*" (p. 635).

According to section 173 (m)(i) of the CPC, the court shall then consider all the evidence adduced before it by both the prosecution and defence, and shall decide whether or not the prosecution has proven its case beyond a reasonable doubt. Under section 173 (m)(ii) to (iii) of the CPC, if the court finds that the prosecution has proven its case beyond reasonable doubt, the court shall find the accused guilty, and upon conviction the court shall pass sentence according to law. If the court finds otherwise, the court shall record an order of acquittal.

4.4 Implication of the Defence on Criminal Liability and Responsibility

There are two ways in which the accused can be made criminally liable in court. The first is if the accused pleads guilty to the charge (section 173(b) of the CPC). In this situation, the case does not proceed with the trial. Secondly, the accused claims for a trial and after the full trial, the accused is found guilty and an appropriate sentence is imposed on him (section 173(m)(ii) of the CPC). In discussing one's criminal liability, it is worth explaining the two terms which are "criminal liability" and "criminal responsibility". The term "liable" is mentioned many times in the Penal Code to indicate the guilt of the accused person. In other words, to hold one criminally liable, he must first be found guilty of committing the offence. For instance, under section 2 of the Penal Code, it states: "*Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within Malaysia.*" On the other hand, Black's Law Dictionary defines the word "responsibility" as "*condition of being answerable or accountable.*" That is to say, a person is answerable for the crime that he has committed. Duff (2007) however stressed that responsibility does not always entail liability, since the accused can avert liability by raising a defence or providing explanations for the commission of the alleged offence.

There are a number of ways for the accused to defend himself in court. The first is denying responsibility for the alleged crime, thus denying criminal liability. The second is by admitting responsibility for the alleged crime, but denying criminal liability. For the former, the accused denies both criminal responsibility and liability. He claims that he should not be answerable to the alleged offence because he was not the one who committed the offence in the first place. An example of this is when he raises the defence of alibi (Hall, 2008). Defence of alibi simply means a claim that he was somewhere else at the time the offence was committed. In Malaysia, it is spelt out under section 402A of the CPC. The burden is on the accused to prove such defence. An example of a case to illustrate this point is *Public Prosecutor v. Mohd Zaidi Zakaria & Anor* [2019] 1 LNS 16, where the High Court acquitted the accused of the charge because, among other reasons, the court accepted the defence of alibi that was raised. The reason why the alibi was accepted was because the alibi was not properly investigated, and that alibi was supported by the defence witnesses. In contrast, if the defence of alibi is not supported by evidence or the evidence against the accused is strong, for example positive and proper identification by a prosecution witness against the accused, then the chance for the defence to succeed is very unlikely. This was explained in *Duis Akim & Ors v. Public Prosecutor* [2013] 9 CLJ 692, where the Federal Court agreed with the finding of the trial judge that since the appellants had been positively identified by prosecution witness (PW 1), then the

alibi defence of the first and second appellants collapsed. Being criminally liable simultaneously means criminally responsible, although the accused denies responsibility. This is because criminal liability does not solely depend on the accused's admission of the offence, but is also based on the evidence adduced by the prosecution in court.

For the latter, the accused admits he is responsible for the act, which means he admits to committing the criminal act, but denies criminal liability. In other words, he has a defence to justify his commission of the offence. Thus, he needs to answer the allegation against him. If he can meet all the conditions of the defence raised, then the defence can succeed, thereby shielding him from conviction. Thus, while it may be argued that responsibility is a condition of liability (Sistare, 1989), responsibility does not always result in liability. This is because if the accused can successfully raise the defence, his liability can be absolved. The distinction between responsibility and liability can be further illustrated by the justification defence (Duff, 2007). The justification defence is raised by the accused to offer an explanation as to why the offence was committed. In other words, the accused does not deny that he has committed the act, but offers justification as to why he did so. The justification is given to explain the commission of the act due to the presence of circumstances that would otherwise be unacceptable. Hence, the justification defence focusses more on the act itself rather than the accused. Robinson (1982) named private defence as an example of a defence that falls under this category. An example of this is when A injures an attacker, which is the only way to defend himself from being killed, then A may raise the defence of private defence. In Malaysia, private defence is mentioned from sections 96 to 106 of the Penal Code. Section 96 states that: “*Nothing is an offence which is done in the exercise of the right of private defence.*” An example of a case to explain this can be seen in *Ya Daud v. Public Prosecutor* [1996] 2 CLJ 540, where the appellant did not deny that he killed the victim, but argued that the killing was in self-defence. In this case, the High Court accepted the defence as all the conditions for it had been met. The appellant was therefore acquitted and discharged. In short, private defence blocks the transition from responsibility to liability (Cruft, 2011).

