IN THE HIGH COURT OF MALAYA IN KUALA LUMPUR

IN THE FEDERAL TERRITORY OF MALAYSIA

CRIMINAL TRIAL NO: WA-45SO-10-03/2018

BETWEEN

PUBLIC PROSECUTOR

AND

ABU HASAN CHAN BIN ABDULLAH
(NRIC NO: 540322-03-5263)

GROUNDS OF DECISION

A) INTRODUCTION

[1] The accused abovenamed was charged with the following:

First Charge

"*Bahawa kamu pada 1 Ogos 2017, jam lebih kurang 10.00 pagi, di Bahagian E8, Counter Terrorism, Cawangan Khas, Tingkat 24, Menara2, Ibu Pejabat Polis DiRaja Malaysia, Bukit Aman, dalam Wilayah Persekutuan Kuala Lumpur, dengan pengetahuan telah memberi sokongan kepada kumpulan pengganas Islamic State dengan*

cara menggunakan aplikasi media sosial Facebook atas nama "Abu Hassan Chan" dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah perenggan 130J(1)(a) Kanun Keseksaan yang boleh dihukum di bawah peruntukan yang sama."

Second Charge

"*Bahawa kamu pada 1 Ogos 2017, jam lebih kurang 10.00 pagi, di Bahagian E8, Counter Terrorism, Cawangan Khas, Tingkat 24, Menara2, Ibu Pejabat Polis DiRaja Malaysia, Bukit Aman, dalam Wilayah Persekutuan Kuala Lumpur, telah memilki item-item yang berkaitan dengan kumpulan pengganas Islamic State (IS) dalam akaun Facebook milik kamu atas nama "Abu Hassan Chan" dan dengan itu kamu telah melakukan suatu kesalahan di bawah perenggan 130JB(1)(a) Kanun Keseksaan dan boleh dihukum di bawah subseksyen 130JB(1) Kanun yang sama.*"

B) PROSECUTION CASE

[2] The prosecution case reveals that on 31.7.2017 at around 5.30p.m., Inspector Mohd Hazil Azhar bin Mohd Ghazali (PW1) lodged a police report against the Accused as he had reason to

believe, based upon intelligence reports received, that the Accused was involved in security offences.

[3] Pursuant to the above, on 11.8.2017, a team of police officers led by Inspector Mohd Nur Shakirin bin Ishak (PW2) arrested the Accused at an unnumbered house in Kampung Tepus, Gunung, 16080, Bachok, Kelantan Darul Naim ("premises").

[4] During the said arrest at the premises, the police seized items believed to be used in the commission of the offence which included a Samsung tab model SM-T239, an ASUS CPU Model X-Five, a portable Huawei WIFI dongle with a DIGI SIM card and a green and black coloured Premier notebook containing the password for the Facebook page under the name of Abu Hassan Chan.

[5] PW2 handed over the said seized items to Inspector Mohd Badri bin Othman (PW15), the investigating officer (I.O) on the same date.

[6] On 18.8.2017, PW15 sent a request to the Malaysian

Communications and Multimedia Commission ("MCMC") for the purpose of conducting an analysis of the said Facebook account under the name of "Abu Hassan Chan". The results of the analysis showed that the said Facebook account existed and was able to be accessed.

[7] On 26.9.2017, PW15 sent the items seized during the raid on the premises namely, the Samsung tab model SM-T239, the Asus X-Five CPU and the portable Huawei WIFI dongle with the DIGI SIM card, to the MCMC for analysis which subsequently found that the 3 items sent to the MCMC were used to access the Facebook account under the name of "Abu Hassan Chan".

[8] PW15 then verified with the telecommunication company DIGI that the ownership of the DIGI SIM card registered and used in the Huawei portable WIFI dongle was the Accused's.

[9] On 5.11.2018, PW15 forwarded the extract of the Facebook page under the name of "Abu Hassan Chan" obtained from the MCMC to Professor Rohan Kumar Gunaratna (PW12) who is the Professor of Security Studies, Head of the International Centre for

Political Violence and Terrorisms Research, S Rajaratnam School of International Studies, Nanyang Technological University, Singapore.

[10] PW12 confirmed that the Accused was at the 4th level of radicalization out of possible 6 levels. It was found that the Accused supported and defended the ideology and cause of the terrorist group Islamic State ("IS").

[11] PW12 further confirmed that the Accused's support for the IS could be seen from the images found in the Facebook account under the name of Abu Hassan Chan.

[12] Corporal Nasrul Hariri bin Che Soh (PW4) and Hosni bin Abu Hasan Chan (PW9), the son of the Accused, confirmed that the premises belongs to the Accused.

C) DUTY OF COURT AT THE END OF PROSECUTION CASE

[13] The duty of the court at the end of the prosecution case is set out in Section 180(1) of the Criminal Procedure Code (CPC) which stipulates that when the case for the prosecution is concluded the

Court shall consider whether the prosecution has made out a prima facie case against the accused.

[14] The cases of **PP v Dato' Seri Anwar Bin Ibrahim (No.3) [1999] 2 AMR 2017**; **[1999] 2 MLJ 1**, **Looi Kow Chai &Anor v PP [2003] 2 AMR 89**, **Balachandran v PP [2005] 1 CLJ 85** and **PP v Mohd Radzi Bin Abu Bakar [2005] 6 AMR 203** respectively lay down the proposition that at the end of the case for the prosecution, their evidence must be subject to maximum evaluation in order to determine whether a prima facie case is made out.

[15] In Looi Kow Chai v Public Prosecutor (supra), the Court of Appeal held:

"*It therefore follows that there is only one exercise that a judge sitting alone under s 180 of the CPC has to undertake at the close of the prosecution case.* ***He must subject the prosecution evidence to maximum evaluation and to ask himself the question: if I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no***

prima facie case has been made out and the accused would be entitled to an acquittal". (Emphasis added)

D) ANALYSIS OF THE PROSECUTION CASE

First Charge

[16] The First Charge against the Accused is under Section 130J (1)(a) of the Penal Code. The said charge in its entirety reads as follows:

130J. Soliciting or giving support to terrorist groups or for the commission of terrorist acts

(1) Whoever knowingly and in any manner solicits support for, or gives support to-

(a) any terrorist group; or

(b) the commission of a terrorist act,

shall be punished with imprisonment for life or imprisonment for a term not exceeding thirty years, or with fine, and shall also be liable to forfeiture of any property used or intended to be used in connection with the commission of the offence.

(2) For the purpose of subsection (1), "support" includes-

(a) an offer to provide, or the provision of, forged or falsified travel documents to a member of a terrorist group;

(b) an offer to provide, or the provision of, a skill or an expertise for the benefit of, at the direction of or in association with a terrorist group;

(c) entering or remaining in any country for the benefit of, or at the direction of or in association with a terrorist group;

(d) becoming a member of a professing membership of a terrorist group;

(e) arranging, managing or assisting in arranging or managing a meeting to further the activities of a terrorist group;

(f) using or possessing property for the purpose of committing or facilitating the commission of a terrorist act;

(g) accumulating, stockpiling or otherwise keeping firearms, explosives, ammunition, poisons or weapons to further the activities of a terrorist group;

(h) arranging, managing or assisting in arranging or managing the transportation of persons to further the activities of a terrorist group;

(i) travelling to, entering or remaining in any foreign country to further the activities of a terrorist group or to commit a terrorist act;

(j) encouraging or inducing any person to leave Malaysia to further the activities of a terrorist group or to commit a terrorist act; or

(k) using social media or any other means to-

group or the commission of a terrorist act; or

(ii) further or facilitate the activities of a terrorist group.

[17] It is apparent from the wordings of the section itself that the ingredients of the charge are firstly, that the Accused has knowledge in giving support, and secondly, the Accused supports a terrorist group, namely, the IS.

[18] The manner in which the Accused is alleged to have supported the IS is by way of using social media which in this case is through Facebook in the name of Abu Hassan Chan.

[19] The proof of knowledge is of course, a matter of inference from the surrounding facts and circumstances as it has been said that even the devil knows not the thoughts of man.

[20] The prosecution must firstly, however, prove that the Accused is the owner of the social media account Facebook under the name of Abu Hassan Chan.

[21] There were several devices recovered from the premises of the Accused, namely, a Samsung tab model SM-T239 (P12), an Asus CPU model X-Five (P21), and a portable Huawei dongle.

[22] In this regard, a Digital Forensic Analyst from SKMM, Teh Wei Ren (PW10), testified that based on the forensic analysis conducted on PC01 (P21) which is the hard disk, revealed 3 Uniform Resource Locator (URL's) that showed that the device had access to the Facebook profile under the Facebook name of Abu Hassan Chan.

[23] The test conducted by PW10 was essentially to extract the history of the websites visited by the person using the said device.

[24] PW10's analysis of P12 which is the Samsung tablet found an email related to the offence. The said email showed that the Facebook account of facebook.com/abuhasan.chan was connected to the email astahi04@hotmail.com.

[25] Further to this, a Premier brand notebook (P41) found at the premises contained the username and password for the Facebook account of Abu Hassan Chan.

[26] The Accused also admitted that the username and password for the Facebook account of Abu Hassan Chan was contained in the said notebook (P41).

[27] This admission was made in a statement (P72) pursuant to Section 18A of SOSMA. The defence however objected to the admission of P72. After hearing submissions from both parties, I allowed the said statement (P72) to be admitted. The issue relating to the admissibility of P72 will be addressed later on in the judgement.

[28] The said username and password found in P41 was supplied to Hairul Anuar bin Mat Nor (PW11), who is the Head of Department at the Malaysian Communications And Multimedia Commission (MCMC).

[29] PW11 testified that his terms of reference was to firstly, confirm the ownership of the Facebook account and the emails "astahi04@hotmail.com" with the password "benji2012".

[30] Secondly, the Facebook account of “Tiger Chan” and the email account “abuhasanchan@yahoo.com” with the password “benji2013”.

[31] Thirdly, the email “astahi04@hotmail.com” with the password “popo2012” or “astahi2016”.

[32] Finally, the email “abuhasanchan@yahoo.com” with the password “wookie2016”.

