

Summary of Constitutional Court Ruling No. 3/2559 (2016)

Dated 1st June B.E. 2559 (2016)*

Re: Whether or not section 9 of the Act on Offences Relating to the Submission of Bids to Government Agencies B.E. 2542 (1999) was contrary to or inconsistent with section 4 and section 5 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014).

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1. Summary of background and facts

The Supreme Court referred the objection of the second defendant to the Constitutional Court for a ruling under section 45 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014). The second defendant objected that section 9 of the Act on Offences Relating to the Submission of Bids to Government Agencies B.E. 2542 (1999) was contrary to or inconsistent with section 4 and section 5 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014) since such provision stipulated a legal presumption of the second defendant's guilt without first requiring proof of any act or intent. The provision extrapolated an offence committed by others as a condition for presuming the second defendant's guilt and criminal liability. The provision was therefore a presumption of guilt of a suspect or defendant in a criminal case by virtue of a person's status as a condition. The provision was not a presumption of facts constituting certain elements of an offence upon the prosecution's proof of a certain act relating to the alleged offence committed by the defendant, and was contrary to the rule of law where the prosecution had the burden of proving the defendant's guilt with respect to all elements of an offence.

2. The preliminary issue considered by the Constitutional Court

The preliminary issue was whether or not the Constitutional Court could admit this application for consideration under section 45 in conjunction with section 5 paragraph two of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014).

The Constitutional Court found as follows. In this application, there was an objection that section 9 of the Act on Offences Relating to the Submission of Bids to Government Agencies B.E. 2542 (1999) was contrary to or inconsistent with section 4 and section 5 of

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the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014), and the plenary session of the Supreme Court decided to refer the second defendant's objection to the Constitutional Court for a ruling under section 45 in conjunction with section 5 paragraph two of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014), and there had not yet been a ruling of the Constitutional Court in relation to such provision. Furthermore, the presumption in criminal procedures that a suspect or defendant was presumed innocent had been a recognized right under several previous constitutions, and was regarded as Thailand's convention under the democratic form of government with the King as Head of State. The presumption was also derived from human rights principles forming the basis for universal criminal justice, recognized under section 4 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014). The case was therefore in accordance with section 45 in conjunction with section 5 paragraph two of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014) and article 17 (13) of the Rules of the Constitutional Court on Procedures and Rulings B.E. 2550 (2007). The Constitutional Court therefore admitted this application for consideration.

3. The issue considered by the Constitutional Court

The issue considered by the Constitutional Court was whether or not section 9 of the Act on Offences Relating to the Submission of Bids to Government Agencies B.E. 2542 (1999) was contrary to or inconsistent with section 4 and section 5 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014).

Section 9 of the Act on Offences Relating to the Submission of Bids to Government Agencies B.E. 2542 (1999) provided a legal presumption of a defendant's guilt. The prosecution did not have to prove the act or intent of a managing partner, managing director, executive officer or authorized person in the operation of a business of a juristic person or any involvement of a person responsible for the operation of the juristic person on such matter. The only proof needed was that there was an offender under this Act which was committed for the benefit of the juristic person's business and that the defendant was a managing partner, managing director, executive officer or authorized person in the operation of the juristic person's business, or person responsible for the juristic person's operations on such matter. The presumption was not merely that the managing partner, managing director, executive officer or authorized person in the operations of such juristic person or person responsible for the juristic person's operations on such matter was a joint principal offender with such juristic person, but there was also a presumption of being a joint principal offender with "any person" who committed an offence for the benefit of such juristic person. This criminal presumption was wider than the presumption of co-liability with the juristic person. The presumption of guilt also had no reasonable connection between the facts constituting the prerequisite for presumption and the presumed facts, which was also another fundamental factor for reaching a presumption. As a consequence, the burden of proving innocence shifted to whoever was the managing partner, managing director, executive officer or authorized person in the operations of the juristic person, or person

responsible for the operations of the juristic person on such matter. Moreover, under the fundamental principle of criminal liability, section 59 of the Criminal Code provided that “a person shall be criminally liable when such person commits...” but section 9 of the Act on Offences Relating to the Submission of Bids to Government Agencies B.E. 2542 (1999) provided that a managing partner, managing director, executive officer or authorized person in the operation of a juristic person, or person responsible for the operations of the juristic person on such matter, would be a co-principal in the commission of such offence under this Act. The prosecution did not have provide any prior proof that such persons who were defendants had committed or omitted or failed to act in a way which was an infringement of the law. The provision in such section was therefore a presumption of guilt of a suspect or defendant in a criminal case by relying on the status of a person as a condition. This was not a presumption of facts constituting an element of an offence after the prosecution provided proof of a certain act relating to the alleged offence committed by the defendant. The presumption was also contrary to the rule of law which stated that the prosecution in a criminal case had the burden of proving a defendant’s guilt with respect to all elements of an offence. Furthermore, the provisions of such section draws a person into the criminal procedure as a suspect or defendant, which could result in a restriction of such person’s rights and liberties, e.g. arrest or detention, without reasonable preliminary evidence that such person had committed or had any intent relating to the alleged offence.

4. Ruling of the Constitutional Court

The Constitutional Court held that section 9 of the Act on Offences Relating to the Submission of Bids to Government Agencies B.E. 2542 (1999) was contrary to or inconsistent with section 4 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014). Upon such a ruling, it was no longer necessary to rule on whether or not such provision was contrary to or inconsistent with section 5 of the Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014).
