DALAM MAHKAMAH TINGGI MALAYA DI TAIPING

DALAM NEGERI PERAK DARUL RIDZWAN

RAYUAN JENAYAH NO.:

AB-42JSKS-2-02/2023 & AB42JSKS-03-02/2023

DAN

AB-42JSKH-1-02/2023 & AB42JSKH-2-02/2023

HENDRA BIN MULANA
[NO KP.: 900513016221] **...PERAYU**

v

PENDAKWA RAYA **...RESPONDEN**

GROUNDS OF JUDGMENT

INTRODUCTION

[1] The Appellant filed two (2) Notices of Appeal to the Court of Appeal against the decision of this Court delivered on 2.11.2023 in respect of Appeal Nos. AB-42JSKS-2-02/2023 and AB-42JSKS-3-02/2023 where the Court upheld the conviction made by the Taiping Sessions Court but varied the sentences of imprisonment. The Applicant had been convicted on 16.2.2023 in Cases No. AB-62JSK-20-11/2019 and AB-62JSK-21-11/2019 after he was found guilty and convicted on four (4) amended charges of requesting for child pornography under s. 8(b) of the Sexual Offences Against Children Act 2017 ("the 2017 Act").

[2] The Appellant was sentenced to 13 years imprisonment from the date of conviction 16.2.2023 and 3 strokes of the *rotan* in respect of each charge and all imprisonment sentences were to run concurrently. He was also sentenced to undergo counselling while in prison and 3 years' police supervision after completing the imprisonment sentence. The Respondent had cross-appealed in Appeal Nos. AB-42JSKH-1-02/2023 and AB-42JSKH-2-02/2023 against the sentences of imprisonment and prayed that the terms be served consecutively as the 4 charges were for different offences committed on different dates.

[3] The 4 charges were as follows:

Case No. AB-62JSK-20-11/2-2019:

i. Pertuduhan Pindaan Pertama

Bahawa kamu pada 14/10/2019 di antara jam 0001 hrs sehingga 2150 hrs melalui media whatsapp (No. telefon: 60177954312) di alamat (deleted) Jalan Kuala Kangsar 34850 Changkat Jering dalam Daerah Larut Matang Negeri Perak telah meminta pornografi kanak-kanak daripada XXXXX, KPT: (deleted) yang merupakan seorang kanak kanak di bawah umur 18 tahun semasa kejadian. Oleh demikian kamu telah melakukan suatu kesalahan di bawah Seksyen 8(b) Akta Kesalahan Kesalahan Seksual terhadap Kanak-Kanak 2017 dan boleh dihukum dibawah Seksyen dan Akta yang sama.

Hukuman Hukuman Penjara selama tempoh tidak lebih lima belas tahun dan hendaklah juga dihukum sebat tidak kurang tiga sebatan.

ii. Pertuduhan Pindaan Kedua

Bahawa kamu pada 15/10/2019 di antara jam 2325 hrs sehingga 2359 hrs melalui media whatsapp (No. telefon: 60177954312) di alamat (deleted) Jalan Kuala Kangsar 34850 Changkat Jering dalam Daerah Larut Matang Negeri Perak telah meminta pornografi kanak-kanak daripada XXXXX, KPT: (deleted) yang merupakan seorang kanak kanak di bawah umur 18 tahun semasa kejadian. Oleh demikian kamu telah melakukan suatu kesalahan di bawah Seksyen 8(b) Akta Kesalahan Kesalahan Seksual

terhadap Kanak-Kanak 2017 dan boleh dihukum dibawah Seksyen dan Akta yang sama.

Hukuman Hukuman Penjara selama tempoh tidak lebih lima belas tahun dan hendaklah juga dihukum sebat tidak kurang tiga sebatan.

iii. Pertuduhan Pindaan Ketiga

Bahawa kamu pada 16/10/2019 di antara jam 0001 hrs sehingga 0106 hrs melalui media whatsapp (No. telefon: 60177954312) di alamat (deleted) Jalan Kuala Kangsar 34850 Changkat Jering dalam Daerah Larut Matang Negeri Perak telah meminta pornografi kanak-kanak daripada XXXXX, KPT: (deleted) yang merupakan seorang kanak kanak di bawah umur 18 tahun semasa kejadian. Oleh demikian kamu telah melakukan suatu kesalahan di bawah Seksyen 8(b) Akta Kesalahan Kesalahan Seksual terhadap Kanak-Kanak 2017 dan boleh dihukum dibawah Seksyen dan Akta yang sama.

Hukuman Hukuman Penjara selama tempoh tidak lebih lima belas tahun dan hendaklah juga dihukum sebat tidak kurang tiga sebatan.

Case No. AB-62JSK-21-11/2-2019:

i. Pertuduhan Pindaan Keempat

Bahawa kamu pada 17/10/2019 di antara jam 0001 hrs sehingga 0250 hrs melalui media whatsapp (No. telefon: 60177954312) di alamat (deleted) Jalan Kuala Kangsar 34850 Changkat Jering dalam Daerah Larut Matang Negeri Perak telah meminta pornografi kanak-kanak daripada XXXXX, KPT: (deleted) yang merupakan seorang kanak kanak di bawah umur 18 tahun semasa kejadian. Oleh demikian kamu telah melakukan suatu kesalahan di bawah Seksyen 8(b) Akta Kesalahan Kesalahan Seksual terhadap Kanak-Kanak 2017 dan boleh dihukum dibawah Seksyen dan Akta yang sama.

Hukuman Hukuman Penjara selama tempoh tidak lebih lima belas tahun dan hendaklah juga dihukum sebat tidak kurang tiga sebatan.

[4] The Appellant at the lower court was represented by a counsel from Messrs. Hakimi, Lalitha, Mardhiyah & Associates, Taiping. In the High Court, he was represented by counsel from Messrs. Abdullah, Maznah &

Jefri, Kuala Lumpur. Prior to the hearing of the appeals, the Appellant had sought leave from the Court to admit fresh evidence pursuant to s. 307 of the Criminal Procedure Code (CPC), in Criminal Application Nos. AB-44-10-06/2023 and AB-44-11-06/2023 on the ground of alleged incompetence of counsel who conducted the trial at the Sessions Court.

[5] The Court dismissed both applications on 4.9.2023 since the Appellant was unable to show that he had satisfied the first and fourth out of four conditions in the English case of **R v Parks [1961] 2 AER 633** which have been followed by the Malaysian courts. The 2 grounds not satisfied were that the evidence sought was not available at the trial and the court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.

THE APPEAL

[6] To protect the privacy of the victim and her family, some names have been deleted. Before setting out the facts of the case, the Court noted that the prosecution called the following witnesses to testify in court against the Appellant:

SP1 - Victim's mother;

SP2 - Inspektor Krishna A/L Munipen (Identification Parade Officer);

SP3 - Victim's class teacher;

SP4 - Noazam bin Hussain (Storekeeper);

SP5 – Victim's father;

SP6 - Mohd Azhar bin Baba (Associates Law Enforcement Agency, Security Department, Maxis Broadband Sdn Bhd);

SP7 - Mohamad Loqman Hakim bin Mohd Yusoff (Technical Assistant, Digital Forensic Deprtment, Malaysia Communiction and Multimedia Commission);

SP8 - Inspektor La Paula bin Abdul Muis Yusoff (Arresting Officer);

SP9 - Muhamad Hashimi Anwar bin Mohd Azizi (Forensic Analyst, Digital Forensic Deprtment, Malaysia Communiction and Multimedia Commission);

SP10 – Victim (aged 15 years when giving evidence);

SP11 - Inspektor Chee Chia Chia (Investigation Officer);

SP12 - Nurul Amirah Binti Mulana (Appellant's sister); and

SP13 - Azura Binti Adam (Investigation Officer, Sexual Crimes & Children Investigation Department, IPD Taiping).

[7] The evidence adduced by the prosecution in respect of the charges were given directly through SP10. She testified that she was an only child and her parents owned a small business selling fruits. They were seldom at home early and she was left much on her own after she finished school; her mother would come home around midnight. She did not have a close relationship with her parents due to their work commitment. SP10 then spent much time on the internet and chatting in social media platforms such as "BIGO" and WhatsApp and she would often stay up late. SP10 had 2 mobile telephones, brand names Redmi and Neffos, bearing registration numbers 014-922XXX and 014-322XXXX. One was given to her by her father and the other phone was a gift from her grandmother.

[8] SP10 first came to know the Appellant in 2019 through the live streaming platform known as BIGO when she was in Year 6 (at the age of 12 years old). SP10 had a few accounts with BIGO which was an adults-only social media platform. She had obtained the assistance of her friend,

S, (which I shall not state her friend's full name here in order to protect the identities of the children) to register the accounts on her behalf. She told the court that she usually used 014-922XXXX to communicate, have lewd conversations and send sexual-related pictures and videos to the Appellant upon his request. SP10 stated that she saved his number as "Secret love" (using the icon love after the word "Secret"). Both telephones were password-protected but her mother, SP1, knew the password as SP10 had told her about it.

[9] SP10 had never met the Appellant in person but they had communicated via live streaming first and later on WhatsApp video calls more than 10 times. She told him that she was 14 years old at that time and she knew his full name, his age and where he worked. They had a special relationship where she would address him as "dear" and he would address her as "love" in their conversations. After gaining her trust that they had a special relationship, the Appellant became more forward and daring by sending sexually explicit pictures (photos) and videos including those of his genital. He encouraged and persuaded SP10 to reciprocate and send him photos and videos of her breast and private part. He pretended to sulk if she refused to do so. SP10 was reluctant at first as she thought it was wrong but after many coaxings, she relented because she felt that the Appellant cared for and loved her.

[10] One day on 19.10.2019, while her daughter was away at school, SP1 chanced upon SP10's telephone in the lounge of their house and unlocked it using the password. She was shocked to see her daughter's lewd video and conversations in WhatsApp with an unknown man. SP1 took only a glance at the last 2 videos in the chat with "Secret love". One showed her daughter lying in her bedroom and playing with her privte part.

It was sent to "Secret love". The other video showed the man masturbating and that video was sent to her daughter's phone. SP1 was heartbroken with what she had seen as she did not expect her daughter to behave in such a manner. SP1 later went to SP3's house to look for her daughter as the latter had not come home from school. That was when she found out from the school's headmaster that the school's PTA President had brought SP10 to the police station to lodge a police report against her. SP1 and SP10 had a misunderstanding the day before where SP1 allegedly threatened her daughter with a knife as the latter did not want to listen to her advice. According to her, SP10 used to be a good daughter until she started playing online game(s). She became aggressive, skipped school, defied her parents, and they often had misunderstandings because of the online games.

[11] The next day the police came and both SP1 and her husband were arrested as the police commenced investigations against them for alleged child abuse. She did not manage to see her daughter but she gave SP11 both telephones belonging to SP10 while they were in remand. SP11 advised her to lodge a police report after they were released from custody on 25.10.2019 and the telephones were seized by the police. SP1 lodged a police report on the same day. Meanwhile, SP10 was sent to stay with her grandmother and for that 3 months, both SP1 and her husband did not see their daughter while investigations were on-going. They were never charged for any offence in respect of their daughter.

[12] Police investigations with a telecommunications provider led to the arrest of the Appellant by SP8 at his workplace in Seri Petaling, Kuala Lumpur on 20.11.2019. A Samsung telephone belonging to the Appellant was seized at that time and he was brought to IPD Taiping for further

investigations. SP8 lodged a police report regarding the arrest and seizure of the telephone. On 23.11.2019, SP11 received the Appellant's second telephone (which was a Vivo brand) from his sister SP12 at the IPD Taiping. The telephone was password-protected. Later SP11 obtained the password from the Appellant.

