

Onus and Quantum of Proof for Breaching the Standard of Procedure during the Movement Control Order

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ABSTRACT

The objective of this research paper is to highlight on the issues relating to the onus and quantum of proof for breaching the standard of procedure (SOP) during the movement control order (MCO) due to Pandemic Covid 19 in Malaysia. In tackling the issues, the research methodology applied by the author is by analysing and evaluating some decided cases, studying the substantive laws, regulations, and procedure in enforcing movement control order. The contemporary legal issues in this article are on whom the onus (burden) of proof lies and what is the quantum (standard) of proof required for the offence of breaching social distancing during the movement control order; be it conditional, restricted or recovery. The standard of procedure always changing based on the types of movement control order made by the Federal Government. In the New Straits Times dated 4 April 2021, it was reported that 17 publics were compounded for not practicing social distancing. Many questions raise as what is the real meaning of social distancing? In which type of offence, the social distancing offence lies on? What are the elements that will constitute the offence? As to the remedies, the author has submitted the nature of the offence for breaching the SOP during MCO. The expectation result of this paper is to give a clear picture as to the matter of standard of proof and burden of proof that to be considered by the trial court in deciding the issue of breaching SOP. The significance of this paper is to point out some contemporary identical legal issues relating to SOP during MCO. The issues will be highlighted in this article.

Keywords: Burden of proof; standard of proof; standard of procedure; movement control order; strict liability offence

INTRODUCTION

The power originated to issue summon or arrest the public for breaching the standard of procedure particularly on social distancing is the Prevention and Control of Infectious Diseases Act 1988, and by virtue of s. 11(2) of the Act, the Ministry of Health has the power to make regulations. This leads to the existence of Prevention and Control of Infectious Diseases Act (Measures within the Infected Local Areas) Regulations 2020 and latest Emergency (Prevention and Control of Infectious Diseases) (Amendment) Ordinance 2021 which is enforceable on 11 March 2021. The Ministry of Health also introduced the standard of procedure or guidelines for social distancing and conduct of public during movement control order or conditional movement control order which stated under Annex 26 (updated 15 February 2021). In general, it is prohibited to move from one place to another place within any infected local areas and any form of gathering is prohibited except for funeral services.

The World Health Organisation (WHO) has advised everyone to understand basic information about COVID-19 including its symptoms, complications, transmission, and prevention. WHO has also advised everyone to stay informed through

reputable sources such as UNICEF, WHO and National Health Ministry Advisory. Clearly, blaming or vilifying the government for their purported lack of preparation or action is also not helpful. This is a viral attack on an unprecedented global scale, our countries are struggling to cope as well. Cluster cases regardless of countries, are notoriously difficult to predict, trace and contain.

So, is there any legislation in Malaysia that can assist in such pandemic?

PREVENTION AND CONTROL OF INFECTIOUS DISEASES ACT 1988

The Prevention and Control of Infectious Diseases Act 1988 may provide some assistance. This is an act intended to govern the prevention and control of infectious disease.

Infectious disease means any disease specified in Part II of the First Schedule of the Act. Obviously, COVID-19 is not listed therein. However, this new disease could fall under the category of “any other life-threatening microbial infection” under the said schedule.

Under s. 22(b) of the Prevention and Control of Infectious Diseases Act 1988 states that:

“Any person who disobeys any lawful order issued by any authorized officer commits an offence.”

This section explains that ‘lawful order’ means the order issued by the Ministry of Health such as the Prevention and Control of Infectious Diseases Order and Annex 26 on Covid 19 Guidelines for Physical Distancing at the Workplace, Home and for Individuals.

Section 23 of the Act states that:

“Any authorized officer may appear in court and conduct any prosecution with respect to any offence against this Act or any regulation made under this Act.”

