INDONESIA'S CRIMINAL JUSTICE SYSTEM ON TRIAL: THE JESSICA WONGSO CASE

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This article discusses flaws of Indonesia's criminal procedural laws through an analysis of the Jessica Wongso case. After a televised trial in 2016, Wongso was convicted of murdering her friend Salihin, by putting cyanide in her coffee at a Jakarta café, and sentenced to 20 years' imprisonment. The conviction was upheld on appeal in late 2018. The police obtained very limited evidence against Wongso, leaving prosecutors unable to determine the cause of Salihin's death, much less to prove convincingly that Wongso was the perpetrator. By contrast, the defense mustered significant exculpatory evidence. But the judges, at first instance and on appeal, took an uncritical view of the prosecution evidence and ignored the defense case. Throughout the investigation and trial, Wongso was not accorded the presumption of innocence, partly because of Indonesia's flawed or absent formal legal infrastructure for arrests, detentions, searches, and disclosure of prosecution evidence to the defense. It is also because highly prejudicial press coverage before and during trials is not prohibited and because judges lack professionalism. All this suggests a strong need for reform—not only to Indonesia's criminal procedure law, but also to the way it is applied in practice.

Keywords: *Indonesia, criminal law, criminal procedure, fair trial, presumption of innocence*

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INTRODUCTION

Indonesia's criminal justice system has long been perceived as dysfunctional, characterized by draconian laws, unfair trials, poorly prepared prosecutions, judicial mistakes, disproportionate sentences, and even corruption.[1] This perception has been perpetuated by an almost continuous string of highly controversial trials since at least the early 1960s, when Indonesia reverted to authoritarianism, only a decade and a half after declaring its independence in 1945 and trialing a form of liberal democracy.[2] During the period of Soeharto's New Order regime (1965–1998) the use of criminal process for political purposes reached its zenith—featuring, for example, the show subversion trials of democracy and human rights advocates, where conviction was assured,[3] and the sham trials of military officials accused of human rights abuses, where acquittal was certain.[4] The criminal process was, at least in cases involving the interests of the state, virtually a judicial rubber stamp for legal outcomes already determined by Soeharto and the military.

When Soeharto was forced to resign in 1998, many hoped, and some even expected, that criminal justice reform would accompany the wide range of "good governance" reforms that Indonesia adopted. These included free and fair elections, the constitutional entrenchment of human rights and democracy, and the establishment of bodies to check the exercise of state power, including a new Constitutional Court (Mahkamah Konstitusi).[5] Reformists also sought to address some problems plaguing Indonesia's existing courts, including the Supreme Court (Mahkamah Agung)—the court of last resort for criminal matters. By 1998, the Supreme Court had lost credibility after decades of subservience to government, worsened by woefully inadequate state budget allocations that forced

1. Daniel S. Lev, *The Criminal Regime: Criminal Process in Indonesia*, *in* FIGURES OF CRIMINALITY IN INDONESIA, THE PHILIPPINES, AND COLONIAL VIETNAM 175 (V. Rafael ed., 1999).

2. Simon Butt, *Constitutions and Constitutionalism*, *in* ROUTLEDGE HANDBOOK OF CONTEMPORARY INDONESIA, ch. 4 (Robert Hefner ed., 2017).

3. JULIE SOUTHWOOD & PATRICK FLANAGAN, INDONESIA: LAW, PROPAGANDA, AND TERROR 158 (1983).

4. INTERNATIONAL CRISIS GROUP, INDONESIA: IMPUNITY VERSUS ACCOUNTABILITY FOR GROSS HUMAN RIGHTS VIOLATIONS, ICG ASIA REPORT NO. 12 (2001).

5. NADIRSYAH HOSEN, HUMAN RIGHTS, POLITICS AND CORRUPTION IN INDONESIA: A CRITICAL REFLECTION ON THE POST SOEHARTO ERA (2010).

judges to seek bribes both to fund the institution and to supplement their meager incomes.[6] This led to judicial brain drain, as top law students eschewed judicial careers, and judicial training programs were abandoned.[7] Many judges were therefore not only corrupt, but also lacked the competence to handle cases properly. In response, reformists established an anti-corruption commission with jurisdiction to investigate judges, made the Supreme Court and the courts it oversees formally independent of government, increased judicial salaries and court budgets, and strengthened judicial education.[8]

Although some of these judicial reforms appear to have borne fruit, the criminal justice system is, by most accounts and standards, still very poor, with many legal reformists complaining about unfair trials where the presumption of innocence is absent.[9] The problem in today's Indonesia is now not so much government interference, which appears to have been largely weeded out. The main problem is judicial professionalism, with legal competence and corruption the most obvious shortcomings. This seems to be accompanied by an apparent oversensitivity to perceived public opinion,[10] which may have taken over from government interference as the most significant outside influence on decisions. More recently, judges appear to have sided with prosecutors, particularly in cases attracting public scrutiny, presumably to demonstrate to the public that they are meting out justice. This has happened when the evidence against the defendant is dubious or even nonexistent.[11] In highly publicized cases, judges appear to think that they will attract less criticism if they convict, rather than acquit, defendants.