[13] SP9 was the Forensic Digital Analyst who analysed data in and tested the 4 telephones seized after he received the request and passwords (for the telephones) from the police through SP7. He took about 3 weeks to conduct the analysis from the time he received the items on 31.3.2020 until they were returned to the police through SP7 on 23.4.2020. He had extracted the photos, videos and WhatsApp conversation between SP10 (from telephones marked as C1 and C2) and the Appellant (from telephones marked as C3 and C4). SP9 used their forensic workstation and the softwares *Cellebrite 4PC* to extract data (whether encrypted or otherwise) and *Cellebrite Physical Analyzer* to analyse the extracted data. From the Appellant's Vivo telephone folder, he extracted 5 sexually explicit videos marked as P27(A-E) and 83 photos marked as P28(1-83) relating to the conversation with SP10. In his analysis on SP10's Neffos telephone he found a WhatsApp conversation between Secret Love and SP10 totaling 2447 communications which started on 10.9.2019 and ended on 22.10.2019. The exually explicit conversations were still available in the Neffos and Vivo telephones as can be seen in the exhibits (RRJ3). The Appellant was charged on 27.11.2019.

[14] The ingredients of the offence under s.8(b) that had to be satisfied by the prosecution were i) **that SP10 was a child** and ii) **that the Appellant had asked for pornography from the child at the material**

time. Based on all the evidence adduced by the prosecution, the Sessions Court Judge (SCJ) conducted a maximum evaluation on the evidence at the *prima facie* stage and called for the Appellant's defence (paragraph 12 of the SCJ's grounds of judgment in RRJ 1). The Appellant gave evidence under oath and he was the sole witness for the defence.

[15] The Appellant never disputed the authenticity of the videos and the makers therein and admitted that he did not think his actions were wrong because they were lovers and he wanted to marry SP10. The defence of the Appellant was that he did not know her true age because in her BIGO profile it was stated as 19 years. He alleged she had also told him she was still in school and that she was in Form Six (Upper). SP10 in her evidence told the Court that she admitted that she did not give her true age as she wanted to keep it a secret (assuming from the public view). However, she was adamant that she told the Appellant that she was 14 years old (although she was actually 12 years old at that time) and had never said she was in Form 6. Moreover, the BIGO account was actually her friend's account. S let her use the account and later S registered a few other accounts for her. SP10 claimed ignorance of what S had registered in the other accounts. I will elaborate further on the defence raised by the Appellant under s.20 of the 2017 Act and my reasons for dismissing the appeals against conviction later in this Grounds of Judgment.

Issues raised in the Appeal

[16] During the appeal, counsel for the Appellant submitted on the 3 main issues to support his contention that the conviction was unsafe as follows:

i. the Appellant had taken all reasonable steps to ascertain the age of the victim, SP10, and could not therefore be guilty of the offence as provided for under s.20 of the 2017 Act;

ii. the credibility of SP10 was doubtful and her evidence had been challenged in cross-examination and therefore there was no *prima facie* case established; and

iii. the Sessions Court Judge fell into error when she had misappreciated the defence under s.20 of the 2017 Act wherein she had imposed a higher burden on the Appellant to prove his case in contravention of s. 173(m)(i), (ii) and (iii) of the CPC.

EVALUATION AND FINDINGS OF THE COURT

Appeal against sentence

[17] In **Lee Ah Seng & Anor v. PP [2007] 5 CLJ 1** it was held that the credibility of a witness is primarily for the trial judge. An appellate court should always be slow in disturbing such findings of fact arrived at by the judge who had audio-visual advantage of the witness, unless there are substantial and compelling reasons for disagreeing with the finding. An appellate court must in order to reverse, not merely entertain doubts whether the decision below is right but be convinced that it is wrong: **Dato' Mokhtar Hashim and Another v. PP [1983] CLJ (Rep) 101.**

[18] This Court had evaluated all the evidence in the Records of Appeal and perused the Grounds of Judgment of the SCJ and compared them with the voluminous Notes of Evidence as well as considered submissions and case laws submitted by both parties. Unfortunately for the Appellant, I found that the evidence against him were overwhelming after hearing the appeals and I agreed with the findings and rationale of the SCJ whom had

the benefit of observing the demeanour of the witnesses before her. Although the trial commenced before a different SCJ, nevertheless, the convicting SCJ had the benefit of observing the star witness of the prosecution case giving evidence when SP10 was still under cross-examination. SP10's evidence was at pages 264 – 356 (RRJ2B). Before she gave evidence, SP10 was asked certain questions to determine whether she understood the duty to tell the truth and the nature of an oath (page 265 RRJ2B). The SCJ was satisified that she was a competent witness (s.118 of the Evidence Act 1950) to give evidence under oath. It must be borne in mind that this was a trial for sexual offences against children under the 2017 Act. The long title states:

> "An Act to provide for certain sexual offences against children and their punishment in addition to other sexual offences against children and their punishment in other written laws, and in relation to it to provide for the administration of justice for children and connected matters".

[19] It is trite law under section 133A of the Evidence Act 1950 that when a child of tender years who is called as a witness does not in the opinion of the court understand the nature of an oath, he may give unsworn evidence if the court is satisfied that he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth. But the accused shall not be convicted unless that evidence is corroborated by some material particular in support implicating the accused before he can be convicted. In the case of a sworn child witness, the old rule of prudence applies, *viz*, the need to give an exhaustive warning on the dangers of convicting on such uncorroborated evidence (Augustine Paul, *Evidence: Practice and Procedure* Fourth Edition, Lexis Nexis, at page 1148). The present case did not involve a child of tender years because by the time SP10 gave evidence in court, she was already 15 years old.

[20] Parliament had provided for the following "revolutionary" and arguably, powerful provisions in the administration of justice of the Act:

> Presumption as to capacity of a child witness
>
> 17. Notwithstanding anything contrary in any other written law, in any proceedings against any person relating to any offence under this Act, or any offence specified in the Schedule where the victim is a child, a child is presumed to be competent to give evidence unless the court thinks otherwise.
>
> Evidence of child witness
>
> 18. Notwithstanding anything contrary in any other written law, in any proceedings against any person relating to any offence under this Act, or any offence specified in the Schedule where the victim is a child, the court may convict such person of such offence on the basis of the uncorroborated evidence of a child, given upon oath or otherwise.
>
> ...
>
> Presumption of age of a child
>
> 20. It is not a defence to a charge for any offence under this Act, or any offence specified in the Schedule where the victim is a child, that an accused believed that the age of the child is or more than that as specified in the respective provisions of such offences at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the child.

[21] SP10's evidence started at page 264 – 356 (RRJ2B) over a period of 4 days. The learned SCJ in considering the issue of SP10's credibility had also looked at the court recording system of the trial before the previous SCJ and found that she was able to give evidence in a well, smooth, articulate (clear), consistent and unhesitant manner. She was also unwavering in her evidence when under intense cross-examination by the Appellant's counsel (paragraphs 18 - 25 of the SCJ's grounds of judgment). The SCJ found that the first ingredient of the charges had been proved wherein SP1 and SP4 had proved the age of their daughter by producing her birth certificate. The SCJ had also applied the provisions of s. 17 and s.18 of the 2017 Act. I see no reason to disturb the findings of

the SCJ on the issue of SP10's credibility and therefore, there was no merit on the second issue raised by the Appellant in the appeals.

[22] In respect of the second ingredient of the charges i.e. that the Appellant had sought for child pornography from SP10, this was also stated in the SCJ's findings in paragraph 15 - 31. She stated:

> "15. Bagi elemen kedua Tertuduh merupakan pelaku yang melakukan perbuatan meminta pornografi daripada mangsa. Elemen ini telah dibuktikan melalui keterangan saksi-saksi pendakwaan, keterangan Tertuduh sendiri dan keterangan dokumentasi yang dikemukakan di mahkamah ini sepanjang perbicaraan dijalankan. Mahkamah dapat melihat penglibatan Tertuduh di dalam melakukan perbuatan-perbuatan meminta pornografi daripada SP10 sepertimana di dalam pertuduhan-pertuduhan terhadapnya dan perbuatan tersebut telah dilakukan oleh Tertuduh dalam keadaan sedar dan tahu bahawa SP10 di dalam kes ini merupakan seorang kanak-kanak pada waktu kejadian. Berikut diperturunkan pembuktian elemen kedua tersebut di dalam perbincangan selanjutnya.
>
> 16. Sepanjang perbicaraan dijalankan, mahkamah ini telah diperlihatkan dengan fakta permulaan perkenalan antara Tertuduh dan kanak-kanak bernama XXXXX (SP10) di dalam kes ini. Perkenalan mereka berdua bermula melalui satu platform media sosial yang dikenali sebagai Bigo iaitu satu platform penstriman langsung yang membolehkan penggunanya menjemput rakan untuk bersembang video dalam talian atau membuat sembang video kumpulan atau panggilan video sehingga 9 orang melalui ruangan Multi-guest. Dengan fungsi match up, pengguna boleh memulakan sembang rawak dengan orang berdekatan atau bertemu rakan baharu dengan menggunakan platform ini. Mahkamah memetik sumber maklumat platform Bigo ini daripada ensiklopedia bebas, Wikipedia, https:llms.wikipedia.orglwikilBigo_live#cite_note-1, dipetik: "Bigo Live ialah platform penstriman langsung yang dimiliki oleh syarikat BIGO Technology yang berpangkalan di Singapura, yang diasaskan pada 2014.
>
> .....
>
> Sembang Video & Panggilan Video Langsung
>
> Pengguna boleh menjemput rakan untuk bersembang video dalam talian 1:1 atau membuat sembang video kumpulan atau panggilan video

sehingga 9 orang melalui ruangan Multi-guest. Dengan fungsi match up, pengguna boleh memulakan sembang rawak dengan orang berdekatan atau bertemu rakan baharu. Filter dan sticker video tersedia untuk penyiar.

...

31. Melalui keterangan-keterangan SP10 ini, jelas bahawa Tertuduh merupakan pelaku yang telah memulakan langkah mendekati SP10 di dalam kes ini dan Tertuduh juga merupakan pelaku yang bertindak meminta pornografi daripada SP10.".

[23] The Appellant was charged for 4 offences under s. 8(b) of the 2017 Act. It is common for this Court to hear appeals under s.14 of the 2017 Act in respect of the offence of physical sexual assault on a child. However, this is the first time it heard appeals under s.8(b) of the Act and sentencing trend on this section was nil at the time of the hearing. It is therefore pertinent to set out the full provision of the said section 8 of the 2017 Act as follows:

Exchanging, publishing, etc., child pornography

8. Any person who—

(a) exchanges, publishes, prints, reproduces, sells, lets for hire, distributes, exhibits, advertises, transmits, promotes, imports, exports, conveys, offers or makes available, in any manner, any child pornography;

(b) **obtains, collects or seeks any child pornography**; or

(c) participates in or receives profits from any business that he knows or has reason to believe is related to any child pornography,

commits an offence and shall, on conviction, be punished with **imprisonment for a term not exceeding fifteen years and shall also be punished with whipping of not less than three strokes.**

[24] Child pornography is defined under the 2017 Act where it states:

4. Child pornography

In this Act—

(a) "child pornography" means any representation in whole or in part, whether visual, audio or written or the combination of visual, audio or written, by any means including but not limited to electronic, mechanical,

digital, optical or magnetic means, or manually crafted, or the combination of any means—
(i) of a child engaged in sexually explicit conduct;
(ii) of a person appearing to be a child engaged in a sexually explicit conduct;
(iii) of realistic or graphic images of a child engaged in sexually explicit conduct; or
(iv) of realistic or graphic images of a person appearing to be a child engaged in sexually explicit conduct;..."