The section above mentioned can be understood that the conduct of prosecution can be made by any authorized officers who may appear in court for any offence against ‘any regulation.’ ‘Any regulation’ can be inferred as the Prevention and Control of Infectious Diseases Act (Measures within the Infected Local Areas) Regulations 2020 together with the Emergency (Prevention and Control of Infectious Diseases) (Amendment) Ordinance 2021. The Act also explains on the guidelines and standard of procedure during the movement control order and conditional movement control order. s. 24 of the Emergency (Prevention and Control of Infectious Diseases) (Amendment) Ordinance 2021 stated that:

“Any person who commits an offence under this Act for which no penalty is expressly provided shall, on conviction, be liable to fine not exceeding RM100,000 or to imprisonment for a term not exceeding 7 years or to both.”

In the Regulations it is clearly stated on the amount of punishment and imprisonment under regulation No. 11(1). There is no clear provision on social distancing offence under the Regulations, however, under regulation No. 6 on control of gathering stated that:

1. No person shall gather or be involved in any gathering in any premises within any infected local area whether for religious, sports, recreational, social or cultural purpose.
2. Notwithstanding sub-regulation (1), a person may gather or be involved in a gathering for the purposes of a funeral ceremony on the condition that the attendance to such ceremony shall be kept to the minimum.

Public are not allowed to gather in any premise such as house, shop and park, no matter for what purpose and only for funeral ceremony is allowed.

The social distancing should be made at least 1 meter from one to another and the guidelines can be found on the Ministry of Health portal under Annex 26 and such guidelines or order are enforceable in the court of law by virtue of s. 11(2) of the Act.

Under the Emergency (Prevention and Control of Infectious Diseases) (Amendment) Ordinance 2021, it is a well-known issue that the maximum fine can be issued by the Enforcement Agencies is RM10,000.00 for individual and RM50,000.00 for corporate body. This can be referred to under s. 25 of the Ordinance on compounding offences. In *Berita Harian Online* dated 11 March 2021,¹ former Inspector General of Police, Tan Sri Abdul Hamid Bador said that the amount of offence depends on the District Health Officer and fine will not be issued directly RM10,000.00, but it is for compounded offence(s) that can be detected from the system for those who are habitually disobey the standard of procedure.²

STRICT LIABILITY OFFENCE

On the type of offence, under regulation No. 6 of the Regulations only mention the physical element (*actus reus*) with the absence of mental element (*mens rea*). Regulation No. 11(1) also stated that any violation of regulation would be an offence.

The element in the regulation is only mentioned the element of *actus reus* or physical element and the element of *mens rea* or mental element is absence. Thus, whether this offence constitute a strict liability offence? It can be understood that violation of social distancing guideline is a strict liability offence. The Prosecution is only needed to prove the existence of the accused physical element in the social distancing offence without the need to prove the accused’s mental element.³ Under the Emergency (Prevention and Control of Infectious Diseases) (Amendment) Ordinance 2021, s. 21B has categorized violation of the regulations would be a seizable offence and under s. 21E, an authorized enforcement officer may arrest any person on whom he reasonably believes to commit or attempt to commit an offence under the Act.

BURDEN AND STANDARD OF PROOF

Generally, the burden of proof lies on the party who claims the truth of the facts in which in criminal case, it lies on the Prosecution, while in civil action it lies on the Plaintiff.⁴ Under ss. 101 and 102 of the Evidence Act 1950, he who asserts must prove it.

In the case of *Tenaga Nasional Bhd v. Perwaja Stell Sdn Bhd*,⁵ Low Hop Bin J stated that:

“Under s. 101(1) of the Evidence Act 1950, the Plaintiff must prove such facts as the Plaintiff desires the court to give judgement as to its right to claim against the Defendant or the Defendant’s liability to pay the Plaintiff. The burden of proof is on the Plaintiff. Under s. 101(2), in order to succeed the plaintiff must prove its affirmatively.”

LEGAL BURDEN AND EVIDENTIAL BURDEN

In the case of *International Times & Ors v. Leong Ho Yuan*,⁶ the court made a clear distinction between ‘legal burden’ and ‘evidential burden.’ ‘Burden of proof’ referred to under s. 101 is the burden of establishing a case and this rests throughout the trial on the party who asserts facts in issue. Meanwhile, evidential burden relates to responsibility of giving evidence in order to discharge the burden of proof, it always changes from time to time.