The substantive and procedural laws under which the criminal justice system operates significantly contribute to its dysfunction. The substantive

6. S. Pompe, The Indonesian Supreme Court: A Study of Institutional Collapse (2005).

7. Supreme Court of Indonesia, Policy paper on permanent, judicial education system reform (2003).

8. KHRN & LeIP, Menuju independensi kekuasaan kehakiman: position paper (1999).

9. Simon Butt & Tim Lindsey, Indonesian Law (2018).

10. World Bank, Village justice in Indonesia: case studies on access to justice, village democracy, and governance (2004).

11. Kenneth Yeung, *Top 10 Controversial Convictions in Indonesia*, Indonesia Expat (Dec. 5, 2018), https://indonesiaexpat.biz/lifestyle/top-10-controversial-convictions-indonesia/.

criminal law applied in most of these cases—the Criminal Code (Kitab Undang-undang Pidana, or KUHP)—is a relic of Dutch colonial rule. It is over a century old, and only several piecemeal amendments have been made to it since independence in 1945.[12] Most investigations, prosecutions, and trials take place under a criminal procedure code—the Kitab Undang Undang Hukum Acara Pidana, or KUHAP—that is almost four decades old and has not been amended. Even the limited procedural safeguards for suspects and defendants in the KUHAP are honored more in the breach than the observance,[13] with police regularly being accused of manipulating evidence and mistreating witnesses and suspects.

Replacing these outdated codes has been on the legislative agenda for decades, and various drafts have been produced. But none have been passed.[14] Instead, legislators have enacted statutes dealing with specific crimes. These statutes replace provisions in the KUHP and KUHAP that are inconsistent with them. In this way, the national parliament has created a body of "special" (*khusus*) criminal laws to supplement the codes, thereby creating sui generis legal bases for the investigation, prosecution, and trial of specific crimes such as terrorism, narcotics offenses, corruption, and money-laundering.[15]

This article examines shortcomings of Indonesian criminal process, including aspects of the legal infrastructure that govern it and the individuals and institutions that operate it. It does this through an analysis of the Jessica Wongso trial—one of Indonesia's best-known cases, if not Indonesia's "trial of the century." After four months of hearings, some of which continued well into the night, the Central Jakarta District Court found Wongso, an Indonesian citizen and Australian permanent resident, guilty

12. BUTT & LINDSEY, *supra* note 9, at 185.

13. Robert R. Strang, *"More Adversarial, But Not Completely Adversarial": Reformasi of the Indonesian Criminal Procedure Code*, 32(1) FORDHAM INT'L L.J. 188–231 (2008); Daniel Fitzpatrick, *Culture, Ideology and Human Rights: The Case of Indonesia's Code of Criminal Procedure*, *in* INDONESIA: LAW AND SOCIETY, ch. 23 (Tim Lindsey ed., 2nd ed. 2008); T. LUBIS, IN SEARCH OF HUMAN RIGHTS: LEGAL-POLITICAL DILEMMAS OF INDONESIA'S NEW ORDER, 1966–1990 (1993).

14. Although in late 2019, it appeared that passage of a new Criminal Code, containing many controversial provisions—including banning any sexual intercourse outside of marriage, prohibiting offending the president and the courts, amongst many others—was imminent. Ultimately, however, the passage of the Code was put on hold as demonstrations, led primarily by students, broke out across Indonesia.

15. BUTT & LINDSEY, *supra* note 9 at 186–87.

of premeditated murder. In their decision, announced on October 27, 2016, the judges sentenced Wongso to 20 years' imprisonment for poisoning Mirna Salihin at an upmarket café in a Jakarta mall on January 6, 2016. They accepted the prosecution's version of events, as follows:

- Wongso arranged to meet Salihin and a mutual friend, Boon Juwita, at the café.
- Wongso arrived early to choose and reserve a table after identifying the location of the café's CCTV cameras.
- She then went shopping at the mall, purchasing three bottles of liquid soap, which she carried in three large paper gift bags back to the café, where she ordered drinks for her friends before they arrived.
- After the drinks were delivered to the table, she dosed Salihin's Vietnamese iced coffee with cyanide, deliberately obscuring the view of the CCTV cameras by putting the three bags on the table. Salihin and Juwita then arrived.
- Salihin drank the coffee, said it tasted horrible and collapsed, foaming from the mouth.
- Despite having some medical training, Wongso did nothing to help Salihin, and watched on while others tried to revive her.
- Salihin died en route to hospital.

