Public Prosecutor v Hii Hiong Ping [2021] MLJU 828

Malayan Law Journal Unreported

HIGH COURT (KINABALU)

LEONARD DAVID SHIM JC

CRIMINAL APPEAL NO BKI-42LB-15/7 OF 2018

1 February 2021

Megat Mahathir bin Megat Tharih Afendi (Jabatan Peguam Negara) for the appellant. Shahlan Jufri (Mohd Luqman Syazwan bin Zabidi with him) (Esteban Jufri & Co) for the respondent.

Leonard David Shim JC:

GROUNDS OF DECISION

[1]This is an appeal by the Prosecution against the decision of the learned Sessions Court Judge made on 26.7.2018 ordering the discharge and acquittal of the Accused of 2 charges at the end of the Prosecution's case.

Brief Background Facts

[2]Following a raid at Kampung Melalia Sipitang (the logging site) on 2.10.2017, TP1 and TP2 were rescued by PW6 and his team. The Accused who was described as "Tauke Ah Ping" had employed TP1 and TP2 to work at the logging site. A person described as 'chief' or 'Harry' had picked up TP1 and TP2 from their home at Kg. Muaya Sipitang and brought the children to the logging site to work. The 2 charges preferred against the Accused read as follows:-

First Charge [BKI - 62ATP - 1/1 - 2018]

> *"Bahawa kamu bersama-sama dengan penama Harry yang masih bebas,* ***pada 02/10/2017 jam lebih kurang 1128hrs, bertempat di kawasan pembalakan kayu, Kampung Melalia di dalam Daerah Sipitang, di dalam Negeri Sabah, telah memperdagangkan penama TISON EMBASAH DON (L/13 Tahun/Tiada Dokumen/W/Indonesia) yang merupakan seorang kanak kanak, bagi maksud eksploitasi kerja paksa dan dengan demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 14 Akta Antipemerdagangan Orang dan Antipenyeludupan***

Migran 2007 dan dibaca bersama Seksyen 34 Kanun Keseksaan."

Second Charge [BKI - 62ATP - 2/1 - 2018]

"Bahawa kamu bersama-sama dengan penama Harry yang masih bebas, pada ***02/10/2017 jam lebih kurang 1128hrs, bertempat di kawasan pembalakan kayu, Kampung Melalia di dalam Daerah Sipitang, di dalam Negeri Sabah, telah memperdagangkan penama NONG BRAN DIDIK DON (L /14 Tahun / Tiada Dokumen / W / Indonesia) yang merupakan seorang kanak kanak, bagi maksud eksploitasi kerja paksa dan dengan demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 14 Akta Antipemerdagangan Orang dan Antipenyeludupan Migran 2007 dan dibaca bersama Seksyen 34 Kanun Keseksaan."***

[3]The prosecution called 9 witnesses including the recording of evidence of the 2 trafficked persons i.e. Trafficked Person 1 (TP1) and Trafficked Person 2 (TP2).

[Notes of Proceeding (NOP):-

[i] Recording of Evidence of Trafficked Person (NOP ROE) and

[ii] Prosecution Stage (NOP PS)]

[4]At the end of prosecution stage, the accused was discharged and acquitted on the said charges against him without his defence being called as the Court was not satisfied that the prosecution had established a prima facie case against the accused on the said charges.

The Law

[5]Section 14 of ATIPSOM reads as follows:-

"Offence of trafficking in Children

14 Any person, who traffics in persons being a child, for the purpose of exploitation, commits an offence and shall, on conviction, be punished with imprisonment for a term not less than three years but not exceeding twenty years and shall also be liable to fine".

[6]Section 14 of the ATIPSOM must be read in conjunction with Section 2, for the definition and interpretation of the words **"exploitation", "coercion"** and **"trafficking in person".**

[7]Under the Section 2 of the ATIPSOM, "exploitation", "coercion" and "trafficking in person" defined as follows: -

"exploitation" *means all forms of sexual exploitation,* ***forced labour, or services, slavery similar to slavery, servitude, any illegal activity or the removal of human organs;***

"coercion" means:-

(a) ***Threat of serious harm to or physical restrain*** *against any person;*

(b) ***Any scheme, plan, or pattern*** *intended to* ***cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person;***

(c) *The abuse or threatened abuse of legal process;*

[8]"Trafficking in person" means all actions involved in **acquiring or maintaining the labour or services** of a person **through coercion** and include the act of recruiting, conveying, transferring, harbouring, providing or receiving a person for the purpose of this act.