[25] The child pornography sought between 14 – 17.10.2019 in the charges were made through the WhatsApp social media platform. Evidence of these were directly given by SP10, SP9, SP11 and SP13. Her mother was the first person to discover the secret chats when she opened SP10's WhatsApp conversation with the Appellant who was identified at that time as "Secret love". The other prosecution witnesses were called to establish the narrative of the prosecution case as well as chain of custody of the exhibits. Apart from the challenge by the Appellant's counsel on the issue of the disputed reliability of the softwares when SP9 was testifying (which SP9 was able to explain in re-examination why it was not an issue for him or MCMC) and the issue of SP10's true age, I found that the Appellant did not really dispute the prosecution evidence. I was also satisfied with the explanation given by SP9 in respect of the article in Exhibit IDD38 (pages 316-319, RRJ3B). Hence, there is no necessity for me to elaborate on those evidence here but to go on the issue of the defence raised under s. 20 of the 2017 Act.

[26] I will now deal with the first and third issues raised in the appeals. The defence case was dealt with by the SCJ in her grounds of judgment in paragraphs 70-79 which I have reproduced below for ease of reference:

"70. Mahkamah juga mendapati kesemua keterangan bersumpah saksi-saksi pendakwaan di dalam kes ini termasuk keterangan bersumpah SP10,

adalah menyokong antara satu sama lain dan mempunyai rantaian penceritaan yang kukuh dan yang saling berkait antara satu sama lain. Terdapat pembuktian yang jelas dan nyata bahawa Tertuduh merupakan satu-satunya individu yang meminta pornografi daripada SP10 di dalam kes ini. Peguambela Tertuduh juga tidak pernah mempersoalkan dan tidak pernah mencabar keterangan saksi- saksi pendakwaan bahawa telah berlaku perbuatan meminta pornografi oleh Tertuduh terhadap SP10 di dalam kes ini. Sebaliknya apa yang pembelaan perlihatkan di mahkamah ini ialah penafian kosong semata-mata iaitu, Tertuduh menyatakan bahawa perbuatan meminta pornografi tersebut dilakukan kerana Tertuduh menyangka bahawa SP10 merupakan seorang yang telah dewasa dan disebabkan hal itu, Tertuduh merasakan adalah tidak salah baginya melakukan perbuatan meminta pornografi daripada SP10 di dalam kes ini,

KETERANGAN TERTUDUH (SD1)

71. Mahkamah juga mengambilkira keterangan Tertuduh di dalam mempertimbangkan sabitan dan hukuman terhadap Tertuduh di dalam kes ini. Teriuduh merupakan satu-satunya saksi yang tampil memberi keterangan di peringkat kes pembelaan (SD1). Tertuduh telah memberi keterangan mengenali SP10 melalui platform media sosial yang dikenali sebagai Bigo pada sekitar tahun 2019 dan memanggil SP10 dengan nama panggilan Yxxx Tertuduh dalam keterangannya juga memberitahu mahkamah bahawa SP10 merupakan kekasihnya dan sepanjang perkenalan mereka, Tertuduh tidak pernah berjumpa secara bersemuka dengan SP 10. Mereka cuma berkomunikasi melalui platform Bigo dan aplikasi whatsapp sahaja dan Tertuduh tidak mengenali ibu bapa SP10.

72. Di dalam keterangannya juga, Tertuduh memaklumkan bahawa dia tidak mengetahui umur sebenar SP10 selain daripada hanya mengetahui yang SP10 masih bersekolah di tingkatan 6 Atas. Disebabkan oleh hal iłu, maka Tertuduh menyangka SP10 berumur 19 tahun sepanjang perhubungan mereka tersebut. Tertuduh juga memaklumkan mahkamah ini bahawa tujuan Tertuduh menjalinkan hubungan dengan SP10 ialah kerana Tertuduh ingin berkahwin dengan SP10 tetapi tidak pernah memberitahu ahli keluarganya tentang hasratnya tersebut.

73. Apabila disoal oleh peguambela Tertuduh semasa pemeriksaan utama, berkenaan hal adakah Tertuduh pernah meminta SP10 menghantar gambargambar serta video-video beraksi lucah dan berinteraksi lucah dengan SP10 sepanjang tempoh perkenalan mereka, Tertuduh telah menjawab di hadapan mahkamah ini dengan membuat pengakuan bahawa Tertuduh merupakan pelaku tersebut kerana Tertuduh merasakan mereka berdua sedang menjalinkan hubungan cinta. Tertuduh juga di dalam keterangannya

menceritakan kepada mahkamah ini bahawa Tertuduh menggelar dirinya sebagai husband dan SP10 menggelar dirinya sebagai wife. Disebabkan oleh hal gelaran status sebagai suami dan isteri itu, maka Tertuduh merasakan bahawa kesemua perlakuannya meminta SP10 menghantar gambar-gambar dan video-video berbaur seksual dan lucah tersebut adalah tidak salah kerana mereka adalah pasangan yang sedang bercinta dan adalah menjadi satu kebiasaan bagi pasangan yang sedang bercinta seperti mereka melakukan perkara tersebut.

74. Selanjutnya Tertuduh di dalam keterangannya, semasa pemeriksaan utama, memberitahu mahkamah ini Tertuduh pernah berinteraksi secara live video dengan SP10 dan dapat melihat reaksi SP10 yang menyukai tindakannya menghantar gambar-gambar dan video-video lucah tersebut. Di sini ingin mahkamah ini memberi penekanan bahawa Tertuduh di dalam keterangannya sendiri telah membuat pengakuan segala perbuatan meminta pornografi daripada SP10 dan juga Tertuduh telah membuat pengakuan bahawa Tertuduh pernah melihat reaksi "suka" SP10 di dalam kes ini. Ini bermaksud Tertuduh telah berpeluang melihat bentuk ciri-ciri fizikal, rupa paras dan perwatakan serta perlakuan kanak-kanak SP10 yang merupakan seorang kanak-kanak semasa sesi *live video* yang berlangsung antara Tertuduh dan SP10 pada masa kejadian, dipetik keterangan Tertuduh semasa pemeriksaan utama:

PB: Hendra dalam perbualan kamu atau pun perhubungan kamu dalam whatsapp, adakah kamu pernah menghantar dan menerima gambar atau video-video yang beraksi lucah?

SD1: Pernah.

PB: Boleh beritahu Mahkamah mengapa kamu meminta dan menghantar gambar-gambar seperti ini?

SD1: Macam yang saya beritahu kamikan bercinta dan kami berhasrat untuk berkahwin. Saya pun gelarkan diri saya dan dia juga gelarkan diri dia sebagai husband and wife. Jadi saya yakin yang saya dah macam suami isteri kepada dia Perkara ini pun saya rasa dah biasa di lakukan oleh orang-orang yang tengah bercinta. Lagi pun Yxxx dah biasa bersembang perkara-perkara yang dewasa bila dekat Bigo. Pernah satu masa dekat Bigo Yxxx masuk dalam live seseorang dan bersembang tentang topik-topik dewasa. Jadi saya rasa Yxxx ini dah terbuka tentang perkara-perkara macam ini.

Selanjutnya:

PB: Boleh bagitahu Mahkamah bagaimanakah Yxxx respon selepas dia menghantar gambar dan video beraksi lucah kepada kamu?

SD1: Dia suka sebab lepas dia hantar dia akan bagitahu detail. Contoh dia bagitahu kain dia dah basah, dia rasa lega, dia ada hantar emoji-emoji suka.

PB: Bagaimana pula respon atau pun reaksi Yxxx apabila terima gambar-gambar lucah dan video-video beraksi lucah daripada kamu?

SD1: Sama juga dia suka sebab selepas saya hantar iłu dia akan bagi komen dekat gambar dan video. Dia komen tentang badan saya, dia ada komen tentang perut saya. Kalau dia tak suka dia mungkin tak akan komen benda-benda yang saya hantar itu.

75. Semasa pemeriksaan balas oleh puan Timbalan Pendakwaraya, Tertuduh memberitahu mahkamah ini bahawa Tertuduh tidak pernah menyiasat tentang umur sebenar SP10 sepanjang perkenalannya dengan SP10 kerana Tertuduh percaya bulat-bulat bahawa SP10 adalah seorang dewasa berdasarkan butiran yang terdapat dalam akaun di platform Bigo tersebut. Di peringkat ini, mahkamah berpendapat alasan yang diberikan oleh Tertuduh ini adalah tidak munasabah dan tidak boleh diterima oleh mahkamah ini, memandangkan Tertuduh bukanlah seorang yang tidak berpendidikan sehingga tidak dapat membezakan ciri-ciri antara seorang perempuan yang berumur kanak-kanak dan seorang perempuan berumur dewasa semasa berinteraksi dengan SP10 dan adakah Tertuduh tidak terfikir langsung untuk menyiasat umur sebenar SP10 apabila Tertuduh dapat melihat sesuatu yang mencurigakan tentang umur sebenar SP10 di dalam kes ini. Tambahan pula Tertuduh di dalam kes ini mempunyai latar belakang pendidikan Diploma di dalam Jurusan Pendidikan Awal Kanak-Kanak dari Kolej Islam Antarabangsa dan mahkamah berpendapat, bagi seseorang yang mempunyai latar belakang pendidikan Awal Kanak-Kanak daripada Kolej Islam Antarabangsa keterangan Tertuduh bahawa Tertuduh menyangka dan mempercayai bulat-bulat bahawa SP10 di dalam kes ini merupakan seorang dewasa adalah tidak munasabah.

76. Tertuduh juga di dalam keterangannya, telah bersetuju atas soalan dan cadangan yang dikemukakan kepadanya oleh puan Timbalan Pendakwaraya bahawa sesiapa sahaja boleh menipu pendaftaran profile di platform Bigo dan sesiapa sahaja boleh mendaftar di akaun Bigo. Dipetik keterangan Tertuduh semasa pemeriksaan balas dan pemeriksaan semula:

<u>Pemeriksaan balas</u>

TPR: Sebelum ini saya ada tunjuk di skrin ada profile dia. Rujuk saksi pada P28 gambar 1(80). Dekat profile Bigo Yxxx tulis tarikh lahir dia 1920 kamu tak rasa curiga nak siasat hal ini?

SD1: Dekat gambar ini profile ini cuma boleh dilihat oleh owner akaun sahaja Untuk orang luar cuma boleh tengok umur dia sahaja. Bahagian ini adalah bahagian untuk di edit oleh owner.

MAH: Soalan dia kamu tak rasa curiga untuk siasat?

SD1: Ini saya tak curiga sebab saya tak tahu bahagian ini, sebab bahagian ini tak ditunjukkan dekat Bigo.

Selanjutnya:

TPR: Hendra kamu ada akaun Bigo?

SD1: Ya, betul.

TPR: Jadi nak daftar akaun Bigo ini macam mana? Boleh bagitahu Mahkamah?

SD1: Mesti ada email and then usia mesti 18 tahun ke atas. Kemudian mesti ada nombor telefon dan mesti ada umur.

