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The Silent Threat: Human Trafficking and Migrant Smuggling Procedures Through the Eyes of the Courts in Malaysia

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ABSTRACT

Human trafficking and migrant smuggling are two severe international crimes. It is a worldwide problem, and it is particularly pernicious. There are many parts to human trafficking, including forced labour, commercial sex, and organ harvesting. Human traffickers are known to use violent, manipulative, and deceptive methods and tactics to lure vulnerable targets into situations of exploitation. In Malaysia, it is estimated that millions of men, women, and children worldwide are victims of these crimes. The international community has adopted the protocols and the United Nations Office on Drugs and Crime in assisting member states to combat these internationally organised crimes. However, there are inadequate laws, both substantive and procedural, in place to deal with those who perpetrate such crimes, to bring them to account for their misdeeds, and to protect the victims of such crimes where such crimes continue to flourish because of the high profits.

Keywords: Human trafficking; Migrant smuggling; Courts; Malaysia

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1. Introduction

Human trafficking is a worldwide problem, and it is especially pernicious. According to the United Nations Office on Drugs and Crime human trafficking and migrant smuggling are global and widespread crimes that use men, women and children for profit. The organised networks behind these lucrative crimes take advantage of people who are vulnerable, desperate or simply seeking a better life. There are many parts to human trafficking—



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including forced labour, commercial sex, and organ harvesting. It is a multi-billion dollar business and is one of the most significant organised crimes in the world today.

Over the years, we have become accustomed to reading news about human trafficking in far-away places in Europe, Africa and the USA/Mexico border. We usually associate human trafficking with cases we read in the news involving foreigners—Myanmarese, Bangladeshi, Vietnamese, Afghans, Iranians, Syrians, Sri Lankans, Africans and Latin Americans. Lately, however, we have had news of cyber slavery involving Malaysians in Cambodia and Thailand. Victims are lured by fake offers of lucrative work, kidnapped by the syndicates, held captive and forced, under threats of violence, to perpetrate web scams. We have had news of Malaysians being rescued from Cambodian human traffickers. Reality came crashing when the heart-breaking news of 23-year-old trainee teacher Goi Zhen Feng—he was a victim of the scammers’ feeding ground—social media. Goi met a girlfriend online and they would talk over video calls.¹ He had gone to Bangkok to meet his girlfriend but did not return. Goi died alone in a hospital in the western Thai border town of Mae Sot; his body bore signs of abuse, including internal bleeding. We cannot imagine what Goi must have gone through and the deep pain and suffering his parents must have endured. We now know that there are many victims of human trafficking involving Malaysians. As such, the theme for this seminar is most appropriate and timely.

The ‘Procedures Through the Eyes of The Courts’ will be addressed in four parts:

- (1) The legal framework of human trafficking and migrant smuggling;
- (2) The role of the Court in respect of procedural law;
- (3) Criminal proceedings under the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007; and
- (4) Protection orders issued by courts for human trafficking and migrant smuggling victims.

2. The Legal Framework of Human Trafficking and Migrant Smuggling

2.1 International Laws and Standards

Everyone, regardless of race, gender, nationality, ethnicity, language, religion, or other status, is born free and equal and has the right to human rights. This is one of the fundamental principles of the rule of law. Internationally, the Universal Declaration of Human Rights 1948 outlines the fundamental human rights that must be universally protected.

In this regard, human rights violations take various forms, including denying a person one or more of the human rights to which he is entitled. Human trafficking and migrant

¹ ‘After son’s death, dad wants other scam victims saved’ *The Star* (Kuala Lumpur, 22 September 2022) <<https://www.thestar.com.my/news/nation/2022/09/22/after-sons-death-dad-wants-other-scam-victims-saved>>.

smuggling are two examples of such human rights violations. While these two types of human rights violations are sometimes conflated, they are, in law and in fact, distinct crimes.

Whilst there is no definitive estimate of the number of victims of these two crimes globally, it is estimated that millions of men, women, and children worldwide are victims of human trafficking and migrant smuggling. To lure vulnerable targets into situations of exploitation, traffickers and smugglers are known to use violent, manipulative, and deceptive methods and tactics. These are serious offences that have had a significant impact on the lives and safety of millions of families around the world.

As such, the United Nations Office on Drugs and Crime has taken the lead role internationally to combat human trafficking and smuggling of migrants under two United Nations General Assembly Protocols adopted in November 2000. The first is the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Particularly Women and Children.² The second Protocol is the Protocol against the Smuggling of Migrants by Land, Sea and Air³ which addresses the growing problem of organized criminal groups who smuggle migrants primarily for money. This Protocol aims at reducing the smuggling of migrants, protecting the rights of smuggled migrants, and preventing the abuse associated with this crime. Malaysia is a party to the United Nations' Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Particularly Women and Children but not a party to the Protocol against the Smuggling of Migrants by Land, Sea and Air.

The words 'human trafficking' and 'smuggling of migrants' have been widely defined under the United Nations' Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Particularly Women and Children and Protocol against the Smuggling of Migrants by Land, Sea and Air. Article 3(a) of the United Nations' Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Particularly Women and Children Protocol defines the crime of 'human trafficking' by broadly defining 'person trafficking' as follows:

'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of

² Adopted in November 2000 by the United Nations General Assembly. It is the first legally binding instrument with an internationally recognised definition of human trafficking. This definition provides a vital tool for the identification of victims, whether men, women or children, and for the detection of all forms of exploitation which constitute human trafficking. Countries that ratify this treaty must criminalise human trafficking and develop anti-trafficking laws in line with the Protocol's legal provisions.

³ It is the first global international instrument to contain an agreed definition of smuggling of migrants. It addresses the growing problem of organised criminal groups who smuggle migrants primarily for money. The Protocol aims at reducing the smuggling of migrants, protecting the rights of smuggled migrants, and preventing the abuse associated with this crime. Countries that ratify this treaty must ensure that migrant smuggling is criminalised in accordance with the Protocol's legal requirements.

sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

On the other hand, 'smuggling of migrants' is defined in Article 3(a) of the Protocol against the Smuggling of Migrants by Land, Sea and Air:

'Smuggling of migrants' shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.

At the international level, the United Nations Office on Drugs and Crime plays an important role into supporting countries in protecting victims and eradicating the crimes of human trafficking and migrant smuggling.⁴ The United Nations Office on Drugs and Crime is a source of global expertise, knowledge and innovation in the fields of human trafficking and migrant smuggling. The Office provides an extensive collection of multilingual, evidence-based publications, tools and manuals for training, education, research, policy and legal reform purposes. Ultimately, their work is to safeguard people from the abuse, neglect, exploitation or even death that is associated with these two crimes.

