**Public Prosecutor**

AND

**Pg Ibrahim Bin Pg Hj Bungsu (D1)**
**Pg Adey Azmee Bin Pg Hj Ahmad (D2)**
**Ak Samrulspawinizam Bin Pg Ibrahim (D3)**
**Ak Mohammad Faisal Bin Pg Ibrahim (D4)**
**Soffian Bin Ali Hassan (D5)**
**Emran Bin Haji Ibrahim (D6)**

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**(High Court of Brunei Darussalam)**
**(Criminal Appeal No. 43 of 2013)**

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Dato Seri Paduka Hj Kifrawi, C.J.
**11th September, 2014.**

Criminal law and procedure – owner using his house as common gaming house – playing in a common gaming house – Defective Search Warrant – no case to answer – correct approach – premature finding as to credibility.
Evidence – Illegally obtained – Test of admissibility – relevance of matters in issue – whether the Court concerned with method of obtaining evidence.

DPP Karen Tan for Public Prosecutor.
Defendants In Person.

**Cases cited in the Judgment:**

*Ang Swi Eng and Public Prosecutor* (1965-1986) 2 BLR on pg.33
*Haw Tua Tau v Public Prosecutor* [1981] 2 MLJ 49 at p.52
*Kuruma s/o Kaniu v Reg* [1955] AC 197 (PC)
*Public Prosecutor v Chong Yoke Choy* (1994) 3 CLJ 718
*Low Chang Chew v Public Prosecutor* (2003) 1 JCBD 266

## J U D G M E N T

**Dato Seri Paduka Hj Kifrawi, C.J.:**

**1. Introduction**

The Defendants were charged on 2/7/2011 as follows:-

Charge against 1st Defendant (D1)

That you, on the 17th day of August, 2009 at about 1734 hours at No.4, Simpang 51-14-6, STKRJ, Kg Perpindahan Rimba Gadong in Brunei Darussalam, being the owner did use the said place as a common gaming house, and you have thereby committed an offence punishable under section 4(a) Common Gaming Houses Act Cap.28.

| **Penalty** |
| --- |
| Maximum penalty under section 4(a) Common Gaming Houses, Cap 28<br>Fine of not less than $5,000 and not exceeding $50,000, imprisonment for a term not exceeding 3 years or both |

Charge against 2nd Defendant (D2)

That you, on 17th day of August 2009 at about 1734 hours at No.4, Spg 51-14-6 STKRJ Kg Perpindahan Rimba, Gadong in Brunei Darussalam did play in a common gaming house and you have thereby committed an offence punishable under section 6(1) Common Gaming Houses, Cap 28.

| **Penalty** |
| --- |
| Maximum penalty under section 6(1) Common Gaming Houses, Cap 28<br>Maximum imprisonment of 6 months and a fine of $10,000 |

Charge against 3rd Defendant (D3)

That you, on 17th day of August 2009 at about 1734 hours at No.4, Spg. 51-14-6, STKRJ Kg Perpindahan Rimba, Gadong in Brunei Darusalam, did play in a common gaming house and you have thereby committed an offence punishable under section 6(1) Common Gaming Houses, Cap.68.

| **Penalty** |
| --- |
| Maximum penalty under section 6(1) Common Gaming Houses, Cap 28<br>Maximum imprisonment of 6 months and a fine of $10,000 |

Charge against 4th Defendant (D4)

That you, on 17th day of August 2009 at about 1734 hours at No.4, Spg 51-14-6 STKRJ Kg Perpindahan Rimba, Gadong in Brunei Darussalam did play in a common gaming house and you have thereby committed an offence punishable under section 6(1) Common Gaming Houses, Cap 28.

| **Penalty** |
| --- |
| Maximum penalty under section 6(1) Common Gaming Houses, Cap 28<br>Maximum imprisonment of 6 months and a fine of $10,000 |

Charge against 5th Defendant (D5)

That you, on 17th day of August 2009 at about 1734 hours at No.4, Spg 51-14-6 STKRJ Kg Perpindahan Rimba, Gadong in Brunei Darussalam did play in a common gaming house and you have thereby committed an offence punishable under section 6(1) Common Gaming Houses, Cap 28.

| **Penalty** |
| --- |
| Maximum penalty under section 6(1) Common Gaming Houses, Cap 28<br>Maximum imprisonment of 6 months and a fine of $10,000 |

