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Case Commentary: Admissibility of Non-Muslim's Witness Statement in Syariah Court: A Comparison Between *Nyonya Binti Tahir* and *Kaliammal a/p Sinnasamy*

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ABSTRACT

In January 2006, the landmark judgment made by the Syariah High Court of Seremban in the case of *Nyonya Binti Tahir, Ex-Parte Majlis Agama Islam Negeri Sembilan* that Nyonya Binti Tahir was no longer a Muslim at the time of her death and allowed her family to carry out her funeral. The decision was held after the Syariah High Court Judge considered the deceased affidavit and the testimonies of the deceased children who are non-Muslims. The decision contrasted with one made in December 2005, *Kaliammal a/p Sinnasamy v. Pengarah Jabatan Agama Islam Wilayah Persekutuan (JAWI)*, in which the Federal Territories of Syariah High Court determined that the deceased, Mount Everest climber Moorthy a/l Maniam, was a Muslim based on a military record, despite not having heard the testimony from his wife, Kaliammal. The Syariah Court of the Federal Territories refused to hear her testimony since she did not have any stand to testify in court. This case commentary critically analyses the rationale behind the Syariah High Court's decision in the following case *Nyonya Binti Tahir, Ex-Parte Majlis Agama Islam Negeri Sembilan* in admitting non-Muslim testimony in the Syariah court.

Keywords: Non-Muslim; Deceased; Testimony; Syariah Court

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1. Introduction

The Malaysian legal system consists of Federal laws and State laws. Islamic law is enacted according to State laws under our Federal Constitution. It should be noted that every judge in the Syariah court applies independent reasoning (*ijtihad*) in the judgment. Therefore, the binding precedent rule is not applicable in the Syariah court system. It is anticipated that the decision of the Syariah court might be varied from one another. This case commentary has selected two cases as examples to examine the decision made by the Syariah Court in Malaysia regarding the religious statutory declaration of the deceased. There is *Dalam Perkara Mohammad Abdullah, Ex-Parte Majlis Agama Islam Wilayah Persekutuan* (referred to as 'M Moorthy's case') which was decided in December 2005, and a month after that around January 2006, another case was decided, *Nyonya Binti Tahir, Ex-Parte Majlis Agama Islam Negeri Sembilan* (refer as 'Nyonya Tahir's case'). The similarity of these cases is both deceased have a conflict with the Islamic Religious Affairs Department regarding their religious status. Their religious statutory declaration has been announced after their demise. It gives difficulty to the legal heirs and authority to determine the deceased religion since the affected person is no longer alive.

Besides, the difference between the two cases is in *M Moorthy's* case, the wife, Kaliasammal has no stand to give her testimony in the Syariah court even though she made an application to give one. Despite converting to Islam, the Federal Territories Syariah High Court ruled that he should be buried according to Islamic rites. Moorthy's family then applied to the High Court to declare him a Hindu, which sparked the tussle. Kaliasammal insisted that her late husband was still living as a Hindu, despite his consumption of pork and alcohol and celebration of Deepavali. However, when Kaliasammal applied to the Court of Appeal, it was determined that the Civil Court did not have jurisdiction over the matter due to Art 121 (1A) of the Federal Constitution, which prohibits the Federal Court from making rulings on Islamic matters. As a result, M Moorthy was laid to rest in Muslim Cemetery.¹

Meanwhile, a different approach has been taken by Syariah High Court in *Nyonya Tahir's* case. It seems that in *Nyonya Tahir's* case, the children were allowed by the Seremban Syariah Court to give their testimonies regarding their mothers lifestyle; the deceased enjoyed eating pork and took part in the worship of idols. Her spiritual beliefs were consolidated around Buddhism, which she embraced and practiced regularly. Throughout her life, she found comfort and meaning in the teachings of this ancient religion. Her children, Chiang Kwai Ying, and Chiang Ah Fatt became the first non-Muslims ever to testify in a Syariah court, which usually only deals with cases involving Muslims. The Syariah High Court admitted documents in which the deceased stated that she wanted to be buried as a Buddhist. After considering all shreds of evidence, the Syariah High Court Judge

¹ *Kaliasammal a/p Sinnasamy v Majlis Agama Islam Wilayah Persekutuan (JAWI)* [2012] 2 Shariah Law Reports 6-11 (CA).

declared Nyonya Tahir at the time of her demise as non-Muslims and allowed her family to carry out her funeral accordingly.²

Thus, it is important to examine these two cases thoroughly since the level of the court is the same but uses a different approach in determining the religious status of the deceased.