The Court accepted that Wongso's motives were jealousy and revenge: she was jealous of Salihin's happy marriage, and wanted revenge after Salihin had told her to break up with her Australian boyfriend.

Police did not initially treat Salihin's death as a murder, but within a few weeks they had interviewed Wongso and formally named her a suspect. They detained her, pending trial, but the evidence they had against her was slim. Indeed, prosecutors were reluctant to proceed to trial using the evidence the police collected; they sent the brief of evidence back to police four times, asking for more evidence.[16] They only prosecuted after receiving a fifth brief, on May 18, 2016. Even then, prosecutors had no direct evidence tying Wongso to Salihin's death. No one saw Wongso put cyanide in the coffee Salihin drank, and Wongso did not admit to poisoning Salihin. The prosecution case, therefore, hinged on circumstantial

16. Akhdi Martin Pratama, *Perjalanan Kasus yang Menjerat Jessica Kumala Wongso* (May 27, 2016), https://pemilu.kompas.com/read/2016/05/27/06412451/perjalanan.kasus.yang.menjerat.jessica.kumala.wongso.

evidence, including grainy footage taken from the café's CCTV system and testimony from café employees about what they saw and did. It also relied heavily on expert evidence about the forensic tests of the coffee, the post-mortem examination of Salihin's body, and even about Wongso's mental state. Fueled by almost daily media coverage of her investigation and trial, which was broadcast live on three television stations, this case attracted significant public interest in Indonesia. Speculation about her guilt or innocence, expressed both privately and publicly, was so widespread that for several months her case almost became a national obsession.[17] Wongso unsuccessfully appealed her conviction three times, most recently in early 2019, and at time of this writing, her lawyers were considering whether to lodge yet another challenge.[18]

This article does not seek to demonstrate whether Wongso murdered Salihin. Rather, it considers whether her investigation, trial, and appeals were fair by Indonesian standards, using her case to identify broader problems in the Indonesian criminal justice system. Under Indonesian law, suspects are entitled to various pre-trial rights, including those relating to searches, arrests, detentions, and interrogations, and police are formally required to follow procedures designed to protect those rights.[19] Defendants are entitled to internationally recognized components of a fair trial, including due process,[20] and should only be convicted if the prosecution proves guilt to the Indonesian standard: judges must be "convinced" of their guilt. When determining this, judges are formally bound by the Indonesian rules of evidence, which specify the types of evidence a judge can consider and even the number of pieces of evidence that the prosecution must produce. Throughout this process, defendants must be accorded the presumption of innocence,[21] which implicitly requires judges to at least

17. The author was in Indonesia during Wongso's trial and conviction and had and heard countless discussions about her case in a variety of fora.

18. Interview with Otto Hasibuan, Jakarta (Dec. 2, 2019).

19. Butt & Lindsey, *supra* note 9, at 11, 12.

20. Simon Butt, The Constitutional Court and Democracy in Indonesia 145–46, 214–15 (2015).

21. Art. 8(1) of Law 48 of 2009 on Judicial Power states that every person suspected, arrested, detained, prosecuted, or summoned before the courts must be considered not guilty until a judicial decision of binding legal authority establishes their guilt. The presumption of innocence until proven guilty is also provided under Art. 18(1) of the 1999 Human Rights Law.

consider defense-led arguments or evidence that might raise doubts about the prosecution case.

This article argues that the handling of Wongso's case, including her trial, was not fair on these standards. Procedural irregularities and legal mistakes plagued her case from the very beginning. Police interrogated her without her lawyer being present, searched her parent's house without a warrant, detained her without reasonable cause, forced her to attend a reconstruction of the alleged crime, did not order an autopsy to establish Salihin's cause of death, and may have mishandled—perhaps even contaminated—the coffee they claimed killed Salihin. As for the trial, the prosecution appears to have fallen well short of meeting the evidentiary standard, and the Court seemed to pay insufficient—arguably no—regard to the defense's arguments and evidence. The guilty verdict therefore appears to suggest that the judges might not have decided the case after carefully considering the evidence put before them, or that they were swayed to convict for other reasons. These could have included pressure to convict to demonstrate the utility of such a long and widely publicized trial and in response to perceived public opinion that she was guilty. Unfortunately, these shortcomings were perpetuated when Wongso lost her appeals, with higher courts also appearing to refuse to consider seriously the defense's exculpatory evidence and her lawyers' convincing critiques of the veracity of the prosecution's evidence.