[33] PW11 testified that as he had information regarding the usernames and passwords, he sought clarification from the investigating officer (IO) as to the true purpose of his scope.

[34] PW11 said that the IO informed him that it was to download all the contents of the Facebook accounts Abu Hasan Chan and Tiger Chan. Pursuant to this, PW11 then using the said usernames and passwords to log in to the Facebook accounts, downloaded all the contents.

[35] PW11 was referred to the email address, astahi04@hotmail.com

and to a birthdate which was 23.3.1954 and an occupation which is that of a retired teacher.

[36] PW11 was also referred to the email address "abuhasan.chan@facebook.com" and said that the phone number used to register the account was 0139056908.

[37] When PW11 was referred to a profile picture, he said that it was that of the Accused.

[38] Mohamad Fesal bin Zakaria (PW13) from the telecommunication company DIGI testified that he was able to extract from the DIGI Customer Relationship Management System the Accused's details which showed that he maintained an account with DIGI (P89).

[39] PW13 also testified that the portable WIFI dongle was able to access the internet using the telecommunication services provided by DIGI.

[40] Mohd Fairos bin Said (PW14) from the telecommunication company Red One said that from the serial number of the SIM

card provided he managed to extract information showing that the SIM card was registered in the name of the Accused.

[41] The said SIM card was found with the Samsung Galaxy Tab (P12) and referred to the said serial number.

[42] The above shows that the Samsung Galaxy Tab device (P12) was used to access the internet with the Red One SIM card (P13) registered in the name of Abu Hassan Chan.

[43] PW4 confirmed that the Accused is his father in law and testified that the Accused was the owner of the Facebook account under the name of Abu Hassan Chan and also based on the photograph of the Accused.

[44] The above evidence was sufficient for the prosecution to prove that the Accused was the owner of the Facebook account Abu Hasan Chan. Further, the above mentioned evidence triggers the presumption under Section 114A (1) of the Evidence Act 1950 (“EA”).

[45] Section 114A (1) reads:

114A. Presumption of fact in publication

(1) A person whose name, photograph or pseudonym appears on any publication depicting himself as the owner, host, administrator, editor or sub-editor, or who in any manner facilitates to publish or re-publish the publication is presumed to have published or re-published the contents of the publication unless the contrary is proved.

(2) A person who is registered with a network service provider as a subscriber of a network service on which any publication originates from is presumed to be the person who published or re-published the publication unless the contrary is proved.

(3) Any person who has in his custody or control any computer on which any publication originates from is presumed to have published or re-published the content of the publication unless the contrary is proved.

(4) For the purpose of this section-

(a) "network service" and "network service provider" have the meaning assigned to them in section 6 of the Communications and Multimedia Act 1998 [Act 588] ; and

(b) "publication" means a statement or a representation, whether in written, printed, pictorial, film, graphical, acoustic or other form displayed on the screen of a computer.

[46] The section, as is evident, raises a presumption that a person who is registered with a network service provider as a subscriber of a network service on which any publication originates from is presumed to be the person who published or re-published the publication unless the contrary is proved.

[47] As can be also seen the presumption is a rebuttable one. Evidence has been led by the prosecution that the Accused admitted that the Facebook account of Abu Hasan Chan belongs to him.

[48] The Accused further informed PW5 that the username and password of the said Facebook account was stated in the notebook. The Accused also admitted to PW15 that he is the owner of the said Facebook account.

[49] The prosecution had therefore adequately proven that the Accused is the owner of the social media account Facebook under the name of Abu Hassan Chan.

[50] The next ingredient to be proven is whether the Facebook postings in the Facebook account under the name of “Abu Hasan Chan” shows support for the IS.

[51] Inspector Muhammad Baihaqi bin Zulkeflee (PW8) recorded the Accused’s admission that he had made the statements and postings supporting and promoting the IS in P74, P75, P76, P77 and P78 respectively.

[52] PW12 is an expert in terrorism and the Professor of Security Studies, Head of the International Centre for Political Violence and Terrorisms Research, S Rajaratnam School of International Studies, Nanyang Technological University, Singapore.

[53] His credentials and expertise were established in evidence. These were not disputed. He has also done a lot of research, attended several courses, presented papers, published articles and books relating to terrorism. His expert evidence relating to terrorism has been accepted in the courts in Malaysia and also abroad.

[54] PW12 testified in his expert’s report (P85) that the Accused is at

Level 4 out of 6 levels of radicalisation according to Fathali Moghaddam's "Staircase to Terrorism" where the Accused identifies himself as a member of a terrorist group.

[55] PW12 analysed 19 examples of postings in the Facebook account of Abu Hasan Chan showing increasing levels of radicalisation. Referring to example 17, PW12 quoted the posting of the Accused as follows, "*if people asked why is it that Cikgu Abu Hassan Chan supports the rise of ISIS, isn't ISIS Wahabis, are ISIS terrorist, my answer is ISIS is an awakening after the Muslim community has been represented by the West for tens of years*."

[56] PW12 referred to example 18, where Abu Hassan Chan stated "*People asked why I show support ISIS, aren't they Wahabis and terrorist, for me, ISIS or Wahabi is a group of muslims fighting against the infidels, who had long killed the muslim community*."

[57] PW12 also referred to example 19 where he quoted the Accused as stating "*Put your hopes on ISIS, although they have been labelled Wahabis and terrorist, the destruction of Israel would bring peace again*."

[58] PW12 clarified however that although the Accused expresses support for ISIS, he is not part of IS. PW12 disagreed to the suggestion by the defence that what the Accused advocates is a sort of sympathy and not support for IS.

[59] PW12 said that it is crucial for the Accused to be rehabilitated or deracialised failing which he will continue to advocate for the IS and he will continue to say that IS is a good organisation that should be followed.

[60] The testimony of PW12 provides clear evidence that the Accused is a supporter of IS and thus supported a terrorist group.

[61] A terrorist group is defined under subsection 130B (1) of the Penal Code as follows:

130B. Interpretation in relation to this chapter

In this Chapter

…….

"terrorist group" means-

(a) an entity that has as one of its activities and purposes the committing of, or the facilitation of the commission of, a terrorist act; or

(b) a specified entity under section 66B or section 66C of the Anti-Money Laundering Act 2001 [Act 631] ;

[62] The IS has been gazetted as a terrorist group pursuant to sections 66B and 66D of the Anti-Money Laundering, Anti-Terrorism and Proceeds of Unlawful Activities Act 2001 [Act 613] ("AMLATPUA") vide Federal Government Gazette P.U.(A) 301 (P53) dated 12.11.2014 at item number 9.

[63] The Islamic State is thus a terrorist group.

Admissibility of statement under Section 18A SOSMA

[64] The prosecution sought to admit in evidence a statement made by the Accused which proves that the Accused had knowledge in giving support to the IS based on the postings, comments and replies that he made in the Facebook account under the name of Abu Hasan Chan.

[65] This statement (P70) was recorded by Inspector Mohd Izwan bin Mohamed Mokhtar (PW5), who in his evidence stated that the Accused admitted to ownership of the Facebook account under the name of Abu Hasan Chan.

[66] Learned counsel for the Accused objected to the introduction of this statement on the basis that the statement was made involuntarily and also that it was not the statement of the Accused but rather of what PW5 had recorded.

[67] The said Section reads as follows:

18A. Statement by accused

Any statement by an accused whether orally or in writing to any person at any time shall be admissible in evidence.

[68] The offences which the Accused stands charged for are procedurally governed by the provisions of SOSMA.

[69] Section 3 of SOSMA reads:

"security offences" means the offences specified in the First Schedule;

The offences listed under the First Schedule of SOSMA are as follows:

Penal Code [Act 574]:

(i) Offences under Chapter VI

(ii) Offences under Chapter VIA

(iii) Offences under Chapter VIB

Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 [Act 670] : Offences under Part IIIA

Special Measures Against Terrorism in Foreign Countries Act 2015 [Act 770]

[70] Sections 130J(1)(a) and 130JB(1)(a) of the Penal Code are listed under Chapter VIA of the Code.

[71] The language in which Section 18A SOSMA was drafted is fairly plain and simple. It clearly renders admissible statements made by an accused, oral or written, made to any person. As can be noted, the section is also drafted widely in the sense that the statement can be made to any person.

[72] By comparison, Section 113 of the Criminal Procedure Code (CPC) reads:

113. Admission of statements in evidence

(1) Except as provided in this section, no statement made by any person to a police officer in the course of a police investigation made under this Chapter shall be used in evidence.

(2) When any witness is called for the prosecution or for the defence, other than the accused, the court shall, on the request of the accused or the prosecutor, refer to any statement made by that witness to a police officer in the course of a police investigation under this Chapter and may then, if the court thinks fit in the interest of justice, direct the accused to be furnished with a copy of it and the statement may be used to impeach the credit of the witness in the manner provided by the Evidence Act 1950 [Act 56].

(3) Where the accused had made a statement during the course of a police investigation, such statement may be admitted in evidence in support of his defence during the course of the trial.

(4) Nothing in this section shall be deemed to apply to any statement made in the course of an identification parade or falling within section 27 or paragraph 32(1) (a) , (i) and (j) of the Evidence Act 1950.

(5) When any person is charged with any offence in relation to-

(a) the making; or

(b) the contents,

of any statement made by him to a police officer in the course of a police investigation made under this Chapter, that statement may be used as evidence in the prosecution's case.

[73] As can be appreciated, Section 18A SOSMA suffers from none of the restrictions contained in Section 113 CPC, most specifically that which is contained in sub section (1) thereof.

[74] Any objection that a statement made under Section 18A SOSMA is inadmissible for failure to comply with Section 113 CPC is appropriately met with the Latin maxim "*generalia specialibus non derogant*" which means that the general provisions of the law must yield to special provisions of the law which means in this case that the provision in Section 18A SOSMA overrides the more general provisions in the CPC and the Evidence Act 1950.