2. Facts of the Case

Nyonya binti Tahir or in her Chinese name known as Wong Ah Kin³ is a Malay, who resides in Tampin, Negeri Sembilan. Since her young age, she was cared for by her grandmother who was a Malay woman married to a Chinese-Muslim convert of Hailam descent. Nyonya Tahir lived with his grandfather (a Chinese-Muslim convert) since she was a child and was raised and educated in Chinese. Her mother, a Malay named Nior, has died earlier. Then, Nyonya Tahir married a Chinese man in 1936 at the age of 18 with her grandfather's consent. Her husband Chiang Meng was born in 1909. They were blessed with 13 children. Since marrying Chiang Meng, she has lived in a Chinese lifestyle, worshipping idols, and eating pork. She did go to the Registry Office to change her name, but it was not allowed. Her husband never embraced Islam. Their relationship as husband and wife lasted until their last breath.

After her demise, the family of Nyonya Tahir was faced with a situation where the deceased religious status was questioned while reporting her death. Her identity card indicated that she was Malay and Muslim, while her son identified the deceased as Chinese and followed the religion of Buddha. Following this incident, an application has been made by the Negeri Sembilan Islamic Religious Council, the Negeri Sembilan Islamic Religious Affairs Department, and the Islamic Religious Officer, District of Tampin, Negeri Sembilan to the Syariah High Court of Seremban, for an order about the religious status of the deceased, whether the deceased, at the time of her demise on 18 January 2006, was a Muslim or otherwise.

3. Decision of the Court

Syariah High Court Judge of Seremban, Justice Mohd Shukor Sabudin delivered his judgment at the end of the case by stating that Nyonya binti Tahir was not a Muslim during the time of her death and her body was allowed to be buried as a non-Muslim. By delivering his judgment, the Syariah High Court Judge explained the jurisdiction of the Syariah Court in the hearing of this case, and the criteria to renounce one religion out of Islam and non-Muslim testimonies in the Syariah Court.

By discussing the issue of whether the Syariah High Court of Seremban has jurisdiction to hear this case, the Syariah High Court Judge refers to Article 121(1A) of the Federal

² *Nyonya Binti Tahir, Ex-Parte Majlis Agama Islam Negeri Sembilan* [2006] 1 Current Law Journal (Syariah) 353, 354 (HC).

³ *ibid* 346.

Constitution stating that civil courts shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts. Based on legal precedents such as *Dalip Kaur v Pegawai Polis Daerah Bukit Mertajam*⁴ and *Majlis Agama Islam Negeri Sembilan v Hun Mun Meng*,⁵ it is the Syariah High Court that has the authority to determine whether the deceased was a Muslim at the time of their death according to Article 121(1A) of the Federal Constitution. Besides, this matter is related to the religious statutory declaration at the time of the deceased death, Syariah High Court Judge refers to Section 61(3)(b)(xi) of Islamic Administration Enactment (Negeri Sembilan) 2003 provides that:

Section 61. Jurisdiction of the Syariah High Court

(3) The Syariah High Court shall—

(b) within his jurisdiction, hear and decide all actions and proceedings if all the parties to the action or proceeding are Muslims and the action or proceeding relates to—

...

(xi) a declaration that a deceased person was a Muslim or otherwise at the time of his death.

These provisions prove that the Syariah High Court of Seremban has jurisdiction in hearing this case since the parties of the proceedings are Muslims, and the cause of action is related to the declaration that a deceased person was a Muslim or otherwise at the time of their death. By applying these provisos to the facts of the case, the parties of the proceedings are Muslim institutions; Negeri Sembilan Islamic Religious Council, the Negeri Sembilan Islamic Religious Affairs Department, and the Islamic Religious Officer, District of Tampin, Negeri Sembilan, and the cause of action in this case satisfied Section 61 (3)(b)(ix) of Islamic Administration Enactment (Negeri Sembilan) 2003. Therefore, the Syariah High Court of Seremban has jurisdiction to hear this case under its authority.

Next, whether the deceased renounced her religion of Islam at the time of her death. By answering this issue, Mohd Shukor Sabudin Syariah High Court Judge refers to a fiqh book written by Wahbah al Zuhaily, *al Fiqh al Islami wa Adillatuhu*, defined word Apostasy, also known as *riddah*, refers to the act of converting from the Islamic religion to disbelief. This can be through intention or action and is indicated by actions such as making fun, stubbornness, or disbelief in one's beliefs. The Syariah Court Judge delivers in his judgment criteria to renounce the religion of Islam in performing either of these three ways, namely through actions, speech, or belief.