TPR: Jadi kalau nak daftar Bigo ini ada tak kena upload kad pengenalan atau sijil lahir?

SD1: Itu tak ada.

TPR: Kalau macam itu maksudnya sesiapa pun boleh daftar Bigo?

SD1: Betul, tapi dekat aplikasi Bigo itu untuk kita download pun dia dah bagitahu yang aplikasi itu untuk usia 18 tahun ke atas.

Selanjutnya:

TPR: Setuju tak maklumat yang dekat Bigo, dekat profile mungkin boleh jadi betul atau mungkin boleh dipalsukan oleh orang yang daftar itu?

SD1: Setuju. Tapi Bigo ini dia ada satu komuniti yang mana dia akan pantau setiap pengguna-pengguna Bigo. Contohnya kalau maçam pengguna itu buat live dia tengok pengguna itu adalah bawah umur dia akan block terus akaun Bigo itu.

Selanjutnya:

<u>Semasa pemeriksaan semula</u>

PB: Semasa kamu mengenali Yxxx di aplikasi Bigo, adakah kamu tahu status umur Yxxx?

SD1: Saya lihat status umur Yxxx 19 tahun sebab dia ada letak umur dia dekat Bigo itu.

PB: Adakah kamu sendiri pernah bertanya kepada Yxxx tentang umur dia?

SD1: Tak pernah tapi yang saya yakin Yxxx betul-betul umur 19 tahun dan Yxxx pernah cakap dia berada di Tingkatan 6 Atas.

Selanjutnya:

PB: Boleh bagitahu Mahkamah macam mana cara Yxxx beritahu tentang umur dia itu dalam Bigo ke Whatsapp?

SD1: Semasa sembang di telefon.

PB: Boleh beritahu apakah sebenarnya hasrat atau tujuan kamu menjalin hubungan dengan Yxxx?

SD1: Kami kan bercinta jadi saya berhasrat jalinkan hubungan lebih serius dan nak kahwin dengan Yxxx.

77. Tertuduh di dalam keterangannya lagi menafikan telah dapat melihat SP10 secara bersemuka di dalam sesi live video antara mereka dan Tertuduh tidak dapat mengenalpasti sama ada SP10 itu seorang kanak-kanak atau dewasa kerana telefon bimbit SP10 mempunyai aplikasi yang boleh edit dan filter, iaitu sejenis aplikasi yang boleh mengubah wajah seseorang untuk menunjukkan diri seseorang itu kelihatan lebih dewasa dan apabila **dicadangkan oleh Puan Timbalan Pendakwaraya, bahawa, jika itu pernyataan Tertuduh kepada mahkamah ini adalah lebih wajar sekiranya Tertuduh berjumpa dengan SP10 sendiri di luar sana bagi memastikan identiti sebenar SP10 dan Tertuduh di dalam jawapannya bersetuju dengan cadangan Timbalan Pendakwaraya tersebut, tetapi di mahkamah ini Tertuduh tidak menunjukkan Tertuduh ada menjalankan usaha dan ikhtiar untuk berjumpa dengan SP10 sendiri bagi memastikan sama ada SP10 ialah seorang dewasa atau kanak-kanak sebelum Tertuduh meneruskan hubungan terlarang dan meminta pornografi daripada SP10 di dalam kes ini**. Di peringkat ini, Mahkamah berpendapat, Tertuduh pada setiap masa dan waktu kejadian sememangnya telah mengetahui bahawa SP10 ialah seorang kanak-kanak pada waktu kejadian dan Tertuduh telah melakukan perbuatan meminta pornografi itu dengan niat untuk menjadikan SP10 seorang yang masih kanak-kanak pada ketika itu sebagai mangsanya dan lebih teruk lagi, Tertuduh di dalam kes ini telah memberitahu mahkamah ini di dalam keterangannya bahawa adalah wajar baginya meminta gambar lucah daripada SP10 iaitu kanak-kanak di dalam kes ini dengan menggunakan alasan mereka ialah pasangan kekasih dan ingin berkahwin.

78. Mahkamah berpendapat, alasan yang diberikan oleh Tertuduh sebagai pasangan kekasih dan ingin berkahwin dengan SP10 tersebut hanyalah salah satu umpan dan helah yang digunakan oleh Tertuduh merayu untuk meransang SP10 memuaskan nafsu serakahnya sepanjang perhubungan mereka tersebut, dipetik keterangan Tertuduh semasa pemeriksaan balas:

TPR: Kamu pernah live dengan dia, daripada video yang kita tengok itu tengok daripada muka dia, perwatakan dia bukan saja Hendra tapi semua orang boleh tahu yang dia bawah umur. Setuju atau tidak?

SD1: Tak setuju.

TPR: Sebab apa tak setuju?

SD1: Sebab saya tak bersemuka dengan Yxxx, saya cuma dia dekat telefon. Dekat telefon dia ada filter yang kita boleh edit dan adjust nampak seperti orang dewasa. Perwatakan Yxxx pun seperti orang dewasa sebab dia tahu sembang tentang perkara-perkara dewasa. Yxxx pun saya tengok dekat telefon dia tinggi.

TPR: Dekat sini maksud kamu, kamu salah anggap tentang umur dia sebab tak bersemuka dengan Yxxx?

SD1: Ya, betul.

TPR: Jadi sepatutnya kamu kena jumpa dengan Yxxx untuk sahkan umur dia, betul?

SD1: Betul.

Selanjutnya:

TPR: Hendra wajarkah tindakan kamu minta gambar lucah daripada seseorang dengan alasan hanya kamu pasangan kekasih dan nak kahwin dengan dia. Wajar ke tidak perbuatan ini?

SD1: Wajar.

79. Mahkamah berpandangan, dengan melihat kepada keseluruhan keterangan Tertuduh ini, jelas di sini Tertuduh merupakan pelaku yang melakukan semua perbuatan meminta pornografi daripada SP10 di dalam kes ini.".

[Emphasis added]

[27] During examination-in-chief, SP10 told the court that she had informed the Appellant about her age (see page 279 of RRJ2B):

TPR: Yxxx pernah bagitahu dekat dia umur Yxxx berapa?

SP10: Pernah.

TPR: Yxxx beritahu umur yang sebenar atau macam mana?

SP10: Yxxx bagitahu dia umur Yxxx 14 tahun.

[28] In the cross-examination by counsel for the Appellant (excerpts taken from pages 328-350, RRJ2B), SP10 was asked:

PB: Yxxx pernah bagitahu Mahkamah, masa itu umur Yxxx 12 tahun tapi Yxxx bagitahu umur Yxxx 14 tahun. Setuju tak?

SP10: Setuju.

PB: Saya katakan, Yxxx memang tak pernah bagitahu pun umur Yxxx yang sebenar kepada Hendra?

SP10: Setuju.

...

PB: Setuju tak dengan saya, Yxxx telah memalsukan usia Yxxx ketika mendaftar akaun Bigo?

SP10: Tak setuju, sebab akaun itu bukan akaun milik Yxxx. Pada mulanya akaun milik kawan Yxxx.

PB: Saya ingatkan sekali lagi, sepanjang perbicaraan ini Yxxx bagitahu itu akaun Yxxx.

SP10: Maksud Yxxx akaun itu memang Yxxx yang guna, tetapi semasa daftar itu bukan Yxxx yang daftar.

...

PB: Jadi setuju dengan saya, Yxxx memang berniat untuk pengguna Bigo yang lain termasuklah Hendra percaya kepada segala maklumat yang ada pada profile Bigo yang didaftarkan oleh Sxxxxxx tadi?

SP10: Tidak setuju, sebab Yxxx menggunakan gambar Yxxx dan username Yxxx sendiri cuma Sxxxxxx yang mendaftarkan.

...

PB: Setuju tak dengan saya, sepanjang Yxxx memberi keterangan di Mahkamah ini, Yxxx tidak pernah ditunjukkan dengan profile Bigo yang Yxxx gunakan?

SP10: Tak setuju, sebab masa Yxxx camkan gambar-gambar tadi ada 1 screen short menunjukkan profile Yxxx.

...

SP10: Gambar yang ke-80.

...

PB: Ini profile Yxxx?

SP10: Ya.

PB: Setuju tak, dekat profile ini ada tertera tarikh lahir?

SP10: Setuju.

PB: Boleh Yxxx bacakan berapakah tarikh lahir pada profile Bigo tersebut?

SP10: 1920-4-10.

...

PB: Kemudian baru Yxxx letak title itu. Setuju tak kalau Yxxx tak suka Yxxx tak akan rakam dan hantar?

SP10: Tak setuju, sebab masa mula-mula Yxxx ada bagi keterangan Yxxx kata tak nak hantar tapi Hendra suruh Yxxx untuk hantar. Masa mula-mula Yxxx bagi keterangan di Mahkamah Yxxx dah kata yang Yxxx tak nak hantar pada mulanya dan bila lama kelamaan Yxxx rasa macam Hendra caring tentang Yxxx, rasa macam ada orang sayangkan Yxxx dan pada masa itu Yxxx tak tahu apa akibat dan apa tujuan video itu.

...

PB: Yxxx mengaku pada Mahkamah Yxxx tidak bagitahu umur sebenar Yxxx, dalam profil Bigo yang Yxxx gunakan pun tak menyatakan tarikh lahir yang sebenar. Dalam perbualan whatsapp pun tidak ada Yxxx nyatakan bersekolah darjah berapa atau tingkatan berapa. Setuju tak dengan saya, sesiapa pun boleh anggap Yxxx mungkin bersekolah Tingkatan 6 dan lebih 18 tahun?

SP10: Tak setuju, sebab Yxxx ada bagitahu umur Yxxx walaupun bukan umur sebenar tapi umur itu dibawah 18 tahun.

PB: Saya katakan, memang Yxxx sengaja nak buat Hendra percaya yang Yxxx berusia lebih 18 tahun?

SP10: Tak setuju.

...

PB: Jadi saya katakan, semasa Hendra menjalinkan hubungan dengan Yxxx Hendra menganggap Yxxx seorang wanita dah cukup umur?

SP10: Tak setuju, sebab umur yang Yxxx bagitahu bawah 18 tahun dan bukan dewasa.

[29] And lastly in her re-examination, SP10 again told the court that she had informed the Appellant about her age (see pages 354-355 of RRJ2B)

TPR: Peguam juga ada cakap, cara Yxxx balas whatsapp kepada Hendra ini memang Yxxx sengaja nak tunjuk bahawa Yxxx seorang wanita yang dewasa dan telah matang untuk berkahwin. Yxxx cakap Yxxx tak pasti. Sebab apa Yxxx cakap macam tu?

SP10: Sebab cara Yxxx bermesej dengan dia tu Yxxx tak nampak macam orang dewasa dan Yxxx sendiri dah bagitahu umur Yxxx 14.

TPR: Peguam juga ada rujuk kepada Yxxx eskhibit P27(A-E), ada 5 video dekat situ. Yxxx tak pernah rasa sedih semasa hantar video ini pada Hendra. Yxxx cakap Yxxx tak setuju. Boleh jelaskan pada Mahkamah?

SP10: Soalan?

TPR: Peguam cakap Yxxx sebenarnya tak rasa sedih bila hantar 5 video ini kepada Hendra tapi Yxxx tak setuju.

SP10: Sebab Yxxx rasa sedih dan bersalah.

TPR: Peguam juga cakap kepada Yxxx, yang Yxxx ini memang sebenarnya sengaja nak Hendra percaya yang Yxxx ini berusia lebih daripada 18 tahun. Yxxx tak setuju bila peguam cakap macam itu. Sebab apa Yxxx tak setuju?