In the case of *Aziz Bin Muhammad Din v. Public Prosecutor*,⁷ the court affirmed that s 101 EA deals with the burden of establishing the case. On the other hand, burden of proof under s 102 for introducing evidence in a case always shifting from one party to the other party. Therefore, if the party on whom the burden lies fails to establish the case, then the other party does not have to adduce any evidence. However, if the burden has shifted to the other party and the party failed to adduce evidence, then he will fail. The principle on burden of proof on civil case, it is the same like in criminal case and only on the standard of proof is different.⁸

STANDARD OF PROOF

Standard of proof means the degree of proof required in proving the facts in issue by adducing relevant evidence which is admissible and has a great weightage.⁹

STANDARD OF PROOF IN CRIMINAL CASES

Lord Denning J. in *Miller v. Ministry of Pensions*,¹⁰ states the nature of proof in criminal cases. It is a settled law that in criminal cases, the Prosecution must prove the charge beyond all reasonable doubt. Similarly, the accused bears no legal burden to prove his innocence. The standard of proof imposed on the Prosecution in Malaysia, is the quantum laid down in the case of *Woolmington v. DPP*,¹¹, i.e., proof beyond a reasonable doubt.

In *P.P. v. Yuvaraj*,¹² it was held that under s. 66 of the Courts of Judicature Act 1964, the burden of rebutting this presumption of proof in a criminal trial can be said to be discharged by the defence as being reasonable and probable, not by proof of such fact or facts the existence of which is so probable that a prudent man would act on the supposition that it exists, as in the definition of “proved” in s. 3, Evidence Act 1950.

Section 3 of the EA 1950 mentions proof relates to all matters before it. In *Jayasena v R*, which is a Sri Lankan case was mentioned by Malaysian judges who referred to this case (*Azmi J. in Ikau Anak Mail v. PP*,¹³), they were of the opinion if there is a difference between common law and the code, the Act must be applied. In *PP v. Yuvaraj*, it was held that there was no intention to do away from the common law concept. Thus, we must prove the case beyond reasonable doubt.

STANDARD OF PROOF IN CIVIL CASES

It is settled law in Malaysia that the standard of proof in civil cases is the preponderance of probabilities. The more serious the allegation, the heavier is the balance of probabilities required.

BALANCE OF PROBABILITIES

In a Singaporean case of *Comfort Management Pte Ltd v. Public Prosecutor*,¹⁴ the Court held that:

“...since the rationale behind strict liability offences is to encourage greater vigilance to prevent the commission of the prohibited act, this implies that an accused is entitled to be acquitted if he can prove on a balance of probabilities that he has taken due care and attention to comply with the statutory requirements. This conclusion is not only just and logical, but also mandated by s. 79 read with s. 40(2) and section 52 of the Penal Code.”¹⁵

It should be noted that Malaysian Penal Code is in *pari materia* with the Singapore Penal Code, this case emphasises that the standard of proof for the accused to rebut the presumption on existence of *mens rea* is on the balance of probabilities and he has acted with due care and attention to comply with the regulation. A person charged for violation of social distancing offence only need to rebut the existence of *mens rea* on balance of probabilities with due care and attention to comply with the Regulations and guidelines issued by the Ministry of Health.¹⁶

Generally, an accused is presumed to be innocent until he is proven to be guilty. This presumption of

innocence established in the case of *Woolmington v. Deputy Public Prosecutor*,¹⁷. There are 2 stages in criminal prosecution i.e. (1) prosecution stage (establish the case by proving *actus reus* and *mens rea*); and (2) defence stage (has to weaken the effect of the prosecution's case). Defence will be called if the prosecution discharged the burden of a *prima facie* standard (quantum of proof). During this stage, the prosecution must prove the case beyond reasonable doubt and defeated all arguments of defences to secure the conviction. A credible standard of proof is required because it can deprive someone's liberty and life imprisonment (criminal case). In criminal trial, the evidence adduced by the prosecution must be so compelling that it rebuts the presumption that the accused is innocent until proven guilty, this means the prosecution has proven the accused is guilty beyond reasonable doubt.¹⁸