One thread underlies the inadequacies in the handling of Wongso's case: the failure of police, prosecutors, and judges to respect the presumption of innocence, which like in many other countries, is a fundamental principle of Indonesia's criminal justice system. In Wongso's case the presumption was routinely violated in practice, including during her detention and trial. However, her case also brings into focus various aspects of Indonesian criminal process that seem to undermine the presumption of innocence, including the formal procedures under which suspects "reconstruct" crime scenes and the fact that police and prosecutors can withhold exculpatory evidence from the defense. These problems are compounded by more general systemic dysfunction within Indonesia's criminal justice system, marked by arbitrariness and a lack of professional competence from most key actors, identified in this article. Of course, these shortcomings are highly undesirable in any system, but are even more problematical in systems, such as Indonesia's, that employ the death penalty, and impose

it, even in cases where these shortcomings are evident.[22] The findings presented here suggest that Indonesian criminal procedure is in dire need of fundamental reform, as much on paper as in practice.

I. PRETRIAL

On January 29, 2016, Wongso was officially "declared a suspect" (*ditetapkan sebagai tersangka*), which is loosely equivalent to being "charged" in other countries, and signifies that police have moved from assessing whether a crime has been committed—and, if so, by whom—to investigating a particular person.[23] However, even before this—when Wongso was still only formally classified as a "witness"—the media raised questions about how the police treated her.

A. Interrogation without a Lawyer

Police interrogated Wongso several times in the weeks after Salihin's death, even giving her lie detector tests, which she passed.[24] She claimed that, despite cooperating, senior police refused to allow a lawyer to accompany her during questioning.[25] Police denied allegations that they forced her lawyer from the room during an interrogation, but admitted that they "asked" the lawyer to leave the room to prevent him from influencing her.[26] The extent to which the

22. Erasmus A.T. Napitupulu et al., A Game of Fate: Report on Indonesia death penalty policy in 2019 (Dec. 10, 2019), https://icjr.or.id/wp-content/uploads/2019/12/A-Game-of-Fate.pdf; Simon Butt, *Judicial responses to the death penalty in Indonesia*, 39(2) Alt. L.J. 134–35 (2014); Timothy Lindsey & Penelope Nicholson, Drugs law and legal practice in Southeast Asia: Indonesia, Singapore and Vietnam (2016); Dave McRae, *A key domino? Indonesia's death penalty politics* (Lowy Inst. Int'l Pol'y, Mar. 2012).

23. Butt & Lindsey, *supra* note 9, at 219.

24. Interview with Otto Hasibuan, Jakarta, (Dec 2, 2019); statement of Wongso's lawyer, Yudi Wibowo, on Indonesia Lawyer's Club, *Benarkah Jessica Meracun Mirna?* (Feb. 3, 2016), https://www.youtube.com/watch?v=TxBKSGxxrKs [hereinafter, Wibowo statement].

25. *Mengusir Pengacara Saat Dampingi Klien, Polisi Langgar Aturan Ini*, Hukumonline (Jan. 23, 2016), https://www.hukumonline.com/berita/baca/lt56a32b5298883/mengusir-pengacara-saat-dampingi-klien—polisi-langgar-aturan-ini.

26. *Diberitakan Mengusir Advokat, Ini Jawaban Kombes Krishna Murti*, Hukumonline (Jan. 29, 2016), https://www.hukumonline.com/berita/baca/lt56ab8befc8e4f/diberitakan-mengusir-advokat—ini-jawaban-kombes-krishna-murti.

lawyer's absence resulted from police pressure remains unclear, but it does appear that Wongso was unrepresented during key moments of her interrogation.