SP10: Sebab Yxxx tak ada tunjukkan yang Yxxx ini lebih 18 tahun.

[Emphasis added]

[30] The learned SCJ also dealt with this issue of SP10 lying about her age that she was 14 years old, where she stated:

> "33. Mahkamah berpendapat penafian Tertuduh itu adalah tidak berasas kerana di sepanjang perkenalan antara Tertuduh dan SP10 mahkamah mendapati melalui siri perbualan-perbualan antara Tertuduh dengan SP10 di dalam platform Bigo dan selanjutnya di aplikasi whatsapp, Tertuduh pernah bertanyakan dan menasihati SP10 tentang hal-hal persekolahan SP10 dan Tertuduh juga pernah bertanyakan berkenaan umur SP10 kepadanya dan SP10 memberitahu Tertuduh bahawa umurnya ialah 14 tahun pada ketika itu. **Di peringkat ini, Mahkamah mendapati, walaupun Tertuduh menyatakan SP10 telah menipu kepadanya tentang umur sebenar SP10, mahkamah berpendapat umur 14 tahun tersebut merupakan umur kanak-kanak dan ditakrifkan di dalam undang-undang sebagai kanak-kanak.** Mahkamah merujuk kepada peruntukan di bawah seksyen 2 Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017 (Akta 792). Seksyen 2, Akta 792 menyebut seperti berikut:
>
> ...
>
> 35. Oleh itu, penafian Tertuduh bahawa Tertuduh tidak tahu SP10 ialah seorang kanak-kanak sepanjang perkenalan mereka ini adalah tidak berasas dan tidak boleh diterima pakai. **Tambahan pula, tidak ada satu pun kenyataan Tertuduh di mahkamah ini menunjukkan Tertuduh ada mengambil ikhtiar atau usaha untuk menyiasat umur sebenar SP10 semasa berkenalan dengan Tertuduh, tetapi sebaliknya Tertuduh telah menunjukkan kepada Mahkamah ini bahawa Tertuduh tahu SP10 merupakan seorang kanak-kanak ketika Tertuduh mengenali dan menjalinkan hubungan intim secara maya dengan SP10 pada waktu kejadian.".**

[Emphasis added]

[31] The provision of s.20 of the 2017 Act makes it no defence for an accused to state that he did not know the true age of the child "...unless the accused **took all reasonable steps to ascertain** the age of the child". The key word here is to "ascertain". The dictionary meaning of "ascertain" is "to find out or learn with certainty" (Merriam-Webster Dictionary). The origin of the word is from "certain". Another meaning of ascertain is "determine". Again, citing from the online Merriam-Webster Dictionary, it

explains that "Some common synonyms of ascertain are determine, discover, learn, and unearth. While all these words mean "to find out what one did not previously know," **ascertain implies effort to find the facts or the truth proceeding from awareness of ignorance or uncertainty**...". Following from this, the Court opines that "ascertain" is defined using the ordinary meaning of the word and it is not even a legal term. One then needs to **take all reasonable steps to find out the truth of the child's age**, when it comes to the defence in s.20 of the 2017 Act. There must be positive efforts taken to find the facts or the truth.

[32] The SCJ did not fall into error when she made a finding of fact that the Appellant did not make any effort to go and meet SP10 in person so that he could discover her true age. I had seen the photos of the victim and I agreed with the DPP's question in cross-examination that anyone could see from the photos of SP10 (P28(1-83)) that she was just a child although the Appellant denied that fact. The SCJ in her grounds of judgment at paragraphs 53 and 56 also discussed her findings that the videos showed SP10's face despite the Appellant's denial that he could not see her face as she used a filter in the media. Hence, the SCJ did not commit any error when she ruled that the defence was just a bare denial.

[33] Counsel for the Appellant submitted that his client had taken all reasonable steps to ascertain (*menentukan*) SP10's age and he really believed that she was more than 18 years old. Therefore, it was wrong for the SCJ to not accept his defence which was provided by law as he had raised a reasonable doubt on the prosecution case in regard to the victim's age. On the other hand, the DPP submitted that s.20 was a presumption of law and therefore, the evidentiary burden had been raised i.e. the

Appellant had to prove on a balance of probabilities that he had taken all reasonable steps to ascertain SP10's age.

[34] In **Mohamad Radhi B Yaakob v Public Prosecutor [1991] 3 MLJ 169** the Supreme Court held:

> "In this connection, counsel for the appellant had referred to us the case of *PP v Saimin & Ors* [1971] 2 MLJ 16 where Sharma J held that the falsity of the defence does not relieve the prosecution from proving the prosecution's case beyond reasonable doubt. **We are of the view that whenever a criminal case is decided on the basis of the truth of the prosecution's case as against the falsity of the defence story, a trial judge must in accordance with the principle laid down in *Mat v PP* [1963] MLJ 263 go one step further before convicting the accused by giving due consideration as to why the defence story, though could not be believed, did not raise a reasonable doubt in the prosecution case. Thus, even though a judge does not accept or believe the accused's explanation, the accused must not be convicted until the court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt in the prosecution case. To satisfy this test it is not so much the words used by the judge, but rather the actual application of the test to the facts of the case that matters. In this case, we found that the learned trial judge offered practically no reason why the defence, notwithstanding its falsity and unconvincing nature, had failed to cast reasonable doubt in the prosecution case, other than to state by way of lip service the duty placed by the law on the defence to earn an acquittal.**
>
> It is a well-established principle of Malaysian criminal law that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is charged. There is no similar burden placed on the accused to prove his innocence. He is presumed innocent until proven guilty. To earn an acquittal, his duty is merely to cast a reasonable doubt in the prosecution case. **In the course of the prosecution case, the prosecution may of course rely on available statutory presumptions to prove one or more of the essential ingredients of the charge. When that occurs, the particular burden of proof as opposed to the general burden, shifts to the defence to rebut such presumptions on the balance of probabilities which from the defence point of view is heavier than the burden of casting a reasonable doubt, but it is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt.** To

earn an acquittal at the close of the case for the prosecution under s 173(f) or s 180 of the Criminal Procedure Code, the court must be satisfied that no case against the accused has been made out which if unrebutted would warrant his conviction (*Munusamy v PP* [1987] 1 MLJ 492). If defence is called, the duty of the accused is only to cast a reasonable doubt in the prosecution case. He is not required to prove his innocence beyond reasonable doubt.".

[Emphasis added]

[35] For completeness, I refer to the relevant paragraph in **Mat v PP [1963] MLJ 263**, when considering the defence raised by an accused:

" ...

(d) If you do not accept or believe the accused's explanation and that explanation does not raise in your mind a reasonable doubt as to his guilt Convict."

[36] I refer to the case of **Masih Perviaz (W/Pakistan) v PP [2022] 4 MLJ 676**, where it was observed that the Court of Appeal confirmed the learned High Court Judge's findings on the defence in that case which was **a bare denial, an afterthought and not credible**. Before convicting the accused, the trial judge must give due consideration as to why the defence story, though could not be believed, did not raise a reasonable doubt in the prosecution case. Thus, even though a judge does not accept or believe the accused's explanation, the accused must not be convicted until the court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt in the prosecution case. A perusal of the SCJ's Grounds of Judgment would show that the learned SCJ had considered the defence case. Moreover, in the present case, the Appellant was not convicted upon the uncorroborated evidence of a child witness as there were ample corroboration of SP10's testimony in court.

[37] The SCJ had discussed the defence case thoroughly and compared it with the evidence given by the prosecution witnesses at the *prima facie* stage. She had considered the Appellant's testimony and tested it against the victim's evidence. The SCJ found that his defence did not raise any reasonable doubt on the prosecution case as she did not accept his explanation that he had no knowledge of SP10's age. The trier of fact had the benefit of assessing the witness's credibility before her (SCJ) whereas this Court is disadvantaged as it only has the records of the appeals before it. **Nevertheless, in assessing the whole of the evidence in the records of appeal and applying the law, it was crystal clear that the Appellant did not have a valid defence at all.**

[38] Earlier, I had mentioned about the Appellant's application under s.317 of the CPC to admit fresh evidence and the appeal to the Court of Appeal as I had dismissed the said applications. It has come to my attention that that appeals had been discontinued, presumably because the substantive appeals here had been disposed on the merits on 2.11.2023. Nevertheless, I refer to the relevant parts of my grounds of judgment dated 6.11.2023 for not allowing the applications made under s. 317 of the CPC as there are some relevance on the defence case here. The applications were made for admission of a purportedly new evidence that was not available during the trial and the reasons given, *inter alia*, were that:

i. the Sessions Court in arriving at its decision had considered the provision of "Presumption of age of a child" under s.20 of the 2017 Act and decided that "*Tertuduh/Perayu tidak menunjukkan Tertuduh ada menjalankan usaha dan ikhtiar untuk berjumpa dengan SP10 sendiri bagi memastikan samada SP10 ialah seorang dewasa atau kanak-kanak*";

ii. no documentary evidence pertaining to "*cabutan/ekstrak profail akaun-akaun BIGO lain Pengadu (SP10)*" were tendered at the trial in the Sessions Court and this directly prejudiced the defence of the Appellant/Applicant;

iii. substantial prejudice would also ensue if the "*cabutan/ekstrak profail akaun-akaun BIGO lain Pengadu (SP10)*" are not allowed to be made as part of the Record of Appeal;

iv. documentary evidence pertaining to "*cabutan/ekstrak profail akaun-akaun BIGO lain Pengadu (SP10)*" sought to be tendered were very inter-related with the findings of the Sessions Court;

v. the said documentary evidence sought to be admitted were credible documentary evidence and would raise a reasonable doubt in the lower court relating to the guilt if the said evidence had been admitted along with other evidence therein.

[39] The DPP objected to the applications at the hearing of the application conducted on 14.8.2023. The Applicant submitted that the main reason for the applications was due to the findings made in the grounds of judgment of the Sessions Court Judge (SCJ) in paragraph 77, where she had stated "*Tertuduh/Perayu tidak menunjukkan Tertuduh ada menjalankan usaha dan ikhtiar untuk berjumpa dengan SP10 sendiri bagi memastikan samada SP10 ialah seorang dewasa atau kanak-kanak*". Referring to s.20 of the 2017 Act, counsel for the Appellant informed the Court that the **previous counsel at the Sessions Court did not present the evidence which they sought to be admitted as part of the defence case**. The crux of the defence case was that although the Appellant had

been communicating via BIGO, telephone and WhatsApp with SP10, he did not know her real age because BIGO was an adults-only platform and not intended for anyone under 18 years of age. The Appellant sought to adduce additional evidence that SP10 owned more than one BIGO account and each of them showed different ages of SP10. These were screenshots of the other BIGO accounts registered under SP10's name where she had stated her age as 19, 22 and 23. The Appellant's counsel submitted that his client had been denied of a fair trial due to the **"incompetence" of the previous counsel** who conducted the case and did not adduce the said new exhibits.

[40] This Court was then referred to a few cases in the Appellants's Bundle of Authorities for the said application where it was argued that the case of **Murugayah v PP [2004] 2 MLJ 545** was applicable here. The Appellant sought to show to the Court that he did make efforts to ascertain her age. The new evidence would satisfy the four conditions in **R v Parks [1961] 2 AER 633** and it may raise a reasonable doubt in the mind of the trial judge.