2.2 Malaysia's Domestic Legislation

In Malaysia, protection against human trafficking and migrant smuggling is a constitutional fundamental. Firstly, the concept of equality is embodied in Article 8 of the Federal Constitution, which declares that all persons are equal before the law and are entitled to equal protection of the law. Secondly, slavery and forced labour are prohibited under Article 6 of the Federal Constitution.

The Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 provides a comprehensive legal framework dealing with a wide range of offences involving conduct associated with human trafficking and migrant smuggling. Initially, promulgated as the Anti-Trafficking in Persons Act 2007, the Act was amended in 2010 and renamed as the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007. As its name suggests, the amendment incorporates provisions relating to the smuggling of migrants in Part IIIA of the Act. According to a statement by the then Minister of Home Affairs of Malaysia, Datuk Seri Hishammuddin Hussein, the 2010 amendments were based on the understanding that trafficking in persons and smuggling of migrants were 'closely linked and interlinked, particularly in the context of exploitation of foreign labour and migrants.'⁵

⁴ United Nations Office on Drugs and Crime, 'Human Trafficking and Migrant Smuggling' <<https://www.unodc.org/unodc/en/human-trafficking/index.html>>.

⁵ Lenore Lyons and Michele Ford, 'Trafficking Versus Smuggling: Malaysia's Anti-Trafficking in Persons Act 1' in Sallie Yea (ed), *Human Trafficking in Asia: Forcing Issues* (Routledge 2014) 35–48 <<https://doi.org/10.4324/9781315851976>>.

The preamble of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act provides that it is 'An Act to prevent and combat trafficking in persons and smuggling of migrants and to provide for matters connected therewith.' Section 2 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act defines 'trafficking in persons' as follows:

'trafficking in persons' means all actions of recruiting, conveying, transferring, acquiring, maintaining, harbouring, providing or receiving, a person, for the purpose of exploitation, by the following means:

- (a) threat or use of force or other forms of coercion;
- (b) abduction;
- (c) fraud;
- (d) deception;
- (e) abuse of power;
- (f) abuse of the position of vulnerability of a person to an act of trafficking in persons; or
- (g) the giving or receiving of payments or benefits to obtain the consent of a person having control over the trafficked person.

Meanwhile, 'smuggling of migrants' is defined under section 2 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act in the following manner:

'smuggling of migrants' means—

- (a) arranging, facilitating or organising, directly or indirectly, a person's unlawful entry into or through, or unlawful exit from, any country of which the person is not a citizen or permanent resident either knowing or having reason to believe that the person's entry or exit is unlawful; and
- (b) recruiting, conveying, transferring, concealing, harbouring or providing any other assistance or service for the purpose of carrying out the acts referred to in paragraph (a).

The Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act sets out 11 offences relating to the smuggling of migrants⁶ as well as numerous offences relating to trafficking in persons.⁷ Criminal liability is also extended to corporations and their agents and employees.⁸ The prosecution of offences under the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act requires written consent from the Public Prosecutor.⁹ Part IV of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act provides powers of

⁶ Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, ss 26A–26K.

⁷ *ibid* ss 12–15A.

⁸ *ibid* ss 63–65.

⁹ *ibid* s 41.

investigation, arrest, search and seizure and examination to ‘enforcement officers’,¹⁰ who are defined as police, immigration, customs, Malaysian Maritime Enforcement Agency or labour officers.¹¹ Enforcement officers are indemnified against prosecution under the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act for any act, statement or omission made in good faith.¹²

More significantly, the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act’s jurisdiction is extra-territorial.¹³ The Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act applies to offences committed within or outside Malaysia, regardless of the offender’s nationality or citizenship—if Malaysia is the receiving or transit country, if the exploitation occurs in Malaysia, and if the receiving or transit country is a foreign country but the human trafficking begins or ends in Malaysia. This is consistent with Article 4 of the UN TIP Protocol, which states that the Protocol applies to preventing, investigating and prosecuting transnational crimes involving an organised criminal group.

On top of that, the enforcement of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act is also supplemented by the Immigration Act 1959/63 (Act 155), Employment Act 1955 (Act 265), Malaysian Maritime Enforcement Agency Act 2004 (Act 633), Customs Act 1967 (Act 235), Child Act 2001 (Act 611), Penal Code (Act 574), Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (Act 297). The Extradition Act 1992 (Act 479) and the Mutual Assistance in Criminal Matters Act 2002 (Act 621) offer some legislative assistance pertaining to international human trafficking and migrant smuggling affairs.

3. The Role of the Court in Respect of Procedural Law

3.1 The Court’s Role in General

The function of the courts is to interpret the law. The most recent authority on the importance of the duty of the Court to interpret the law is the judgment of the Federal Court in *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases*¹⁴ where the Federal Court most critically observed as follows:

Be that as it may, one of the functions of the courts is to interpret the law. An inherent part of this function is to see that the Executive acts within the law and does not encroach unnecessarily into the realm of liberty of the subject (see *Re Datuk James Wong Kim Min; Minister of Home Affairs, Malaysia v Datuk James Wong Kim Min* [1976] 2 MLJ 245 at p 251; [1976] MLRA 132 at pp 145–146 (FC)). Whatever safeguards that are provided by law against the

¹⁰ *ibid* ss 28–34.

¹¹ *ibid* s 27.

¹² *ibid* s 62.

¹³ *ibid* s 3.

¹⁴ [2021] 3 Malayan Law Journal 759 (FC).

improper exercise of such power must be vigorously enforced by the courts. As such, strict compliance with statutory requirements must be observed in depriving a person of his liberty. The material provisions of the law authorising preventive detention must be strictly construed and safeguards which the law provides for the protection of any citizen must be liberally interpreted.

In this regard, the courts have manifested their powers in certain cases, among others, in the case of *Ketheeswaran all Kanagaratnam v Public Prosecutor*.¹⁵ In this case, the applicants faced three charges under section 12 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act. For the purpose of the trial, the prosecution delivered to the applicants the depositions made by the three victims in the three charges pursuant to section 51A of the Criminal Procedure Code. Later, the applicants filed an application to challenge the constitutionality of section 61A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act. Section 61A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act, in gist, provides that the deposition of trafficked persons or smuggled migrants who could not be found would be accepted as prima facie evidence without needing it to be tested under cross-examination. In support of their application, the applicants contended that section 61A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act was unconstitutional and in contravention of Articles 121(1), 8(1), and 5(1) of the Federal Constitution.

The High Court dismissed this application and held that section 61A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act does not contravene Articles 121(1), 8(1) and 5(1) of the Federal Constitution because section 61A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act does not usurp the power of the Court as the final arbiter to rule and decide to make a finding and arrive at a decision. The High Court further ruled that section 61A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act is concerned only with prima facie evidence and the consideration of the deposition itself does not provide a prima facie case. In order to establish a prima facie case, the courts still have to consider the evidence in totality before arriving at its decision. The depositions would still be subject to an evaluation as to their contents, irrespective of the fact that the statement is not subject to cross-examination.