What if an accused in the current discussion unable to provide explanations on why they committed the offence for not obeying the social distancing guidelines issued by the Minister of Health? In other words, the Prosecution has not established a *prima facie* case? For an illustration, in the case of *Public Prosecutor v. Salmin & Ors*,¹⁹ the accused were charged under s 329 of the Penal Code for theft of coconuts and the Magistrate convicted them not because the Prosecution has established the case beyond reasonable doubt, but because all three of them have no reasonable explanations on the charge against them. The High Court stated 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. So, it was the duty of the Magistrate to acquit and discharge the accused at the close of the Prosecution case.”²⁰

Therefore, it can be understood from the above case that the Magistrate cannot convict the accused if the Prosecution failed to establish a case and failed to prove the case beyond reasonable doubt. When the case has not been proven, then the burden will not be shifted to the accused. In the current discussion, since the offence is a strict liability and the Prosecution only need to prove the *actus reus* (physical element) or conducts of the accused that violates Regulation No. 6 of the Regulation and Ordinance and Annex 26 on guidelines for social distancing, what is his *modus operandi* and is there any witness to support the accusation? For instance, in another strict liability offence for speed limit and traffic offences, the investigation officer (IO) must

show to the court on what device used by him to record the speed limit? What was the condition at that time? A lot of aspects need to be proved just in term of physical element, for social distancing how the enforcement agency officer measures the distance between the accused? What was the condition during the commission of the offence? Although, it is strict liability, it does not mean the Prosecution merely states orally that the accused violates the social distancing, and the conviction will be secured.

BEYOND REASONABLE DOUBT

In *Miller v. Minister of Pensions*,²¹ the court held that the term ‘beyond reasonable doubt’ should not be confused with the term ‘beyond the shadow of doubt.’ Although it is a high degree, but there is no need for it to reach certainty, it depends on the facts and circumstances of the case. Reasonable doubt is the one which makes us hesitate to the correctness of the conclusion at the end of the Prosecution case. If we ever feel doubt after the full investigation of evidence, then it is a reasonable doubt. A reasonable doubt must be a doubt rise from the evidence and it cannot be an imaginary doubt or unrelated with the evidence.²²

In the case of *Wong Sieng Ping v. Public Prosecutor*,²³ the appellant, a dentist appealed to the High Court to challenge the decision of the Magistrate for convicting him on the offence of cheating under section 417 of the Penal Code. The High Court opined that the burden of proof has never shifted to the accused to establish a case, because it is the duty of the Prosecution who asserts that the accused was at fault and guilty for the offence. In addition, to put the burden on the accused in order to establish a case (*prima facie*) would be tantamount to breach the principle of presumption of innocence on the accused. The Prosecution must establish the case beyond reasonable doubt and not merely on the preponderance of evidence. In the case of *Mat v. Public Prosecutor*,²⁴ in reaching decision, the Court stated as follows:

“If a judge is satisfied beyond reasonable doubt that the accused is guilty after full investigation of evidence, then the accused shall be convicted. If a judge accepts or believes the accused's explanations, then the accused shall be acquitted. If a judge does not believe or except the accused's explanations, he needs to consider further whether the explanation raise a reasonable doubt to the accused guilty or not? If not, then the accused shall be convicted, but if yes then the accused shall be acquitted.”²⁵

This case explains on the guidelines for a judge either to convict the accused or not to convict after all evidence have been adduced and investigated on its relevancy, admissibility, and weightage from both parties. The standard of proof must be beyond reasonable doubt until the end of the trial and before the defence being called, there will be a term called prima facie case which means the case had been well established by the Prosecution. This means after the Prosecution proved the physical element for disobeying the social distancing, the case has been established and evidential burden will be shifted to the accused if he has any defence or mitigating factors to weaken the Prosecution's case or reduce the punishment.