Mohd Shukor Sabudin Syariah High Court Judge pointed out that apostasy through action occurs when a person worships anything other than Allah s.w.t, such as idols, the sun, the moon, the stars, etc. It also occurs when a person intentionally engages in actions

⁴ [1991] 3 Current Law Journal 2768 (SC); [1992] 1 Malayan Law Journal 1 (SC).

⁵ [1993] 1 Current Law Journal 179 (HC); [1992] 2 Malayan Law Journal 676 (HC).

that are forbidden by Islam and considers them halal, intending to belittle and disrespect all the rules set by Islam.⁶ In *Nyonya Tahir's* case, the Syariah High Court Judge opined that the deceased renounced her religion of Islam through her action by referring to the following:

an original letter from the Department of Islamic Religion and the Kadi Court Alor Gajah (marked as exhibit P4). In exhibit P4, she declared that ... When she turned 18, she entered marriage with Chiang Meng KP 0203417, a man of Chinese origin, with the blessing of her grandfather. The couple eventually had 13 children. Following her marriage to a Chinese man, she embraced the Chinese way of life, which included the worship of idols and the consumption of pork.

According to the testimony given by the son of Chiang Ah Fatt, there exists an altar in the house where he and the deceased resided together.

Based on the testimony of her daughter, Chiang Kwai Ying, it is clear that the deceased was a devout follower of Buddhism and did not practice any other religions. She expressed a desire to be buried alongside her husband, who was also a practitioner of Buddhism.

Despite renouncing the religion of Islam through action, a person is also considered apostate whenever he/she renounces the religion by speech. The Judge of the Seremban Syariah High Court noted that apostasy can occur through speech when someone expresses disbelief by denying the existence of Allah swt, rejecting other pillars of faith, or denying the obligations that are imposed on all Muslims. Mohd Shukor Sabudin Syariah High Court Judge further noted that the deceased in this case expressed her disbelief in Allah by following:

- (i) The deceased declared in her *Surat Akuan*, ... Therefore, I do not intend to return to Islam and here I want to make a confession that I have renounced the religion of Islam and I will continue to live as a Chinese and if I die should be buried according to the tradition of the Chinese people.
- (ii) Through exhibit P4; Based on her upbringing and current lifestyle, it is unlikely that the deceased would have converted to Islam. She was raised in Chinese culture by her Muslim-Chinese convert grandfather and resides in a remote area with her spouse, far from the Malay community. It is known that altar idols are present in their home, and they practice idol worship. Additionally, all her children have Chinese spouses.

By referring to the above discussions, the Syariah High Court Judge was satisfied that the deceased was not a Muslim during the time of her demise. Mohd Shukor Sabudin Syariah High Court Judge ensured that the deceased, Nyonya binti Tahir, was a sensible person and sane during her life and doing actions and conversations above voluntarily and of her own choice without any coercion, until the moment of her death.

⁶ *Nyonya Tahir* (n 2) 350.

Moreover, Mohd Shukor Sabudin Syariah High Court Judge further explained that evidence submitted to the Syariah Court consists of *bayyinah*—testimonies of deceased children, *qarinah*—documentary evidence, and written confession from the deceased. There are two testimonies admitted to the Syariah High Court, one is from the deceased son name Chiang Ah Fatt, and one is from the deceased daughter, Chiang Kwai Ying, both are non-Muslims. According to the Syariah High Court Judge in Seremban, Syariah Court Evidence Enactment (Negeri Sembilan) 2003 gives room to non-Muslims to be witnesses in Syariah Court. Mohd Shukor Sabudin refers to Section 83 (2) of Syariah Court Evidence Enactment (Negeri Sembilan) 2003 provides a non-Muslim is competent to give *bayyinah* for a Muslim if his evidence is acceptable according to Hukum Syarak. *Explanation—Bayyinah* of a non-Muslim expert against a Muslim is acceptable if desired. According to this section, the Syariah High Court has discretionary power to consider testimony from children, even if they are non-Muslim, regarding their mother's life and behaviour. If any of their statements are acceptable under Syariah law, they may be considered.⁷

Thus, by considering all legislation and all evidence submitted to the Seremban Syariah High Court, the Honourable Judge delivered his judgment by giving the order in favour of the family of the deceased.