3.2 Procedural Law as Part of Access to Justice

That said, procedural law in respect of human trafficking and migrant smuggling crimes has a significant impact on the overall accessibility of a legal system. One shall be mindful that the procedural law forms parts of the access to justice and seeks to “provide the machinery, the manner or means, by recourse to which legal rights and duties may be enforced or recognised by courts”.¹⁶

¹⁵ [2022] 8 Malayan Law Journal 23 (HC).

¹⁶ [1997] 1 Malayan Law Journal 145, 222 (FC), per Edgar Joseph Jr FCJ.

The purpose of procedural law is to facilitate access to justice, as observed by the Indian Supreme Court in *The State of Punjab v Shamlal Murari*, and with which I respectfully agree:¹⁷

... [P]rocedural law is not to be a tyrant but a servant, not an obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the hand-maid and not the mistress, a lubricant, not a resistant in the administration of justice.

Access to justice has assumed constitutional status due to its inseparability from the rule of law. As Lord Phillips observed in the United Kingdom Supreme Court case of *Ahmed v HM Treasury*, 'Access to a court to protect one's rights is the foundation of the rule of law.'¹⁸

And, when it comes to the issues involving the rule of law, Lord Steyn, in the case of *Regina v Secretary of State for the Home Department, ex p Pierson*, observed that:¹⁹

The rule of law in its wider sense has procedural and substantive effect. ... Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural.

4. Criminal Proceedings under the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act

4.1 General

Human trafficking and migrant smuggling are comprehensively criminalised under Malaysian law. The statutory basis to prosecute the perpetrator of these two crimes is the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act.

However, human trafficking and smuggling of migrants are governed by different procedures in criminal proceedings. Criminal proceedings for human trafficking are conducted under the Criminal Procedure Code.²⁰ On the other hand, migrant smuggling cases are conducted under the Security Offences (Special Measures) Act 2012 because offences under Part IIIA (Smuggling of Migrants) are deemed as 'Security Offences' as defined in section 3 of the Security Offences (Special Measures) Act and the First Schedule of the Security Offences (Special Measures) Act.

In Malaysia, criminal procedure law is codified in the Criminal Procedure Code, which controls the entire process of criminal proceedings from the beginning, i.e., the commission

¹⁷ [1976] 1 Supreme Court Cases 719, para. 8 (SC India).

¹⁸ [2010] United Kingdom Supreme Court 2, para 146 (SC UK).

¹⁹ [1998] Appeal Cases 539, 591 (SC UK).

²⁰ Section 3 of the Criminal Procedure Code lays down the general rule that all offences under the Penal Code, as well as all offences in statutes other than the Penal Code, must be inquired into and tried according to the same provisions of the Criminal Procedure Code.

of the offence to the conclusion of the judgment for that particular case.²¹ The Criminal Procedure Code prescribes rules and procedures to ensure an accused receives a fair trial. In a criminal trial, observing certain basic rules is the most effective safeguard against unfairness, errors and abuse.

In *Foo Yong Fong v Regina*,²² Rose CJ observed as follows:

I may perhaps be forgiven for observing that forms and procedures, whether civil or criminal, are not intended or devised in order to put obstacles in the way of the plaintiff or the prosecution, as the case may be. They are designed to ensure that the issues to be determined are fairly and clearly stated, so that the defendant in a civil and the accused in a criminal case knows the case that he has to meet and is not placed in a position of embarrassment. Thus, a fair trial is assured.

Courts have decided in many cases that a departure from the provisions of the Criminal Procedure Code is a ground upon which an appellate court may intervene. However, there is an important exception to that rule. The appellate court would not exercise that intervention power if there were no miscarriage of justice; or ‘failure of justice’ as the phrase employed by section 422 of the Criminal Procedure Code. In *Goh Keat Peng v PP*,²³ Zulekfli J (as he then was) said as follows:

It is to be noted that the relevant provisions of the Criminal Procedure Code and the Act (ie the Courts of Judicature Act) have been enacted with the primary purpose of ensuring proper conduct of the prosecution of an offence and to prevent injustice meted out on any party.

Every accused has a right to a fair trial. A fair trial includes fair and proper opportunities allowed by law to prove one’s innocence. Adducing evidence in support of the defence is a valuable right denying that right means denying of a fair trial. It is essential that rules of procedure designed to ensure justice should be scrupulously followed and the courts should be vigilant in seeing that there is no breach of them.²⁴

It is also a cardinal principle that in criminal cases, the provisions of the law must be strictly followed.²⁵ No court may override the Criminal Procedure Code’s express provision or any other statute.²⁶ As said by Justice Zulekfli in the case of *Goh Keat Peng v PP*,²⁷ the relevant provisions of the Criminal Procedure Code have been enacted with the primary purpose of ensuring a fair trial, proper conduct of the prosecution of an offence, and to

²¹ [2011] 9 Malayan Law Journal 752 (HC).

²² [1962] 1 Malayan Law Journal 156 (HC Singapore).

²³ [2001] 2 Current Law Journal 498 (HC).

²⁴ [2007] 2 Supreme Court Cases 258 (SC India).

²⁵ [1986] 2 Malayan Law Journal 319 (HC).

²⁶ [2007] 4 All Malaysia Reports 578 (CA).

²⁷ [2001] 2 Current Law Journal 498 (HC).

prevent injustice being meted out to any party. We must always bear in mind that, however serious a crime a person is accused of, and however despicable the accused may be, that despicable person may only be convicted on evidence produced in accordance with the stringent requirements of the law.²⁸

In criminal cases, compliance with the provisions of the Criminal Procedure Code is mandatory. The accused person is not competent to waive non-compliance with any of the provisions of the Criminal Procedure Code by the Public Prosecutor. No default by the defence or waiver or agreement by the parties can supersede the written law, especially in criminal matters.²⁹

In *PP v H Chamras Tasaso*,³⁰ Hashim Yeop A Sani J, commenting on the criminal justice system, said that:

Our system of justice has its own traditions. These traditions are based on well-established principles. One of these principles is that an accused person is presumed innocent until proven guilty. The right of the accused in any criminal trial will be ineffective and meaningless unless such right is supported by the spirit and the traditions on which our system is built. The importance of the presumption of innocence lies not on its abstract principle but in the extent to which in actual practice an accused person, irrespective whether he be a citizen or not, is in a position to assert that principle against an over-eager prosecutor or official who may find it easier to build up a case based on the assumption of guilt than by the laborious collection of independent evidence.