[9]In order to secure a conviction under offence of Section 14 of ATIPSOM, the prosecution has to prove beyond reasonable doubt the necessary ingredients, namely:-

[i] That the accused trafficked TP1 and TP2 on the date, time and place of the said charges;

[ii] That TP1 and TP2 were children; and

[iii] That the accused trafficked TP1 and TP2 for the purpose of exploitation via forced labour.

[10]The grounds of appeal as stated in the Petition of Appeal as follows:

1. Your humble petitioner is dissatisfied with the order given by the trial judge and hereby appeals on the following grounds:

   a) The learned Sessions Court Judge had erred in law and in fact by holding that the prosecution had failed to prove a prima facie case against the Respondent when the entire evidence adduced has proven each and every elements of the charge (s) on maximum evaluation.

2. Your humble petitioner therefore prays that the decision made by the learned Sessions Court Judge to be varied and substituted with another order as justice deems fit and relevant.

[11]I am mindful of the approach to be taken by an appellate Court in hearing an appeal from the Court of first instance. In *Dato' Mokhtar Bin Hashim & Anor v Public Prosecutor* [1983] CLJ Rep 101**,** the

Federal Court held:

> ***"The credibility of a witness is primarily a matter for the trial Judge.*** There is a homogeneous concatenation of authority on this principle and we refer to the locus classicus on this aspect in a passage in the judgment of Lord Thankerton in *Watt or Thomas v. Thomas* [1947] AC 484 (at p. 487). The Privy Council said in *Caldeira v. Gray* [1936] MLJ 137 *that the* ***functions of an appellate Court, when dealing with a question of fact, and a question of fact in which questions of credibility are involved, are limited in their character and scope, and that in an appeal from a decision of a trial Judge based on his opinion of the trustworthiness of witnesses whom he has seen, an appellate Court must in order to reverse, not merely entertain doubts whether the decision below is right but be convinced that it is wrong. We feel that the following passage (at p. 138) from the judgment of that Board in that case delivered by Lord Alness bears citation in extenso:***
>
> *The appellant is exercising a right of appeal which is his by right, and their Lordships recognise that they cannot merely because the question is one of fact, and because it has been decided in one way by the learned Trial Judge abdicate their duty to review his decision, and to reverse it, if they deem it to be wrong. Nonetheless, the* ***functions of a Court of Appeal, when dealing with a questions of fact, and a question of fact, moreover, in which, as here, questions of credibility are involved, are limited in their character and scope.***
>
> This is familiar law. It has received many illustrations - and, in particular in the House of Lords -, the most recent of these

being the case of *Powell & Wife v. Streatham Manor Nursing Home,* [1935] AC 243; 104 LJ KB 304; 152 LT 563; 79 SJ 179; 51 TLR 289. In that case it was held that:

Where the Judge at the trial has come to a conclusion upon the question which of the witnesses, whom he has seen and heard, are trustworthy and which are not, he is normally in a better position to judge of this matter than the appellate tribunal can be: and the appellate tribunal will generally defer to the conclusion which the Trial Judge has formed.

Lord Wright, in the course of his speech, said:

Two principles are beyond controversy. First it is clear, that, *in an appeal of this character, that is from the decision of a Trial Judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal 'must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong'."*

[12]In the case of *Periasamy S/O Sinnapan & Anor v Public Prosecutor* [1996] 3 CLJ 187**,** the Court of Appeal stated:

"In the state of the law, ***what was the duty and function of the learned Judge on appeal? His duty and function have been the subject of discussion in a great many cases and for purposes we find it sufficient to refer to two of these.***

In *Lim Kheak Teong V. Public Prosecutor* [1984] 1 CLJ 207 (Rep)*, the Sessions Court acquitted the accused on two charges under the Prevention of Corruption Act, 1961, after having heard his defence.*

On appeal, the High Court set aside the order of acquittal and substituted therefor an order of conviction.

The accused applied under the now repealed s. 66 of the Courts of Judicature Act, 1964, to reserve a question of law.