[75] I find support for this view from the case of **PP v Aszroy Achoi [2018] 8 CLJ 762**, a decision by Ravinthran Paramaguru J (as His

Lordship, now JCA, then was), where it was held:

"*[23] Counsel for accused objected to the statement on the ground that it is not admissible under the Criminal Procedure Code. I overruled the objection as the SOSMA is a special law that governs trials of security offences. In accordance with the basic principle of statutory interpretation captured in the Latin maxim "generalia specialibus non derogant " which means that the general provisions of the law must yield to special provisions of the law, I hold that s. 18 overrides any impediment to the admission of the said statement that is found in the Criminal Procedure Code or the Evidence Act 1950. In fact, s. 18 is found in Part VII of SOSMA and s. 17 enacts that Part VII shall have effect notwithstanding any inconsistency with the Evidence Act 1950.*

[24] I find support for the view in the unreported cases of PP lwn. Siti Noor Aishah Atam (No. 2) [2017] 1 LNS 684 and Pendakwa Raya v. Jusninawati bt Abdul Ghani [2016] 1 LNS 1657; [2016] MLJU 1256 that was brought to my attention by the learned DPP. In the said cases, the court held that a confessionary statement of an accused person can be admitted under s. 18A without regard to the provisions of the Criminal Procedure Code and the Evidence Act 1950."

[76] See also the observations of the Learned Judicial Commissioner in **PP v Siti Noor Aishah Atam [2017] 1 LNS 684** made in respect of the revisiting of his earlier ruling in respect of section 18A SOSMA.

[77] Under all the circumstances of the case, and for the reasons given above, the prosecution had thus proven all the ingredients of the First Charge against the Accused.

Second Charge

[78] Section 130JB of the Penal Code reads:

130JB. Possession, etc, of items associated with terrorist groups or terrorist acts

(1) Whoever-

(a) has possession, custody or control of; or

(b) provides, displays, distributes or sells,

any item associated with any terrorist group or the commission of a terrorist act shall be punished with imprisonment for a term not exceeding seven years, or with fine, and shall also be liable to forfeiture of any such item.

(2) In this section-

"item" includes publications, visual recordings, flags, banners, emblems, insignia and any other thing displaying symbols associated with a terrorist group, terrorist act or ideology of a terrorist group;

"publications" includes all written, pictorial or printed matter, and everything of a nature similar to written or printed matter, whether or not containing any visible representation, or by its form, shape or in any other manner capable of suggesting words or ideas, or an audio recording and every copy, translation and reproduction or substantial translation or reproduction in part or in whole thereof.

[79] The offence under paragraph (a) of Section 130JB, is essentially one of possession, custody or control of certain items stipulated.

[80] The locus classicus with respect to what amounts to possession is the case of **Leow Ngee Lim v PP [1956] 1 MLJ 28**, which held:

"*The dictionary definition brings in the idea of exclusiveness. It is often said that "possession must be exclusive." This is ambiguous. Possession need not be exclusive to the accused. Two or more persons may be in joint possession of chattels, whether innocent or contraband.* ***The exclusive element of possession means***

that the possessor or possessors have the power to exclude other persons from enjoyment of the property*.*

Custody likewise may be sole or joint and it has the same element of excluding others*. The main distinction between custody and possession is that a custodian has not the power of disposal*." (Emphasis added)

[81] It has already been proven earlier by the prosecution evidence that the Accused is the owner of the Facebook profile under the name of "Abu Hasan Chan". This would position the Accused as having possession of the said Facebook account.

[82] The prosecution's case showed that there were 5 items found which were extracted from Abu Hasan Chan's Facebook profile which are associated with the IS.

[83] This evidence came from PW12 and his expert's report (P85) which inter alia, stated as follows:

"*Abu Hasan Chan's support for IS was also observed in his IS-linked images found in his Facebook account with the username 'Abu Hasan Chan'. In total, 5 IS-linked images were found. They are seen*

in IMAGE 1, IMAGE 2, IMAGE 3, IMAGE 4 and IMAGE 5 below. They bear the IS logo and symbol which are seen in the terrorist group's black flag. The symbols on the logo when not associated to IS, are not extremist and read, 'Lailahaillallah', which means 'There is no God but Allah' and 'Muhammadun Rasulullah' which means 'Muhammad is the Messenger of Allah'.

[84] The inevitable conclusion from this is that the 5 images found in the Accused's Facebook account are items associated with the IS. As these 5 items were extracted from Abu Hasan Chan's Facebook profile, the Accused therefore had possession of these items.

[85] The contention of the defence is that even if the Accused is found to have in his possession these 5 images linked to IS, this was a mere triviality given a total of 10 to 11 years of Facebook activity.

[86] Accordingly, the maxim "de minimis non curat lex" ought to apply and that the Accused ought not to be convicted. The answer to this is that the Legislature in its wisdom had seen it fit and proper to enact such legislation with the objective of curbing the promotion of such ideology.

[87] This legislative endeavour cannot be given short shrift by merely saying that the offence committed was so trivial in nature as to not attract a conviction.

[88] The prosecution had thus proven the necessary ingredients of the Second Charge.

Specific issues raised by the defence

a) The prosecution failed to specify which particular Facebook status or comments amounted to giving support to a terrorist group.

[89] The defence therefore contends that this prejudices the Accused and results in him not being able to properly defend himself.

[90] The First Charge (P2) states that the Accused had with knowledge given support to IS using the Facebook account of 'Abu Hasan Chan' while the Second Charge states that the Accused was in possession of items related to IS in the Facebook account under the name of 'Abu Hasan Chan'.

[91] This in plain and simple terms would enable the Accused who was represented by counsel, to know precisely and without much difficulty the charges faced by him. In addition, the Accused was

served with an expert witness report in respect of 2 Facebook accounts of 'Abu Hasan Chan' (P85) by Professor Rohan Gunaratna (PW12) pursuant to the mandatory provisions of Section 51 A of the Criminal Procedure Code ("CPC").

[92] In P85, PW12 had identified with clarity and analysed the postings contained in the Facebook of 'Abu Hasan Chan' from the period June 2012 until August 2017 which evidenced support for the IS.

[93] A perusal of P85 would identify clearly which postings in the Accused Facebook account has showed support for the IS. In similar vein, P85 under the heading "IS-linked images", clearly identified the 5 images said to be associated with IS in respect of the Second Charge.

[94] The manner of committing an offence must be stated pursuant to Section 154 of the CPC as follows:

154. When manner of committing offence must be stated

When the nature of the case is such that the particulars mentioned in sections 152 and 153 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also

contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

[95] It can be seen that the necessity of including particulars of the manner in which the alleged offence was committed in the charge is when the particulars as stated in sections 152 and 153 CPC do not give the accused sufficient notice of the matter with which he is charged.

[96] As has been demonstrated from the above, this is not the case here. Further, as the prosecution has pointed out, the following cited cases will show that the charges instituted were similarly worded as the charges here.

[97] In the Court of Appeal case of **PP v Wan Mohamad Nur Firdaus Abd Wahab & Another Appeal [2019] 5 CLJ 320**, the charges read as follows:

"*1st charge*

Bahawa kamu di antara 25 Mac 2016 hingga 25 September 2016, di sebuah rumah beralamat No. 8, Jalan Cili 24/28D, Seksyen 24, di dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan,

dengan pengetahuan telah memberi sokongan kepada kumpulan pengganas iaitu Islamic State dengan cara menggunakan aplikasi media social Telegram atas nama Lat Firdaus, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 130J(1)(a) Kanun Keseksaan yang boleh dihukum di bawah seksyen 130J(1) Kanun yang sama.

Hukuman

Jika disabitkan dengan kesalahan, kamu hendaklah diseksa dengan penjara seumur hidup atau penjara selama tempoh tidak melebihi tiga puluh tahun, atau denda dan bolehlah dirampas mana-mana harta yang telah digunakan atau diniat untuk melakukan kesalahan itu.

2nd charge

Bahawa kamu pada 25 September 2016 jam lebih kurang 8.35 pagi, di sebuah rumah beralamat No 8, Jalan Cili 24/28D, Seksyen 24, dalam Daerah Petaling, dalam Negeri Selangor Darul Ehsan, telah memiliki 23 keping imej di dalam telefon bimbit jenama Oppo model R8006 berwarna hitam (Nombor IMEI:356121042654354) yang mempunyai kaitan dengan kumpulan pengganas Islamic State (IS) dan dengan itu kamu telah melakukan satu kesalahan di

bawah perenggan 130JB(1)(a) Kanun Keseksaan (Akta 574) dan boleh dihukum di bawah peruntukan yang sama.

Hukuman

Jika disabitkan dengan kesalahan, kamu hendaklah dihukum dengan penjara untuk tempoh tidak melebihi tujuh (7) tahun atau denda dan boleh dilucut hak mana-mana item tersebut."

[98] In **PP v Azroy Achoi [2018] 8 CLJ 762**, the amended charges read:

"*1st charge (amended)*

Bahawa kamu pada 5 Julai 2016 hingga 19 Julai 2016, di Kampung Kota Bungan, Jalan Kudat, dalam daerah Kota Belud, dalam negeri Sabah, dengan pengetahuan telah memberi sokongan kepada kumpulan pengganas Islamic State dengan cara menggunakan aplikasi media social, Facebook atas nama

Yohyo Illa'nun AlSaba Malizia milik kamu, dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah perenggan 130J(1)(a) Kanun Keseksaan yang boleh dihukum di bawah peruntukan yang sama.

2nd charge (amended)

Bahawa kamu pada 24 Julai 2016 jam lebih kurang 10 pagi, di Bilik Cawangan Khas, Ibu Pejabat Polis Daerah Kota Belud, dalam daerah Kota Belud, dalam negeri Sabah, telah memiliki 43 keping imej yang mempunyai kaitan dengan kumpulan pengganas Islamic State (IS) di dalam sebuah telefon berwarna hitam jenama Samsung model: SM- G318HZ/DS (IMEI 1: 352465/07/594418/0; IMEI2:352466/07/594418/8) dan dengan itu kamu telah melakukan satu kesalahan di bawah perenggan 130JB(1)(a) Kanun Keseksaan [Akta 574] dan boleh dihukum di bawah peruntukan yang sama."

[99] As will be noted, the manner the charges were drafted in the cases cited were similar to the manner in which the charges were drafted in the instant case and the charges in those cases were not held to have suffered from any infirmity.

