HAW TUA TAU – THE AFTERMATH (HAVE WE NO CASE TO ANSWER?)

The Privy Council's decision in *Haw Tua Tau* v. *P.P.* restated the burden of proof at the close of the prosecution's case from that enunciated previously in the Singapore and Malaysian Courts and, in so doing, created a controversy which has not yet been put to rest even after the recent decision of the Singapore Court Of Criminal Appeal in *Abdul Ghani* v *P.P.* This article attempts to discuss the inherent problems in these cases and the difficulties faced by judge, counsel and accused at the close of the prosecution case.

I. INTRODUCTION

HAW Tua Tau v. *P.P.*[1] together with two other appeals[2] went before the Judicial Committee of the Privy Council as a result of the conviction of three accused persons on charges of murder and drug trafficking. At the close of the prosecution case the trial judge called upon the accused to give evidence which they did after consulting counsel. At the end of the trial the accused were convicted.

The appeal before the Privy Council concerned the question whether the 1976 amendments to the Criminal Procedure Code[3] were inconsistent with Article 9(1) of the Constitution of Singapore.[4] One of the amendments concerned section 189(1)[5] which sets out the procedure at the end of the prosecution case. Lord Diplock who delivered the judgment of the Privy Council held, *inter alia,* that at the end of the prosecution case, if there was "no evidence (or if the evidence was so inherently incredible that no reasonable person could accept it as being true)" to prove any one or more of the essential elements of the offence, the accused must be acquitted. He then went on to say that "but if there were some evidence, the judge must let the case go on"[6]: in other words, the defence will be called.

II. THE PRACTICE BEFORE *HAW TUA TAU*

Theoretically, there can be two approaches to the "no case" submission.[7] They are based on the two possible interpretations of the phrase "*prima facie* case" or "*prima facie* evidence", namely:

> "(a) where a party's evidence in support of an issue is sufficiently weighty to entitle a reasonable man to decide the issue in his favour, although as a matter of common sense, he is not obliged to do so" and

1 [1981] 2 M.L.J. 49.
2 *Tan Ah Tee v. P.P.* and *Low Hong Eng* v. *P.P.*
3 Amendment Act No. 10 of 1976.
4 "No person shall be deprived of his life or personal liberty save in accordance with law."
5 Formerly s. 188(1), now renumbered as *s.* 189(1) in Criminal Procedure Code, Cap. 68, Singapore Statutes, 1985 (Rev. Ed.).
6 [1981] 2 M.L.J. 49, at p. 52.
7 See K.S. Rajah, "Establishing a Prima Facie Case And Establishing A Case Beyond Reasonable Doubt", [1982] 1 M.L.J. xxxiii.

> "(b) where a party's evidence in support of an issue is so weighty that no reasonable man could help [but decide] the issue in his favour in the absence of further evidence."[8]

In *Tan Ah Ting* v. *P.P.*,[9] Wan Suleiman F.J., held that "the second sense is the proper meaning generally accepted by our courts".[10] The second approach, therefore, regards a *"prima facie* case" as a case proved beyond reasonable doubt.[11] This case approved *PP. v. Chin Yoke*,[12] decided some thirty-four years before it.

In 1970 the Singapore Court of Criminal Appeal also adopted the second meaning of the term *prima facie* [13] in the case of *Ong Kiang Kek* v. *P.P*[14] Wee C.J. said in that case that "the trial court is required by section 177C,[15] at the close of the case for the prosecution, to determine whether or not the evidence tendered on behalf of the prosecution, if unrebutted, has established the case against the accused beyond a reasonable doubt. If the court finds at that stage of the trial that it has not been so established there is nothing left but to acquit the accused."[16]

The English position was set out in a practice note by Lord Parker C.J. in 1962, namely, that:

> "[a] submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it."[17]

This position, particularly the second limb of Lord Parker's direction, therefore, seems to have been rejected in Singapore and Malaysia.