Charge against 6th Defendant (D6)

That you, on 17th day of August 2009 at about 1734 hours at No.4, Spg 51-14-6 STKRJ Kg Perpindahan Rimba, Gadong in Brunei Darussalam did play in a common gaming house and you have thereby committed an offence punishable under section 6(1) Common Gaming Houses, Cap 28.

| **Penalty** |
| --- |
| Maximum penalty under section 6(1) Common Gaming Houses, Cap 28<br>Maximum imprisonment of 6 months and a fine of $10,000 |

The Defendants claimed trial. On 16/11/2013, the Chief Magistrate was satisfied that the Prosecution has failed to adduce enough evidence to establish any prima facie case against D1, D3, D4 and D6 and the Chief Magistrate discharged and acquitted them. The 2nd Defendant passed away before the prosecution case was completed. The 5th Defendant pleaded guilty and sentenced on 11/7/2011 to a fine of $1800 in default 1 month imprisonment. The 5th Defendant later gave evidence for the prosecution. The Public Prosecutor appealed against the Chief Magistrate's decision.

## 2. The Chief Magistrate's Ruling

The search warrant applied for by the police was for a house located at No.4, Spg 51-14-6, Perumahan Kg Rimba in Brunei Darussalam. The Search Warrant number is 57772. The Prosecution conceded that the house as listed

in the Search Warrant no.57772 was not the same place where the Defendants were arrested.

The Court ruled that any subsequent evidence obtained after the wrongful entry, were inadmissible including the statements recorded from the Defendants. The Chief Magistrate in his Ruling stated:

'In this matter, there are evidences that the place that they entered and searched were observed for several days. I am amazed that after several days and times the place was observed, they came out with wrong address. There is no evidence produced in court that the mistake was on the Magistrate issuing the search warrant or when it was applied for. If the Magistrate made the mistake, the police should have informed the Magistrate before they left the Court's building. The mistake, if any, could have been ratified.

If the mistake is on the complaint to the magistrate, it means that the police had not been diligent in discharging their duties.

As result of the search, items were seized and these items if admitted could activate the presumptions. This would be prejudicial to all the defendants.

Having had said the above, I am satisfied that the search warrant was issued on the wrong premise and ruled that the entry and search cannot be lawful under the Act and any items seized during the search are inadmissible.

In ***Low Chang Chew's*** case, it was held that the search warrant '*is an important document as it forms the foundation for the seizure of exhibits and arrest of suspected criminals.*"

In the present case, as result of the search warrant number 5772, several persons were arrested and investigated. As part of the investigations statements were recorded from them. The statements that were recorded based on the activities at the house that was wrongly entered.

As I have ruled earlier, based on the wrong search warrant, any items found and seized are deemed to be inadmissible. As result of the wrong search warrant, statements were recorded on the basis of the activities that happened at the place that was wrongly entered. This entry was deemed to be not in accordance to the Act. The court rules that any subsequent investigations after the wrongful entry are deemed to the inadmissible including the statements recorded from the Defendants…..'

**3. The Law**

In general, evidence in both civil and criminal trial is admissible, if it is relevant to the matters in issue. The court is not concerned with how the evidence was obtained. In practice, in a criminal case, however, the court has a discretion to exclude admissible evidence against the Defendant if the court considers that the prejudicial effect of the evidence outweighs the probative value of the evidence against the Defendant. This judicial discretion has been approved by Lord Goddard in *Kuruma s/o Kaniu v Reg* [1955] AC 197 (PC). The Chief Magistrate referred to this in his Ruling.

Section 2 of the Common Gaming Houses Act defines –

"common gaming house" includes –

(a) any place kept or used for gaming, to which the public or any class of the public has or may have access;

(b) any place kept for habitual gaming, whether the public or any class of the public has or may have access to it or not;

(c) any place kept or used for the purpose of a public lottery;

(d) any place (including a place which is owned, occupied, possessed, kept, used or maintained by any society or any other organisation, body, or group of persons whether or not that society, organisation, body or group is established by or under any written law) –

(i) where 4 or more persons are gaming;

(ii) where any game specified in the Schedule is being played; or

(iii) where gaming is carried out and for which payment is made by any person to any society, organisation, body or group of persons or any other person as consideration for permitting gaming in such place;";

" "gaming" means playing any game of chance or of mixed chance and skill for money or money's worth and includes –

(a) playing any game specified in the Schedule; and

(b) playing or operating any gaming machine;

Section 2(3) of Common Gaming Houses Act provides –

> "A place shall be deemed to be used for a purpose if it is used for that purpose even on one occasion only."