In allowing the application and quashing the conviction, the Federal Court whose judgment was delivered by Hashim Yeop Sani FJ (later CJ Malaya) said:

We gave leave because firstly we felt that there was no proper appraisal of *Sheo Swarup v. King-Emperor* AIR 1934 PC 227 and secondly purporting to follow Terrell, Ag. CJ in *Rex v. Low Toh Cheng* [1941] MLJ 1*, the appellate Judge went into conflict with the trend of authorities in similar jurisdictions.*

With respect, what Lord Russel of Killowen said in Sheo Swarup was that although no limitations should be placed on the power of the appellate Court, in exercising the power conferred 'the ***High Court should and will always give proper weight and consideration to such matters as:***

(1) *the* ***views of the trial Judge on the credibility of the witnesses;***

(2) *the presumption of innocence in favour of the accused;*

(3) *the* ***right of the accused to the benefit of any doubt; and***

(4) ***the slownesss of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses***

Lord Reid reiterated this same principle in *Benmax v. Austin Motor Co. Ltd.* [1955] AC 370*, 375 where he quoted from Lord Thankerton's judgment in Thomas v. Thomas* [1947] 1 All ER 582*, that:*

Where a question of fact has been tried by a Judge without a jury, and there is no question of misdirection of himself by the Judge, ***an appellate Court which is disposed to come to a different conclusion on the printed evidence,***

should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion.

The learned appellate Judge held that the learned President had 'misdirected himself on the explanation of the accused.' Given the facts as stated in the appeal record, can it be said that there was a misdirection? Or can it be said that the ***decision of the learned President was 'plainly unsound'? (Thomas v. Thomas(supra)). On the facts of this case we do not think so.***

In Wilayat Khan v. The State of Uttar Pradesh AIR 1953 SC 122, 123, 125, Chandrasekhara Aiyar J, when delivering the judgment of Supreme Court said:

Even in appeals against acquittals, the powers of the High Court are as wide as in appeals from conviction.

But there are two points to be borne in mind in this connection.

One is that ***in an appeal from an acquittal, the presumption of innocence of the accused continues right up to the and; the second is that great weight should be attached to the view taken by the Sessions Judge before whom the trial was held and who had the opportunity of seeing and hearing the witnesses.***

Interference with an order of acquittal made by a Judge who had the advantage of hearing the witnesses and observing their demeanour can only for compelling reasons *and not on a nice balancing of probabilities and improbabilities, and certainly not because a different view could be taken of the evidence of the facts."*

Evaluation and FindingsWhether the Accused had trafficked TP1 and TP2

[13]It is observed that there is no evidence of any threat or coercion by the chief of the logging company in picking up TP1 and TP2 (the children) from their home to the logging camp. It appears that the Accused and the children's father had known each other and the children's father is aware that the children were working with the Accused at the logging site. The evidence shows that the children had voluntarily left their home and followed the 'Chief' of the logging site located at Kg. Melalia, Sipitang (the logging site) to the logging site. See lines 395-396, 410-414, and 434-447 of NOP at pages 1416 of Record of Appeal. The Prosecution did not adduce any or any sufficient evidence to prove otherwise.

[14]The element of coercion is essential in the definition of trafficking in persons. It is trite that the burden is on the prosecution to prove coercion. In *PP v Mong Soon Tat* [2019] 1 LNS 726**,** the High Court (per YA Anselm Charles Fernandis JC, as his Lordship then was) stated that:

"[26] *As to what constitute* ***"coercion" under ATIPSOM section 2 states:***

"coercion" *means -*

(a) ***threat of serious harm*** *to or* ***physical restraint against any person;***

(b) *any* ***scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or***

(c) *the abuse or threatened abuse of the legal process*

[27] The definition of ***"coercion" is indeed wide. Paragraph (a) of the definition does not require actual serious harm or actual physical restraint to take place. The threat of such harm or physical restraint to the trafficked person or any other person would suffice to constitute coercion. As to paragraph (b) it is the belief or the person trafficked that matters. There is therefore a subjective element to this part. If there is a "scheme, plan, or pattern" perpetrated or caused by the trafficker that results in the person trafficked to believe that failure to perform any act would result in serious harm to the person trafficked or to any person for that matter, that by itself would constitute coercion. In my view paragraph (a) is a more direct form of coercion than that in paragraph (b). As for paragraph (c) it is self-evident that the mere threat of abuse of the legal process would suffice. The abuse of the legal process could, for example, take the form of an arrest, detention or deportation or a treat thereof against the trafficked person or any other person.***

[31] Exploitation is however ***only one of the elements of the the offence of trafficking in persons. As stated earlier the element of coercion is essential in the definition of trafficking*** *in persons. The* ***burden is on the prosecution to prove coercion.*** See *Siow Hee Liong & Satu Lagi lwn. PP* [2017] 1 LNS 348.