III. THE REJECTION OF *ONG KIANG KEK*

The course seemingly settled by the *Ong Kiang Kek* case was radically altered in 1981. Lord Diplock in his speech on behalf of the Privy Council in *Hua Tua Tau v. P.P.*[18] referred to section 189(1)[19] and said:

> "For reasons that are inherent in the adversarial character of criminal trials under the common law system, it does not place upon the court a positive obligation to make up its mind at that stage of the proceedings whether the evidence adduced by the prosecution has by then already satisfied it beyond reasonable doubt that the accused is guilty. Indeed it would run counter to the concept of what is a fair trial under that system to require the court to do so"[20]

8 See Cross R. & Tapper C., *Cross on Evidence*, 6th ed., pp. 60-61.
9 [1974J 2 M.L.J. 37.
10 *Ibid.,* at p. 39.
11 *P.G. Ralph* v. *P.P.* [1973] 1 M.L.J. 81. See also *Tan Ah Ting* v. *P.P. supra* note 8; and *P.P.* v. *Lim Teong Seng & Others* [1946] M.L.J. 108.
12 [1940] M.L.J. 47.
13 That is, equating *"prima facie"* with "beyond reasonable doubt".
14 [1970] 2 M.L.J. 283.
15 Now s. 189(1).
16 [1970] 2 M.L.J. 283, at p. 284.
17 [1962] 1 All E.R. 448.
18 [1981] 2 M.L.J. 49.
19 Then numbered s. 188(1).
20 *Ibid*., at p. 51.

How is it that the Privy Council and the Court of Criminal Appeal came to take opposite views? The answer lies in the interpretation of two words — "if unrebutted" — in section 189(1).

The Court of Criminal Appeal had taken the phrase, "if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction" as raising an *actual* question of fact, namely, that at stage the court has to enquire as to whether the evidence is of such quantity and quality that if the accused does not rebut it he must be convicted. Interpreting it in this way it will be necessary for the court to assess the value of the evidence including the accuracy and veracity of the witnesses. However, the Privy Council interpreted that same phrase as raising a *hypothetical* question which requires the court (in deciding whether or not to call on the defence) to act on two presumptions, namely,:

> "(a) that all such evidence of primary fact is true, unless it is inherently so incredible that no reasonable person would accept it as being true; and
>
> (b) that there will be nothing to displace those inferences as to further facts or to the state of mind of the accused which would reasonably be drawn from the primary facts in the absence of any further explanation."[21]

The phrase "if unrebutted" was therefore taken to mean "if, *assuming* the evidence were unrebutted". In adopting this interpretation the court must (as Lord Diplock pointed out in the same case[22]) keep an open mind as to the veracity and accuracy of the witnesses. Hence, the quality of the evidence is *not* assessed at that stage. If there is sufficient evidence, then the court must act as if the evidence is reliable, call on the defence and wait till the end of the *whole* case before evaluating the evidence to see if the prosecution has made out a case beyond reasonable doubt. Lord Diplock said that "[a]t the close of the prosecution case what has to be decided remains a question of law only."[23]

However, it may be said that by the same token, the Privy Council converted an actual question of fact into a hypothetical question and in so doing ignored the real and practical problems facing a judge sitting without a jury. The judge will be asked to act on *a priori* assumptions when he could have acted on fact. It was perhaps forgotten that the judge sits alone and has to continually hear, record, and assess the value of the evidence.

IV. THE SARAWAK CONNECTION

It is also pertinent to note that the Sarawak Criminal Procedure Code[24] provides in section 163 the following direction:

> "If, upon taking all the evidence referred to in section 162 and asking such questions, if any of the accused under section 201 as the court considers necessary it finds that no evidence has been adduced which,

[21] *Ibid*., at p. 51.
[22] *Ibid*., at p. 51.
[23] *Ibid*., at p. 52.
[24] Cap. 54, Sarawak Ordinance.

if believed[25] would warrant his conviction, the court may, subject to the provisions of section 171, record an order of acquittal."

This may be the crucial difference between a provision drafted in this form and one drafted in the form of the Singapore section 180(f)[26] and the Malaysian section 173(f) which does not have the words "if believed ". This difference has been pointed out in *Chua Guan Keng* v. *P.P.*[27] In this case, the magistrate followed an authority from a Malayan case[28] and applied the "beyond reasonable doubt" test. It was pointed out by the appeal court that the Malayan[29] case relied upon depended "solely on a point on which the two Ordinances differed and it would therefore have been properly disregarded."[30] It has been accepted by the Malaysian courts that the Sarawak provision lends itself to be interpreted in accordance with the approach in *Haw Tua Tau*[31] but this has not been a consistent view.[32]