This follows that another important concept in criminal proceedings that 'one is innocent until proven guilty'. This principle is recognised in Article 11 of the Universal Declaration of Human Rights, which provides that, 'Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which they have had all the guarantees necessary for their defence.' A similar declaration is contained in the European Convention on Human Rights. This right is embodied in Article 5(3) of the Federal Constitution in Malaysia. The Federal Court in *Pendakwa Raya v Gan Boon Aun*³¹ affirmed the presumption of innocence as part of our criminal jurisprudence. In that case, the Federal Court opined:

In *PP v Yuvaraj* [1969] 2 MLJ 89, the Privy Council held that the principle that the prosecution must prove its case against an accused beyond reasonable

²⁸ [1987] Current Law Journal (Rep) 145 (SC).

²⁹ *Fan Yew Teng v PP* [1971] 2 Malayan Law Journal 271 (FC); *Chah Siew Kok v PP* [1987] Current Law Journal (Rep) 518 (HC); *Ooi Lean Chai v PP* [1991] 2 Malayan Law Journal 552 (SC); *Alcontara all Ambross Anthony v PP* [1996] 1 Current Law Journal 705 (FC); and *Mahdi Keramatviyarsagh Khodavirdi v Public Prosecutor* [2015] 3 Current Law Journal 336 (CA).

³⁰ [1975] 2 Malayan Law Journal 44, 44 (HC).

³¹ [2017] 3 All Malaysia Reports 164 (FC).

doubt was fundamental to the administration of justice under the common law. This means that the presumption of innocence is a fundamental right at common law just as access to justice is a common law fundamental right. It is a right that falls within Article 5(1) of the Constitution, as the definition of 'law' in Article 160(2) and section 66 of the Interpretation Acts 1948 and 1967 includes written law and the common law of England. In *Ranjitsing v State of Maharashtra* (2005) 5 SCC 294 and in *Rajagopal v State of Tamil Nadu* (1994) 6 SCC 632, the Indian Supreme Court held that the presumption of innocence is a human right protected by Article 21.

It is also essential to look into the discretionary powers of judges, especially when it comes to procedural law. In this context, they are the Criminal Procedure Code, the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act and the Security Offences (Special Measures) Act. For example, in many of the provisions found in the Criminal Procedure Code, the courts and judges have been vested with wide discretionary powers on a variety of matters such as authorising detention pending investigation, issuing warrants of arrest, search, etc. It is part of the judicial function that is not controlled by fixed rules of law. However, like all discretionary powers, the judges will (and must) exercise this power judiciously and according to justiciable reason. Lord Halsbury in *Sharpe v Wakefield*³² held that 'discretion means, 'according to the rules of reason and justice, not according to private opinions; according to law and not humour. It is not to be arbitrary, vague and fanciful, but legal and regular.' The word 'discretion' in itself implies vigilant circumspection and care, therefore, where the legislature concedes wide discretion, it also imposes a heavy responsibility.³³

Similarly, in *Veerasingam v PP*,³⁴ Thomson CJ opined that:

Clearly, to exercise his discretion properly the judge must apply his mind to all the relevant material. He must consider the circumstances of the original trial. He must consider the original Petition of Appeal. And he must consider the circumstances which are now urged upon him to induce him to allow any departure from or addition to that original Petition of Appeal. He must consider his own powers as to such matters as the granting of adjournment and the requiring of Notice to be given. And then he must exercise his discretion as he sees fit in order that substantial justice may be done in the matter. It may be that he may find it helpful to look at what has been done in some other case by some other judge but if he does he must be careful to look at what that other judge has done merely as an illustration and not as laying down any judicial precedent (see the observations of Bowen LJ, in *Jones v Curling* 13 QBD 262, 271, *supra*).

³² [1891] Appeal Cases 173 (HL).

³³ *Ibrahim v Emperor* All Indian Reports 1933 Sind 49 (HC India).

³⁴ [1958] Malayan Law Journal 76, 79 (CA).

Next, on the burden of proof in respect of criminal proceedings since human trafficking and migrant smuggling are both penal offences. It is a well-established principle that the burden of proving a criminal charge rests on the Public Prosecutor. The Public Prosecutor must prove their case beyond reasonable doubt, which involves two aspects. One is the legal burden on the prosecution to prove its case beyond reasonable doubt and the other is the evidential burden on the accused to raise a reasonable doubt. These burdens can only be fully discharged at the end of the whole case when the defence has closed its case.³⁵

For example, in the case of human trafficking, exploitation is one of the essential elements to prove the offence. It is well settled through numerous judicial decisions that the element of coercion is essential in the definition of 'trafficking in persons' under section 12 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act.³⁶ Hence, the burden is on the prosecution to prove coercion.³⁷ The accused would be entitled to a full acquittal if the prosecution had not proved the element of coercion.

In the case of smuggling of migrants, section 2 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act defined the act of 'smuggling of migrants' as, inter alia, 'arranging, facilitating or organising, directly or indirectly, a person's unlawful entry into ... or unlawful exit from any country of which the person is not a citizen or permanent resident ...'. By this definition, facilitating or arranging for unlawful entry or unlawful exit is the key ingredient or actus reus of the offence 'smuggling of migrants.' The court would acquit the accused if the prosecution failed to prove their case on this crucial ingredient. In this respect, the Court of Appeal in *Public Prosecutor v Sumon Khan*,³⁸ held as follows:

As far as the second accused's role is concerned, it was merely confined to looking after the said 13 Bangladeshis in Sibul including purchasing the flight tickets to KLIA from Sibul, Sarawak and it does not involve facilitating or arranging for unlawful entry or unlawful exit of the said 13 Bangladeshis, into or out of Malaysia. At Sibul, Sarawak, the 13 Bangladeshis were already in Malaysia and when they flew to KLIA they were not exiting Malaysia. Hence the essential element of the offence of smuggling of migrants, that is to arrange the said Bangladeshis to enter and exit Malaysia, is not made out against the second accused because his role, as instructed by Sivasankar, was to assist while the said 13 Bangladeshis were in Sibul only. He was never involved in cross border or international smuggling.

What about Practice Directions issued by the Courts? The Criminal Procedure Code also must be read alongside the various practice directions issued by the Chief Justice, President of the Court of Appeal, Chief Judge of each High Court or Chief Registrar of the Federal

³⁵ [2005] 2 Malayan Law Journal 301 (FC).

³⁶ *PP lwn Ooi Wei Yhee* [2016] 2 Current Law Journal 861 (HC); *PP v Mong Soon Tat* [2019] 1 Legal Network Series 726 (HC); *Siow Hee Liong lwn PP* [2017] 1 Legal Network Series 348 (HC).

³⁷ *Siow Hee Liong lwn PP* [2017] 1 Legal Network Series 348 (HC).

³⁸ [2019] 2 Malayan Law Journal 215 (CA).