[41] The DPP submitted during the hearing of the applications that the Appellant knew that SP10 lied about her age as the evidence would show. The printouts from the victim's BIGO profile in Exhibit HM-3 of the Affidavit in Support of the application were inconclusive as two (2) of them did not show the victim's face. If the printouts were admitted, the prosecution could not send them for verification and whether these profiles were still in existence. It was submitted further that it was not known if the alleged profiles were used in communications between the Appellant and SP10. Moreover, if what the Appellant alleged was true, Exhibit HM-3 would have existed during the trial and therefore did not satisfy the conditions in ***R v***

Parks (supra). Further, the SCJ had assessed the credibility of the witnesses and came to a correct finding at the trial and the victim's cross-examination at pages 333-337 of the Notes of Evidence (which were not exhibited in the application) showed that she had been asked the relevant questions regarding her age. Hence, to allow the applications would be a travesty of justice to the prosecution case after trial and a second bite at the cherry by the Appellant, so to speak.

[42] In reply, counsel for the Appellant submitted (rather puzzlingly) that ***Murugayah v PP*** (supra) could be distinguished because the application under s.317 of the CPC was made about three years later whereas the Notis Usul in Encl. 1 was filed immediately pending the present substantive appeals. In the instant case, the existence of other BIGO accounts held by SP10 would show that she had stated different ages (lied about her real age). In paragraph 9 of Encl. 2, the Appellant stated that in his testimony, he told the Sessions Court that in each account SP10 had stated her age as 19, 22 and 23. SP10 also told him that she was studying in Upper Form 6 and which was why he believed that she was more than 18 years' old. In paragraph 10 of Encl. 2, the Appellant averred that he had honestly attempted to ascertain her real age. In paragraph 11, the Appellant stated that nevertheless, there was no such documentary evidence submitted by the previous counsel to support his oral evidence in court at that time. Therefore, he had been substantially prejudiced by the findings of the SCJ in his defence because the judge had applied s.20 of the 2017 Act on the wrong evidence.

[43] In paragraph 12 of his Affidavit in Support of the application, the Appellant stated that in March 2023 upon appointing a different counsel to conduct his appeal and in preparation of the Petition of Appeal, he had

been asked about SP10's other BIGO account profiles. Pursuant thereto, in paragraph 15 the Appellant stated that he had taken steps to obtain the extracts of SP10's other BIGO account profiles in order for the documents to be admitted as additional evidence for the purposes of the appeals.

[44] The Appellant relied on the phrase "*unless the accused took all reasonable steps to ascertain the age of the child*". Augustine Paul JCA in ***Murugayah v PP*** (supra) stated:

> "6 It will be observed that the reception of additional evidence is a matter of discretion. It is settled law that the exercise of a discretion must be in accordance with established judicial guidelines. In the case of adducing additional evidence, the guidelines were spelt out in *Ladd v Marshal* [1954] 3 All ER 745 in the form of three conditions. In elaboration of the conditions, Lord Parker CJ said in *R v Parks* [1961] 3 All ER 633 at p 634:
>
> > **Those principles can be summarized in this way. First, the evidence that it is sought to call must be evidence which was not available at the trial. Secondly, and this goes without saying, it must be evidence relevant to the issues. Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but it must be evidence which is capable of belief. Fourthly, the court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.**
>
> 7 The statement of the law in *R v Parks* [1961] 3 All ER 633 has been adopted and applied in local cases such as *Mohamed bin Jamal v Public Prosecutor* [1964] 1 MLJ 254; *Dol bin Lasim v Public Prosecutor* [1987] 1 MLJ 116; *Lo Fat Thjan & Ors v Public Prosecutor* [1968] 1 MLJ 274 and *Che Din bin Ahmad v Public Prosecutor* [1976] 1 MLJ 289. **The conditions are cumulative and not in the alternative and it is for the appellant to satisfy the court that they have been fulfilled (see *Che Din bin Ahmad v Public Prosecutor* [1976] 1 MLJ 289). It is only in the most exceptional circumstances that the court will receive additional evidence.** As Syed Agil Barakbah J (as he then was) said in *Che Din bin Ahmad v Public Prosecutor* [1976] 1 MLJ 289 at pp 289-290:

> Now, s 317 of the Criminal Procedure Code gives a discretion to the judge in hearing any appeal to allow additional evidence if he thinks such is necessary. In considering such application the appellate court has always adopted the attitude that it is only in the most exceptional circumstances, and subject to what may be described as exceptional conditions, that the court is ever willing to listen to additional evidence (*Mohamed bin Jamal v Public Prosecutor* [1964] 1 MLJ 254, 255 per Thomson LP, quoting Hallet J in the case of *R v Jordan* (1956) 40 Cr App R 152, 154). **It is clear, therefore, that not only the circumstances must be most exceptional but the subject which is proposed to be adduced by further evidence is subject to exceptional conditions. It becomes necessary only if a failure of justice would result if such additional evidence was not taken and allowed when additional facts have come to light since the date of trial. The matter is left entirely to the discretion of the court.".**
>
> [Emphasis added]

[45] In ***Murugayah v PP*** (supra), the accused was charged in the sessions court with an offence under s.326 of the Penal Code for having caused grievous hurt to one Kantharupan who at the trial had identified the accused as one of the four persons who had attacked him. The accused was convicted in February 1997 and sentenced. He appealed to the High Court against the conviction and sentence. While the appeal was pending, the accused made an application to the High Court to adduce additional evidence pursuant to s.317 of the CPC from himself, Kantharupan and one Krishnan. His application was dismissed by the High Court. He appealed against the High Court decision. **The basis of that application was that sometime after his conviction, in 1998, he was informed by Krishnan that Kantharupan was actually assaulted by other persons**. He later met Kantharupan who told the accused that he had identified the accused in court based on information he obtained from a third party. His appeal against the High Court decision was allowed. The circumstances in that case was the proposed evidence could not have been available at the trial and it went to the identity of the assailant.

[46] Therefore, it appeared in the above case that the information sought to be admitted as fresh evidence was only available in 1998 after the trial ended (the first and second conditions). The third and fourth conditions in ***R v Parks*** (supra) were also not satisfied in that case. To summarise, the four conditions are:

1. The evidence that it is sought to call must be evidence which was not available at the trial.
2. It must be evidence relevant to the issues.
3. It must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but it must be evidence which is capable of belief.
4. The court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.

[47] This Court was also referred to the case of **Mohamed Bin Jamal v PP [1964 1 MLJ 254** where the Federal Court of Singapore which also cited ***R v Parks*** (supra) with approval. It discussed what was a wholly exceptional circumstance, and there it was in regard to ignorance on the defence of murder. With respect, the decision in the Singaporean case was confined to the facts of the case and the apex court had stated:

> "… We are not suggesting for one moment that any ignorance of the law on the part of counsel should necessarily avail a prisoner anything in every case. The law relating to murder, however, is the most fundamental portion of all our law. It governs the conditions in which society may take away life; an error in its application may be such that it can never be repaired.".

[48] This Court opined that the decision of the Singaporean court was only persuasive but not binding here and that it was not an apple-to-apple comparison as the law in relation to the defence for the capital offence of murder could not be equated with the defence available to an accused in s.20 of the 2017 Act. The apex court continued:

"In the event we found ourselves compelled to a very firm view to the effect that had that evidence together with the evidence as to the nature of the killings been before the trial court and had the law relating to the incidence and quantum of proof been correctly stated to the jury (as it was) then no reasonable jury could possibly have come to any conclusion other than that the defence of diminished responsibility was made out.".

[49] Lastly, I had referred to the case of **Dol v Lasim v PP [1987] 1 MLJ 116** where the Supreme Court held that:

"It is the paramount duty of the court to see that, in the last resort, justice is done and any miscarriage of justice rectified. In view of the fact that the learned Judge came to his conclusion as a result of the demonstration given by the chemist we cannot say he was not influenced by this additional evidence which was not shown to be necessary and also improperly admitted. **A Judge cannot simply call for additional evidence just to satisfy his curiosity or doubt or to supplement a gap in the prosecution. Also, such evidence, if necessary, must be in proper form and taken in accordance with the provisions of the Criminal Procedure Code.**".

[Emphasis added]

[50] As clearly explained in the third condition enunciated in ***R v Parks*** (supra), it was not the task of this Court at the hearing of the application to decide whether the proposed evidence was to be believed or not. The function of the Court was only to determine whether the proposed evidence, if given, was capable of belief; which it was capable of belief. But the first condition, is that the evidence must not be available at the trial. To recap, in paragraph 9 of Encl. 2, the Appellant stated in his testimony, he told the Sessions Court that **in each account SP10 had stated her age as 19, 22 and 23**. In paragraph 10, the Appellant averred that he had honestly attempted to ascertain her real age. Nevertheless, there was no such documentary evidence submitted by his previous counsel to support his oral evidence in court at that time. Then in paragraph 15, he **contradicted himself** by stating that pursuant to his newly appointed counsel's advice, he had obtained the printouts in Exhibit

HM-3 as further evidence for the purpose of the appeal. **I found that this purportedly new evidence was available at the trial, as he already knew then she had stated three different ages in the BIGO account profiles.** But as to why the previous counsel did not adduce them at that time, only the Appellant and his defence team knew the reason. Failure, if any, of the previous counsel to submit the documents then, did not mean they were not available at all. **I concluded that the Appellant did not satisfy the first condition**.

[51] With regard to the fourth condition, a perusal of the grounds of judgment showed that the SCJ had considered the Appellant's evidence and defence about not knowing SP10's true age (paragraphs 32 onwards). Then in paragraph 37 onwards the SCJ stated why she did not believe his defence. In paragraph 75, 12th line onwards, she stated "*...apabila Tertuduh dapat melihat sesuatu yang mencurigakan tentang umur sebenar SP10...*" She went on to paragraph 77, which was the basis for his applications to admit additional evidence. The SCJ viewed that the Appellant should have met SP10 in person to ascertain the age of the girl. And then the SCJ also mentioned about the Appellant's academic qualification i.e. Diploma in Early Childhood Education, which she considered as well that the defence raised did not convince her that he did not know the victim's true age.

[52] The Appellant was asking to admit the additional documentary evidence of SP10's purported adult ages but the **SCJ's conclusion was that he did not make any effort to meet with SP10 in person**. I found that based on her conclusions, the additional documentary evidence in Exhibit HM-3 "would not have raised a reasonable doubt in the mind of the SCJ as to the guilt of the Appellant if that evidence had been given

together with the other evidence at the trial". **Therefore, the Appellant also did not satisfy the fourth condition.**

[53] It is trite law therefore, that not only the circumstances must be most exceptional but the subject which is proposed to be adduced by further evidence is subject to exceptional conditions. It becomes necessary only if a failure of justice would result if such additional evidence was not taken and allowed **when additional facts have come to light since the date of trial**. The matter is left entirely to the discretion of the court. And the Court has exercised its discretion judiciously in accordance with established legal principles. There was nothing new in the additional evidence which the Appellant sought to be admitted in the Records of Appeal as they were already known to the defence at the trial. Moreover, the SCJ would not have come to a different conclusion even if the documents to show SP10's "purported other adult ages" had been admitted at the trial. What she said was that he should have met SP10 in person to ascertain her age. Had he done so and still thought she was an adult, that would have been a complete defence as provided by the law.