PRIMA FACIE CASE

What does it mean by prima facie case? With cross reference to other statute, sections dealing with prima facie are ss. 173 (f) and (h)(i) CPC and s. 180 of the Criminal Procedure Code which stated as follows:

Section 173 (f)(i) CPC

"When the case for the prosecution is concluded the Court shall consider whether the prosecution has made out a prima facie case against the accused."

Section 173 (f)(ii) CPC

"If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal."

Section 173 (h)(i) CPC

"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."

Section 180 CPC

"When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a prima facie case against the accused."

All of the sections above explain on what must be done by the Court or a judge sitting in trial at the end of the Prosecution case. A judge after hearing all the arguments made by the Prosecution and investigates the weightage of all evidence adduced by the Prosecution, he has the duty to rule out whether the case has been established or in other words it is a prima facie case or not? Only if there is a prima facie case, the accused will be called for a defence stage, if there is no prima facie case then the judge shall give an order for acquittal.

Another section in the Criminal Procedure Code that explains on the failure to raise any defence after the case has been ruled out as prima facie can be found under s. 173(h)(iii). This section tells on the burden of proof in which after the prosecution has adduced credible evidence which means evidence which is relevant, admissible and the weightage or probative value is high, the accused must raise any defence. Failure to rebut or justify the commission of the offence by the accused means a warrant of conviction or guilty for the offence.

In the Federal Court case of *Balachandran v. Public Prosecutor*²⁶, the Court has made a test to determine prima facie case as follows:

1. Sufficient evidence to be called upon to answer and evidence adduced by the prosecution must be defeated by evidence adduced by the defence counsel.
2. If unrebutted it is sufficient to induce the Court to believe in the existence of the facts stated in the charge or the existence is so probable that a prudent man ought to believe that these facts do not in existence.
3. It is not made out if there is no material evidence which can be believed in the sense as described earlier.
4. The Court must at the close of prosecution's case, undertake a positive evaluation of the credibility and reliability of all the evidence adduced to determine whether the elements of the offences have been established.
5. If the prima facie case is established and the accused elects to remain silent then the accused must be convicted. If there is any reasonable doubt, then there is no prima facie case.
6. As the accused can be convicted on the prima facie evidence, it must reach a standard capable of supporting the conviction beyond reasonable doubt.²⁷

All the sections above on prima facie are applicable for the violation of social distancing during Movement Control Order under the Regulations, Ordinance (Emergency) and Guidelines issued by the Minister of Health (MOH). However, the prosecution only needs to prove all physical elements to make a prima facie case for disobeying social distancing since it is a strict liability offence.

BEYOND REASONABLE DOUBT

When the statutes and case law laid down that the prosecution needs to prove beyond reasonable doubt

in order to establish a prima facie case, what does it mean by beyond reasonable doubt? Does it mean it must reach an irresistible conclusion?

In the Federal Court case of Dato Moktar Hashim v. Public Prosecutor,²⁸ the Court of the opinion that where circumstantial evidence is a basis of the prosecution case, the evidence must irresistibly point to one conclusion, i.e. the guilt of the accused, but in a case tried without a jury, the failure by the Court to expressly state this is not fatal and it would suffice if it merely says that it is satisfied as to the guilt of the accused beyond reasonable doubt.²⁹

Similarly, in the Federal Court case of Low Kian Boon & Anor v. Public Prosecutor,³⁰ it was held by the Court that the prosecution needs to state that the facts are inconsistent with any other justifiable explanation as an excuse. This means that it is sufficient for the Court to conclude that it is satisfied the accused is guilty beyond reasonable doubt.