[32] Whether coercion exists is a question of fact. In *Mohamad Abdullah v. PP* [2017] 1 LNS 1978 *the fact that the* ***person trafficked was accompanied by the trafficker whenever she went out*** was regarded as indicative of coercion. In those circumstances it did not matter that the person trafficked had her passport and telephone with her. In that case it was held ***that there was coercion where the persons trafficked were locked in a room from outside and only the trafficker held the keys. Escaping from the clutches of the trafficker or contemplating to do so was also held to be indicative of coercion.*** *In Chang Kar Fei lwn. PP* [2018] 1 LNS 1777 *the person trafficked owed a debt for the expenses incurred in bringing her to Malaysia and was compelled to repay the debt by providing sexual services. This was found to be a form of coercion.* ***Control over the trafficked person by the trafficker is also a consideration in determining whether there was coercion. In*** *PP v. Latif Sabang* [2016] 1 LNS 1018 *one of the reasons the accused was acquitted was because there was* ***no credible evidence he "had control over the movements of the 4 Indonesian women."***

[33] The issue is whether on the facts of this case, there is evidence of coercion. I am of the view that on the basis of the evidence of ***SP1 and SP2 it can be deduced that they both came to Malaysia voluntarily. They worked at Thai Somai on their own accord. They were free to leave the premises unaccompanied and had their hand phones with them when they went out. Their passports were with them all the time. I would also say the same for SP3 and SP4. Neither SP1, SP2, SP3 nor SP4 had complained that they were being held against their will or they were threatened with physical harm. There was no evidence to that effect. There was no evidence of "any scheme, plan, or pattern intended to cause" either of them to believe that failure to providesexual services during their work would result in serious harm to or physical restraint against them. Neither was there any attempt by any one of them to escape from the premises. I am therefore of the opinion that the essential element of coercion had not been proven by the prosecution."***

[15]In *Siow Hee Liong & Anor v Pendakwa Raya* [2017] MLJU 289**,**

the High Court held:

"[20] *Sehubungan itu berdasarkan* ***tafsiran 'pemerdagangan orang' di bawah seksyen 2 ini, yang adalah jelas tanpa ada sebarang kekaburan, unsur 'paksaan' adalah perlu dibuktikan oleh pihak pendakwaan. Dalam konteks kes ini, perkhidmatan yang diberikan oleh SP1 adalah melalui paksaan.***

[21] Bagi mengukuhkan lagi pandangan saya berhubung keperluan membuktikan unsur paksaan ini, Akta 670 ini juga telah memberi tafsiran 'paksaan' di bawah seksyen 2 iaitu seperti berikut:

" 'paksaan' ertinya -

(a) *ancaman kecederaan berat kepada atau sekatan fizikal terhadap mana-mana orang;*

(b) *apa-apa skim, rancangan, atau corak yang diniatkan untuk menyebabkan seseorang untuk mempercayai bahawa kegagalan untuk menjalankan sesuatu perbuatan akan mengakibatkan kecederaan berat kepada atau sekatan fizikal terhadap mana-mana orang; atau*

(c) *penyalahgunaan atau ancaman penyalahgunaan proses undang-undang.""*

[40] Tanpa adanya keterangan mengenai paksaan ini, saya dapati pihak pendakwaan telah gagal membuktikan kesalahan memperdagangkan orang di bawah seksyen 12 Akta Antipemerdagangan Orang 2007 (ATIPSOM) "

[16]After perusing the Record of Appeal, this Court finds that the evidence adduced by the Prosecution does not clearly or adequately show that the children were forced or coerced by the Accused to work at the logging site. Based on the available evidence at the close of the Prosecution's case, the learned Judge found, inter alia, that:

[i] Both TP1 and TP2 were rescued by PW6 and his team at a logging site at Kampung Melalia Sipitang on 2 October 2017.

[ii] TP1 and TP2 were found at the logging site repairing heavy Hitachi machinery.

[iii] Despite the fact that TP1 and TP2 were born in Sabah, TP1 and TP2 were without any valid documentation as their father's work permit had lapsed. Due to this, they were unable to register their birth, attend school and/or work.