Section 4 of Common Gaming Houses Act provides –

"Any person who –

(a) being the owner or occupier or having the use temporarily or otherwise thereof keeps or uses a place as a common gaming house; or

……

is guilty of an offence and liable on conviction to a fine of not less than $5,000 and not exceeding $50,000, imprisonment for a term not exceeding 3 years or both."

Section 6 of Common Gaming Houses Act provides –

" (1) Any person who plays in a common gaming house shall be guilty of an offence: Penalty, a fine of $10,000 and imprisonment for 6 months.

(2) A person found in a common gaming house or found escaping therefrom on the occasion of its being entered under this Act shall be presumed until the contrary is proved to be or to have been playing therein."

Section 16 of Common Gaming Houses Act provides -

" If any instruments or appliances for gaming are found in any place entered under this Act or upon any person found therein, or if persons are seen or heard to escape therefrom on the approach or entry of a magistrate or a Senior Police Officer, or if a police officer or any person having authority under this Act to enter or go to such place is unlawfully prevented from or obstructed or delayed in entering or approaching the same or any part thereof, it shall be presumed until the contrary is proved that the place is a common gaming house and that the same is so kept or used by the occupier thereof."

Section 20A of Common Gaming Houses Act provides –

"Notwithstanding any rule of law, any provision of this Act or of any other written law, any person or agent found gaming together with the person charged with any offence under this Act shall not be presumed to be unworthy of credit by reason only of his having admitted to abetting the commission of

an offence under this Act if his abetment or attempt to abet or his participation in the gaming was solely for the purpose of securing evidence against the person charged with that offence.".

**4. Ruling at prima facie stage**

The issue here is that whether the Chief Magistrate has exercised this judicial discretion according to the law.

DPP in her submission conceded that the house mentioned in the Search Warrant No.5772 is not the same place where the Defendants were arrested. The house raided was, therefore, not the same house that the police had been observing. The evidence which activate the presumptions should be excluded. This would mean the Defendants arrested by the police in the house should not be presumed to be playing in a common gaming house under section 6(2) of the Common Gaming Houses Act. The evidence of gaming instruments seized from the house should not activate the presumption under section 16 of the Common Gaming Houses Act that the place is a common gaming house and that it is so used by the occupier as a common gaming house. Bearing in mind that the house was not observed by the police, it would be unfair for the Defendants to be presumed to have committed the offences and for the Defendants to rebut the presumptions on the balance of probability. In *Low Chang Chew v Public Prosecutor* (2003) 1 JCBD 266, although the police observed the house raided, the court still decided that the presumptions under section 6(a) and other presumptions under the Common Gaming Houses Act were not available to the prosecution due to the defective Search Warrant.

PW1 testified that D2, D3 and D4 gambled. PW1 did see D1 and D6 in the house and he confirmed they did not gamble. PW1 admitted he also gambled making him an accomplice in this case. PW2 another accomplice who wanted to gamble there testified that D1, D2, D3, D4 and D6 gambled. PW1 and PW2 may not be reliable witnesses. There is no evidence that PW1 and PW2 were Police Agents who were in the house to secure evidence against the Defendants under section 20A of the Common Gaming Houses Act. The gambling instruments (for Katam Katam) were seized from PW2's car parked at the house. The other gambling instruments allegedly seized from the house were for Katam Katam and for Sam Cheong. Several Prosecution Witnesses including PW2 and PW5 confirmed that D1 was the owner of the house raided by the police.

PW1 claimed he had gambled at the house 5 to 6 times. PW2 claimed he had been at the house two times. The DPP submitted that the Prosecution is relying mainly on the evidence of PW1 and PW2 to prove the charges against the Defendants. At the end of the Prosecution case, the Prosecution has to

prove there is a prima facie case against the Defendants. The Court is not supposed to make a finding of facts without hearing the Defendants' case.