Whether Wongso had a legal right under Indonesian law to such representation is disputed. The KUHAP provides *suspects* with the right to legal counsel during all stages of the criminal process (Articles 54–55), but does not specifically grant the right to *witnesses*.[27] Why the Code distinguishes between suspects and witnesses is unclear, given that it appears to require any person, including witnesses, to attend for questioning if police so request (Article 112). Nevertheless, formal police procedures give witnesses rights to contact and be accompanied by a lawyer, and prohibit police from interrogating a witness who wants a lawyer but does not get one.[28] Violations of these rights are said to be routine, because officers almost never face penalties for failing to respect them,[29] and statements made by unrepresented witnesses during police interrogations are never excluded at trial.[30] Even formally named suspects have difficulties availing themselves of their KUHAP rights to legal representation, despite the Indonesian Supreme Court deciding that, if investigators do not offer a lawyer to a suspect during interrogations, any ensuing prosecution of

27. The right is provided in Art. 18(4) of Law 39 of 1999 on Human Rights, but seems to be similarly limited, applying to "every person being interrogated," but only from the point of investigation until binding court decision. Art. 5 of Law 13 of 2006 on Witness and Victim Protection, as amended by Law 31 of 2014, provides the right to obtain "legal advice," but applies only in relation to crimes that put witnesses in life-threatening situations, requires the approval of the Witness and Victim Protection Agency, and does not expressly extend to legal representation during police interviews.

28. Arts. 27(1)(a) and 27(2)(a) of Police Chief Regulation 8 of 2009 on the Implementation of the Principles and Standards of Human Rights in the Performing of Police Tasks.

29. Art. 60 of the Police Chief Regulation says that the police are required to "impose sanctions" on officers who "perform acts that violate human rights principles," but does not specify what these sanctions are, referring only to their imposition being through disciplinary proceedings, the enforcement of police ethics, and or criminal proceedings. It is questionable whether this Regulation is directly enforceable in any event, given that the Regulation refers to itself as providing "guidelines" (*pedoman*) and is of a relatively low legal status, compared, for example, with statutes or regulations issued by the government or ministers.

30. Bobby Manalu, *Urgensi Pendampingan Saksi oleh Advokat*, HUKUMONLINE (May 26, 2011), https://www.hukumonline.com/berita/baca/lt4dde135c2e3a4/urgensi-pendampingan-saksi-oleh-advokat.

that suspect should be thrown out at trial.[31] Police are said to rarely advise suspects of this right and, instead, threaten suspects with more serious charges if they insist on representation.[32] Many *defendants* are not even represented at trial,[33] despite Article 56(1) of the KUHAP requiring that a legal advisor be appointed for suspects or defendants who face 15 years' imprisonment or more or the death penalty, and for those unable to afford a lawyer who face 5 years' imprisonment or more.

Of course, in Indonesia, as elsewhere, it is precisely during police interviews that witnesses are likely to benefit from legal accompaniment and advice. This is because what witnesses say in these interviews might lead police to decide to formally name them a "suspect." Indeed, media reports suggested that police began suspecting Wongso of the murder because her account of events changed during her questioning as a witness, and that some of her statements were inconsistent with "other evidence," which was not specified.[34]

Also relevant here are the allegations Wongso made about inappropriate police behavior during her interrogation that, if true, might not have occurred if her lawyer had been present. First, controversially, she claimed to have been involuntarily hypnotized.[35] Second, she claimed that, when a lawyer was not present, Metro Jaya Police Commissioner Krishna Murti tried to force her to confess. According to her account, Murti threatened her with the death penalty if she did not admit to murdering Salihin, and promised her a maximum of 7 years' imprisonment if she did.[36] Third, she

31. *See* Supreme Court Decisions 1565/K/PID/1991 and 367/K/PID/1998.

32. BUTT & LINDSEY, *supra* note 9, at 216.

33. According to one survey, conducted by the Indonesian Court Monitoring Community at the University of Indonesia Faculty of Law, only about 40% of defendants in Bogor District Court were represented during their trials. Siksa Trisia, *Pemantauan Persidangan dan Potret Unfair Trial di Indonesia*, HUKUMONLINE (June 10, 2019), https://www.hukumonline.com/berita/baca/lt5cfda8ac7e38c/pemantauan-persidangan-dan-potret-iunfair-trial-i-di-indonesia-oleh—siska-trisia. This survey was limited—covering 123 cases in courts in Jakarta and Bogor—but even if taken to be roughly indicative, this level of representation is very low.

34. Asnida Riani, *Terkait Kasus Mirna, Ini Alasan Polisi Menahan Jessica Wongso*, FIMELA (Jan. 31, 2016), https://www.fimela.com/lifestyle-relationship/read/2424955/terkait-kasus-mirna-ini-alasan-polisi-menahan-jessica-wongso.

35. *Jessica Mengaku Pernah Dihipnoterapi di Ruang Polda tanpa Pengacara*, MEDIA INDONESIA (Sept. 28, 2016), https://mediaindonesia.com/read/detail/69384-jessica-mengaku-pernah-dihipnoterapi-di-ruang-polda-tanpa-pengacara.