[100] Further and in any event, Section 156 of the CPC provides as follows:

156. Effect of errors

No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those

particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by that error or omission.

[101] In **Ahmad Zubair Hj Murshid v PP [2014] 1 CLJ 697**, it was held:

"*Section 156 of the Criminal Procedure Code ('CPC') provides that no error in stating either the offence or the particulars be stated in the charge and no omission to state the offence or those particulars shall be regarded at any stage of the case as material, unless the appellant was in fact misled by that error or omission. However,* ***whether such error or omission had occasioned a failure of justice could only be determined at the conclusion of the trial having regard to the entire evidence being placed before the trial judge***."(Emphasis added)

[102] It is therefore premature for such an objection to be taken at this stage.

[103] In any event, as has been shown, it cannot be said that the Accused here was misled in any manner in formulating his defence having regard to the amount of detail contained in P85 and the

manner in which the defence had conducted the case during the course of the prosecution case.

b) The prosecution had failed to prove that the date of the offences was on 1.8.2017 as stated in the charges.

[104] The evidence from PW15 was that he accessed the social media Facebook account of Abu Hasan Chan around 10.00a.m., on 1.8.2017 at his office located at the Unit Cawangan Khas Counter Terrorism, Tingkat 14, Menara Ibu Pejabat Bukit Aman.

[105] The defence however contends that there is no evidence to show that the Accused had given any support to a terrorist group via the Facebook account of “Abu Hasan Chan” on 1.8.2017.

[106] It was contended also that there were no status or comments posted on 1.8.2017 the said Facebook account giving support to a terrorist group. The defence also submitted that based upon P85, all the instances of statuses and comments in respect of giving support to a terrorist group were between January 2013 and December 2016. As such, contended the defence, the actus reus of the case was not proven.

[107] The prosecution submitted in reply that PW15 during the course of his checks on the Facebook account of “Abu Hasan Chan” on 1.8.2017, found many postings suggesting that the Accused was showing support for the IS. This showed thus that as at 1.8.2017, the offence was still continuing.

[108] By way of analogy, the prosecution cited the case of **Ahmad Abd Jalil v PP [2015] 5 CLJ 480**, where the accused was charged under section 233 of the Communications and Multimedia Act 1998 [Act 588]. The accused was convicted at the Sessions Court and appealed against his conviction to the High Court.

[109] In that case, the charge read as follows:

“*Bahawa kamu pada 10 Oktober 2012 jam lebih kurang 6.00 petang di RD Resources Sdn Bhd, No. 30-3, Jalan Wangsa Delima II, Seksyen 5, 53300 Wilayah Persekutuan Kuala Lumpur telah menggunakan perkhidmatan aplikasi Facebook di alamat internet Protokol 175.139.168.216, melalui akaun Facebook http:://www.facebook.com/Ibrahim.osman.313371 dan menggunakan nama profail "Zul Yahya" secara sedar telah membuat dan*

memulakan penghantaran komunikasi suatu komen yang jelik sifatnya iaitu:

Sultan Johor kulitnya putih seperti kulit babi...

dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 233(1)(a) Akta Komunikasi dan Multimedia 1998 yang boleh dihukum di bawah seksyen 233(3) Akta yang sama."

[110] The brief material facts of the case as set out in the written judgement of that case was as follows:

"*(a) Pada 10 Oktober 2012 jam lebih kurang 6 petang pengadu Syed Bukhari (SP10) bertugas sebagai Pegawai Pusat Media, Ibu Pejabat Polis Kontinjen Johor memantau segala aktiviti dalam laman sosial Facebook*."

[111] The High Court dismissed the appeal and it is evident that it found no flaw with the charge as proffered.

[112] It is clear from that case that the date on which the statement was made is taken to be the date on which the investigator from the investigating agency read the particular statement on the Facebook page.

[113] Furthermore, Section 153(3) CPC reads:

> *153. Particulars as to time, place and person.*
>
> *(1)……*
>
> *(2)……*
>
> *(3) When the accused is charged with an offence relating to publication by electronic means, the place of publication is where the publication is seen, heard or read by any person*.

[114] It is clear therefore that the place of publication is where it is heard or read by any person which in this case was PW15.

[115] There was therefore no merit to the submission raised by the defence in respect of this issue.

c) <u>The prosecution has failed to prove that the Accused had access to the internet during the publication of the Facebook statuses and comments in question from the period November 2012 to December 2016</u>.

[116] There was sufficient evidence adduced that the Accused is the owner of the Facebook account under the name of “Abu Hasan

Chan". These include the CPU device (P21) and the Samsung tablet (P12) recovered from the premises.

[117] In addition, PW4, the son-in-law of the Accused confirmed that P12 and P21 belonged to the Accused. There is also the evidence of PW10 who had conducted a digital forensic analysis on P21, and discovered that there were 3 URL's or web browser link showing that P21 had been used to access "Abu Hasan Chan's" Facebook page.

[118] Further to this, the "Premier" notebook (P41) found at the premises contained the username and password for the Facebook account of "Abu Hasan Chan".

[119] Besides all of this, the Accused himself pursuant to his statement taken pursuant to Section 18A SOSMA, admitted that he was the owner of the Facebook account under the name of "Abu Hasan Chan".

[120] Finally, PW13 confirmed that the SIM cards used to access the internet found in the portable WIFI dongle (P19) and the Samsung

Galaxy Tab (P12) were registered in the name of the Accused.

[121] As there was ample evidence to show that the Accused is the owner of the Facebook account under the name of "Abu Hasan Chan", the presumption under Section 114A of the Evidence Act 1950 ("EA") triggers to the effect that the Accused is then presumed to have published the contents of the publication unless the contrary is shown.

[122] As the charge against the Accused is that the offence was committed on 1.8.2017, it was not incumbent upon the prosecution to prove that the Accused had access to the internet from November 2012 to December 2016.

[123] There was no merit to the submission by the defence in respect of this issue.

Decision at the end of the prosecution case

[124] Upon a maximum evaluation of the evidence, and for the reasons expressed above, I found that the prosecution had proven a prima facie case against the Accused in respect of the First and Second Charge proferred, pursuant to section 180(3) Criminal Procedure

Code (CPC) and I accordingly called upon him to enter on his defence.

E) DEFENCE CASE

[125] After the three alternatives were explained to him, the Accused elected to give sworn testimony.

[126] The Accused testified on oath in examination in chief and said that before he became pensionable at the age of 58 he was a school teacher at S.K.R Tumpat. He started teaching when he was 19 years of age and taught mainly the English language.

[127] The Accused testified that he suffered from mental disturbance. When he used to go jogging he said, the people in his village would tell their children to quickly go inside as a madman was jogging.

[128] The Accused said that he has run naked before in his village and said that there were voices telling him that he was out of his mind. The Accused said that when he suffered from mental disturbance, he does not feel love for his wife and had beaten her before until

she bled from the ears but this was 30 years ago.

[129] He has uncontrollable bouts of anger but this seldom happens. The Accused said that he uses insulin as he has suffered from diabetes for many years now. The Accused said that he embraced Islam when he was 16 years of age before which he was of the Buddhist faith.

[130] The Accused said that he was warded previously and registered as a mental patient because he had heard whispers in his head. These whispers caused him to be afraid and that he felt he had sinned and was bound for hell. He also said that he could hear cats talking to him.

[131] The Accused also said he experienced hallucination and had attempted to commit suicide by various methods including using a knife, by drowning and by electrocuting himself.

[132] The Accused said that the doctors told him that he was schizophrenic. He said that previously he had run away from the

Psychiatric Ward. This was because it was noisy, dirty and he could not sleep well.

[133] After he was apprehended, the Accused was taken to Tanjung Rambutan. The Accused said that he now hears less of the whispers. These auditory hallucinations continued until 2013. The hallucinations are now momentarily presently. The Accused said that he is normal now.

[134] The Accused said that in order to avoid the hallucinations, he now reads a lot and also listens to MP3.

[135] The Accused said that he uses the computer at home and has a laptop and said that besides himself other persons do not utilise these devices. The Accused said that he is not very sure of the charges against him but knows that he had made some comments regarding events in the Middle East. The Accused was referred to two examples of the FB postings i.e. examples 17 and 18 and admitted that he did send these two comments.

[136] The Accused however said that he did not know that the mention

of the word”Isis” was wrong and said that he really does not know what “IS” or “Daesh” means.

[137] He said that he wondered why people had “ketuk” or condemned IS as it was a good thing. He said that when he was using FB, there were voices that supported him in doing so.

[138] The Accused said that he was never contacted by anyone from the IS. The Accused was then referred to exhibit D8 and admitted that he did post the comment on 28.9.2016 which said that the Isis was sponsored by the United States of America and they created the Isis in order to afford them an opportunity to infiltrate into Islamic nations.

[139] The Accused admitted posting on FB on 18.9.2016 but said that this was just his opinion and that if people did not like it, then they could just unfriend him.

[140] The Accused said in reference to exhibits P70 to P77, which were his statements made pursuant to Section 18A of SOSMA, he said

that he was told what to write because he wanted to get out in order to pray.

[141] The Accused then said that once a month a doctor gives him some medication for his mental condition which is for bipolar disease and schizophrenia. He said that he still hears voices in his head and he feels like dying quickly.

[142] The Accused admitted to ownership of the computer seized from his house which he said he used to go on FB. The Accused also admitted that the laptops shown in photographs no.61 and 62 were used by him to go on FB while the dongle shown in photographs no.55 and 56 were for sharing the wifi and internet.

[143] The defence next called Dr Subash Kumar Pillai (DW2). This witness is a physiatrist from the Raintree Specialist Clinic, Petaling Jaya who examined the Accused after the defence of the Accused was called, the court allowing an adjournment upon the request of the defence for the purpose of referring the Accused to DW2.

[144] DW2 prepared and produced a report tendered as D7 which stated

inter alia as follows:

"*<u>Opinion</u>*

In my opinion the history from the patient, mental state examination and corroborative history from his wife and son are consistent with a diagnosis of Schizophrenia. A differential diagnosis of Schizoaffeclive Disorder can also be considered. The term schizophrenia refers to a major mental illness that usually starts from the adolescents. The early or prodromal symptoms may not be obvious to many people. Prodromal symptoms can include mood symptoms and deterioration in school performance. Mr Hassan's history also suggest that he has a premorbid Schizoid or Schizotypal personality. This personality characterized by social isolation and feelings of indifference toward other people.