IRRESISTIBLE CONCLUSION

Irresistible conclusion means a standard of proof which is similar to the beyond reasonable doubt, it is also similar to beyond the shadow of doubt. In the case of Magindran a/l Mohan v. Public Prosecutor,³¹ the Court opined that the guilt of the appellant is beyond reasonable doubt and the Court agreed with the trial judge for not imposing a higher standard of onus of proof (higher than beyond reasonable doubt).³²

By virtue of the case Dato Moktar Hashim, an irresistible conclusion means when the prosecution establishes a case, there is no other evidence that the offence being committed by other person, except the accused. Thus, if there is no other relevant fact, but only the evidence against the accused then this will be considered as the prima facie case against the accused which is embedded in the Criminal Procedure Code and the standard of beyond reasonable doubt is established.³³

CONCLUSION

In conclusion, it is submitted that the burden of proof on proving the offence for violation of social distancing guideline under the Regulation No. 6 and Annex 26 issued by the Minister of Health lies on the Prosecution. However, it must be borne in mind that this offence is a strict liability and the Prosecution only need to prove the physical element (*actus reus*) and no need to prove the mental element (*men*

rea) because it is presumed to be in existence that need to be rebutted by the accused by raising any defence under the Act together with the explanation that the accused already observe due care and attention to comply with the regulations, guidelines and Ordinance issued by the Ministry of Health pursuant to s 11(2) of the Prevention And Control Of Infectious Diseases Act 1988. On the other hand, the physical element for not obeying social distancing guideline must be proved by the prosecution beyond reasonable doubt until the end of the trial in order to secure the conviction for strict liability offence.

NOTES

- ¹ Safeek Affendy Razali, 'Polis keluar kompaun RM10,000 langgar SOP mulai hari ini', *Berita Harian*, 10 March, <https://www.bharian.com.my/berita/nasional/2021/03/795062/polis-keluar-kompaun-rm10000-langgar-sop-mulai-hari-ini> [15 May 2021].
- ² *Ibid.*
- ³ Mohamad Ismail Mohamad Yunus, *Criminal Liability and Its Exceptions*, Penerbit UTHM, Johor Bahru, 2020, p 71.
- ⁴ Hamid Sultan Abu Backer, *Janab's Key to the Law of Evidence, Advocacy and Professional Ethics*, 5th edn, Janab (M) Sdn. Bhd., Kuala Lumpur, 2019, p 664.
- ⁵ [1998] 2 AMR 1189.
- ⁶ [1980] 2 MLJ 86.
- ⁷ [1996] 5 MLJ 473.
- ⁸ M. Peters, *Law of Evidence in Malaysia*, LexisNexis, Petaling Jaya, 2013, p 156.
- ⁹ A. Paul, *Evidence: Practice and Procedure*, 4th edn, LexisNexis, Petaling Jaya, 2010, p 835.
- ¹⁰ [1947] 2 All E.R. 372.
- ¹¹ [1935] AC 462.
- ¹² 1969] 2 MLJ 89.
- ¹³ [1973] 2 MLJ 153.
- ¹⁴ [2003] 2 SLR (R) 67.
- ¹⁵ *Ibid.*
- ¹⁶ *Comfort Management Pte Ltd v. Public Prosecutor* [2003] 2 SLR (R) 67.
- ¹⁷ [1935] AC 462.
- ¹⁸ Habibah Omar, Siva Barathi Marimuthu, Mazlina Mahali, 2018, *Law of Evidence in Malaysia*, 2nd edn. Sweet & Maxwell, Selangor, p 545.
- ¹⁹ [1971] 2 MLJ 16.
- ²⁰ *Public Prosecutor v. Salmin & Ors* [1971] 2 MLJ 16.
- ²¹ [1947] 2 All ER 372.
- ²² *Ibid.*
- ²³ [1967] 1 MLJ 56.
- ²⁴ [1965] 1 MLJ 263.
- ²⁵ *Ibid.*
- ²⁶ [2005] 2 MLJ 301.
- ²⁷ *Ibid.*
- ²⁸ [1983] 2 MLJ 232.
- ²⁹ *Ibid.*, 275.
- ³⁰ [2010] 4 MLJ 443.
- ³¹ [2010] 6 MLJ 619.
- ³² Habibah Omar et al, *Law of Evidence in Malaysia*, p 548.
- ³³ *Ibid.*, 558.

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