36. Martin Sihombing, *Jessica Wongso: Saya Tidak Membunuh, Saya Dipaksa Mengaku*, KABAR24 (Oct. 12, 2016), https://kabar24.bisnis.com/read/20161012/16/591800/jessica-

claimed that she was propositioned by a mid-ranked police investigator.[37] Whether or not police in fact hypnotized, coerced, or propositioned her is unclear; she could not prove these allegations, and police simply denied them. But controversy could likely have been avoided altogether had she been accompanied by a lawyer: Wongso would have been less likely to make false allegations against police, and police would have been less likely to engage in unprofessional behavior.

B. Detention

After naming Wongso a suspect on January 29, 2016, police formally detained her, pending her trial.[38] Detention is not mandatory under Indonesian law.[39] Indeed, the primary KUHAP provision on detention, Article 21, requires that the suspect be "strongly suspected" of committing the relevant crime based on "sufficient evidence," and that there be "circumstances creating concern" that the suspect will "abscond, damage or dispose of evidence, or repeat the crime."[40] These provisions have long been criticized for being vague and requiring subjective judgments: they specify neither who must hold the "concern," nor that the concern must be reasonable. Unfortunately, Indonesian courts appear to have decided that the subjectively held concern of police suffices to justify a suspect's initial detention under Article 21(1).[41] Of course, this is problematical, because it allows police to simply express a concern, with no real substantiation, that the prospective detainee will otherwise abscond, destroy evidence, or repeat the crime.

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wongso-saya-tidak-membunuh-saya-dipaksa-mengaku; *Cuitan Krishna Murti Menjawab Jessica Wongso*, PUBLICA (Oct. 1, 2016), https://www.publica-news.com/berita/hukum/2016/10/01/3336/cuitan-krishna-murti-menjawab-jessica-wongso.html.

37. *Rayuan Bos Polisi ke Jessica Wongso: Kamu Tipe Saya Banget*, TEMPO.CO (Sept. 29, 2016), https://metro.tempo.co/read/808393/rayuan-bos-polisi-ke-jessica-wongso-kamu-tipe-saya-banget.

38. Yohanes Paskalis, *Jessica Wongso Resmi Jadi Tersangka Kematian Mirna*, TEMPO.CO (Jan. 30, 2016), https://metro.tempo.co/read/740788/jessica-wongso-resmi-jadi-tersangka-kematian-mirna.

39. BUTT & LINDSEY, *supra* note 9, at 213.

40. The remaining provisions in the KUHAP governing detention deal primarily with the types of detention (Arts. 22–23) and time limits and extensions (Arts. 24–31).

41. M. YAHYA HARAHAP, PEMBAHASAN PERMASALAHAN DAN PENERAPAN KUHAP JILID 1, PENYIDIKAN DAN PENUNTUTAN 163 (2000).

Worse, police have incentives to detain suspects. Institutionally, police budgets are determined, in part, by the number of cases they handle; the more suspects they detain, the bigger their budget.[42] For individual officers, the more detentions they make, the more cases they are deemed to have "handled," and the greater their prospects for promotion. The result is that very few suspects remain free, even on bail, pending their prosecution or trial, and many remain in detention for the maximum period permitted under the KUHAP.[43] Unsurprisingly, this leads to high levels of overcrowding in detention facilities and prisons.[44]

In some cases, police have even admitted to detaining suspects to punish them, apparently without clear intent to prosecute, at least when the suspect is first detained. This happened, for example, in a case involving radio presenter Augie Fantinus in 2018. He claimed that police were scalping tickets to the basketball competition at the Asian Para Games and posted a video on his Instagram account of a police officer allegedly offering him a ticket.[45] After Fantinus was detained, the public relations head of the Metro police told the press that his detention was intended as "a lesson to the public to not spread hoaxes or fake news."[46]

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42. Pilar Domingo & Leopold Sudaryono, Ekonomi Politik dari Penahanan Pra-persidangan di Indonesia 28 (2015).

43. *Id.* at 27–28.

44. According to the Directorate General of Corrections, there are 178,063 prisoners across 477 prison facilities, and 34% of these prisoners are pre-trial detainees. These figures do not include the vast numbers of detainees held in police detention. One result is that Indonesia's prisons operate, on average, at around 150% of capacity, with some operating at 600%. *Id.* at v. For an excellent overview of overcrowding in Indonesia, see Rully Novian et al., Strategi menangani overcrowding di Indonesia: penyebab, dampak, dan penyelesaiannya (2018); Leopold Sudaryono, *Overcrowding crisis*, 113 Inside Indonesia (July 22, 2013), http://www.insideindonesia.org/overcrowding-crisis.