4.5 Raising Defence in a Criminal Trial

Based on the foregoing discussion, it is clear that the accused has the right to present his defence to prove his innocence. The effect of successfully raising a defense can either absolve the accused of criminal liability or at least reduce the seriousness of the offence that he has been charged with. Nevertheless, as mentioned earlier in Section 1.1, the CPC is silent as to when exactly the defence should be raised. Thus, a reference to the case law is necessary to know the

legal position on this. Referring to the Supreme Court case of *Lin Lian Chen v. Public Prosecutor* [1992] 1 CLJ 285 (Rep) , Edgar Joseph Jr SCJ explained that:

Indeed, it behoves the defence to do so (to put its case at the earliest possible stage) for we need hardly say that if a defence is sprung in court for the first time when the accused makes his defence from the witness box or the dock, so that the prosecution is taken by surprise, the accused runs the risk of being criticized for keeping his defence ‘up his sleeve’ so to speak, and it branded as a recent invention (p. 292).

This case shows that the defence should be raised at the early stage which refers to the prosecution stage. Otherwise, the defence may be criticised for keeping the defence a secret, where it can be regarded as a mere invention. The same principle was applied in the Federal Court case of *Anthony v. Public Prosecutor* [1996] 1 LNS 595, which implies that defence should be presented at the prosecution stage. This is to inform the court and also the prosecution from the very beginning of his line of defence, which indirectly avoids the occurrence of any element of surprise.

But how is a defence introduced when the accused has not yet been called to defend himself at the prosecution stage? This is because it is not a duty of the prosecution to raise defence on behalf of the accused. This was elucidated in *Public Prosecutor v. Dato’ Sri Anwar Bin Ibrahim* (No. 3) [1999] 2 CLJ 215, where Augustine Paul J explained that: “*the nature of the defence is to be ascertained not only from the evidence of the accused himself but also from the trend of the cross-examination of the prosecution witnesses*” (p. 424). It is therefore important for the accused to put his defence to the relevant prosecution witnesses through cross-examination, such as the investigating officer.

What happens then if the defence is merely raised at the defence stage? The issue was addressed by the Supreme Court case of *Lin Lian Chen* and further clarified in the Federal Court case of *Alcontara A/L Ambrose Anthony v. Public Prosecutor* [1996] 1 CLJ 705 where it was held that: “... *thus avoid the adverse comment, that the defence is a recent invention in other words, ‘kept up its sleeve’, as it were*” (p. 718). Again, the same principle was adopted in *Public Prosecutor v. Lim Hung Wang & Anor* [2012] 1 LNS 368, where the court held that since the accused merely introduced their defence at the defence stage and did not put it through prosecution witnesses, their evidence was merely an afterthought and/or recent invention, doubtful and not credible.

While the principle has long been judicially recognised and has been part of the rule in raising defence, there are still cases decided by the court where the defence was rejected on the grounds that, among others, the defence was not put forward at the prosecution stage through relevant prosecution witnesses. Among the recent cases where the court rejected the defence on the grounds that, among other things, it was not being raised during the prosecution stage are the following: *Public Prosecutor v. Mohammad Jobi Ullah* [2020] 1 LNS 972, *Muhammad Nazrin Ayan v. Public Prosecutor* [2020] 1 LNS 1513, *Lim Chee Hwa v. Public Prosecutor* [2020] 1 LNS 670, and *Ariff Arhanan Che Udin v. Public Prosecutor* [2020] 1 LNS 657.

4.6 Recommendation

To address the issue that was raised in Section 4.4, reference to section 257(1) of the CPC is important. The section states the role of the court in assisting the unrepresented accused in situations provided for in the section. The section states:

At every trial before the Court of a Magistrate if and when the Court calls upon the accused for his defence it shall, if he is not represented by an advocate, inform him of his right to give evidence on his own behalf, and if he elects to give evidence on his own behalf shall call his attention to the principal points in the evidence for the prosecution which tell against him in order that he may have an opportunity of explaining them.