In *P.P.* v. *Saimin & Ors,*[33] Sharma J. said that a conviction cannot be sustained if the court is merely satisfied that the prosecution's evidence *may be true.* It must be satisfied that the evidence *must be true.* "If the learned magistrate was not satisfied with the case for the prosecution it was his duty to acquit and discharge the accused at the close of the prosecution case."[34] At this stage it is quite clear that Sharma J. adopted the beyond reasonable double test at the close of the prosecution case but, in the next breath he said, "...it may perhaps serve a useful purpose to remind those administering justice in the lower courts that evidence discloses a *prima facie* case when it is such that *if uncontradicted* and *if believed* it will be sufficient to prove the case against the accused."[35] This paragraph carries that same perplexing ambiguity inherent in the phrase "if unrebutted ". Was the learned appeal judge referring to a hypothetical question (of "if believed") in the *Haw Tua Tau* sense or an actual belief in the *Ong Kiang Kek* sense? The tenor of the entire judgment seems to suggest that he had in mind an actual finding of fact against the accused and was not addressing the magistrates on a hypothetical question. It can be seen that even the phrase "if believed" can be interpreted either *a la Ong Kiang Kek* or *a la Haw Tua Tau.*

V. DIFFICULTIES WITH *ONG KIANG KEK*

The interpretation of section 180(f) and section 189(1) of the Singapore Code by the Court of Criminal Appeal in *Ong Kiang Kek* is not free from difficulty. If the court finds *as a fact* that the prosecution had made out a case beyond reasonable doubt which if unrebutted would warrant the conviction of the accused, then one may be forgiven for asking if the accused still retains his right to silence. The 1976 amendments[36] abolished the right of the

25 Emphasis added.
26 Formerly numbered s. 179(0.
27 [1973] 1 M.L.J. 178.
28 *Wong Ah Mee* v. *P.P.* [1970] 1 M.L.J. 98.
29 That is, from Peninsular Malaysia.
30 [1973] 1 M.L.J. 178, at p. 179.
31 *P.P.* v. Omar Lopez, [1967] 2 M.L.J. 281.
32 See *P.P.* v. *Saimin & Ors* [1971] 2 M.L.J. 16.
33 [1971] 2 M.L.J. 16.
34 *Ibid.*, at p. 17.
35 [1971] 2 M.L.J. 16, at p. 17.
36 Criminal Procedure Code (Amendment) Act No. 10 of 1976.

accused to make an unsworn statement from the dock, but it does not take away an accused person's right to remain silent. Moreover, it inserted paragraph (k) to section 180[37] of the Criminal Procedure Code which requires the court to "tell the accused that he will be called upon by the court to give evidence in his own defence and shall tell him in ordinary language what the effect will be if, when so called upon, he refuses to be sworn or affirmed ". The accused is, therefore, entitled to refuse to testify, but he does so at his own risk.[38] However, if he chooses not to testify, and has no other witnesses, he cannot then, possibly rebut the prosecution's case, which by now the court has found to have been proved beyond reasonable doubt. In other words, he cannot rebut the prosecution case by silence. In *Tan Ah Ting* v. *PP.* it was held that if the defendant was called to make his defence, "and the defendant chooses to remain silent, then and only then is the case proved against him beyond reasonable doubt."[39] With the *Ong Kiang Kek* approach, it seems, silence is inevitably followed by conviction.

With the *Haw Tua Tau* approach, if the accused remains silent when there is some evidence against him (which does not amount to proof beyond reasonable doubt) he will be acquitted after the court reconsiders the evidence. The question facing the accused would be, whether he should give evidence himself. If he elects to remain silent he might be acquitted but if he gives evidence he might condemn himself from his own mouth. Perhaps the real question in this case should be, whether justice will be done if either approach is adopted? Assuming that the prosecution has not proved its case beyond reasonable doubt at the close of its case, with the *Ong Kiang Kek* approach, the accused in this situation would have been acquitted without his defence being called. In other words, he will not be put to that election from which he might make the decision to give evidence and be convicted "out of his own mouth".

With the *Haw Tua Tau* approach, the defence may be called if there is some evidence (but not enough to prove the prosecution case beyond reasonable doubt) against the accused. Nevertheless, the accused may still be acquitted at the end of the trial even if he did not give evidence himself. This is because the judge would be obliged then to weigh the evidence to see if it had established the prosecution case beyond reasonable doubt.