[iv] TP1 and TP2 were promised of RM300 for their work and to be paid by the end of the month. They had worked for about 23 days with the accused prior to being rescued. TP2 worked 5 days earlier than TP1. Within that 23 days, the Accused had paid RM100 to TP1 and RM50 to TP2 respectively. As they had not been working for a month, the non-payment of wages is a non-issue at this juncture.

[v] They testified that at times they were tired while working and their lunch time was short. They were also afraid of being scolded by their employer.

[vi] However, PW1 testified TP1 and TP2 voluntarily agreed to work [see lines 291 - 293, page 10 of NOP PS]. PW1 testified that TP1 and TP were treated well where their employer provided a place to stay and food [see lines 304 - 309, page 11 of NOP PS]. The house provided was dilapidated and used car batteries to power the lights at the house [Exhibit P7(9)- (14)]. Their father was earning RM200 per one ton of palm oil. The only information on the living condition with the father was that they stayed at a one bedroom wooden house equipped with electricity and water facilities [Exhibit P7].

[vii] When PW1 interviewed TP1 and TP2, they confirmed that they were willing to work with the accused to earn their own money despite objection from their father. [Exhibit P7]. TP1 testified that their father knew that TP1 and TP2 were working with their employer [see lines 376 - 378, page 13 of NOP PS]. If TP1 and TP2 had not been working, they would be playing games or at cyber with their friends.

[viii] Both TP1 and TP2 testified that they were not threatened or hit by the accused. They did not intend to run away or escape from their situations.

[ix] TP1 was not forced to do the work, found the work to be suitable and were not afraid of during their time working there [see lines 766 - 775, page 26 of NOP ROA].

[x] TP1 and TP2 also testified that the accused treated them well and loved them [see 1630-1663, page 55-56 NOP ROA] and they loved the accused [see lines 1748 - 1755, page 59 of NOP ROA].

[xi] Their house with their father was far from the logging site. However TP1 and TP2 testified that they were able to contact their father and sister and their movements were not restricted or confined by the accused [see line 1783, page 60 of NOP ROE]. TP1 and TP2 were not guarded by anyone.

[xii] PW6 also testified that both TP1 and TP2 were healthy, their movements were not restricted and that they may return to their home, their work area were assessable, no injuries were suffered by TP1 and TP2 and that they were not depressed or traumatised.

[xiii] There was no evidence from the prosecution that TP1 and TP2 remain or prevented by some form of coercion [See also PP v Boon Fui Yan [2015] 7 CLJ 374].

[xiv] There was no evidence to suggest that TP1 and TP2 were threatened or physically or mentally restrained or abused by the accused. They did not intend to run away or escape from their situations.

[xv] There was no (a) threat of serious harm to physical restraint against TP1 and TP2; (b) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against TP1 and TP2; or (c) the abuse or threatened abuse of the legal process used by the accused to TP1 and TP2.

[xvi] From the evidence of the prosecution, TP1 and TP2 were not forced into forced labourer by the accused nor were they not coerced by the accused.

[xvii] Hence, I am not satisfied that the accused trafficked TP1 and TP2 on the date, time and place of the said charges.

[17]The above findings of facts were made by the learned Sessions Court Judge after having the advantage of audible evidence of hearing and assessing the demeanour and honesty of the witnesses before her. The learned Sessions Court Judge had also conducted an inquiry on the competency of the child witnesses to give evidence and was satisfied that the child possesses sufficient knowledge and understanding of the nature and consequences of the oath before permitting the child witness to give sworn evidence. After perusing the Record of Appeal, I do not find any appealable error in her findings of fact. When asked by the Court during the hearing of the present appeal, the learned DPP could not point out any specific finding which were erroneous and unsupported by the evidence adduced at the trial. Without any cogent evidence to the contrary, this Court is not inclined to disturb the findings of fact made by the learned Sessions Court Judge and make its own findings of fact. In *Public Prosecutor v Mohd Radzi Abu Bakar* [2006] 1 CLJ 457**,** the Federal Court held:

> ***"[32]*** *Now,* ***it settled law that it is no part of the function of an appellate court in a criminal case - or indeed any case - to make its own findings of fact. That is a function exclusively reserved by the law to the trial court. The reason is obvious. An appellate court is necessarily fettered because it lacks the audio-visual advantage enjoyed by the trial court.***
>
> *[31] The further principle established by this court in Muhammed bin Hassan v. Public Prosecutor is that where s. 37(da) is relied on by the prosecution, it is for the trial court to make a specific finding that the accused was in possession in the legal sense. In the absence of such a finding,* ***it is not open to an appellate court to fill the gap and make the finding. A suggestion by counsel for the prosecution that this court in entitled to make its own findings of fact was firmly rejected."***