45. Fachrul Sidiq, *Presenter detained after accusing police of being ticket scalper*, Jakarta Post (Oct. 14, 2018), https://www.thejakartapost.com/news/2018/10/14/presenter-detained-after-accusing-police-of-being-ticket-scalper.html.

46. Matius Alfons, *Augie Fantinus Belum Ajukan Penangguhan Penahanan*, Detik News (Oct. 14, 2018), https://news.detik.com/berita/d-4255963/augie-fantinus-belum-ajukan-penangguhan-penahanan. Augie Fantinus was, in fact, eventually tried and convicted for violating the Electronic Information and Transactions Law, and sentenced to imprisonment for the time already served since his detention, around five months. Natalia Palupi, *5 Fakta Bebasnya Augie Fantinus dari Penjara, Langsung Peluk Anak dan Istri Sambil Menangis*, Tribun News.com (Mar. 12, 2019), https://www.tribunnews.com/section/2019/03/12/5-fakta-bebasnya-augie-fantinus-dari-penjara-langsung-peluk-anak-dan-istri-sambil-menangis?page=2.

The subjectivity of Article 21 was brought into sharp relief in Wongso's case. There seemed little to suggest that Wongso would do the things that detention is intended to prevent. If police held a legitimate concern about any of these possibilities, then they appear to have been ill-founded. Police had already searched Wongso's parent's residence and, as discussed below, had coffee samples and Salihin's body for testing, so Wongso could hardly interfere with evidence. Police had almost no proof that Wongso had killed Salihin, much less that she would kill again. And police had imposed a travel ban,[47] which would have prevented her from absconding by leaving Indonesia. Police had suggested that Wongso was a flight risk because she was not at her parent's house when they went there to arrest her. This was a rather spurious suggestion: Wongso and her parents had checked into a hotel to avoid the throngs of journalists camped outside her house, and had even informed their local neighborhood association head, Paulus Sukiyanto, that they were going to a hotel.[48] In any event, police appeared to have had no real problem finding her. She was arrested at 7:45 A.M. at the hotel, the morning after being declared a suspect at 11 P.M.[49]

Before her case went to trial, Wongso challenged her detention at a pretrial (*praperadilan*) hearing.[50] The decision is not publicly available, but various media outlets reported her main argument: that police lacked the "sufficient evidence" required under Article 21. A sole judge dismissed the challenge on March 1, 2016, but the reasoning he appears to have employed was less than convincing. According to one media report, he held that police had sufficient evidence to detain Wongso, without specifying that evidence, and referring only to police documents.[51]

47. No. R/541/I/2016/DATRO (Jan. 26, 2016) (the police document containing Wongso's travel ban).

48. Robertus Belarminu, *Ini Alasan Jessica Pindah ke Hotel Menurut Ketua RT*, KOMPAS (Jan. 30, 2016), https://megapolitan.kompas.com/read/2016/01/30/18190651/Ini.Alasan.Jessica.Pindah.ke.Hotel.Menurut.Ketua.RT.

49. Bagus Prihantoro Nugroho, *Jessica Ditangkap di Hotel, Ketua RT: Orang Tuanya Pamit Mau Ngungsi*, DETIK NEWS (Jan. 30, 2016), https://news.detik.com/berita/3131029/jessica-ditangkap-di-hotel-ketua-rt-orang-tuanya-pamit-mau-ngungsi.

50. Central Jakarta Praperadilan Decision No. 04/Pid.Prap/2016/PN.JKT.PST. For general discussion of praperadilan process and shortcomings, see BUTT & LINDSEY, *supra* note 9, at 218–19.

51. Alfani Roosy Andinni, *Gugatan Praperadilan Jessica Ditolak Hakim PN Jakarta Pusat*, CNN INDONESIA (Mar. 1, 2016), https://www.cnnindonesia.com/nasional/20160301105756-12-114500/gugatan-praperadilan-jessica-ditolak-hakim-pn-jakarta-pusat.