On the other hand, if there was some evidence (which *does* amount to proof beyond reasonable doubt) and the accused remains silent, he would be convicted whichever approach was adopted.

The other major difficulty with the *Ong Kiang Kek* approach is that, if it is right that the accused must be convicted if he chooses to remain silent,[40] then there is no sense in telling him that adverse inferences would be drawn by his remaining silent. There is no question then, of drawing any inference, adverse or otherwise; for he *will be* convicted in any case.

37 Formerly s. 179.

38 The accused may of course choose to remain silent and call other witnesses to give evidence on his behalf.

39 [1974] 2 M.L.J. 37, at p. 39.

40 *I.e.* elects not to give evidence for call any other witnesses.

VI. DIFFICULTIES WITH *HAW TUA TAU*

However, the difficulties embedded in the *Haw Tua Tau* approach are equally perplexing. First, if it is said that at the close of the prosecution case there need not be proved a case beyond reasonable doubt then what is it that the defence is called upon to rebut? The Court of Criminal Appeal answered this question by stating that the court *must* therefore find a case proved beyond reasonable doubt at that stage. The Privy Council answered it by stating that for the time being one only *presumes* that all the evidence to be proved has been proven and gives it a final assessment as to weight only at the end of the entire case; but this is to raise another question: why should the judge be asked to act on assumptions when he can act on fact? Lord Diplock seems to justify the "presumptions" approach when he stated that the decision-making function is divided between judge and jury. It is for the judge to find if there is relevant evidence to establish the essentials of the charge[41] and for jury to decide if that evidence is true. He then went on to say that this principle of division of function applies even "in criminal trials where the combined roles of decider of law and decider of fact are vested in a single judge".[42] It is not easy to see why and, which is even more important, how a judge is to alternate between two bodies with separate functions. If witnesses are impeached during the course of the prosecution case, it will be difficult (if not impossible) for the judge, when he calls on the defence, to ignore the impeachment and pretend that the impeached witnesses were truthful.

It is true that in summary trials in England the magistrate is indeed called upon to perform this incredible exercise. However, in England, a submission of "no case", based on the principles enunciated in *R.* v. *Galbraith,*[43] allows the defence to make a submission on an "either or " basis, that is, either, there was no evidence to prove that the accused committed the offence in which event the case stops,[44] or, the evidence was so weak and unreliable that no reasonable man would convict on it. If there is some evidence, then the judge has to consider whether, by taking it at its highest a reasonable jury would acquit.[45] If so, the submission of "no case" succeeds and the defence will not be called. But, if the strength of the prosecution case depended on the veracity of the witnesses the defence will be called.[46] Lord Diplock may well be influenced by the English approach which does not require an actual finding of fact as to whether the prosecution has discharged its legal burden at the close of its case.[47]

Secondly, can the court acquit after it has called on the defence and the accused chose not to give evidence and did not also call any evidence on his behalf? If the answer is in the affirmative then the judge's credibilty may be put in question. When the defence is called, the judge will be saying to the accused that a case has been made out against him which if unrebutted would warrant his conviction and will be telling the accused that he has

41 Surely the essentials of a charge can only be established by evidence beyond reasonable doubt?

42 *Ibid.*, at p. 52.

43 (1981) 73 Cr. App. R. 124.

44 In Singapore, this is already covered by s. 180(g) of the Criminal Procedure Code.

45 *R.* v. *Galbraith, supra,* note 43.

46 *Ibid.*, at p. 127.

47 These were clearly in his mind although he stated that they need not be referred to. See [1981] 2 M.L.J. 49, at p. 52.

a right not to give evidence but if he does not, adverse inferences may be drawn against him.[48] If the accused then remains silent and the judge (taking the *Haw Tua Tau* approach), after evaluating the evidence, acquits the accused, what would that accused think? Had he made the opposite decision and given evidence he might have been too nervous to give his evidence clearly, cogently and convincingly and as a result have been convicted. It is, therefore, preferable to take the element of gamble away by clearly stating at the close of the prosecution case whether a case beyond reasonable doubt has been established so that the accused will then know whether or not he should give evidence. If the case is proved beyond reasonable doubt then he knows that he *must* give evidence.[49] The *Haw Tua Tau* approach may be hard on undefended illiterate persons. They are most likely to be uncertain as to whether they ought to give evidence when the defence is called. They are likely to be weak in expression, nervous and confused. If the prosecution evidence is not proved beyond reasonable doubt they should not be called upon to state their defence. Even where educated accused persons are defended by counsel they (and also their counsel) can never be certain whether the evidence *really* needed rebuttal.