[18]A careful perusal of the Notes of Evidence shows that the findings of fact by the learned Sessions Court Judge was supported by the following evidence:

PW 1 (Ponniya Bt Irham) who is the Welfare and Protection Officer testified under Examination in Chief as follows:

> *"Q Kamu telah sediakan laporan ini, boleh ringkaskan dapatan kamu mengenai hasil temuduga bagi penama kanak-kanak bernama Nong?*
>
> *A Bagi penama Nong, muka surat terakhir di bawah syor Pegawai Pelindung,* ***saya mendapati kanak-kanak dengan rela hati bekerja kerana ingin mempunyai sumber kewangan sendiri walaupun telah dimarahi oleh bapa agar tidak bekerja."***

[19]Further, PW1 testified under Cross Examination as follows:

> *"Q Setuju juga dengan saya kedua kanak-kanak ini dengan* ***rela hati dan memilih untuk bekerja, setuju?***
>
> *A* ***Ya."***
>
> *"Q Saya juga cadangkan bahawa* ***bapa kepada kedua kanak-kanak ini tahu kedua kanak-kanak ini bekerja dengan majikan mereka sebelum dihantar, setuju?***
>
> *A* ***Setuju."***
>
> *"Q Setuju juga dengan saya, semasa temuduga kedua kanak-kanak ini,* ***mereka dalam keadaan sihat, setuju?***
>
> *A* ***Setuju.***
>
> *Q Setuju juga dengan saya semasa temuduga kedua kanak-kanak ini,* ***mereka tidak berada dalam keadaan trauma atau tekanan, setuju?***
>
> *A* ***Setuju."***
>
> *"Q Saya cadangkan kepada kamu* ***berat badan dan fizikal kedua kanak-kanak ini tidak menunjukkan yang mereka ini adalah mangsa ATIP, setuju?***
>
> *A* ***Setuju.***
>
> *Q Semasa menemuduga kedua kanak-kanak ini, tidak ada kesan-kesan lebam, luka atau apa-apa kecederaan di badan mereka, setuju?*
>
> *A Setuju."*

[20]The evidence of PW3 (Uzair bin Mohd Salleh), a Medical Officer with Jabatan Perubatan Forensik, Queen Elizabeth Hospital shows that the children were generally healthy and the children are in a condition to work. PW 3 testified as follows:

> *"Q Apa dapatan pemeriksaan yang telah kamu jalankan terhadap penama Nong?*
>
> *A Yang saya periksa tu* ***dia tiada apa-apa masalah, dia sihat.***

*Q Apakah maksud kamu katakan di bahagian impression iaitu **'generally healthy child'?***

A Secara keseluruhan kanak-kanak tu sihat.

*Q Adakah dengan dapatan ini **membolehkan kanak- kanak bernama Nong ini bekerja?***

*A **Boleh."***

*"Q Apakah dapatan kamu terhadap pemeriksaan **kesihatan Tison ini?***

*A **Secara keseluruhan dia sihat.***

*Q Adakah dengan **kesihatan kanak-kanak ini membolehkan dia bekerja?***

*A **Ya."***

[21]The evidence of PW6 (Insp. Amizan bin Azmi), the Investigating Officer shows that there was no evidence of any scheme, plan or pattern causing the children to feel threatened by any harm if they fail to perform the work or any physical restraint. PW 6 testified, inter alia, that:

*"Q Setuju dengan saya, **kanak-kanak ini mempunyai hubungan yang akrab dengan OKT, setuju?***

*A **Setuju.***

*Q Setuju dengan saya keakraban tersebut adalah disebabkan **OKT menjaga dan melayan kanak-kanak ini seperti anak sendiri, setuju?***

*A **Setuju.***

*Q Setuju dengan saya **sepanjang tempoh lebih kurang 2 minggu, kanak-kanak di bawah jagaan OKT, OKT tidak pernah menghalang atau melarang kanak- kanak tersebut untuk balik ke rumah ibu bapa mereka?***

*A **Setuju."***

*"Q Setuju dengan saya kanak-kanak tersebut **boleh menghubungi ibubapa mereka pada bila-bila masa***

sahaja sepanjang tempoh mereka bekerja, setuju?