The DSM 5 defines schizoid personality disorder as a "pervasive pattern of social and interpersonal deficits marked by acute discomfort with, and reduced capacity to form close relationships as well as by cognitive or perceptual distortions and eccentricities of behavior, beginning by early adulthood and present in a variety of contexts." They are usually described as distant, aloof detached or withdrawn or even odd. The disorder usually first becomes noticeable during childhood and is usually apparent by early adulthood. The

symptoms of the disorder may also make it difficult to work in positions that require a lot of social interaction, It is also not uncommon for people with schizoid personality to eventually develop psychotic symptoms. In the case of Mr Hassan, it is clear that he developed his first psychotic episode at age 36 (1983). He presented with a combination of affective and psychotic symptoms. It is unfortunate that he decided to discontinue with treatment. This had led to multiple problems affecting him personally and professionally.

<u>Prognosis</u>

Mr Abu Hassan Chan has been having emotional, behavioural and psychotic symptoms since 1983. He has not been on any treatment since he absconded from the ward in 1983. The duration of untreated illness is 36 years and this is likely to have had a negative effect on his overall brain function. In view of this I would consider his overall prognosis to be poor."

[145] The summary of DW2's conclusions formed after his examination of the Accused was that the Accused has been suffering from schizophrenia and continues to suffer from it until today.

[146] Further DW2 said that the Accused has been suffering from the

illness as early as 1983 and was not treated for the last 35 to 36 years since 1983, resulting in his condition worsening.

[147] DW2 further said that Schizophrenia is a continuous illness and not a sporadic illness, hence a person continuously suffers from it, instead having “episodes” and that Schizophrenia is not an illness that one can recover from without treatment.

[148] DW2 also said that the Accused was suffering from schizophrenia at the time of the commitment of the Facebook Activities and as a result of the illness, his judgement was impaired.

[149] According to DW2, the Accused is aware of his postings and activities on Facebook, but he is not aware of the nature and consequences of his actions.

[150] The Accused also has “*concrete thinking” which “is not being stubborn, [but] basically we cannot just reason with them no matter how obvious it is wrong, they will just do it*” and hence, impairment in his judgement.

[151] DW2 said that the impairment of judgement is also contributed by the fact that the Accused claims he hear voices and see hallucinations.

[152] DW2 said that the cognitive function, the attention, and the concentration, of the Accused is fine and he is capable of writing the posts on Facebook, however, that does not mean that he is not suffering from schizophrenia.

[153] It also does not mean that he can fully grasp the nature and consequences of his actions, and does not mean that his judgement is not impaired.

[154] The prosecution called the wife of the Accused, Puan Rahani Bte Ag Nor (DW3) who testified that the Accused had previously been admitted to the mental ward in a hospital in Kota Bahru at the end of 1983 because he was hearing whisperings.

[155] She also said that the Accused wanted to commit suicide because he believed that God did not accept him. DW3 said that the Accused spent two months in the hospital after which he ran away.

[156] DW3 said that after the year 1983, the Accused did not receive treatment anymore. DW3 said that she met with Dr Ian, a physiatrist who inquired about the Accused's condition.

[157] DW3 said she also met with DW2 who asked her questions about the background and behavior of the Accused.

[158] DW3 said that the Accused preferred to isolate himself, read books and to pray. DW3 said that the Accused did not like to mix with people. DW 3 said that his relationship with his grandchildren depended on his moods.

[159] DW3 further testified that before this, the Accused worked as a teacher and that there were no problems but that at one point of time he did not like to study religion.

[160] DW3 also testified that the Accused's hobby was reading and his daily activities comprised of reading and using the computer. She said that the Accused suffered from diabetes and when he was angry his eyes would turn red and when this happened she would run away.

F) DUTY OF THE COURT AT THE CONCLUSION OF THE TRIAL

[161] The duty of a trial court at the conclusion of the defence case is set out in section 182 A of the Criminal Procedure Code (CPC) which imposes an obligation upon the court to consider all the evidence to decide whether the prosecution has proved its case beyond reasonable doubt.

[162] See also **Prasit Punyang v Public Prosecutor [2014] 4 MLJ 282** and also **Md Zainudin bin Raujan v Public Prosecutor [2013] 3 MLJ 773**. In the former case, the Court of Appeal speaking through Azahar Mohamed JCA ("as His Lordship then was"), held:

"*In accordance with the provisions of s 182A(1) of the Criminal Procedure Code, it is the bounden duty of the learned JC, at the conclusion of the trial, to consider all the evidence adduced before him and shall decide whether the prosecution has proved its case beyond reasonable doubt.* ***The legislature has advisedly used the term all the evidence. The emphasis must be on the word all***."(emphasis added)

[163] Aside from the above, the correct thought process and stages that should be followed by a trial court in the assessment and evaluation of the defence evidence is that as encapsulated in the time honoured decision of **Mat v Public Prosecutor 1963 29 MLJ 263**, where it was held by Suffian J (as he then was) as follows:

"*The position may be conveniently stated as follows: –*

(a) If you are satisfied beyond reasonable doubt as to the accused's guilt

Convict.

(b) If you accept or believe the accused's explanation

Acquit.

(c) If you do not accept or believe the accused's explanation

Do not convict but consider the next steps below.

(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.

(e) If you do not accept or believe the accused's explanation but nevertheless it raises in your mind a reasonable doubt as to his guilt

Acquit."

[164] The approach in Mat v Public Prosecutor was endorsed by the Federal Court as being the correct one to adopt when evaluating the evidence of the defence case in **Public Prosecutor v Mohd Radzi Bin Abu Bakar [2005] 6 MLJ 393**.

[165] If a statutory presumption has arisen, it is incumbent on the Accused to rebut such presumption on a balance of probabilities in order to secure an acquittal. See **PP v Yuvaraj [1969] 2 MLJ 89**.

G) ANALYSIS OF THE DEFENCE CASE

[166] The defence of the Accused in respect of the first and second charge is that he is of unsound mind as defined under section 84 of the Penal Code and therefore he is not guilty of the offences charged. Alternatively, he did not have the capacity to form the necessary mens rea and he is therefore not guilty.

[167] In respect of the second charge, the defence also states that the offence is so minuscule in nature that it attracts the maxim “de minimis non curat lex” or “the law does not deal in trifles”.

The defence of unsoundness of mind under section 84 of the Penal Code

[168] The distinction between persons who were categorised as lunatics and therefore held not accountable for their actions and those who were sane and therefore held responsible had existed since the times of ancient Rome.

[169] In more recent times, the insanity defence owes its origins to an infamous incident in 1843 where one Daniel M‘Naghten attempted to assassinate the then British Prime Minister Sir Robert Peel, because he (M‘Naghten) believed, albeit wrongly, that he was being persecuted.

[170] Instead, he fired at and killed Peel‘s secretary, Edward Drummond, whom he had mistaken for Peel. Edward Drummond died five days later. At his trial Daniel M‘Naghten raised the defence of insanity.

[171] His acquittal on grounds of insanity caused an uproar which resulted in the House of Lords asking a panel of judges, presided over by Sir Nicolas Conyngham Tindal, Chief Justice of the

Common Pleas, a series of hypothetical questions about the defence of insanity.

[172] The House after deliberation expounded as follows:

"….*the jurors ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong*".

[173] Although of an extra judicial origin, the pronouncement which came to be known as the "M'Naghten Rules" has been the prevailing test in England when the court there has to determine whether an accused was insane.

[174] The law in respect of unsoundness of mind in our jurisdiction is set out in section 84 of the Penal Code which reads as follows:

"84. Act of person of unsound mind

Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

[175] As evident from the wording of the section, the defence under section 84 above is a complete defence operating to absolve altogether the accused from culpability of the offence with which he is charged. At first blush, the defence might appear similar to the M'Naghten Rules.

[176] Caution however has been urged by the writers of the book **"Criminal Law in Malaysia and Singapore" by Yeo, Morgan and Chan, 3rd Edition Lexis Nexis** that the formulation in the M'Naghten Rules and section 84 are not to be treated as the same bearing in mind the different phraseology employed notably that of "unsoundness of mind" in section 84 as opposed to "disease of the mind" under the Rules, "incapable" in section 84 as opposed to "did not know" in the Rules, "nature of the act" in section 84 as opposed to "nature and quality of the act" in the Rules and "either

wrong or contrary to law" in section 84 as opposed to "wrong" in the Rules.

[177] The learned authors are also of the view that the term "unsoundness of mind" employed in section 84 is wider than the term "disease of the mind" in the Rules and therefore would also encompass conditions such as deliruim tremens, alcoholic dementia and substance abuse disorder.

[178] With respect to the burden placed upon an accused in the event of such a defence being raised, section 105 of the Evidence Act 1950 states:

"105. Burden of proving that case of accused comes within exceptions

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of those circumstances.

ILLUSTRATIONS

(a) A accused of murder alleges that by reason of unsoundness of mind he did not know the nature of the act.

The burden of proof is on A."

[179] This aspect in respect of the burden is somewhat similar to the M'Naghten Rules which stipulated that every man is presumed to be sane. The burden therefore to prove to the contrary is upon the accused. The standard of proof applicable on an accused is on a balance of probabilities.

[180] In **PP v Ismail b Ibrahim [1998] 3 MLJ 243**, it was held:

"*In a case where s 84 is in issue, three principles of law require consideration. They are:*

(i) that every person is presumed to be sane until the contrary is established;

(ii) that the onus of the prosecution is not merely to establish that the accused committed the offence but also to establish that he had the necessary mens rea to commit the offence; and

(iii) that the onus of proving insanity is on the accused under s 105 of the Evidence Act 1950.

It will therefore be observed that section 84 embodies the fundamental maxim of criminal law, that is to say, an act done does not constitute a crime unless done with a guilty intention. Thus, where a plea under this section has been successfully raised, the effect is that there is no culpability on the part of the accused as he did not have the required mens rea at the time of committing the alleged act.