[54] I have stated before that I agreed with the DPP's submissions that s.20 of the 2017 Act operated as a presumption of law. Therefore, if the Appellant wished to invoke it, he must adduce such evidence on a balance of probabilities to dispel any notion that he knew of the victim's true age. Despite agreeing to the DPP's suggestion that it was reasonable for him to make efforts to meet SP10 in person, the Appellant stated in his evidence that he did not do so because of work commitments. He alleged that SP10 gave a positive response when he asked her for her sexually explicit videos and photos. Nevertheless, the Court found that SP10 in her evidence said she was reluctant at first but had to give in because he

persistently asked for them. From the WhatsApp conversations too, it could be seen that it took her a lot of coaxing and assurance (that he was her "husband", that he loved her very much) before she agreed to take and send the videos and photos. The excerpts from the cross-examination of the Appellant are reproduced below for reference:

TPR: Setuju kalau betul-betul kamu nak kahwin dengan dia kamu takkan minta gambar-gambar lucah daripada dia?

SD1: Tak setuju sebab Yxxx pun beri respon yang positif.

TPR: Kalau betul-betul kamu nak kahwin dengan dia, kamu sepatutnya jumpa dengan keluarga dia? Jumpa dia sendiri tengok betul tak IC dia semua? Ada kamu buat semua itu?

SD1: Memang saya hasrat nak jumpa dia dan saya pernah bagitahu yang saya nak datang ke Perak untuk jumpa dia. Cuma masa itu belum ada lagi sebab saya bekerja.

TPR: Hendra sebenarnya kamu tak ada ambil apa-apa langkah munasabah untuk tahu berapa umur sebenar Yxxx? Semuanya berdasarkan kepada Bigo dan apa yang dia cakap sahaja?

SD1: Saya tak minta sebab saya yakin betul-betul umur dia 19.

TPR: Maksudnya semua berdasarkan kepada profile di Bigo dengan apa yang dia cakap?

SD1: Ya, betul.

[55] In re-examination, the Appellant gave the following explanation why he believed that SP10 was an adult. In essence, he claimed that she did things that only adults would do:

PB: Hendra tadi semasa ditanya oleh puan pendakwaraya yang kamu tak ada ambil langkah-langkah untuk ambil tahu tentang umur Yxxx. Semua bergantung kepada maklumat di Bigo dan perkara-perkara yang kamu jawab setuju. Boleh jelaskan?

SD1: Sebab apa saya tak siasat detail sebab jika Yxxx seorang kanak-kanak dia tidak ditinggalkan berseorangan sehingga pukul 2-3 pagi. Kadang-kadang sampai pukul 6 pagi dia tinggal sorang-sorang dekat rumah. Seorang kanak-kanak juga mustahil ada sampai 2 biji telefon tanpa

pengawasan ibu bapa. Yxxx seorang sahaja yang tahu password telefon Yxxx. Saya pun ada anak buah bawah umur, diaorang semua abang dan kakak saya pantau dan tahu password telefon anak-anak dia dan selalu cek. Tak pernah pun tinggalkan sampai pukul 2-3 pagi sorang-sorang dekat rumah. Kalau nak pergi mana-mana pun dia akan bawa atau pun hantar ke rumah orang lain untuk dijaga. Jadi dekat situ saya lagi yakin yang Yxxx memang betul-betul cukup umur and then dia pun bebas nak pergi mana-mana contoh dia nak pergi mall ke mana ke tanpa ibu dan bapa dia boleh pergi. Masa saya telefon yang saya tahu Yxxx pandai bawa motorsikal and then dia pernah keluar pukul 10 malam untuk bungkus makanan dekat luar sebab mak dan ayah dia tak ada dekat rumah. Kanak-kanak yang bawah umur mustahil keluar sorang-sorang pukul 10 malam, gelap lagi confirm dia takut tapi dia berani keluar sorang-sorang.

[56] My observation on this last part of the trial was that **these allegations against SP10 were never put to her or her parents** when they were giving evidence. In my view, if these were true facts, the Appellant certainly knew a lot of things about her background. His "ignorance" about her true age was just feigned. He took advantage of the child to have "telephone-sex" with him because he knew her parents were not home. Despite knowing that she was still in school, he urged her on in the wee hours of the night to give him an exclusive sexual show, to satisfy his lust. I agreed with the SCJ that his defence did not manage to raise any reasonable doubt on the prosecution case; this evidential burden is even lower than to rebut the prosecution evidence on a balance of probabilities that he did not know her true age.

[57] If I am wrong on the evidential burden to be satisfied by the Appellant, I am of the view that applying the principle in ***Mat v PP*** (supra), I did not accept or believe the Appellant's explanation and it had not raised any reasonable doubt on the prosecution case. Taking into account his academic background in Early Childhood Education, to my mind that was

the "final nail in the coffin" for the Appellant in regard to his purported defence under s.20 of the 2017 Act.

[58] Finally, on the appeal against conviction, although this was not repeated at the substantive hearing of the appeal, I would address the issue of "the incompetence of the previous counsel" as it was brought up as a ground in the application to admit fresh evidence. In the case of **Yahya Hussien Mohsen Abdulrab v PP [2021] 5 MLJ 811** this Court noted the salient points in that appeal and the following paragraphs as stated by the Federal Court:

> "[26] The Court of Appeal considered the law in respect of the appellant's contention that his counsel who conducted the case at the trial court was incompetent. **It relied on the decision of this court in *Shamim Reza bin Abdul Samad v Public Prosecutor* [2011] 1 MLJ 471 ('Shamim Reza') for the proposition that anyone claiming unfair trial in this context must establish that his counsel was not just incompetent but flagrantly incompetent.** In particular, the following passage of *Shamim Reza* was quoted:
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> > [6] ... In our considered judgment, the incompetence of counsel in the conduct of a defence in a criminal trial is a ground on which a conviction may be quashed provided that: **(i) such incompetence must be flagrant in the circumstances of a given case; and (ii) it must have deprived the accused of a fair trial thereby occasioning a miscarriage of justice. Nothing short will suffice.** And in considering the question, an appellate court must have regard to the conduct of counsel as a whole and not merely to his or her failure in one or two departments. Further, in the ordinary way, a court whether at first instance or at the appellate stage will of course have regard to its paramount function and duty to ensure that justice is done so that the incompetence of counsel will not factor into the equation.
>
> [27] Having laid down the law, the Court of Appeal proceeded to examine the facts pertaining to what was done or not done by the appellant's counsel. The following is the Court of Appeal's findings:
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> (a) that the appellant's counsel had only challenged the prosecution's witnesses on the weight of the drugs. No other defence was

raised by the appellant's counsel in cross-examining the prosecution's witnesses;

(b) that the appellant's counsel had taken an untrue and a precarious position at the trial court; untrue because the appellant's defence was that P2 containing the drugs were given to him by Mickey and the appellant was not aware of the drugs in P2;

(c) that it was indeed flagrantly incompetent for the appellant's counsel not to cross-examine the prosecution's witnesses on this particular defence;

(d) that this would mean that the appellant had been deprived of a fair trial; …".

[Emphasis added]

[59] The Federal Court pointed out that despite the Court of Appeal finding that the two conditions or grounds stipulated in ***Shamim Reza*** to quash the appellant's conviction were satisfied, the latter did not make an order that the appellant be acquitted and discharged. Instead, the Court of Appeal ordered a retrial. This Court opined that the facts of that appeal differed from the present case and may be distinguished upon the peculiarity of the course of actions taken by the appellant's former counsel in the High Court. Upon perusal of the Notes of Evidence and Written Submissions as per Rekod Rayuan Jilid 2 and Jilid IV respectively, this Court found that there was no merit on this issue. SP10 being the star witness of the prosecution case was cross-examined extensively by the previous counsel (as can be seen in RRJ2B) and her credibility had not been demolished. The case of ***Yahya Hussien Mohsen Abdulrab*** *(supra)* could be distinguished on its facts since the Federal Court acquitted the appellant not due to failure of counsel to cross-examine the prosecution witnesses but due to the counsel's own shortcomings.

[60] On the overall evidence in these appeals, and after considering the submissions and case laws cited by both parties, I could not agree with the Appellant's submissions but I agreed with the findings and decision of

the SCJ and did not see any reason to disturb the findings of guilt against the Appellant. This Court affirmed the convictions recorded against the Appellant as proper and safe in light of the overwhelming evidence against him. The appeals against conviction were accordingly dismissed.

[61] When the 2017 Act was being tabled on 3.4.2017, the then Law Minister had stated the following in her policy speech:

> " Kini pelbagai bentuk ancaman jenayah seksual alaf baru juga turut membahayakan keselamatan anak-anak kita. Tidak ramai yang mengetahui akan kewujudan laman-laman sesawang di dunia siber yang lebih dikenali sebagai *the deep web* ataupun *the dark web*, dengan izin. Tambahan pula bilangan laman web yang dikhaskan untuk pornografi kanak-kanak di seluruh dunia semakin bertambah terutama melalui rangkaian *peer to peer*, dengan izin dan *dark web*. Di mana rangkaian tersebut menyukarkan pihak berkuasa untuk mengesan kewujudan pelaku jenayah. Malahan sebahagian daripada mereka menggunakan peranti media sosial untuk tujuan *sexual grooming*, dengan izin bagi meraih kepercayaan kanak-kanak sebelum memanipulasikan mereka.
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> ...
>
> Tuan Yang di-Pertua, secara amnya Rang Undang-undang Jenayah Seksual Kanak-kanak ini bertujuan untuk mengadakan peruntukan mengenai kesalahan-kesalahan seksual terhadap kanak-kanak yang tertentu dan hukumannya sebagai tambahan kepada kesalahan-kesalahan seksual terhadap kanak-kanak yang lain dan berhubung dengannya untuk mengadakan peruntukan mengenai pentadbiran keadilan DR.03.04.2017 21 bagi kanak-kanak dan perkara yang berkaitan. Skop akta baharu tersebut adalah secara amnya mengandungi peruntukan yang lebih spesifik dan memperincikan lagi kesalahan yang terdapat dalam undang-undang sedia ada berhubung dengan kesalahan seksual yang dilakukan terhadap kanak-kanak.
>
> Peruntukan kesalahan tersebut mengandungi elemen yang lebih terperinci berbanding undang-undang sedia ada yang bersifat am. Akta ini juga memperuntukkan mengenai hukuman yang bersesuaian dengan undang-undang yang diperincikan tersebut. Selain memperuntukkan mengenai kesalahan, aspek lain yang akan diambil kira dalam penggubalan akta tersebut termasuklah aspek penyiasatan, kebolehterimaan keterangan di mahkamah dan peruntukkan lain yang bertujuan untuk menambah baik sistem pentadbiran keadilan jenayah bagi kanak-kanak. Ini semua bagi memastikan agar akta yang digubal ini dapat memenuhi objektif dan mencapai hasrat kerajaan untuk menangani jenayah seksual kanak-kanak.".