*A **Setuju.***

*Q Setuju dengan saya kadang-kadang **OKT akan menyiapkan dan menyediakan makanan untuk kedua kanak-kanak tersebut, setuju?***

*A **Setuju.***

*Q Setuju dengan saya bahawa **kawasan di mana kamu menjumpai kanak-kanak tersebut boleh diakses tanpa sebarang halangan, setuju?***

*A **Setuju.***

Q Setuju juga dengan saya semasa menjumpai kanak- kanak tersebut, ***tidak ada sebarang kecederaan di badan mereka, setuju?***

A ***Setuju."***

Q Setuju dengan saya ***kanak-kanak tersebut baru sahaja kerja dengan OKT iaitu dalam tempoh seminggu atau 2 minggu sebelum pasukan kamu sampai ke tempat kejadian, setuju?***

A ***Setuju.***

[22]It is clear that the evidence of the prosecution had caused reasonable doubts on the element of coercion which is essential to the ingredient of "trafficking in persons" and "exploitation and forced

labour" as stated in the 2 charges. In *Yusoff bin Kassim v Public Prosecutor* [1992] 1 LNS 31, the Supreme Court held:

"On the other hand, it will be recalled, that Customs Officer Hamzah's evidence on this point was quite the contrary, he having alleged throughout that the appellant carried only one bag, namely, the brown bag containing the cannabis.

There was thus an ***acute conflict of evidence upon a question of central importance in the case for the prosecution itself, giving rise to more than a reasonable doubt as to whether the appellant carried one or two bags, the benefit of which he was plainly entitled to."***

[23]In *Satiya Seelan Naidu Marimuthu v PP* [2020] 1 LNS 920**,** the

Court of Appeal (Per Hamid Sultan Abu Backer, JCA) stated that:

"[5] *It is essential to note that in* ***criminal cases it is paramount for the prosecution to lead evidence consistent with the facts of the case. It is dangerous for the prosecution to create a doubt through its own evidence as to whom the drugs belong to. To put it mildly, conflict of evidence on crucial facts will oblige the court to give the benefit of the doubt to the accused.*** This proposition was eloquently stated by the great jurist and judge Edgar Joseph JR SCJ as early as 1992, whilst sitting in the Supreme Court and delivering the judgment in the case of *Yusoff bin Kassim v. PP* [1992] 1 LNS 31; [1992] 2 MLJ 183."

[24]In *Loo See Lee v PP* [2018] 5 CLJ 385**,** the Court of Appeal succulently states:

"...there are ***two sets of evidence led by the prosecution and that each one contradicts the other, the consequence of which is that the court will be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. Inevitably, the accused would have to be given the benefit of the doubt in such a situation."***

[25]In *PP v Mohd Radzi Abu Bakar* [2006] 1 CLJ 457**,** the Federal Court held:

". Thus, if ***the prosecution evidence admits of two or more inferences, one of which is in the accused's favour, then it is the duty of the court to draw the inference that is favourable to the accused.*** See, *Tai Chai Keh v. Public Prosecutor* [1948] 1 LNS 122*; [1948-49] MLJ Supp 105; Public Prosecutor v. Kasmin bin Soeb [1974] 1 LNS 116; [1974] 1*

MLJ 230."

[26]Having regard to the conflict of evidence on crucial facts relating to the element of coercion and exploitation by means of forced labour which are part of the essential ingredients of the charges, this Court finds that the benefit of the doubt should be given to the Accused.

Whether the trafficked persons were a child

[27]The 2nd ingredient of the charges is whether the trafficked persons i.e. T1 and T2 were a child. S.2 pf the Act defines a child as "a person who is under the age of eighteen years". The unchallenged evidence of PW2 (Azalina bini Osman @ Ali) who is a pediatric dental specialist shows that T1 (Nong Bran Didik Don) is between 14 and 15 years old whereas T2 (Tison Embasah Don) is between 13 and 14 years old. As the evidence of PW 2 was not disputed by the Respondent, the learned Sessions Court Judge found that T1 and T2 were a child at the time of the alleged offence within the meaning of the Act. Hence, the 2nd ingredient is proven by the Prosecution.

Whether there is any exploitation of the trafficked persons for forced labour

[28]The 3rd ingredient is whether there is any exploitation of T1 and T2 by way of forced labour. The learned Sessions Court Judge made the following findings of fact:

[i] Prior to rescue, TP1 and TP2 were promised of monies at the end of the month and provided with lodging and food by the accused during their employment.