4. Commentary

With regards to the decision made by Seremban Syariah High Court, it is believed that the overall judgment was sound assisted by cautious analysis of legislation, and legal issues, and keen-eyed judge consideration is meritorious. It is further noted that every Syariah judge applies independent reasoning (*ijtihad*) in delivering their judgment. Moreover, the binding precedent rule does not apply to the Syariah court judge. It should be noted that every Syariah court is enacted by State authority and their decision might be varied from one another. This can be seen from the recent *Nyonya Tahir's* case and *M Moorthy's* case. Despite *M Moorthy's* case being decided earlier than *Nyonya Tahir's* case, the Syariah judge in *Nyonya Tahir's* case chose not to adhere to the decision made by the Syariah judge in *M Moorthy's* case. It is worth noting that both cases have a similar cause of action, which involves the declaration of a deceased person's religion at the time of their death.

According to the Syariah judge in *Nyonya Tahir's* case, he provided guidelines for identifying an apostate person based on three criteria: expressing disbelief through action, speech, or heart. According to the Syariah judge, if a person performs either of these three criteria, that person is considered renounced the religion of Islam. Having this guideline gives a clearer approach to determining whether a person is committed to apostasy. The Syariah court found that the deceased in *Nyonya Tahir's* case expressed her disbelief by action and speech where there was proof from testimonies of deceased children, exhibit P4, and *Surat Akuan* sworn by the deceased.

⁷ *Nyonya Tahir* (n 2) 347.

Furthermore, *Nyonya Tahir's* case, the initiation of an application to the Syariah court is carried out by State religious departments, namely the Negeri Sembilan Islamic Religious Council, the Negeri Sembilan Islamic Religious Affairs Department, and the Islamic Religious Officer of the District of Tampin, Negeri Sembilan. As per legal records, Nyonya binti Tahir is identified as a Muslim and Malay based on her identity card, and hence, these departments represent the deceased. If the deceased is alive, she must go to Syariah court to file the declaration of renouncing the religion of Islam. It should be noted that if the deceased were alive, she would have been required to file the declaration of renouncing the religion of Islam herself by going to the Syariah court. The religious departments involved in this matter are solely concerned with persons related to the religion of Islam, and they have the authority to manage the deceased's burial if the court determines that she was a Muslim at the time of her passing. The next of kin of the deceased cannot represent her, as non-Muslims are not permitted to be named as parties in Syariah court proceedings.

Besides, it is imperative to note that the court's approach of accepting the testimonies of her non-Muslim children as bayyinah is significant. The Syariah High Court in Seremban deemed the testimony of the deceased son, Chiang Ah Fatt, and the deceased daughter, Chiang Kwai Ying, admissible in the Syariah court. Under Syariah law, testimony is considered evidence and falls into two categories: Syahadah and Bayyinah. Muslims can give testimony in a Syariah court and be admitted to either Syahadah or Bayyinah.⁸ However, non-Muslims are also permitted to provide testimony in the Syariah court and may be deemed competent to provide bayyinah for a Muslim if their testimony is admissible according to Hukum Syarak.⁹ This provision allows non-Muslims to give their testimony in the Syariah court, and such testimony holds weight in the eye of Syarak.

However, a different approach has been taken in *M Moorthy's* case by the Syariah High Court. M Moorthy is a Hindu convert to Islam without informing his family members. Moorthy was disabled from the waist down after the incident at the Sungai Udang Military Camp. He hurt his head when he fell out of his wheelchair on November 11th, 2005, and went into a coma. He did not make a full recovery and died on December 20, 2005.¹⁰ Major Shukri informed Kaliasammal, the wife of the deceased, that Moorthy had converted to Islam with the name Mohammad bin Abdullah on October 11, 2004, according to section 85 of the Administration of Islamic Law (Federal Territories) Act of 1993 and would receive an Islamic burial. Upon receiving this information, Kaliasammal expressed her objection to the Islamic Religious Affairs Council who arrived to retrieve the body upon Moorthy's passing. To release the body, the Hospital Director, had to request a court order to confirm Moorthy's religious status.¹¹ Soon after M Moorthy's demise, an application was made in the Federal

⁸ Syariah Court Evidence (Negeri Sembilan) Enactment 2003, s 83(1).

⁹ Syariah Court Evidence (Negeri Sembilan) Enactment 2003, s 83(2).

¹⁰ K Shanmuga, 'A Summary of the Case and Related Events of *Kaliasammal Sinnasamy v Islamic Religious Affairs Council of the Federal Territory, Director Kuala Lumpur General Hospital & Government of Malaysia*' (*Malaysian Bar*, 29 December 2005) <<https://www.malaysianbar.org.my/article/news/bar-news/news/re-everest-moorthy>>.