Court from time to time for the efficient and orderly disposal of criminal cases. Practice Directions do not have the force of law. They provide guidelines for more effective implementation of the Criminal Procedure Code. In other words, practice direction is only a direction for administrative purposes. However, once practice directions have been properly and legally issued, they must be complied with.³⁹ For migrant smuggling cases, the Chief Justice has issued a Chief Justice's Practice Direction No. 1 2017 in relation to the day-to-day registration, case code to categorise the type of cases, and hearing of cases in the High Courts.

On this matter, the judiciary has also taken its own initiatives to expedite cases concerning human trafficking and migrant smuggling. One of the initiatives is the establishment of a specialised court known as the Anti-Trafficking in Persons Sessions Court in Klang Sessions Court to deal with human trafficking cases⁴⁰ on 28 March 2018 to deal with human trafficking cases. Klang has been the pioneer location⁴¹ and presently, Klang Sessions Court is the only Anti-Trafficking in Persons Sessions Court operating in Malaysia.⁴² The court in its first month successfully expedited the hearing of the 12 trafficking cases in an existing court by setting aside a few hours a week for senior, experienced judges to focus on trafficking cases.⁴³ It allowed the prosecutors to engage with victims at least two weeks before trial to better understand and address victims properly.⁴⁴

For the speedy disposal of human trafficking cases, the Judiciary also has a fixed timeline of 9 months from the date of registration for the disposal of these types of offences.⁴⁵

Statistics wise, between 2019 and Jun 2022,⁴⁶ it shows that yearly, the number of cases of migrant smuggling appears not to deviate too much, although the trend appears to show a decline in the number of registrations. In 2019, the total number of migrant smuggling cases that were registered was 329, in 2020 it was 221 cases, in 2021 it was 218 cases, and as of June 2022, it was 96 cases. Over these four years, the High Court has disposed of 741 cases leaving 238 cases pending disposal. This translates to a disposal rate of 86%.

As for human trafficking cases, the disposal rate is 90% between the years 2019 and Jun 2022. This disposal rate is translated from the number of registrations of human trafficking

³⁹ *Yeo Yoo Teik v Jemaah Pengadilan Sewa, Pulau Pinang* [1996] 2 Current Law Journal 628 (CA); and *Raja Guppal all Ramasamy v Sagarar all Pakiam* [1999] 2 Current Law Journal 972 (CA).

⁴⁰ Chief Justice Tun Raus Sharif speech during the official of the Anti-Trafficking in Persons Sessions Court in Klang dated 28 March 2018.

⁴¹ *ibid.*

⁴² Information from Pejabat Pendaftar Mahkamah Rendah Malaya, Istana Kehakiman, Putrajaya.

⁴³ Rohaida Nordin and Renuka a/p Jeyabalan, 'Protection of the Rights of the Victims of Human Trafficking: Has Malaysia Done Enough' (2019) 3 Journal of Southeast Asian Human Rights 300–316 <<https://doi.org/10.19184/jseahr.v3i2.9231>>.

⁴⁴ *ibid.*

⁴⁵ *ibid.*

⁴⁶ 'Strategic Development and Training division' (Official Portal of the Office of the Chief Registrar, Federal Court of Malaysia) <<https://www.kehakiman.gov.my/en/strategic-development-and-training-division>>.

cases over these four years, which was 1381 cases, and from this figure, the courts managed to dispose of 1247 cases. As you can tell from the numbers and percentage, the performance of the courts in respect of these two crimes is at near maximum efficiency.

4.2 Procedures for Human Trafficking Offences under the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act and the Criminal Procedure Code

Human trafficking offences under the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act are tried in the Sessions Court. The Sessions Court has jurisdiction to try all offences other than offences punishable by death. It can pass any sentence allowed by law other than the death sentence.⁴⁷

The Sessions Court is within the class of Subordinate Courts, where the applicable trial procedures are summary trial procedures as laid down in chapter XIX of the Criminal Procedure Code. In Malaysia's context, summary trial means trial before the subordinate court pursuant to chapter XIX of the Criminal Procedure Code.⁴⁸ Although chapter XIX of the Criminal Procedure Code is entitled 'Summary Trials by Magistrates', the procedure applies to trials before the Sessions Courts.⁴⁹

A summary trial is a speedy trial dispensing with unnecessary formalities or delay.⁵⁰ A summary trial is, however, to be conducted with the same care as in regular trials, or perhaps with more care, so that the accused may not entertain any apprehension of a failure of justice on account of the summary procedure.

In a summary trial, the following matters are important to be observed:

- (i) that the trial is summary;
- (ii) that the evidence must be confined to what is legally relevant; (iii) that where the rule of evidence is explicit, it must be enforced strictly on both sides; and
- (iii) that where the rule is discretionary, for example, as to points which are remote or only affect credit, the discretion must be exercised with regard to the real gravamen of the charge.⁵¹

The main provisions for the summary trial are given in sections 173(a) to (o) of the Criminal Procedure Code, where the procedure at the commencement of a trial includes the reading of the charge and the taking of the plea.⁵² If the accused pleads guilty to a charge,

⁴⁷ Subordinate Courts Act 1948, ss 63–64.

⁴⁸ Hamid Sultan bin Abu Backer, *Janab's Key to Criminal Procedure* (3d ed, Janab 2015) 149.

⁴⁹ *Tengku Abdul Aziz v PP* [1951] 1 Malayan Law Journal 185 (CA); *Loh Kam Foo v PP* [1997] 4 Malayan Law Journal 113 (HC); and *Karpal Singh v PP* [1991] 2 Malayan Law Journal 544 (SC).

⁵⁰ Prabhas C Sankar, *Sarkar on Criminal Procedure* (7th edn, Indian Law House 1996) 837.

⁵¹ *Muthusamy v PP* [1948] Malayan law Journal 57 (HC); *Goh Tong v PP* [1953] Malayan law Journal 251 (CA).

⁵² Criminal Procedure Code, s 173(a).

the plea shall be recorded and he may be convicted thereon and the court shall pass sentence according to the law.⁵³

However, if the accused refuses to plead or does not plead, or claims to be tried, the court shall proceed to take all such evidence as may be produced in support of the prosecution.⁵⁴ In turn, the accused can cross-examine all the witnesses for the prosecution.⁵⁵

The process of a criminal trial is essentially a two-stage one, consisting of the prosecution's case, and if defence is called, the case for the defence. The duty of the court at the end of the prosecution's case during a summary trial is set out in section 173(f) of the Criminal Procedure Code which stipulates that 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.

A prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained, would warrant a conviction.⁵⁶

The cases of *Mohamad Radhi bin Yaakop v Public Prosecutor*,⁵⁷ *Looi Kow Chai v Public Prosecutor*,⁵⁸ *Balachandran v Public Prosecutor*,⁵⁹ and *Pendakwa Raya v Mohd Radzi bin Abu Bakar*⁶⁰ among others have respectively laid down the proposition that at the end of the case for the prosecution, their evidence must be subject to maximum evaluation in order to determine whether a prima facie case has been made out. Recently, this proposition has also been reiterated and affirmed by the 7-member panels of the Federal Court in the case of *Abdullah bin Atan v Public Prosecutor*.⁶¹

In *Public Prosecutor v Mohd Radzi bin Abu Bakar*,⁶² the Federal Court gave the following guidance to the lower courts in determining a prima facie case:

For the guidance of the courts below, we summarise as follows the steps that should be taken by a trial court at the close of the prosecution's case:

(i) the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from that evidence. If the evidence

⁵³ *ibid* s 173(b).

⁵⁴ *ibid* s 173(c).

⁵⁵ *ibid* s 173(e).

⁵⁶ *ibid* s 180(4).

⁵⁷ [1991] 3 Malayan Law Journal 169 (SC).

⁵⁸ [2003] 2 Malayan Law Journal 65 (CA).

⁵⁹ [2005] 2 Malayan Law Journal 301 (FC).

⁶⁰ [2006] 1 Current Law Journal 457 (FC).

⁶¹ [2020] 6 Malayan Law Journal 727 (FC).

⁶² [2006] 1 Current Law Journal 457 (FC).

admits of two or more inferences, then draw the inference that is most favourable to the accused;

(ii) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is 'Yes', then a prima facie case has been made out and the defence should be called. If the answer is 'No' then, a prima facie case has not been made out and the accused should be acquitted;

(iii) after the defence is called, the accused elects to remain silent, then convict;

(iv) after defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v Public Prosecutor* [1963] MLJ 263.

If the prosecution invoked a statutory presumption against the accused, it is incumbent upon the accused to rebut such presumption on a balance of probabilities.⁶³

Should a prima facie case be established, the court will order the accused to enter his defence.⁶⁴ The accused will then be given three alternatives thereafter, namely, to give sworn evidence, to give unsworn evidence (statement from the dock) or to remain silent.⁶⁵

After the summary trial, the court shall consider all the evidence before it and decide whether the prosecution has proved its case beyond a reasonable doubt.⁶⁶ If the court finds that the prosecution has proved its case beyond a reasonable doubt, the court shall find the accused guilty and he may be convicted on it⁶⁷ but if the court finds that the prosecution has not proved its case beyond a reasonable doubt, the court shall record an order of acquittal.⁶⁸

Upon a conviction being recorded against an accused, he has the right to appeal to a higher court in the judicial hierarchy against both the conviction and sentence. Section 26 of the Courts of Judicature Act 1964 provides for the jurisdiction of the High Court in hearing criminal appeals from the subordinate courts. The procedures for such appeals are stipulated in Chapter XXX of the Criminal Procedure Code.

In addition, the human trafficking offence also has some special procedures under the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act. In this regard, section 5 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act provides for the application of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act to prevail if it conflicts with provisions of other written laws and supersedes the other written laws.

⁶³ [2020] 6 Malayan Law Journal 727 (FC).

⁶⁴ Criminal Procedure Code, s 173(h).

⁶⁵ *ibid* s 173(ha).

⁶⁶ *ibid* s 173(m)(i).

⁶⁷ *ibid* s 173(m)(ii).

⁶⁸ *ibid* s 173(m)(iii).

For example, section 59 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act provides that no agent provocateur shall be presumed to be unworthy of credit by simply having attempted to commit or to abet, or having abetted or having been engaged in a criminal conspiracy to commit any human trafficking offence if the main purpose of such attempt, abetment or engagement was to secure evidence against such person. It also provided that notwithstanding any law or rule of law to the contrary, a conviction for any offence under the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act solely on the uncorroborated evidence of any agent provocateur shall not be illegal and no such conviction shall be set aside merely because the court which tried the case has failed to refer in the grounds of its judgment to the need to warn itself against the danger of convicting on such evidence.

In respect of admissibility of documentary evidence, where any enforcement officer has obtained any document or other evidence in the exercise of their powers under the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act, such document or copy of the document or other evidence, as the case may be, shall be admissible in evidence in any proceedings under the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act, notwithstanding anything to the contrary in any written laws.⁶⁹

On top of that, the deposition of trafficked persons or smuggled migrants who cannot be found recorded under the Immigration Act 1959/63 would be accepted as prima facie evidence without the evidence being tested under cross-examination at the trial.⁷⁰

In this regard, the High Court in the case of *Ketheeswaran all Kanagaratnam v Public Prosecutor*⁷¹ held that although section 61A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act exempts the right to cross-examine the recorded deposition, it is, however, still retained the court's power to decide according to the law, the facts and evidence. The High Court also held that section 61A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act would override the requirement of section 145 of Evidence Act 1950 (cross-examination as to previous statements in writing) due to section 5 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act which provided for the application of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act to prevail in the event that it conflicted with provisions of other written laws and superseded the other written laws.

However, section 61A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act requires issuing an order of removal from the Director General of the Immigration Department before such a deposition can be taken. The Court of Appeal in the case of *PP v Sumon Khan*⁷² held that before depositions of migrants can be admitted as

⁶⁹ Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, s 60.

⁷⁰ Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, s 61A.

⁷¹ [2022] 8 Malayan Law Journal 23 (HC).

⁷² [2018] 1 Legal Network Series 1506 (CA).

evidence, there must be an order to remove them issued by the Director General of the Immigration Department.

4.3 Procedures for Migrant Smuggling Offences under the Criminal Procedure Code and the Security Offences (Special Measures) Act

Since the smuggling of migrants has been classified as a security offence the procedures for such offences are regulated by the Security Offences (Special Measures) Act. Therefore, a person involved in smuggling of migrants will be dealt with according to the procedures under the Security Offences (Special Measures) Act.

It is also important to note that except for matters where express provision is contained in the Security Offences (Special Measures) Act, the general provisions of the Criminal Procedure Code are still applicable. But where there are matters for which both the Security Offences (Special Measures) Act and the Criminal Procedure Code provide for, then the Security Offences (Special Measures) Act provisions shall prevail. This is in accordance with the maxim *generalia specialibus non derogant*—the principle of interpretation of statutes that general provisions do not derogate from the specific ones.

For example, the Security Offences (Special Measures) Act makes no specific provision relating to the procedure on the stages of a criminal trial. Accordingly, the general provisions in the Criminal Procedure Code on High Court trials (Chapter XX) will apply where the court must determine the proof of a prima facie case at the end of the prosecution's case and the determination of the defence raised by the accused at the end of the case for defence. These procedures are laid down under sections 178 to 183 of the Criminal Procedure Code.