[ii] Despite objections from their father, TP1 and TP2 wanted to earn their own living. They had no valid documentations and were under aged. If they were not working, they will play games and cyber with their friends. They were also able to return to their father if they did not want to work with the accused [see line 1770-1774, page 60 of NOP ROA and line 3781-3792, page 128 of NOP ROA].

[iii] PW1 felt that given their tender age, TP1 and TP2 were not given enough rest during their working hours and this amount to exploitation.

[iv] Both TP1 and TP2 testified that they were not threatened or hit by the accused.

[v] Hence I am not satisfied that the accused trafficked the TP1 and TP2 for the purpose of exploitation.

[29]The findings of the Sessions Court Judge were supported by cogent evidence including the uncontroverted evidence of TP 1 and TP 2, PW 1, PW 3 and PW 6 as set out above which clearly shows that the children willingly choose and agreed to work at the logging site. Further, there is no evidence to prove that the children were threatened or intimidated or forced by the Accused into submission to work at the logging site.

[30]In *PP v Boon Fui Yan* [2015] 7 CLJ 374**,** the High Court (per Mairin Idang JC as his Lordship then was) held:

"The third ingredient - ***purpose of trafficking - exploitation. The term 'exploitation' is limited to certain acts under the interpretation s. 2 of the Act. On "forced labour" the same is not defined under s. 2 of the Act but in its ordinary meaning, it*** must mean some form of force or compulsion on the worker to continue working. **Under this ingredient, there** must be evidence to show that the worker was forced to remain or prevented by some form of coercion. **So when a worker**

says that, "I am forced to work or I have no choice but to carry on working because I needed the money to support my family or that there is no other work available", **these** personal circumstances **of the worker** cannot amount to "forced labour".

So too where a ***worker admits that she consents to work for an employer and that she was not forced or coerced into so working, her service cannot be said to be "forced labour"."***

[31]In*Mohamad Nizam Mohamad Selihin & Anor v PP* [2018] 1 LNS 67, the High Court (per Celestina Stuel Galid JC as her Ladyshipthen was) held:

"[39] *"Exploitation" is defined in Section 2 of the Act to include "all forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, any illegal activity or the removal of human organs".*

[40] "Forced labour" is not defined under the Act. However, in the case of *Public Prosecutor v. Benedict Chai Jun Siang* [2017] MLJU 577*, his Lordship Justice Ravinthran Paramaguru when dealing with a case on Section 12 of the Act held that* ***"exploitation" need not necessarily include***

the physical act of restraining and forcing a person to do an act but can include even threats to intimidate one into submission."

[32]Applying the aforementioned authorities to the facts of this case, this Court finds that there is insufficient evidence adduced by the Prosecution to prove that the children (TP1 and TP2) were forced or coerced into working at the logging site. Therefore, the 3rd ingredient of exploitation of the children for the purpose of "forced labour" have not been proven beyond reasonable doubt by the Prosecution.

[33]The Prosecution further contends, that due to the young age and naivety and/ or vulnerability of the children, the Court should not attach any significant weight to the children's evidence in relation to the absence of coercion or threat. However, the evidence of the adult witnesses i.e. PW 1 and PW 6 also supports the evidence given by the children that they willingly consented to work at the logging site to earn their own money despite objection from their father.

[34]The Prosecution further contends that the non-payment of the monthly salaries of TP1 and TP2 is another form of exploitation which falls within the ambit of "forced labour and services". The undisputed evidence shows that the Accused had paid RM100 to TP1 and RM50 to TP2 respectively even though they had only been working for about 2 to 3 weeks at the logging site. Hence, assertion on non-payment of salaries is a bare assertion which is unsupported by any or any cogent evidence.

Conclusion

[35]Based on the aforesaid reasons, this Court agrees with the finding of the learned Sessions Court Judge that the Prosecution had failed to establish a prima facie case against the Accused. The order of acquittal was made by the Sessions Court Judge who had the advantage of hearing the witnesses and observing their demeanour. This Court does not find any compelling reasons to interfere with the decision of the lower Court. The evidence given by the Prosecution's witnesses had casted reasonable doubts on the Prosecution's case.

[36]Hence, the appeal herein is dismissed and the decision of the learned Sessions Court Judge to discharge and acquit the Accused if affirmed.