Thirdly, the introduction of the concept of evidence which is "inherently so incredible" is both otiose and vague. It is otiose because if evidence is indeed inherently incredible then the courts can always acquit the accused at any stage by virtue of section 180(g), [50] This is taking a broad view of section 180(g). The narrow view is to say that this subsection covers only cases where the evidence is cogent but its relevancy is suspect,[51] after all, one of the reasons why a charge may be groundless is that the evidence is inherently incredible.

The phrase is vague because today, six years after *Haw Tua Tau* the courts do not seem to be confident of expressing what it means. The judge in *P.P.* v. *Tan Seow Chuan*[52] said, "[t]he words "inherently incredible", used by the Privy Council in the *Haw Tua Tau* case, in my experience lately, have given rise to a lot of confusion. I would take them to mean, on a fair reading of that judgment, that on the face of it, such evidence is not fit for believing."[53] Is this last phrase, "evidence not fit for believing" to replace "inherently incredible", or do they mean the same thing?

Peh J. in *Indran & Anor* v. *P.P.*[54] felt obliged to give an indication of what credible and incredible evidence is. He said that "[c]redible evidence, in this context, does not mean evidence of a witness whose credibility has been established, but means instead, evidence which is not inherently improbable not for example, that incredible story of a witness seeing a cow

48 This is the standard allocution which will be made to the accused when his defence is called. It is to explain to him that he may remain silent and not call any evidence, or remain silent and call evidence through other witnesses, or to give evidence himself. He will also be warned of the consequences if he chose to remain silent.

49 This leads to the criticism of *Ong Kiang Kek* discussed above, *i.e.* that the right to silence has no practical effect, and that adverse inferences need not be drawn.

50 "...nothing in paragraph (f) shall be deemed to prevent the court from acquitting the accused at any stage of the case if, for reasons to be recorded by the court, it considers the charge to be groundless."

51 This would be an unnecessary and restrictive reading of the subsection.

52 [1985] 1 M.L.J. 18, *per* Peh Swee Chin J.

53 *Ibid*., at p. 321.

54 [1985] 2 M.L.J. 408.

jump across the moon."[55] He then went on to say that "credible evidence *i.e.* evidence which is not inherently improbable, which, if believed, and subject to all possible lines of defence, including one frailty of such evidence, may result in a conviction." He seems therefore, to have made Lord Diplock's test of "inherently incredible" to be synonymous with "inherently improbable".

VII. *RATIO DECIDENDI* OR *OBITER DICTA?*

When the *Haw Tua Tau* appeal went before the Privy Council the grounds of appeal stated were not argued by counsel because as Lord Diplock said, "[i]t is unnecessary for their Lordships to say anything about the various grounds relied on by any of the appellants in the Court of Criminal Appeal. They were plainly without merit and none of them was pursued before this Board."[56] The only question was, as Lord Diplock himself stated, that the 1976 amendments were inconsistent with Article 9(1) of the Constitution of Singapore.[57] and, being inconsistent, were rendered void by Article 4."[58] Hence, what lies at the end of the prosecution case was not a matter directly in issue and, therefore, any pronouncement on it must surely be *obiter.* Indeed, Lord Diplock went on to say,

> "[T]he question for their Lordships is not whether the 1976 amendments made a significant alteration to the disadvantage of accused persons in the procedure previously followed in criminal trials in Singapore (as indisputably it does), but whether the consequence of the alteration is a procedure for the trial of criminal offences that is contrary to some fundamental rule of natural justice."[59]

His Lordship's next paragraph is even more illuminating.