¹¹ *ibid.*

Territories of Syariah High Court to declare the deceased had converted to Islam, as Muslim at the time of his death. This was necessary for them to be buried according to Muslim rites. Based on the evidence presented in the Syariah High Court, which included sealed copies of exhibits from the Pejabat Agama Kem Kementah Kuala Lumpur, the Federal Territories Syariah High Court recognised the declaration of faith made by the deceased on October 11th, 2004, in the presence of two male witnesses. As per the requirements of section 44(1)(e) of the Syariah Court Evidence (Federal Territories) Act 1997, the facts of the conversion did not need to be proven as the sealed documents were admissible as public documents.¹² Ultimately, the court ruled in favour of the deceased being recognised as Muslim at the time of their death, allowing them to be buried according to Muslim customs. There is no evidence to suggest that the deceased renounced their Islamic faith after this conversion. Therefore, it is necessary to provide the deceased with a Muslim burial.¹³

M Moorthy's case is a good comparison to *Nyonya Tahir's* case with regards to the non-Muslims being witnesses in the Syariah court. In *M Moorthy's* case, the Syariah High Court took a different approach when not calling any non-Muslim family members of the deceased as a witness to testify in the Syariah court to verify his lifestyle. In the Court of Appeal's application of *M Moorthy's* wife, Kaliasammal, Abdul Wahab Patail JCA was concerned about the issue of whether he had truly converted to Islam. According to His Lordship, the determination of whether the deceased was a Muslim is the responsibility of the Syariah High Court. This issue becomes emotional due to the assumption that a non-Muslim is not allowed to be named as one of the parties in the Syariah Court because the Syariah Court has no jurisdiction over non-Muslims. The validity of this assumption can be found in Item 1 List II of the Federal Constitution, which states that the Syariah Court has no jurisdiction over non-Muslims.

... the constitution, organisation, and procedure of Syariah Courts which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph.

Nyonya Tahir's case offers a promising opportunity for non-Muslims to play a role in the Syariah court. This inclusive approach allows non-Muslims to provide testimony in cases that directly affect them, such as custody battles between Muslim and non-Muslim parents, cases involving conversion out of Islam, and declarations of the religious status of the deceased. Although non-Muslims are not permitted to be a party to proceedings in the Syariah Court, section 83 (2) of the Syariah Court Evidence (Negeri Sembilan) Enactment guarantees their appearance as witnesses. This is a significant moment for Syariah courts to adopt this approach and incorporate it into their procedures.

The Syariah Court Judge's observations in *Nyonya Tahir's* case are simply astounding. His Lordship meticulously explained the various types of evidence submitted to the court,

¹² *Dalam Perkara Mohammad Abdullah, Ex-Parte Majlis Agama Islam Wilayah Persekutuan* [2007] 1 Current Law Journal (Syariah), 407, 409 (Syariah HC).

¹³ *ibid.*

including *syahadah*, *bayyinah*, *qarinah*, and written confessions from the deceased. Confession, being the highest level of evidence in Syariah law, was scrutinised closely by the court. Despite the confession being in written form and the confessor no longer alive, the court deemed its content as corroborative evidence to the oral testimony of the witness, as outlined in section 57 and section 58 of the Syariah Court Evidence (Negeri Sembilan) Enactment 2003.

Both courts have started to recognise non-Muslims as witnesses in the Syariah Court, despite their varying approaches. This promising advancement has the potential to effectively settle legal disputes between Muslims and non-Muslims in the future.

5. Conclusion

The decision between *M Moorthy's* case and *Nyonya Tahir's* case has an impact not only on the Syariah law but also on society at large in Malaysia. Conversion into or out of Islam is a very sensitive issue because it is related to belief, culture, marriage and inheritance. The presiding judge must take a cautionary approach in determining this issue beforehand. Since Syariah evidence law guarantees the appearance of non-Muslims in giving testimony in Syariah Court, Syariah Court Judge may take this as an opportunity to embrace this approach in their decision. Having this approach in our law might assist in giving solutions to very long conflict issues between Muslims and non-Muslims in Malaysia. It should be noted that the Syariah judge in Malaysia applies independent reasoning therefore this approach does not make their hand tied to bind this approach. Applying this approach to the Syariah Court shows that the Syariah Court is prepared to welcome non-Muslims and provide them with a platform to express themselves.

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