

CASE REPORT

WHEN EXPERTS DISAGREE

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Abstract

Objective: The objective of this case report is to highlight some learning points behind the reasoning of the Appellate Court in a case where there were two different expert opinions by two forensic psychiatrists from two distinctive Malaysian Approved Psychiatric Hospital in regard to the soundness of mind of Mr. A for an alleged offence punishable by a death penalty. **Methods:** This case report is based on the reasoning of the Appellate Court in rejecting the plea of the prosecutor. **Results:** The High Court order remained in which the defendant was found not guilty due to reason of insanity (NGRI) provided by the Malaysian Law under Section 84 of Penal Code for the charge of dangerous drug trafficking, and he was ordered by court to undergo treatment for his underlying mental illness in a Psychiatric Institution under Section 348(1) of the Malaysian Criminal Procedure Code. **Conclusion:** In writing expert report, it is preferable to use a singular first-person pronoun in stating the conclusion. If there are other experts involved in either current or previous assessment, it would be beneficial to address their different opinions in the expert report. However, expert opinion is still an 'opinion,' and the court would be perfectly entitled to reject or differ from any of the expert opinions when there are proper grounds to do so. *ASEAN Journal of Psychiatry, Vol. 17 (2): July – December 2016: XX XX.*

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Introduction

Mahatma Gandhi once said, "Honest disagreement is often a good sign of progress." [1]. It is common to have disagreement even among experts of the same field. However, disagreements are rarely being reported in the field of forensic psychiatry. An expert witness is a person who is a specialist in a subject, often technical, who may present his/her or her or her expert opinion without having been a witness to any occurrence relating to the lawsuit or criminal case. It is an exception to the rule against giving an opinion in trial, provided that the expert is qualified by evidence of his/her or her or her expertise, training and special knowledge [2]. Malaysian Law, Act 56 under Section 45 of Evidence Act

1950 stated that "(1) When the court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts. (2) Such persons are called experts." [3]. Expert opinions from a forensic psychiatrist are sought when a Judge or a Magistrate holding a trial has reason to suspect that the accused person is of unsound mind and consequently, incapable of making his defence provided under section 342 of the Criminal Procedure Code (CPC) [4].

Case Report

We are reporting a case in the Court of Appeal in Malaysia where government-based forensic psychiatrists had given a different opinion in regard to the criminal responsibility of an accused, for crimes took place under the identical circumstance in the same time frame. Mr. A had committed three criminal acts under Malaysian law under the same circumstance in the same time frame in the year 2011. He was charged under Section 39B (1) (a) of Dangerous Drug Act 1952, which is punishable under Section 39B(2) of the same act, Section 8 Firearm Act 1971 and Section 8(a) Firearm Act 1960 [5,6,7]. The capital punishment under Section 39(B) of Dangerous Drug Act 1952 for dangerous drug trafficking is a mandatory death penalty if found guilty. Mr. A was sent for forensic psychiatry assessment by the Magistrate Court to an Approved Psychiatric Hospital in August 2011 for observation under section 342(3) of the CPC for the alleged charge of dangerous drug trafficking [4]. Forensic psychiatrist 1 (FP1) who had assessed Mr. A on the first occasion reported that the accused was diagnosed Bipolar Affective Disorder and was of unsound mind during the alleged offence (dangerous drug trafficking). Later in November 2011, the High Court sent him for another assessment to the same hospital for the other two charges which were related to an illegal procession of firearms. During the second assessment, forensic psychiatrist 2 (FP2) too has diagnosed the accused with Bipolar Affective Disorder. However, in FP2 opinion, Mr. A was of sound mind during the alleged offence (illegal firearms procession).

In view that the alleged offences took place within the same time frame and under the same circumstances; and due to the different opinion from the two experts; the High Court requested a third assessment by a third forensic psychiatrist (FP3) from another Approved Psychiatric Hospital in regard to all the three charges. The third report to be not in favor of an insanity defense, i.e. that Mr. A is of sound mind during the alleged offences. Mr. A. was only called to enter the defense for the dangerous drug trafficking. The charges for procession of firearms were dropped as the persecutor failed to prove the *prima facie* of the accused. During the trial for the charge of

dangerous drug trafficking, FP1 and FP3 gave evidence. The High Court had decided on the verdict that the defendant was found not guilty due to reason of insanity (NGRI) provided by the Malaysian Law under Section 84 of Penal Code for the charge of dangerous drug trafficking [8]. Therefore, Mr. A was ordered by court to undergo treatment for his underlying mental illness in a Psychiatric Institution under Section 348(1) of the CPC [4].

In the year 2014, the prosecutor appealed to the Malaysia Appellate Court in regard to all three charges. The Appellate Court, however, rejected the appeal, and the High Court order remains. The objective of this paper is to highlight some learning points behind the reasoning of the Appellate Court which was in favor of FP1's expert opinion over FP3.