> "It would be imprudent of their Lordships to attempt to make a comprehensive list of what constitute fundamental rules of natural justice applicable to procedure for determining the guilt of a person charged with a criminal offence. *Nor is this necessary in order to dispose of these three appeals.*[60] The only rule alleged to be the fundamental rule of natural justice, against which the appellants claim Act No. 10 of 1976 offends, is the so-called privilege against self-incrimination as expressed in the latin maxim *nemo debet se ipsum prodere."*

Shortly after *Haw Tua Tau* was decided, a Singapore District Court in *P.P.* v. *Abdul Ghani*[61] declined to apply the test laid down by the Privy Council and applying the *Ong Kiang Kek* test, acquitted the accused at the close of the prosecution case without calling on the defence. The Public Prosecutor appealed[62] and Chua J. allowed the appeal holding that *Ong Kiang Kek* had been overruled and the trial judge ought to have called on the defence. However, he reserved two questions of law for the determina-

55 *Ibid*., at p. 410.
56 [1981] 2 M.L.J. 49.
57 Namely, that "No person shall be deprived of his life or personal liberty save in accordance with law".
58 *Ibid*., at pp. 49, 50.
59 *Ibid*., at p. 50.
60 Emphasis added.
61 *P.P.* v. *Abdul Ghani,* 19. August 1981, Subordinate Courts.
62 Criminal Motion No. 26 of 1982.

tion of the Court of Criminal Appeal.[63]

The Court of Criminal Appeal gave an oral judgment dismissing the appeal but took time to prepare the written decision.[64] With regard to the first question,[65] the Court of Criminal Appeal referred to various passages in the judgment of Lord Diplock and concluded that "the interpretation of section [189(1)] of the Criminal Procedure Code was necessary for the decision of the case of *Haw Tua Tau* v. *PP.*"[66] The passages referred to, concerned Lord Diplock's view of whether the maxim *nemo debet se ipsum prodere* enshrined a fundamental rule of natural justice which was infringed by section 189(2) of the Criminal Procedure Code, Curiously, the Court of Criminal Appeal held that the interpretation of section 189(1) was "necessary" instead of saying that it was part of the ratio decidendi of the case. Many provisions may necessarily be examined in the course of argument and some may therefore be referred to in a court's judgment but it does not follow that all that was necessarily discussed must be part of the *ratio decidendi.* In the event, Lord Diplock himself said that:

> "their Lordships *do not find it necessary*[67] to decide whether by virtue of that maxim it should be recognised, as a fundamental rule of natural justice under the common law system criminal procedure, that a person who is standing trial before a court of justice charged with an offence which he does not admit, must not be ordered by the court, under threat of legal sanctions in the event of disobedience, to disclose what he knows about the matter which is the subject of the charge."[68]

It must not be forgotten either, that Lord Diplock said at the outset that the *only question* was whether the 1976 amendments were unconstitutional. The issue relating to the question of whether the prosecution must adduce evidence beyond reasonable doubt at the close of its case is an issue concerning the burden of proof.

The sole question was whether the 1976 amendments were *ultra vires* the Constitution in that they took away the accused person's right to make an unsworn statement from the dock. In this context, the interpretation of section 189(1) was not essential.

With regard to the second question[69] the Court of Criminal Appeal held that "the re-enactment of section 177C[70] did not preclude the Judicial Committee of the Privy Council from giving an interpretation which is different from the interpretation given by the Court of Appeal in the *Ong Kiang*

63 "(a) Whether the degree of proof required at the close of the prosecution case by Lord Diplock (in the *Haw Tua Tau* case) is *obiter* or *ratio decidendi,* and (b) whether the judical construction given to section 172(f) of the Criminal Procedure Code in *Ong Kiang Kek* v *P.P.* by the Court of Criminal Appeal by virtue of the legislature having repeated them without alternation in the subsequent statue *i.e.* Act 10, is deemed to have been approved by the legislature thereby precluding the Privy Council from giving a different interpretation." [1985] 1 M.L.J. 93 at p. 94.

64 *Abdul Ghani v. P.P.* [1985] 1 M.L.J. 93.

65 See note 63 *supra.*

65 *Ibid.*, at p. 97.

67 Emphasis added.

68 [1981] 2 M.L.J. 49, at p. 53.