[62] Recently on 29.3.2023, the Government tabled the amendments to the 2017 Act where the same Minister in the policy speech stated:

> " Dalam tempoh lima tahun sejak penguatkuasaan akta tersebut, terdapat 5,519 kes yang telah dilaporkan dari tahun 2018 hingga 2022. Ahli-ahli Yang Berhormat, 5,519 kes ini bukanlah satu angka semata-mata. Seramai 5,000 lebih kanak-kanak yang telah gagal kita lindungi daripada dianiayai secara seksual oleh manusia-manusia yang tidak berperikemanusiaan dan terpaksa hidup dalam keadaan ketakutan dan trauma.
>
> ...
>
> Oleh yang demikian, Rang Undang-undang Kesalahan-kesalahan Seksual Terhadap Kanak-kanak (Pindaan) 2023 ini yang saya bentangkan di hadapan Dewan yang mulia ini adalah bertujuan untuk meminda Akta 792 melalui cadangan 15 fasal. Cadangan-cadangan fasal adalah sebagaimana yang diperincikan dalam rang undang-undang yang telah diberikan kepada semua Ahli-ahli Yang Berhormat.
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> **Pertama, fasal 2 hingga 9 bertujuan untuk meminda peruntukan dalam Bahagian II Akta 792 dengan menggantikan istilah "pornografi kanak-kanak" di mana juga terdapat istilah "Bahan Penganiayaan Seksual Kanak-kanak". Jawatankuasa Persatuan Bangsa-bangsa Bersatu mengenai hak-hak kanak-kanak melalui dengan izin, Guidelines Regarding the Implementation of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography dengan izin, kini mengesyorkan agar negara-negara ahli, termasuklah Malaysia untuk tidak menggunakan istilah pornografi kanak-kanak dan pelacuran kanak-kanak dan mencadangkan supaya istilah bahan penganiayaan seksual kanakkanak digunakan berbanding dengan child pornography atau pornografi kanak-kanak.**
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> **Istilah bahan penganiayaan seksual kanak-kanak memperlihatkan secara tepat sifat jenayah bahan itu yang terhadapnya kanak-kanak itu tidak akan sama sekali memberi keizinan mereka. Penggantian istilah pornografi kanak-kanak juga bertujuan untuk membezakan bahan ini dengan pornografi dewasa yang secara lebih jelas.**
>
> ...
>
> Menurut kajian yang dijalankan oleh ECPAT International, INTERPOL dan UNICEF dengan izin laporan Disrupting Harm, 94 peratus daripada kanak-kanak berumur 12 hingga 17 tahun di Malaysia merupakan pengguna internet. Daripada jumlah tersebut sekurang-kurangnya empat peratus telah melaporkan bahawa mereka dieksploitasi dan dianiaya secara seksual di dalam talian, di mana ia mewakili anggaran 100,000 kanak-kanak di Malaysia yang mungkin telah mengalami mana-mana kemudaratan dalam tempoh satu tahun. Oleh itu undang-undang sedia ada perlu ditambah baik bagi memastikan

ia boleh menangani sebarang bentuk penganiayaan seksual yang diguna pakai selaras dengan perkembangan semasa.

Seksyen baharu 15A yang diperuntukkan kesalahan mengenai persembahan seks berhasrat untuk menangani isu live streaming seks yang semakin meluas.

...

Dengan penggubalan seksyen 15A yang baharu ini bukan sahaja orang yang menonton dan mengambil bahagian dalam persembahan seksual kanak-kanak boleh didakwa tetapi semua pihak yang terlibat seperti penganjur, orang tengah atau mana-mana sindiket yang terlibat dalam melakukan kesalahan persembahan seksual kanak-kanak. Hukuman yang dicadangkan Tuan Yang di-Pertua adalah pemenjaraan selama tempoh tidak melebihi 20 tahun dan boleh juga dikenakan denda tidak melebihi RM50,000.".

[63] The amendments to the Act has come into force on 11.7.2023. The 2017 Act was drafted in such a way to encompass many types of sexual offences against children which the Penal Code could not capture because of factors such as the changing times, societal behaviour and advent in technology. The amendment to the 2017 Act is testament of the Government's reaction to these factors in terms of ensuring continued protection of children against sexual predators. The major amendments to the Act consist of replacing "child pornography" with "child sexual abuse material" but they have not changed the objective of the 2017 Act which was to cater for certain sexual crimes perpetrated by sexual predators including child grooming.

[64] In a previous appeal case of **Noor Azmi Bin Ibrahim v PP & Other Appeals [2023] 12 MLJ 182; [2023] 6 CLJ 906** involving charges under s.14(a) and (b) of the 2017 Act, I had mentioned briefly about child grooming when I cited its meaning from an Australian State website. I compared child grooming with our own s.14 offence where I had stated:

"[64] Before I conclude, it is worth noting that "*amang seksual fizikal*" or "physical sexual assault" is part of the larger offence of "sexual grooming" when

committed on a child. The provisions in the Act have been drafted to cater to such situations, to the minutest detail.

[65] Sexual grooming is also recognised in other countries. In an entry in the State of Victoria, Australia website: "*Grooming is when a person engages in predatory conduct to prepare a child or young person for sexual activity at a later time. Young people are often 'groomed' before they are sexually abused. At first they may be tricked into thinking they are in a safe and normal relationship so they may not know it's happening or may feel they have no choice but to be abused.*".

[65] It is noted in the Malaysian NGO Women's Centre for Change (WCC) website where it explained the concept of "grooming" as follows:

> "Grooming is the act of befriending and establishing an emotional connection with a child to prepare the child for sexual abuse. It is a process of an adult trying to access or to get close to the child with sexual intention by gaining the trust of the child or family members.
>
> Grooming can take place both in reality and online. In reality, the adult first gains the trust of the child or family members so that he is less likely to be accused of any sexual abuse allegations. Such as, voluntarily helping the family in terms of monetary favours, offering to babysit the child, give gifts or money to the child in exchange for sexual contact and then start showing pornographic materials to the child, etc.
>
> In online, the abuser may communicate with the child through social media to befriend or pretends to be a friend to the child and form a trusted relationship. Sometimes they will create fake profiles to befriend and pose themselves as a different person to the child, chat with the child and make arrangements to meet in person.".

[66] Although some may not agree with me, I stand by my views that s. 14 of the 2017 Act is part of the larger offence of sexual grooming, as the physical acts of sexual abuse are committed after gaining the trust of the child. Physical sexual touching of the child when committed regularly would, over time, make the child think that the act is not wrong and in the end he or she becomes a willing participant in the prohibited sexual relationship. Although Parts III and IV of the 2017 Act compartmentalised the offences into separate categories by virtue of the degree of severity of

the offences, the main distinction is in the punishment that the courts can impose on the offender upon conviction. Obviously, the offences in Part IV carry higher terms of imprisonment up to the maximum of 20 years. With the inclusion of the new s.15A in Part IV, an offence relating to sexual performance of a child (which can be a recorded performance such as a video recording) could be covered under the new section and may be punished upon conviction with imprisonment of up to 20 years and fined RM50,000.00 as compared with the maximum of 15 years and whipping of not less than 3 strokes of the *rotan* under s.8(b) of the 2017 Act.

Appeal against sentence

[67] The cross-appeal against sentence was on the purportedly manifestly inadequate terms of imprisonment where the DPP submitted that the SCJ should have ordered them to run consecutively in view of the fact that they were committed on different dates. The Appellant's counsel meanwhile prayed for the imprisonment terms to be reduced as he was a first offender and that the SCJ had applied the wrong case law as those cases she cited were in fact in respect of violence-related offences.

[68] An appellate court would be slow to interfere or disturb a sentence passed by a lower court unless it is manifestly wrong in the sense of being illegal or unsuitable to the proved facts and circumstances: **PP v Mohamed Nor & Ors [1985] 2 MLJ 200**. But having considered all factors in the mitigation on sentence, this Court viewed that the SCJ had imposed almost the maximum term of imprisonment on the Apellant due to the seriousness of the offences i.e. the public interest factor.

[69] In the case of **Bachik Abdul Rahman v PP [2004] 2 CLJ 572** Augustine Paul JCA (as he then was) stated:

"...The exercise of the discretion to determine the date of commencement of the sentence of imprisonment is dependent on the facts and circumstances of each case. **In deciding whether the terms of imprisonment should be consecutive or commence at another date the court will be guided by the one transaction rule and the totality principle.** Pursuant to the one transaction rule where two or more offences are committed in the course of a single transaction all sentences in respect of these offences should be concurrent rather than consecutive (see *R v. Saleem* [1964] Crim LR 482; *R v. Walsh* [1965] Crim LR 248). **For there to be one transaction four elements must be present, that is to say, proximity of time, proximity of place, continuity of action and continuity of purpose or design (see *Jayaraman & Ors v. PP [1979] 1 LNS 36*; [1979] 2 MLJ 88; *Amrita Lal Hazra v. Emperor* 42 Cal 957; *Chin Choy v. PP [1955] 1 LNS 17*; [1955] MLJ 236). The rule, however, is not absolute.** As Yong Pung How CJ said in *Kanagasuntharam v. PP* [1992] 1 SLR 81 at p. 83:

> The English courts have recognised that there are situations where consecutive sentences are necessary to discourage the type of criminal conduct being punished: see *R v. Faulkner* [1972] 56 Cr App R 594,*R v. Wheatley* [1983] 5 Cr App R (S) 417 and *R v. Skinner* (1986) 8 Cr App R (S) 166. The applicability of the exception is said to depend on the facts of the case and the circumstances of the offence. It is stated in broad and general terms and although it may be criticised as vague, it is necessarily in such terms in order that the sentencer may impose an appropriate sentence in each particular case upon each particular offender at the particular time the case is heard.".

[Emphasis added]

[70] It is noted further that ***Bachik Abdul Rahman*** and **PP v Prabu s/o Veeramuthu & Ors [2009] 3 MLJ 838** decided that the "one transaction rule" was not absolute. The courts should look at whether the commission of the crimes involved elements such as cruelty, violence and fear. I have decided earlier that the charges have been proved and it is unnecessary to go into details here again. In the present case, the facts did not warrant the application of the "one transaction rule" principle as they were committed over a number of days. Nevertheless, the Appellant was a first

offender and this mitigating factor should not be thrown aside lightly although he had gone through a full trial, where his defence was, albeit mistaken, that his actions were not wrong because SP10 was an adult.

[71] In the case of **Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167**, the Supreme Court held:

> "In assessing the length of custodial sentence, the court must look at the overall picture in perspective by considering, firstly, the gravity of the type of offence committed; secondly, the facts in the commission of the offence; thirdly, the presence or absence of mitigating factors, and, fourthly, the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy, if any. The fact that a sentence of imprisonment is imposed as a deterrence does not justify the sentencer in passing a sentence of greater length than what the facts of the offence warrant. The gravity of the type of offence involved must be considered in the light of the particular facts of the offence. As stated by James L.J. in *R v Ladd & Tristam* [1975] Cr LR 50; Thomas Encyclopaedia of Current Sentencing Practice p 1058 :
>
> > "We have to look at the overall picture of what is the right sentence for the total involvement, the total degree of criminality involved, and we have to keep the sentences in perspective with the sentences that have been passed on other occasions for offences involving criminal activity of this kind, though of course varying in their gravity. Clearly a deterrent element has to be involved, but because the offences are very serious, it does not necessarily follow that on the particular facts very long sentences are justified."

[72] Therefore, considering the submissions of the parties on sentence and the rationale of the SCJ as well as the relevant principles of sentencing, I reduced the term of imprisonment to 10 years for each charge and maintained the order for the sentences to run concurrently. The sentence of 10 years is already 2/3 of the maximum that can be imposed for each offence.

Conclusion

[73] Premised on the above, the Court did not find any error of fact or law such that would justify the Court to disturb the findings of guilt by the Sessions Court Judge. Accordingly, the Court dismissed the appeals against convictions but varied the terms of imprisonment on the Appellant. The appeals against sentence by the Public Prosecutor were dismissed.

Order accordingly.

Dated 3 January 2024

NOOR RUWENA BINTI MD. NURDIN
Judicial Commissioner
High Court of Malaya, Taiping

Representation

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