The application of this section was explained in *Awaluddin bin Suratman & Ors v. Pendakwa Raya* [1992] 1 MLJ 416, where the court stated that under section 257(1) of the CPC, a trial judge should explain to an undefended accused the main points of a prosecution witness's testimony to enable the accused to properly cross-examine such witness properly. In other words, if the accused is unrepresented, then the court should play a role in clarifying important points from the evidence of the prosecution witness to enable the accused to present his defence and in order for him to have an opportunity to explain. Another relevant case to explain the application of this section can be seen in *Dolly bin Surop v. Public Prosecutor* [2020] MLJU 1613, where the accused was not represented by a lawyer before the prosecutor closed the case. At the defence stage, the appellant was informed of the three options available to him. However, there was nothing in the notes of proceedings that showed the case for the prosecution was explained by the court to the appellant, who was unrepresented, pursuant to section 257(1) of the CPC. In this case, the High Court allowed the appeal and the convictions

were quashed. Among the reasons for the judgment was that the appellant must be allowed the opportunity to present his best defence and able to cross-examine. In other words, in a case where the accused is not represented, the main points of the evidence adduced by the prosecution witnesses, especially vital witnesses such as a victim should be explained to the accused. This is to enable the accused to cross-examine the witness properly and to provide him an opportunity to explain. Therefore, in accordance with section 257 (1) of the CPC and legal principles from the judgment in *Dolly bin Surop*, the court should explain the important points given by the prosecution witness. This is to not only allow the unrepresented accused to cross-examine the witness with the aim to challenge the evidence or to raise doubt as to the truth of what the prosecution witness has said, but also caution the unrepresented accused about the need to present the defence (if any) at the prosecution level through relevant prosecution witnesses.

However, if the accused is represented by a lawyer, as explained above, section 257 of the CPC does not apply. The principle was explained in the case of *Kumarasamy Naciappan v. Public Prosecutor* [2014] 8 CLJ 760. That responsibility is borne by lawyers, who should discuss and advise their clients on the best strategies in presenting their defence. It is worth noting that criminal cases are unique in the sense that some of them are straight-forward cases, and some of them are complicated cases. Also, the complexity of raising the defence depends of the uniqueness of why and how the offence was committed. There are cases in which the defence is really spot on; for example, D injures E to save himself from being unlawfully attacked by E. Based on this example, the best defence would be private defence. Another example is when a police officer misses the shot, which was aimed at the kidnapper, and the bullet accidentally hit the innocent hostage instead. In this situation, the best defence would be the defence of accident. At the same time, there are cases in which it is hard for the accused to provide a defence for the crime committed. For example, A, consciously and without coercion, steals goods from a shop, which is later seen by other eye-witnesses. Although A may give the reason that he is poor and the stolen goods were intended to feed his family, it is not a valid defence. It can however instead be used as mitigation to plead for a lesser punishment. In certain cases, a strategy that could be considered by the defence is to wait and see the evidence that is provided by the prosecution witnesses. This is because sometimes doubts may arise in the testimony of the prosecution witnesses themselves. This may happen when there is a material contradiction in the evidence of the prosecution witnesses, and the contradiction is not clarified. Also, there may be the question of the handling of the exhibits that could raise suspicion as to whether the exhibits adduced in court are identical to the items seized at the

crime scene. Regardless of the strategy the defence might use, the lawyer should take note, if there is a defence relevant to the case, then such defence should be introduced at the prosecution stage in order to avoid any element of surprise, and above all to avoid the presumption that the defence is mere invention and afterthought.

5.0 CONCLUSION

The right to defence is constitutionally protected and is well explained in the CPC. While not explicitly mentioned in the CPC, a number of cases, namely *Lin Lian Chen*, *Anthony* and *Alcontara A/L Ambrose Anthony* indicate that the defence should be put forward at the prosecution stage through relevant witnesses. By failing to comply with this, the court may form the view that the defence raised was mere invention rather than a genuine one. While the principle has been regarded as law in raising defence, there are still cases where the accused did not present their defence at an earlier stage. Regardless of the strategy the defence might use, the lawyer should take note that if there is any defence relevant to the case, then such defence should be introduced at the prosecution stage. While a represented accused may be advised of this by his lawyer, an unrepresented accused may not be aware of this. Therefore, in accordance with section 257 (1) of the CPC and legal principles from the judgment in *Dolly bin Surop*, the court should not only explain the important points given by the prosecution witness, but also caution the unrepresented accused, who may not be familiar with criminal procedure, his rights, and the need to present the defence at the prosecution level through prosecution witnesses. This will allow the unrepresented accused to cross-examine the witness, not only to challenge or cast doubt on the truth of what the prosecution witness has said, but also to put his defence through by cross-examining the witness.

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