69 See note 63 *supra.*

70 Now s. 189(1).

Kek case."[71] This answer to the second question is, no doubt, technically correct but it must be remembered that the authority, the *Abedigba* case[72], from which this principle was extracted warned against overly enthusiatic departure from precedents.[73] Salmon L.J. in the same case noted that Parliament when re-enacting a statute may well overlook a decision and he went on to say that in his view the decision in question in that case (*R.* v *Blane*[74]) had been overlooked by the legislature.[75] There is nothing to suggest that *Ong Kiang Kek* was so overlooked by the Singapore legislature. Lord Denning citing his own judgment in *Royal Crown Derby Porcelain Co. Ltd* v. *Russell*[76] said that it does not mean that every time Parliament re-enacts a provision of statute it gives statutory authority for every erroneous interpretation which has been put on it. In fact,

> "[t]he true view is that the court will be slow to overrule a previous decision on the interpretation of a statute when it has long been acted on, and it will be more than usually slow to do so when Parliament has since the decision, re-enacted the statute in the same terms. But, if a decision is, in fact, shown to be erroneous, there is no rule of law which will prevent it from being overruled."[77]

In *Haw Tua Tau,* Lord Diplock did not say that *Ong Kiang Kek* was clearly erroneous. In fact, it seems that their Lordships in the Privy Council (certainly Lord Diplock) were uncertain as to the position in *Ong Kiang Kek* and hence referred to the relevant passages as "those delphic passages".[78] His Lordship in referring to the said passages recognised that on a literal reading, those passages do suggest that at the close of the prosecution case that the evidence adduced must satisfy the judge beyond reasonable doubt that the accused is guilty. He then said that "this can hardly have been what that court intended..". It is therefore regrettable that the Court of Criminal Appeal in the *Abdul Ghani* case did not take the opportunity to state that that was in fact what it had intended; instead, the judgment[79] seems redolent of a reluctant acceptance of *Haw Tua Tau.*

VIII. *HAW'S* RECEPTION IN MALAYSIA

Malaysia abolished the right of appeal to the Privy Council (in criminal and constitutional matters) in 1978[80] and hence, whatever may be said about the binding force of *Haw Tua Tau* on the Singapore courts, the Malaysian courts are certainly not bound by it. Yet in *A. Ragunathan* v. *Pendakwa Raya*[81] the Federal Court quoted Lord Diplock's speech in *Haw Tua Tau in extenso* and accepted it.[82] About a year later in *P.P* v. *Nordin bin Johan*

71 See *R.* v. *Bow Road Justices (Domestic Proceedings Court) Ex Parte Abedigba* [1968] 2 Q.B. 572.
72 [1968] 2 Q.B. 572.
73 *Ibid*., per Edmund-Davies L.J. at p. 586.
74 (1849) 13 Q.B. 769.
75 [1968] 2 Q.B. 572, at p. 583.
76 [1949] 2 K.B. 417.
77 *Ibid*., at p. 429.
78 [1981] 2 M.L.J. 49, at p. 54.
79 Especially at p. 97.
80 S. 13 Courts of Judicature (Amendment) Act 1976.
81 [1982] 1 M.L.J. 139.
82 Merely by saying, "[a]pplying that principle, the learned Magistrate at the close of the prosecution's case had to determine as a question of law whether on the evidence as adduced, and unrebuttted, the applicant could lawfully be convicted, that is to say, whether there was with respect to every element in the charge some evidence which, if accepted, would either prove the element directly or enable its existence to the reasonably inferred." *Ibid*., at p. 141.

& Anor[83] the Public Prosecutor appealed against an acquittal of the two respondents at the end of the prosecution's case. On appeal, the Federal Court approved the trial judge's decision because he (the trial judge) had considered the voluminous and lengthy evidence against the two respondents and "came to the conclusion that it did not in relation to them have any real probative value to the charge and even taken as a whole did not take the prosecution case anywhere for the purposes of proving common intention under section 34 of the Penal Code."[84] Indeed, Peh J. in the *Indran* case was of the view that the "beyond reasonable doubt" test had been "resurrected by the Federal Court in the *Nordin case*".[85] If *Haw Tua Tau* was to be followed then there would be no necessity for the trial judge to weigh the probative value of the evidence at the close of the prosecution case — that weighing process was to be performed at the end of the whole case. The trial judge, in the *Nordin* case, in fact directed himself as follows: "[d]oes the totality of the evidence against the second accused and the fourth accused excluding the confession[86] lead the court to the *irresistible inference*[87] that they were present at the scene of the crime and participated in the commission of the offence?"[88] He then answered in the negative and acquitted the respondents.