It follows that the question of the guilt of the accused does not arise as he cannot be said to have committed any offence. Therefore, the law requires that an order of acquittal must be made with regard to the charge preferred against him. The court is only required to make a finding whether he committed the act or not."

[181] It is clear therefore that when insanity is successfully raised as a defence the accused cannot be held accountable for his action because of the inability to form the necessary mens rea on his part.

[182] In Malaysia, the locus classicus in respect of the law relating to unsoundness of mind is the Court of Appeal decision in **John ak Nyumbei v PP [2007] 3 AMR 14**; **[2007] 2 CLJ 509**, where the court speaking through Abdul Hamid Embong JCA(as His

Lordship was then) sets out much of the learning on the subject as follows :

"*The law on unsoundness of mind as a complete defence in our criminal jurisprudence is, as was correctly submitted by learned counsel for the appellant, contained in s. 84 of the Penal Code. It states:*

"84. Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

This section exempts a person found to be insane of any criminal responsibility if it is found that he is "incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law" (see commentary in Ratanlal and Dirajlal's Law of Crimes, 25th edn, p 280). The learned authors there further commented that a person "is not protected if he knew that what he was doing was wrong, even though he did not know that it was contrary to law, and also, if he knew what he was doing was contrary to law even though he did not know that it was wrong.

Thus, under s 84 of the Penal Code, criminality has to be determined according to that legal test and not merely by the

mental state of an accused person according to the medical test.

There is a distinction between the notion of a legal insanity and medical insanity. Not every form of insanity exempts a person from criminal responsibility. Only legal insanity provides that exemption under s 84 of the Penal Code. The specie of insanity addressed by s 84 is the one that impairs the cognitive faculties of a person. Its nature and extent must be that to make the offender incapable of knowing the nature of his act, or that he is doing is wrong or contrary to law. *The criminality of an act therefore must be determined by this test laid down in s 84 as distinguished from the medical test (see Ratanlal and Dhirajlal's Law of Crimes, 25 edn, p 280). As was stated recently by this court through the judgment of Ariffin Zakaria JCA (as he then was) in PP v Muhammad Suhaimi Abdul Aziz [2004] 1 CLJ 378:*

"It is settled law that the defence of insanity under s 84 is concerned with the accused's legal responsibility at the time of the alleged offence and not with whether he was medically insane at that time. See PP v Zainal Abidin b Mat Zaid [1993] 1 CLJ 147; PP v Misbah b Saat [1998] 1 CLJ 759; [1997] 3 MLJ 495.

When the defence of insanity is raised the court thus needs to consider two matters, namely:

(i) whether the accused person has successfully established, as a preliminary issue, that at the time of committing the act he was of unsound mind, and

(ii) if he was of unsound mind, whether he has proven that his unsoundness of mind was of a degree to satisfy one of the tests earlier mentioned ie, that the accused was incapable of knowing the nature of his act as being wrong or against the law *(see Ratanlal and Dhirajlal's Law of Crimes, 5th edn, p 289 et seq).*

It is also settled law that the burden of proof rests on the person who raises the defence of insanity *(see Juraimi b Hussein v PP [1998] 2 CLJ 383 also Baharom v PP [1960] 1 LNS 9; [1960] MLJ 249). And it is only the accused person who has this right to raise a defence of insanity. It is not open to the court or the prosecution to raise it (see PP v Misbah b Saat, (supra)).*

The standard of proof upon the accused raising the defence of insanity is on a balance of probabilities, as in a civil case *(Rajagopal v PP [1976] 1 LNS 122; [1977] 1 MLJ 6, Goh Yoke v PP [1969] 1 LNS 48; [1970] 1 MLJ 63). So, if the appellant here is able to show, either from the prosecution or other evidence that he committed the crime but was at that time insane, he cannot be culpable by virtue of s 84 of the Penal Code*". (Emphasis added)

[183] It is also evident from the fairly recent decision in **PP v Jufri b Nanti [2016] AMEJ 0147**; **[2016] 1 LNS 53** that the assessment of a trial court in cases of this nature involves a two stage test as follows:

"*So it was clear to our mind, that* ***in determining whether an act could be categorised as one that has amounted to an act of insanity under s 84 of the Penal Code, it would inevitably involve a two-tier exercise****. **First, there must be a finding, based entirely on medical evaluation by a psychiatrist that the accused person was suffering from some kind of psychiatric condition that was affecting his cognitive faculties at the material time.*** *This condition may take a variety of forms as medically described, such as he being delusional and so forth.* ***That condition may qualify a person as being medically insane. But that finding per se is not sufficient to be determinate or conclusive of the fact that the accused person is legally insane, a condition with which s 84 of the Penal Code is concerned about as a general defence under the law****. **To be legally insane, as opposed to being merely medically insane, the person must be determined by the psychiatrist to have lost his cognitive faculties to a degree such that he is incapable of knowing the nature of his act, or that***

what he is doing is wrong or contrary to law. If the first tier test is a medical test, then this second tier test is a legal test. *Learned Justice Ariffin Zakaria JCA [as he then was] described the defence of insanity under s 84 of the Penal Code in the following manner:*

"It is settled law that the defence of insanity under section 84 is concerned with the accused's legal responsibility at the time of the alleged offence and not with whether he was medically insane at that time. See PP v Zainal Abidin b Mat Zaid [1993] 1 CLJ 147; PP v Misbah [1998] 1 CLJ 759; [1997] 3 MLJ 495. Indeed, the learned authors of Ratanlal and Dhirajlal's Law of Crime, 5th edn at p 289 had written ***when the court is faced with a defence of insanity under s 84 of the Penal Code, it would have to consider two matters, namely: [i] whether the accused person has successfully established, as a preliminary issue, that at the time of committing the act he was of unsound mind, and [ii] if he was of unsound mind, whether he has proven that his unsoundness of mind was of a degree to satisfy one of the tests earlier mentioned i.e., that the accused was incapable of knowing the nature of his act as being wrong or against the law****. "*

It is therefore clear as well that the appellant bore the burden of establishing that he was of medically unsound mind and that he was

for all intents and purposes, legally insane when he committed the dastardly act referred to in the charge". (Emphasis added)

[184] The case of **PP v Shalima Bi [2016] 1 AMR 537**; **[2016] 2 CLJ 231** explained the difference between legal and medical insanity in the following terms:

"*Legal And Medical Insanity*

The law is trite that the court is only concerned with legal insanity and not with medical insanity. Section 84 of the Code is concerned with legal insanity and not with medical insanity. The distinction between legal and medical insanity has been explained by the learned authors of Ratanlal and Dhirajlal's Law of Crimes 26th edn in the following terms at p 307:

'Medical insanity' and 'legal insanity'. – There is a good deal of difference between 'medical insanity' and 'legal insanity' and courts are concerned only with the legal and not the medical aspect of the matter. *It is not every kind of frantic humour or something unaccountable in a men's action, that points him out to be a mad man, to be excepted from punishment. It is not mere eccentricity or singularity of manner that would suffice the plea of insanity. Abnormality of mind is not by itself sufficient to show that the*

accused must have acted while of unsound mind. Such exemption can be claimed only when the insane person is incapable of knowing the nature of the act or he is doing either wrong or contrary to law.

Thus, where medical insanity has been established, the defence of insanity under s 84 of the Code is only available where, at the time the accused committed the act, he:

(a) did not know the nature of his act; or

(b) did not know that what he was doing was wrong; or

(c) did not know that what he was doing was contrary to law.

What a trial judge has to do as the first step in determining whether the defence of insanity has been established is to see whether the accused was medically insane at the time he committed the act. Expert medical evidence is necessary as the question of whether he was medically insane at any particular point in time is in the realm of forensic science. It is not something that the court can determine without the benefit of expert opinion.

Once that threshold is crossed, the next step is for the trial judge to consider whether, by reason of medical insanity, the accused was incapable of knowing the nature of his act or that what he was doing was either wrong or contrary to law. Expert medical opinion is irrelevant as the question of whether the accused was incapable of knowing the nature of his act or that he was doing what was either

wrong or contrary to law is a matter to be inferred from the proved facts and circumstances and not from expert medical opinion. It is purely a question of fact for the trial judge to determine". (Emphasis added)

[185] The established authorities in cases where the defence of unsoundness of mind is raised, as referred to above, reinforce the view that a two stage test is applicable.

[186] Firstly, there must be a finding based upon medical evaluation that the accused was suffering from some kind of psychiatric condition that impaired his cognitive faculties at the material time so as to be classified as being medically insane. This is of course a matter for a medical expert to determine. But this is not conclusive.

[187] Secondly, in order to be legally insane, the accused must be determined by reason of that psychiatric condition to have lost his cognitive faculties to a degree such that he is incapable of knowing the nature of his act or that what he is doing is wrong or contrary to law. This second stage is a legal test.

[188] The position is thus clear that once the determination is made as to the medical insanity of the accused by medical evidence, it then falls upon the court to decide whether by reason of the medical insanity, the accused was incapable of knowing the nature of his act or that what he was doing was either wrong or contrary to law.

[189] One passage cited in PP v Shalima Bi (supra) however, has been subjected to comment from the learned authors of the book "Criminal Law in Malaysia and Singapore" by Yeo, Morgan and Chan, 3rd Edition Lexis Nexis, as to why medical opinion about the effect of the accused's mental illness on his cognitive faculties would be considered irrelevant in the assessment of whether the accused was legally insane unless the court meant to say that it was for the trial judge and not medical experts in the final analysis to determine whether an accused suffered from any one of the incapacities mentioned in section 84.

[190] This flows from the portion of judgement in that case which said that medical opinion is irrelevant as the question of whether the accused was incapable of knowing the nature of his act or that he was doing what was either wrong or contrary to law is a matter to

be inferred from the proved facts and circumstances and not from expert medical opinion and that this was purely a question of fact for the trial judge to determine.

[191] The learned authors of the said book hold the view that although in theory at least, there is nothing in principle to prevent a court from making a finding of unsoundness of mind without any clinical evidence, in practice, such evidence would be necessary to assist the court to understand the effect of the accused's mental illness on his cognitive capacities.