Discussion

In this case, opinion was stated as "in my opinion" by FP1 and "in our opinion" by FP3. The court has found favour in the expert opinion given in the form of a singular first-person pronoun "in my opinion" rather than the collective pronoun "in our opinion." The court argued that the conclusion obtained collectively was doubtful unless the persecutor could prove their (the collective 'our') expertise and qualification as expert witnesses. Gunn J. et. al. (2014) has suggested that expert must summarize the range of opinion and gives reasons for his or her own opinion and the sources and qualifications of those who hold a contrary opinion too should be given [9]. The court has rejected the argument by the prosecutor whom FP3 had eventually given a personal opinion during the trial.

Secondly, it is accustomed for the court to want to be beyond any reasonable doubt as to the verdict given in criminal cases especially involving the possibility of a death penalty. The meaning of 'beyond reasonable doubt' is best explained in the case of Public Prosecutor V. Saimin (1971) 2 MLJ 16, Sharma J. who had enunciated, "...The following definition of 'reasonable doubt' is often quoted: It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence are open to some possible or imaginary doubt. It is that state of the case

which after the entire comparison and consideration of all the evidence leave the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. It has again been said that "reasonable doubt" is the doubt which makes you hesitate as to the correctness of the conclusion which you reach. If under your oaths and upon your consciences, after you have fully investigated the evidence and compared it in all its parts, you say to yourself, I doubt if he is guilty, then it is a reasonable doubt. It is a doubt which settles in your judgment and finds a resting place there.' Or as sometimes said, it must be a doubt so solemn and substantial as to produce in the minds of the jurors some uncertainty as to the verdict to be given. A reasonable doubt must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence..." [10]. The fact that there are two contradictory expert opinions gave ground for a reasonable doubt in this case; besides another evidence by other witnesses also cast reasonable doubt for a death sentence for Mr. A. The court has taken into account all the evidence and was not able to be beyond any reasonable doubt that the alleged offence was carried out under sound mind.

Gunn J. et. al. (2014) recommended that in a criminal case where an opinion has been formed by other experts, it may be sensible to contact the experts after informing the instructing solicitor. Such contact is to be encouraged in general, as it ensures that any differences of opinion are not based on different data bases, and it also often focuses any differences of opinion in advance of the hearing. It is useful in court to reduce the differences between apparently competing experts by explaining to the court how much is agreed upon and why there are differences in the opinion on specific points [9].

Furthermore, the Appellate Court has added an argument based on the case *Sek Kim Wah v Public Prosecutor* (1998) 1 MLJ 348 in which the Singapore Appeal Court had made the statement as below: "...in our context the trial judges would assume the role of the jury in making this finding, and it is equally clear that the same principles enumerated in the cases set above apply. Thus, the verdict as to

abnormality of mind is plainly a finding of fact, which must be founded on all evidence which evidence of course includes medical opinion. Even where such medical opinion is unchallenged, the trial judges would be perfectly entitled to reject or differ from the opinions of the medical opinions of the medical men, if there are other facts on which they could do so. In such a case, an Appellate Court would not and indeed could not disturb their finding." [11]. Therefore, we learnt that the judges are entitled to differ from any expert opinions based upon reasonable grounds and the Appellate Court would not and could not differ from their findings. In the case of Mr. A, the High Court had rejected the conclusion of FP3 and adopted the finding of FP1, who concluded that Mr. A. was of unsound mind at the time of alleged offence as provided under Section 84 of Penal Code, which stated that "at the time of doing it, the person 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." [8] The Appellate Court could not disturb this finding.

One of many reasons leading to the disagreement in the opinion in the assessment in this case was indeed the limitation in retrospective assessment of mental state itself. The process of seeking to gain knowledge about another person's past intentions and motivations is an epistemological challenge. Shuman D.W. and Simon R.I. (2002) stated that the inherent limitations on obtaining contemporaneous data about past mental states render the ability to engage in this task more problematic than a contemporaneous assessment based on a concurrent examination [12]. Thus, retrospective mental state assessment is bounded by such limitation and represents mainly the abductive reasoning of the expert witness based on the best information available at that point of time. Of many reasons, leading to the disagreement in the opinion in the assessment in this case was indeed the limitation in retrospective assessment of mental state itself. The process of seeking to gain knowledge about another person's past intentions and motivations is an epistemological challenge. Shuman D.W. and Simon R.I. (2002) stated that the inherent limitations on obtaining contemporaneous data about past mental states render the ability to

engage in this task more problematic than a contemporaneous assessment based on a concurrent examination [12]. Thus, retrospective mental state assessment is bounded by such limitation and represents mainly the abductive reasoning of the expert witness based on the best information available at that point of time.

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