The Federal Court's judgments in *Ragunathan* and *Nordin* were delivered by Rajah Azlan Shah L.P. It seems that his Lordship had changed his mind in the interim. Another aspect of *Nordin's* case needs comment. The Federal Court began to talk in the language of "the *prima facie* case" again. This phrase, it must be remembered, is also used in preliminary inquiries. There, a magistrate may commit a person to trial if sufficient evidence is adduced. Such evidence clearly need not be beyond reasonable doubt.[89] This is because a magistrate at a preliminary inquiry is an inquirer and not a trier of facts. He is not concerned with the veracity of the witnesses but only with what they will say. Hence, if Lord Diplock is right, the *prima facie* test at the preliminary inquiry will also be used at the trial. This will create the uniformity and consistency presently absent in the use of the phrase *prima facie* case. It is infelicitous to refer to the two situations as *prima facie* cases because the trial judge in Singapore (unlike a judge in a judge and jury trial elsewhere), is also a trier of fact, and, in such a case the common use of the phrase *prima facie* may lead to confusion. This confusion is likely to settle in the notion that evidence sufficient for committal to trial is also sufficient to call on the defence. This is a practical problem because magistrates who conduct preliminary inquiries on one day may be trying a case on another. In this sense, adopting *Haw Tua Tau's* approach would standardize the test of finding a *prima facie* case at the preliminary inquiry and at the close of the prosecution case.

The string of Malaysian cases adopting the *Haw Tua Tau* interpretation may be growing longer[90] but it cannot be said that confidence in its

83 [1983] 2 M.L.J. 221.
84 *Ibid*., at p. 222.
85 [1985] 2 M.L.J. 408, at p. 410.
86 Prosecution Exhibit P101.
87 Emphasis added.
88 [1983] 2 M.L.J. 221, at p. 222.
89 *Indran & Anor* v. *P.P.* [1985] 2 M.L.J. 408.
90 See also *P.P.* v. *Tan Gong Wai & Anor* [1985] 1 M.L.J. 355; *P.P. v. Tan Seow Chuan* [1985] 1 M.L.J. 18; and *P.P.* v. *Param Cumaraswainy (No. 2).* [1986] I M.L.J. 512.

correctness and applicability are growing proportionately. In *K.J. Barlow* v. *P.P*[91] Salleh Abbas L.P., held that the trial judge had complied with the principles laid down in *Haw Tua Tau,* and that the defence was, therefore, properly called. However, he went on to say that "accepting that the judge went beyond the parameters of *Haw Tua Tau,* we do not think that on the evidence adduced there was any substantial miscarriage of justice.."[92]

IX. CONCLUSION

To argue that the *Haw Tua Tau* approach is not a happy one does not mean that the *Ong Kiang Kek* approach is. The solution will have to come from a statutory amendment to sections 180 and 189 of the Criminal Procedure Code. There are two alternatives. The first is to reaffirm the *Ong Kiang Kek* approach, in which case, the provisions relating to the drawing of adverse inferences must be removed, and the standard allocution rephrased. The second is to give the *Haw Tua Tau* approach statutory approval, by modifying the existing provisions along the lines of section 163 of the Sarawak Criminal Procedure Code The first alternative is preferable because the second one will still leave the judge with all the practical problems of having to disregard the weight of the prosecution's evidence at the close of the prosecution case.

Finally, it may be remembered that Lord Diplock himself acknowledged that English authorities were inappropriate guides in this context. He stated that these authorities "are directed to the propriety of the comments made by English judges to English juries in particular cases, under a system of procedure under which the jury and not the judge is the sole decider of primary facts and inferences to be drawn from them, and the accused still has the option to make an unsworn statement instead of giving evidence."[93] It is also important to note that in matters of policy, practice and procedure, the Privy Council has always shown a reluctance to intervene with what had been locally determined.[94]

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91 [1986] 2 M.L.J. 104.
92 *Ibid*., at p. 105.
93 [1981] 2 M.L.J. 49, at p. 52.
94 *Muhamad Nawaz* v *King-Emperor* (1941) 68 I.A. 126.; See also *Lim Yam Tek & Anor* v. *P.P.* [1972] 2 M.L.J. 41 at p. 42.

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