The Security Offences (Special Measures) Act contains some special procedures—which may appear to infringe on a person's fundamental rights under Article 5 (Liberty of the person), and Article 8 (Equality). This is because the Security Offences (Special Measures) Act is stated to be an Act enacted to provide for special measures relating to security offences for the purpose of maintaining public order and scrutiny. It is important to note that the Security Offences (Special Measures) Act was enacted pursuant to Article 149 of the Federal Constitution which empowers Parliament to enact legislation against subversion, action prejudicial to public order, etc. This means that any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Articles 5, 9, 10, or 13 of the Federal Constitution all of which relate to the guarantee of certain fundamental rights of citizens.

The rationale for the Security Offences (Special Measures) Act is explained further in the second part of the preamble, which is to prevent any action or threatened action from persons both inside and outside Malaysia with regard to the following: (1) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; (2) to excite disaffection against the Yang di-Pertuan Agong; (3) which is

prejudicial to public order in, or the security of, the Federation or any part thereof; or (4) to procure the alteration, otherwise than by lawful means, of anything by law established.

The special nature of the Security Offences (Special Measures) Act was highlighted by the Federal Court in *Dato' Seri Anwar Ibrahim v Kerajaan Malaysia*⁷³ in the following words:

SOSMA is an Act to provide for special measures relating to security offences for the purpose of maintaining public order and national security. SOSMA was enacted pursuant to paras (a), (b), (d) and (f) in cl (1) of art 149. Part II on 'SPECIAL POWERS FOR SECURITY OFFENCES' provides for the power of arrest without warrant and detention for an initial period of twenty-four hours and thereafter for a period of up to twenty-eight days for the purpose of investigation (ss 4–5). There are also other special procedures relating to: (i) electronic monitoring device (s 7); (ii) sensitive information (ss 8–11); (iii) protected witnesses (ss 14–16), (iv) evidence (ss 17–26); and (v) trial of security offences by the High Court and on bail (ss 12–13).

Therefore, the inclusion of offences under Part IIIA (Smuggling of Migrants) enactment of the Security Offences (Special Measures) Act has far-reaching consequences with regard to the court procedures as well as the rights of accused persons, as it represents a significant departure from normal and usual procedures.

For example, under sub-section 4(5) of the Security Offences (Special Measures) Act, upon the arrest of a person for alleged involvement in a security offence, a police officer of or above the rank of Superintendent of Police may extend the period of detention for not more than twenty-eight days, for investigation.

Another example is the right of the accused to consult a legal practitioner of his choice is made subject to sub-sections 5(2) and 5(3) of the Security Offences (Special Measures) Act which stipulate as follows:

Notification to next-of-kin and consultation with legal practitioner 5.

(1) ...

(2) A police officer not below the rank of Superintendent of Police may authorise a delay of not more than forty-eight hours for the consultation under paragraph (1) (b) if he is of the view that—

(a) there are reasonable grounds for believing that the exercise of that right will interfere with evidence connected to security offence;

(b) it will lead to harm to another;

(c) it will lead to the alerting of other person suspected of having committed such an offence but who are not yet arrested; or

⁷³ [2021] 8 Current Law Journal 511 (FC).

(d) it will hinder the recovery of property obtained as a result of such an offence.

(3) This section shall have effect notwithstanding anything inconsistent with Article 5 of the Federal Constitution.

In addition, the Public Prosecutor may authorise any police officer or any other person to intercept, detain and open any postal article in the course of transmission by post, to intercept any message transmitted or received by any communication or to intercept or listen to any conversation by any communication if he considers that it is likely to contain any information relating to the commission of a security offence.⁷⁴ The Court of Appeal has lucidly explained the right procedures in respect of this in the case of *PP v Kadir Uyung*⁷⁵ in the following words:

A rightly pointed out by learned counsel for the appellants, there are two types of communication interception, one under section 6(1) and the other under section 6(3) of SOSMA. Information that is required to be given in an application for communication interception is regulated by section 31 of SOSMA. For communication interception under 6(1), the requirements of the First Schedule of the Regulations have to be followed and for communication interception under section 6(3) of SOSMA, the requirements of the Second Schedule of the Regulations have to be followed.

We have gone through the grounds of judgment carefully and we were not persuaded that the learned trial judge had mishandled the issue of interception of communications as alleged. In fact, the learned judge had dealt with the issue admirably and we can do no better than to reproduce verbatim what he said in full below, parts of which we have reproduced earlier in this judgment:

12.19. Reading s 6 of the Act which states that notwithstanding any other written law, this includes Regulations 2012, the discretion is on the PP to decide whether the communication interception is likely to contain any information relating to the commission of a security offence. When such an application is made to PP, the application or basis for the application is not provided to the court and it is not in a position to assess and determine whether the communication interception is likely to contain any such information relating to the commission of a security offence.

Further to the above, information that is obtained through intercepted communication under section 6 of the Security Offences (Special Measures) Act is admissible by virtue of section 24 of the Security Offences (Special Measures) Act, which says that, inter alia, 'No person or police officer shall be under any duty, obligation or liability or be in any manner

⁷⁴ Security Offences (Special Measures) Act 201, s 6.

⁷⁵ [2017] 1 Legal Network Series 1403 (CA).

compelled to disclose in any proceedings the procedure, method, manner or the means or devices used with regard to- (a) anything done under section 6; and (b) any matter relating to the monitoring, tracking or surveillance of any person.’

A significant departure from normal procedures applicable to pre-trial discovery and disclosure of documents can be found under section 8 of the Security Offences (Special Measures) Act. Section 8(1) of the Security Offences (Special Measures) Act stipulates that, notwithstanding section 51A of the Criminal Procedure Code relating to the disclosure of certain documents and facts, if the trial of a security offence involves matters relating to sensitive information, the Public Prosecutor may, before the commencement of the trial, apply by way of an ex parte application to the court to be exempted from the obligations under section 51A of the Criminal Procedure Code.

The court shall view the sensitive information and other documents relating to the sensitive information and the court shall, in lieu of the delivery of the documents by the Public Prosecutor to the accused, order the Public Prosecutor to produce a statement setting out relevant facts that the sensitive information would tend to prove or a summary of the sensitive information to be admitted as evidence.⁷⁶

This follows that sensitive information statement or summary of the sensitive information pursuant to section 51A of the Criminal Procedure Code, if the accused objects to the admission of the statement or summary of the sensitive information as evidence, the accused’s counsel shall be allowed to view the sensitive information, submit against the admission of the statement or summary of the sensitive information in the trial and submit whether that the sensitive information is to be disclosed to the accused.⁷⁷

In addition to the above, the hearing shall be held in camera and after hearing the Public Prosecutor’s submission, the court shall decide whether the statement or summary of the sensitive information is admissible as evidence or whether the sensitive information be disclosed to the accused⁷⁸. Section 8(8) of the Security Offences (Special Measures) Act specifically spells out that the court’s decision under this section is non-appealable.