[192] Notwithstanding, what is clear from a consideration of the authorities on the subject is that the accused must be determined by reason of that psychiatric condition to have lost his cognitive faculties to a degree such that he is incapable of knowing the nature of his act or that what he is doing is wrong or contrary to law.

[193] A plain reading of section 84 also will lead one to the inescapable conclusion that the conditions described that exempt an accused from criminal liability, namely, that he is incapable of knowing the

nature of the act, or that he is doing what is either wrong or contrary to law, must in the first place arise out of the unsoundness of mind determined with reference to the time when the act was committed.

[194] As quoted by the learned authors of Ratanlal and Dhirajlal's Law of Crimes 26th edn (also quoted in Shalima Bi):

"*Abnormality of mind is not by itself sufficient to show that the accused must have acted while of unsound mind. Such exemption can be claimed only when the insane person is incapable of knowing the nature of the act or he is doing either wrong or contrary to law*."

[195] The first thing to be determined therefore when faced with a defence under section 84, is whether the accused was of unsound mind.

[196] The Penal Code does not contain any definition of what amounts to an unsound mind. This omission may have been deliberate of course, so as not to possibly limit the multifarious ways in which a person can be considered to be of unsound mind particularly so when the science of psychology is presently advancing at a rapid

rate. Notwithstanding, the available literature and case law seem to point toward a condition that impairs the cognitive faculties of a person.

[197] Now, what amounts to the cognitive faculty of a person? The Concise Oxford English Dictionary, 11th edn, Oxford University Press describes “cognition” as the mental action or process of acquiring knowledge through thought, experience and the senses or a perception, sensation, or intuition resulting from this.

[198] The online version of the Cambridge Dictionary describes the phrase “cognitive” as connected with thinking or conscious mental processes. Any condition that impairs the cognitive faculties of a person therefore would result in the said person not being able to think, experience, sense perceive or indulge in any form of conscious thought processes as would a normal person.

[199] It would not be too far-fetched to state therefore that the “unsoundness of mind” contemplated by section 84 of the Penal Code is any condition of the mind that impairs the cognitive faculties of a person which would result in the person not being

able to think, experience, sense, perceive or indulge in any form of conscious thought processes as would a normal person.

[200] This means that it is not as simple as merely attaching a label, however compelling or attractive it may seem, for example, that the accused suffers from a bipolar condition or from schizophrenia in order to determine the accused's condition as falling under the category of unsoundness of mind for the purposes of section 84 without more.

[201] The condition, however it is described, must point towards an impairment of the cognitive faculties of the accused in order for an accused to avail himself of the section 84 defence on the basis of unsoundness of mind.

[202] It is thus possible for a person to be suffering from a bipolar disorder or from schizophrenia and yet have his cognitive faculties intact. He would then not be classified as being of unsound mind for the purposes of the defence in section 84.

[203] The process involved therefore in conducting an analysis of the

defence under section 84 must necessarily commence with a description of the clinical condition of the disease affecting the mind and also the manner in which such condition affects the cognitive faculties or functioning of the accused. This is the process of establishing the unsoundness of mind and this is where the evidence of an expert normally in the form of a physiatrist is necessary.

[204] Once however it is established that the condition affects the cognitive faculties or functioning of the accused and he is therefore determined to be of unsound mind, the next part of the analysis is whether the unsoundness of mind resulted in the accused being incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

[205] This is disjunctive in nature because of the manner of the expressions used. This means that the defence will succeed if the accused can establish either that he was incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

[206] This stage of the analysis is where the trial judge solely determines legal insanity although practically speaking clinical input would be necessary.

[207] I am fortified that this is the correct approach to take by reference to the following passage in the case of John ak Nyumbei v PP (supra):

"*Not every form of insanity exempts a person from criminal responsibility. Only legal insanity provides that exemption under s 84 of the Penal Code. The specie of insanity addressed by s 84 is the one that impairs the cognitive faculties of a person. Its nature and extent must be that to make the offender incapable of knowing the nature of his act, or that he is doing is wrong or contrary to law*."

[208] I also find no small comfort in my analysis of the condition from the view expressed by the learned authors of the book "Criminal Law in Malaysia and Singapore" by Yeo, Morgan and Chan, that the concept of "unsoundness of mind" cannot be viewed in isolation but is integrally connected with the cognitive incapacities described in section 84.

[209] The learned authors opine that this is because “unsoundness of mind” per se simply refers to mental malfunctioning which could vary in nature and intensity.

[210] The authors also state that a straight reading of section 84 requires the mental malfunctioning to be of such a nature and intensity as to render the accused completely incapable of knowing the nature of his or her act or that the act was either wrong or contrary to law.

Was the accused of unsound mind?

[211] According to the testimony of DW2, the Accused was suffering from schizophrenia at the time of the commitment of the Facebook Activities and as a result of the illness, his judgement was impaired.

[212] According to DW2, the Accused is aware of his postings and activities on Facebook, but he is not aware of the nature and consequences of his actions.

[213] The Accused also has “concrete thinking” which to quote DW2

"is not being stubborn, [but] basically we cannot just reason with them no matter how obvious it is wrong, they will just do it" and hence, impairment in his judgement.

[214] DW2 said that the impairment of judgement is also contributed by the fact that the Accused claims he hears voices and has hallucinations.

[215] DW2 said that the cognitive function, the attention, and the concentration, of the Accused is fine and he is capable of writing the posts on Facebook, however, that does not mean that he is not suffering from schizophrenia.

[216] It also does not mean that he can fully grasp the nature and consequences of his actions, and does not mean that his judgement is not impaired.

[217] An analysis of the evidence of DW2 as gathered from above will indicate that while the Accused was diagnosed as suffering from schizophrenia, he is also said to be aware of his postings and activities on Facebook, but he is not aware of the nature and consequences of his actions.

[218] According to DW2 further, it was the Accused who told him that he was not aware that his actions were wrong and could result in him being imprisoned.

[219] More significantly, DW2 said that the cognitive function, the attention, and the concentration, of the Accused is fine and he is capable of writing the posts on Facebook. DW2 however, said that does not mean that he is not suffering from schizophrenia.

[220] In D7, DW2 stated under the heading “Cognitive Functions” that the Accused was fully oriented to his surroundings and his attention and concentration was fair. He was also able to perform the serial 7 test and the digit span test well. This is a test of attention and concentration. His memory was stated to be not impaired.

[221] So while the diagnosis of DW2 is that the Accused is suffering from schizophrenia, his cognitive functions are intact. DW2 further said that the Accused is aware of his postings and activities on Facebook.

[222] The Concise Oxford English Dictionary, 11th edn, Oxford University Press describes “schizophrenia” as a mental disorder involving a breakdown in the relation between thought, emotion, and behaviour, leading to faulty perception, inappropriate actions and feelings, and withdrawal from reality into fantasy and delusion.

[223] The official website of the World Health Organisation (“WHO”) describes schizophrenia as a psychosis, a type of mental illness characterized by distortions in thinking, perception, emotions, language, sense of self and behaviour.

[224] The same website also lists hallucination, delusion, abnormal behaviour and disturbances of emotions as some of the experiences of someone suffering from the condition.

[225] These definitions seem to suggest that the condition would normally be characterized by a loss of the cognitive faculties to the extent that it would render the person incapable of knowing the nature of his act.

[226] So I find the assessment of DW2 to be a contradiction in terms

when he states on the one hand, that the judgement of the accused is impaired as he is not aware of the nature and consequences of his actions and that his cognitive functions are intact and that he is aware of his postings and activities on Facebook, on the other hand.

[227] DW2's assessment also that the Accused has "concrete thinking" which "is not being stubborn, [but] basically we cannot just reason with them no matter how obvious it is wrong, they will just do it" and hence, impairment in his judgement appears to me to be a condition where he holds a certain belief however tenacious it may be.

[228] There are however many individuals who hold fast to a certain belief and no amount of persuasion to dissuade them can dislodge them from their views which may be even characterised as concrete thinking but I hardly think they would qualify as being of unsound mind.

[229] While giving evidence in his defence, the Accused admitted that he set up the Facebook ("FB") account of "Abu Hassan Chan"

because he wanted to express his own views and that he welcomed alternative comments from his FB friends.

[230] The Accused also admitted uploading his status, comments and photograph in his FB account as per exhibit P85 and that these postings represented his mindset.

[231] He further said that he was aware of what he was doing when he posted his status, comments and images in P85. DW2 said that the FB comments of the Accused were written in good structure and with good writing skills.

[232] With regard to the images posted on FB which constituted the subject matter of the second charge, the Accused said that he was attracted to those images.

[233] An assessment of the above evidence by the Accused would suggest to me that he was in full possession of his cognitive faculties and he was aware of and understood what he was posting on FB.

[234] The postings were also said to be well constructed. This cannot be done unless one is in possession of his faculties and is able to reason, think and organise. These activities cannot be done by someone whose mind or judgement is impaired. Consequently, I find the claim by DW2 that the judgement of the Accused was impaired to be unsubstantiated. I find that the Accused therefore knew full well the nature of the act and therefore fails in respect of the first limb in section 84 in respect of both charges.

[235] With regard to the Accused's testimony that he was unaware of the consequences of what he posted on FB, I quite agree with the submission advanced by the learned Deputy Public Prosecutor (DPP) that this is akin to saying that he was ignorant of the law which is met by the oft quoted maxim that ignorance of the law is no defence or more popularly encapsulated in its original Latin form "ignorantia juris non excusat".

[236] I find to the contrary that as the cognitive faculties of the Accused was intact at the time he posted his FB postings, he was able to discern that his act was both wrong and contrary to law.

[237] The Accused therefore also fails in respect of the second limb in section 84 viz. “that he is incapable of knowing that he is doing what is either wrong or contrary to law” in respect of both charges.

[238] As was stated in the book “Criminal Law in Malaysia and Singapore” by Yeo, Morgan and Chan quoting from Beg J in **Lakshimi v State 1959 60 Cri LJ 1033** at 1034 as follows:

“....*What the law [by virtue of s 84] protects is the case of a man in whom the guiding light that enables a man to distinguish between right and wrong and between legality and illegality is completely extinguished.* ***Where such light is found to be still flickering, a man cannot be heard to plead that he should be protected because he was misled by his own misguided intuition or by any fancied delusion which had been haunting him and which he mistook to be a reality***.” (Emphasis added)

[239] In the case of the Accused, the light was more than flickering and he knew fully well and understood what he was doing when he made those FB postings.