Roberts, C.J. commented in *Ang Swi Eng and Public Prosecutor* (1965-1986) 2 BLR on pg.33 –

"…..*Submission of no case*

One of the main grounds of appeal was that the magistrate's approach to the submission of no case to answer was incorrect and that he should have adhered to the principles set out in the following extract from Lord Diplock's judgment in *Haw Tua Tau v Public Prosecutor* [1981] 2 MLJ 49 at p.52:

> "At the end of the prosecution's case what has to be decided is a question of law only. As decider of law, the judge must consider whether there is some evidence (not inherently incredible) which if he were to accept as accurate, would establish each essential element in the alleged offence. If such evidence as respects any of those essential elements is lacking, then and then only, is he justified in finding that 'no case against the accused has been made out which if unrebutted would warrant his conviction' within the meaning of s.188(1) of the Criminal Procedure Code. Where he has not so found he must call upon the accused to enter upon his defence, and as decider of fact he must keep an open mind as to the accuracy of any of the prosecution's witnesses until the defence has tendered such evidence, if any, by the accused or other witnesses as it may want to call and counsel on both sides have addressed to the judge such arguments and comments on the evidence as they may wish to advance."…."

On page 35 Roberts, C.J. stated –

"….*Rulings on submission of no case*

It is the usual practice in courts elsewhere for a judge or magistrate, to whom a submission of no case is addressed, to say no more than that he is satisfied that there is a sufficient *prima facie* case established by the Crown to call upon the defendant for his defence. I commend this practice to Brunei magistrates.

Long, fully reasoned and detailed rulings, of the kind delivered in this case, are dangerous and are liable to lure magistrates into premature findings of fact, as happened to the careful and experienced magistrate who tried this case…."

In *Public Prosecutor v Chong Yoke Choy* (1994) 3 CLJ 718 the Court decided that direct evidence given by the Prosecution witnesses should not be excluded

by the Magistrate's Court, although the presumptions under the Common Gaming Act were not available to the Prosecution. In the Magistrate's Court, the Prosecution witnesses testified that 8 persons including the Respondent were found gambling. The Respondent was the owner of the premises raided by the Police without a Search Warrant and the premises was not observed by the Police before the raid. The Court decided that the Magistrate was wrong in ruling there was no prima facie case.

**5. Conclusion**

In this case, despite PW1 and PW2 were accomplices and their evidence contradicted as regards what PW1 and PW6 did in the house, it would be premature for the Court to make finding of facts without hearing the Defendants' case.

In this case, the Chief Magistrate should also make a ruling whether the Defendants' statements were voluntary and become admissible evidence. The Chief Magistrate should also take note that the definition of 'common gaming house' is now wider than before.

Section 2 of Common Gaming Houses Act provides –

"Common gaming house" includes –

(a) any place kept or used for gaming, to which the public or any class of the public has or may have access;

(b) any place kept for habitual gaming, whether the public or any class of the public has or may have access to it or not;

(c) any place kept or used for the purpose of a public lottery;

**(d) any place (including a place which is owned, occupied, possessed, kept, used or maintained by any society or any other organisation, body, or group of persons whether or not that society, organisation, body or group is established by or under any written law) –**

**(i) where 4 or more persons are gaming;**

**(ii) where any game specified in the Schedule is being played; or**

(iii) where gaming is carried out and for which payment is made by any person to any society, organisation, body or group of persons or any other person as consideration for permitting gaming in such place;"

PW1's and PW2's evidence that the Defendants were playing Sam Cheong in the house raided by the police, if their evidence were believed by the Court at the end of the trial would be sufficient to convict the Defendants on the charges against them. There were 4 persons (including PW1) or more were found gambling. D2, being the owner, was using his house as a common gaming house. PW1 alleged that D2, D3 and D4 were playing Sam Cheong in the house raided by the police which is a common gaming house. PW2 alleged D1, D2, D3, D4 and D6 were playing Sam Cheong in the same common gaming house.

I, therefore, allow the appeal and set aside the Chief Magistrate's order of discharge and acquittal against D1, D3, D4 and D6.

I order that the Chief Magistrate should make a Ruling on the Voir Dire regarding the statements given by D1, D3, D4 and D6.

I also order, whether the Defendants' statements were admitted or not, for the Chief Magistrate to invite D1, D3, D4 and D6 to give their Defence, subject to sections 179, 220 and 221 of the Criminal Procedure Code.

**DATO SERI PADUKA HJ KIFRAWI BIN DATO PADUKA HJ KIFLI**
Chief Justice