It is also important to point out that the High Court shall try all security offences.⁷⁹ The High Court in the case of *PP v Puganeswaran Paramasivam*⁸⁰ has held that:

SOSMA which clearly provides for special procedures for the trial of the security offence by the High Court and equally special procedures for the granting of bail must mean that these special procedures are only exercisable by the High Court. Those powers cannot be used by the Sessions Court.

⁷⁶ Security Offences (Special Measures) Act 2012, s 8(3).

⁷⁷ *ibid* s 8(4).

⁷⁸ *ibid* ss 8(6) and 8(7).

⁷⁹ *ibid* s 12.

⁸⁰ [2022] 1 Legal Network Series 688 (HC).

Regarding bail, section 13 of the Security Offences (Special Measures) Act provides, inter alia, that bail shall not be granted to a person who has been charged with a security offence with the exception of a person below the age of 18 years, a woman, or a sick or infirm person. This exception means that the offence is now rendered non-bailable in the case of these categories of persons.

As mentioned above, such categories of persons except those who are charged with an offence under Chapter VIA of the Penal Code and the Special Measures Against Terrorism in Foreign Countries Act 2015 (Act 770), may be released on bail subject to an application by the public prosecutor that the person be attached with an electronic monitoring device in accordance with the Criminal Procedure Code.⁸¹

Therefore, apart from those categories of persons who are absolutely prohibited from having a right to bail, there is a prima facie right to bail for the three categories of persons mentioned above i.e., a person below the age of 18 years, a woman, or a sick or infirm person. In the case of *Jimmy Seah Thian Heng v Public Prosecutor (and 4 Other Applications)*,⁸² the High Court held that bail was available under section 13(1) Security Offences (Special Measures) Act notwithstanding that the Public Prosecutor does not first apply for an electronic monitoring device.

Another departure from the usual procedures applicable to accused persons is the provision for 'protected witnesses'. Section 3 of the Security Offences (Special Measures) Act defined this as to mean a witness whose exposure will jeopardise either the gathering of evidence or intelligence, or his life and well-being. Section 14 of the Security Offences (Special Measures) Act expressly stipulates that the evidence of such a witness is to be given specially notwithstanding Article 5 of the Federal Constitution and section 264 of the Criminal Procedure Code.

With regards to any statement by an accused person, whether made orally or in writing to any person at any time, the said statement/s shall be admissible in evidence.⁸³ This is expressed to be so notwithstanding that this is inconsistent with the Evidence Act 1950. The relevant provisions in the Evidence Act are sections 24 and 26 respectively where, inter alia, a confession caused by inducement, threat or promise is irrelevant in a criminal proceeding. This again is a significant departure not only from the provisions of the Evidence Act but also from the Criminal Procedure Code, especially section 113 of the Criminal Procedure Code which provides that a statement made by an accused under section 112 of the Criminal Procedure Code is inadmissible against an accused person. Any confession thus obtained under the Security Offences (Special Measures) Act against the accused person can be admitted and used against the accused even if it was given involuntarily.

Another special procedure is section 19 of the Security Offences (Special Measures) Act where a conviction obtained based on the uncorroborated testimony of a child of tender

⁸¹ Security Offences (Special Measures) Act 2012, s 13.

⁸² [2018] 6 All Malaysia Reports 345 (HC).

⁸³ Security Offences (Special Measures) Act 2012, s 18A.

years is not illegal, though not given on oath if the court opines that the child has sufficient intelligence and understands the duty of speaking the truth. In a similar vein, section 26(1) (b) of the Security Offences (Special Measures) Act provides that no agent provocateur shall be presumed to be unworthy of credit by simply having attempted to abet or abetted the commission of a security offence.

As can be seen from the foregoing, the special procedures under Security Offences (Special Measures) Act are significant as they deal with the power of arrest and detention, rights of the accused, power to intercept the communication, sensitive communication, trial and bail, protected witness and evidence.

5. Protection Orders Issued by the Courts

Under the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act, a trafficked person will be placed under government facilities for 21 days-interim protection orders for suspected victims⁸⁴ and 90 days of protection orders for certified victims.⁸⁵ Here the courts, especially the Magistrate Court play an important role in granting protection orders.

For example, in the case of *Public Prosecutor v Zhao Jingeng*,⁸⁶ the High Court highlighted the importance of the protection order granted by the court, among others, to assist the work of the investigation officers in recording the evidence of a victim of human tracking under section 52 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act. In this case, the High Court allowed the prosecution's revision application and made an extension of the protection order under section 51(3)(a)(ii) of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act. The High Court ordered that the victims be placed at a place of refuge for a period not exceeding three months to enable the enforcement officer to make the necessary deposition. The Court also ordered the Immigration Department and the prosecution to take immediate steps under section 52(1) of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act to record the evidence of the victims. This is to ensure that there is no unnecessary prolonging of the stay of the victims so that they can go back to their home country as soon as possible.

In a similar manner, the High Court in the case of *Public Prosecutor v Vira Prihatin*,⁸⁷ held that the initial 21 days period was important in order to enable the necessary investigation and enquiry to be carried out pursuant to section 51 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act. In this case, the High Court held that any interpretation of the provisions in the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 'must be construed with reference to the intended objective of the Legislature in enacting such provisions' that is 'to prevent and combat trafficking in persons and smuggling of migrants and to that end it has also clearly defined in rather wide terms these categories of persons'.

⁸⁴ Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, s 44.

⁸⁵ *ibid* s 51.

⁸⁶ [2010] 7 Malayan Law Journal 306 (HC).

⁸⁷ [2018] 8 Malayan Law Journal 421 (HC).

Apart from that, the welfare of the trafficked person is further protected when section 66A(1) of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act stipulates the court's power to order compensation to be paid by the convicted person. Besides, section 66A(4) of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act further provides that the payment of the compensation to the victim upon conviction of the offender shall not prevent any civil proceeding instituted by the victim. Even in the case of acquittal of the accused, the court has the power to make an order to pay wages in arrears to the alleged trafficked person. This has been provided under section 66B of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act.

6. Conclusion

In closing, it is recognised that human trafficking and smuggling of migrants is a heinous transnational crime—a matter which has galvanised the international community to adopt the Protocols and the United Nations Office on Drugs and Crime in assisting member states to combat these transnational organised crimes. Whilst there are substantive and procedural laws, in place to deal with those who perpetrate such crimes, to bring them to account for their misdeeds, and to protect the victims of such crimes—such crimes continue to flourish because of the high profits. Yes, human trafficking and the smuggling of migrants is a silent threat—that's why it is especially insidious and menacing to our society.

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