[240] I also find the contention by learned counsel for the Accused that

the court ought to apply the maxim “de minimis non curat lex” as a defence to the second charge to be without basis.

[241] The law was enacted by the Legislature no doubt with a particular objective in mind which was to tackle and deal with those who lend support to terrorist organisations by whatever means and an accused cannot be heard to state that the offence is so trivial in nature as not to attract a conviction.

[242] I also find that the defence has failed to rebut the presumption of fact in publication under section 114A of the Evidence Act 1950 on a balance of probabilities in respect of both charges for the reasons stated above.

Prosecution’s failure to call rebuttal evidence

[243] The defence submitted that the prosecution called no rebuttal evidence to the testimony of SD2. The prosecution submitted on the other hand that there was no need to call evidence in rebuttal as the testimony of SD2 did not show that the cognitive faculties of the Accused was impaired so there was nothing to rebut.

[244] The prosecution did not call Dr. Ian Lloyd who was the psychiatrist who examined the Accused prior to the trial, as a witness although his Report was tendered as D6.

[245] The material parts of Dr. Lloyd's Report D6 are reproduced hereunder:

"*PEMERIKSAAN MENTAL*

…….Pemeriksaan kognitif seperti daya ingatan, penumpuan, pertimbangan serta penyelesaian masalah adalah normal.

KESIMPULAN

Semasa melakukan perbuatan-perbuatan yang dituduh pada 01 Ogos 2017, beliau berada dalam keadaan mental yang waras dan sedar akan akibat daripada perbualan beliau.

Keadaan mental beliau adalah stabil pada tarikh laporan ini ditulis. Beliau layak dihadapkan ke mahkamah untuk dibicarakan serta mampu untuk membela diri."

[246] Learned counsel for the defence submitted that firstly, the purpose for which the Accused was referred to Dr. Lloyd was limited in nature, namely, to ascertain his ability as to his fitness to plead and to stand trial while contrary to what was stated in the report,

the offence alleged to have been committed by the Accused was not on 1st August 2017.

[247] To my mind, these distinctions made no difference as firstly, Dr. Lloyd being an expert, can be taken to have assessed the Accused in a comprehensive manner before stating that at the time the Accused was in a stable mental condition and aware of the consequences of what he did. It must be noted more specifically that Dr. Lloyd came to this conclusion as a result of the conversation he had with the Accused.

[248] Secondly, when Dr. Lloyd mentioned the offences being committed on 1st August 2017 he was merely reflecting what was stated in the charge although from the facts it is evident that the Accused's FB postings were done before that date. As earlier alluded to, this was a continuing offence. This aspect of the case has already been dealt with earlier in the judgement and I do not propose to repeat it here.

[249] By all accounts and after considering the contents of D6, I tend to

agree with the prosecution that there is no difference in substance between what is stated in D6 and the evidence of DW2.

[250] In this context, I agree that there was no necessity for the prosecution to call evidence in rebuttal.

Decision

[251] The burden on an accused when raising the defence under section 84 is that on a balance of probabilities.

[252] In **Miller v Minister of Pensions [1947] 2 All ER 372**, proof on a balance of probabilities was described as follows:

"*This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled.* ***It must carry a reasonable degree of probability****, but not so high as is required in a criminal case.* ***If the evidence is such that the tribunal can say: "We think it more probable than not," the burden is discharged but, if the probabilities are equal, it is not***." (Emphasis added)

[253] Under all the circumstances, and for the reasons stated above I find that the defence has failed on a balance of probabilities to prove that the Accused was of unsound mind under section 84 of the Penal Code in respect of both offences.

[254] I find consequently that the prosecution has succeeded in proving their case beyond a reasonable doubt in respect of both charges as proferred and pursuant to section 182A(2) of the Criminal Procedure Code I therefore convict the Accused of both charges.

Sentence

[255] In mitigation, learned counsel for the Accused submitted that the Accused is 65 years old and is married with adult children. The Accused is a pensioner and a former teacher who retired at the age of 58. He has served 39 years as a teacher.

[256] The Accused is a diabetic and requires regular intake of insulin. The Accused is also a first offender and has rendered his co-operation with the authorities at all times. He has also not resisted arrest and his actions had not resulted in any loss of life.

[257] It was further submitted that there is no evidence that anyone was influenced by his FB postings as he had not recruited anyone.

[258] Learned counsel further submitted that the Accused's mental state ought to be given consideration as 2 doctors have certified he suffers from mental illness and while this may not have availed him of the defence of insanity under section 84, it is clear that he needs help.

[259] To this end a long period of incarceration would not do him any good. Any sentence passed ought also to be with effect from date of arrest which is on 11.8.2017.

[260] Counsel next submitted several cases that demonstrated the trend of sentencing for similar offences. It was suggested pursuant to that, the court impose 5 years for the first charge and 2 to 3 years for the second charge with both sentences to run concurrently.

[261] The Deputy Public Prosecutor tendered a written submission on aggravating factors in reply. The element of public interest was

emphasised upon in support of imposing a heavy sentence befitting the seriousness of the crime.

[262] The case of **PP v Loo Choon Fatt [1976] 2 MLJ 256** was cited which held as follows:

"***One of the main considerations in the assessment of sentence is of course the question of public interest****. On this point I need only quote a passage from the judgment of Hilbery J. in Rex v Kenneth John Ball 35 CrAppR 164 as follows:–*

*"**In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest**. **The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it.** A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest*

living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe." (Emphasis added)

[263] As is evident, the primary objective of sentencing is also to serve as a deterrence to would be offenders. It was also submitted that this was a case where the Accused was convicted after a full trial where 15 witnesses were called by the prosecution while 3 witnesses were called by the defence. The trial also was conducted over a staggered period of about 2 years and 4 months. Much time and expense has thus been expended.

[264] The prosecution submitted several cases in respect of the first charge under section 130J (1)(b) which reflected the trend of sentencing for similar offences which showed a rough average of around 7 years for cases where the accused had pleaded guilty and a rough average of around 10 to 12 years imprisonment for cases after a full trial.

[265] The case of **PP v Mustaza Abdul Rahman** was cited, although no citation or case number was given, where after a full trial upon a conviction under section 130J(1)(b) the accused was sentenced to 12 years imprisonment from date of arrest.

[266] For the same case, again without a citation and a case number, the Court of Appeal imposed a term of imprisonment of 10 years from date of arrest after a full trial on a charge under section 130J(1)(a). It was however unclear whether the sentence was reduced or enhanced as no citation was given.

[267] The prosecution also submitted the case of **PP v Mohd Firdaus Asren Saputra B M S Asren [2019] 1 LNS 1913** a case on appeal to the Court of Appeal where the accused had pleaded guilty after 18 witnesses had given evidence on a charge under section 130J (1)(a) and was sentenced to 10 years imprisonment from date of arrest.

[268] It must be emphasised though that this was a case where there was evidence of the Accused giving support to the terrorist group which actually carried out a bombing on an establishment.

[269] In respect of the second charge under section 130JB (1)(a), an average imprisonment of roughly 2 to 3 years was reflected in the trend of sentencing in the cases cited.

[270] The case of **Ahmad Azmi Ahmad Rosli v PP [2019] 1 LNS 358** was cited where a term of imprisonment of 3 years from date of arrest was imposed.

[271] The prosecution also submitted the case of **Mohamad Nasuha Abdul Razak v PP [2019] 3 CLJ 612** where a term of imprisonment of 4 years was imposed.

[272] While these cases provided some indicative guidelines, every case has nevertheless to be assessed on its own particular facts. Otherwise the element of discretion in sentencing is no longer a discretion.

[273] Upon consideration of the respective submissions advanced by both parties, while the seriousness of the offences cannot be disputed, it is also evident given the advanced age of the Accused that a long period of incarceration will not benefit him.

[274] I also took into account that the Accused suffers from diabetes and requires an intake of insulin which no doubt can better be treated if he is no longer in incarceration.

[275] The period of incarceration he has suffered from the date of arrest can of itself also be considered a form of punishment especially in light of the Accused's age and accompanying ailments.

[276] I have also taken into account the seriousness and prevalence of the offences committed and the public interest element as well as the need to deter would be offenders.

[277] A passage from the case of **Liow Siow Long v Public Prosecutor [1970] 1 MLJ 40**, ironically cited by the prosecution, emphasises a balanced approach as follows:

"*It is not in doubt that the right measure of punishment for an offence is a matter in which no hard and fast rules can be laid down and it is to be determined by a consideration of a variety of circumstances.* ***In assessing sentence, the primary consideration is the character and magnitude of the offence, but the court cannot lose sight of the proportion which must be maintained between the offence***

and the penalty and the extenuating circumstances which might exist in the case."(Emphasis added)

[278] Given the extenuating circumstances in this case referred to above and after conducting a balancing exercise between the public interest and the private interests of the Accused, I imposed a period of imprisonment of 6 years from date of arrest for the first charge and a period of imprisonment of 3 years for the second charge from date of arrest, both sentences to run concurrently.

[279] Under all the circumstances, I do not think that the sentences imposed were manifestly excessive nor were they manifestly inadequate.

[280] I also ordered all items seized in connection with the offences committed to be forfeited.

Dated: 07th August 2020

t.t.

(COLLIN LAWRENCE SEQUERAH)

Judge

High Court of Malaya

Kuala Lumpur

Counsels:

For the Appellant/ Respondent	…	Tn. Muhammad Fadzlan bin Mohd Noor together with Tn. Aaron Abhilash Paul Chelliah, Tn. Aliff Asraf bin Anuar Sharuddin, Tn. Low Qin Hui, Pn. Syazwani and Pn. Rohaiza binti Abd Rahman Public Prosecutor [Attorney General's Chambers] Putrajaya
For the Respondent/ Appellant	…	En. Syahredzan Johan together with En. Louis Liaw Vern Sien and Ms. Amanda Wong [Messrs. Ram Caroline Sha & Syah]