C. Search and Seizure without a Warrant

At her *praperadilan* hearing, Wongso also unsuccessfully challenged the legality of police searches conducted at her parents' house in Jakarta on January 10 and February 6, and the seizure of various items, including a computer, documents, and tissues. The local neighborhood association head to whom the Wongsos had reported when moving to a hotel attended the Wongso house when police arrived to conduct the search. He testified that police attempted to search the house without a warrant on both dates.[52] He also said that Wongso's father refused to let police into the house until their lawyer, Yudi Wibowo Sukinto (Jessica Wongso's cousin), arrived, and that once Sukinto arrived, police conducted the search.[53] Sukinto provided a different account in the media, saying that police left after being unable to present a warrant, but that around 20 to 30 police returned to conduct the search at night. When again he objected and demanded a warrant, he received a threatening phone call from a senior police officer who called him a "pig" and a "dog" for impeding the investigation.[54]

At the hearing, Wongso's lawyers argued that the police search contravened Article 33(1) of the KUHAP, which requires investigators to obtain a warrant "from the chairperson of the local district court" to search a house, unless pressing circumstances make obtaining a warrant beforehand impossible.[55] These circumstances are:

> If the suspect or defendant is strongly suspected to be in the place to be searched and it is reasonable to be concerned that he or she will abscond or repeat the crime; or there is concern that an item that could be seized will be destroyed or moved; and a warrant from the head of a district court cannot be obtained using reasonable means and in a short time.[56]

52. Oscar Ferri, *Di Praperadilan, Ketua RT Jessica Ditanya soal Surat Geledah*, LIPUTAN6 (Feb. 25, 2016), https://www.liputan6.com/news/read/2444990/di-praperadilan-ketua-rt-jessica-ditanya-soal-surat-geledah.

53. *Id.*

54. Indonesia Lawyers Club: Jessica, (2016), https://www.youtube.com/watch?v=krsqF82mFEs&t=175s.

55. Alfani Roosy Andinni, *Jessica Ajukan 21 Butir Permohonan dalam Praperadilan Perdana*, CNN INDONESIA (Feb. 23, 2016), https://www.cnnindonesia.com/nasional/20160223114230-12-112837/jessica-ajukan-21-butir-permohonan-dalam-praperadilan-perdana.

56. Explanatory memorandum to Art. 34(1).

If police conduct a search without a warrant under the pressing circumstances exceptions, Article 34(2) expressly prohibits them from examining or confiscating written materials not connected to the crime.

The KUHAP then authorizes officers to "enter a house" (*memasuki rumah*) without carrying a warrant if they can produce a written order from an investigator (*penyidik*) (Article 33(2)) who does have a warrant (Elucidation to Article 33(2)). If the occupant or suspect consents to allow the police to enter the house, then two witnesses must be present (Article 33(3)), but if the occupant or suspect does not consent or is not present, then police can enter regardless, provided two witnesses and the village or neighborhood head are present (Article 33(4)).

As mentioned, the *praperadilan* judgement is not publicly available. No media reports were found outlining how the court addressed the lawyers' challenges to the legality of the search of the Wongso house and seizure of Jessica Wongso's property. It bears noting, however, that there is some dispute about whether the relatively limited purposes for which *praperadilan* proceedings can be commenced include challenging the legality of searches and seizures.[57] The judge may have decided that they do not and simply dismissed the challenge to the search and seizure.

Nevertheless, police thoroughly searched the house and seized items.[58] Because they had no warrant, this was illegal—even though Wongso's parents appeared to consent to the search after Sukinto arrived—because no "pressing circumstances" existed. During the pre-trial hearing, police alleged that they had produced a search order from Police Commissioner Krishna Murti.[59] However, if Murti himself had not obtained a court warrant, then he had no legal authority to issue such an order. In any event, the neighborhood head testified that he saw no such order before

57. M. Yasin & Nando Narendra, *Upaya-Upaya Memperluas Objek Praperadilan*, HUKUMONLINE (Feb. 11, 2015).

58. The KUHAP defines searching a house as "the act of an investigator entering a residence or other closed place to investigate and/or seize and/or arrest in the circumstances and according to the procedures regulated by statute" (Art. 1(17)).

59. No. SP3/235/I/ 2016 (Jan. 2016), *cited in* Ahmad Faiz, *Sidang Praperadilan Jessica, Polisi: Salah Alamat*, TEMPO.CO (Feb. 24, 2016), https://metro.tempo.co/read/747785/sidang-praperadilan-jessica-polisi-salah-alamat.

officers entered the house.[60] Sukinto claimed that when he complained about there being no search order, an officer simply wrote up an order, that Murti had apparently already signed, on the bonnet of a car parked in front of Wongso's house.[61]

It is not clear why police did not obtain a warrant. There are at least two possible explanations. The first is that the police genuinely did not know that a warrant was required, despite the reasonably clear KUHAP provisions just mentioned. Given that the searches took place within a month or so of Salihin's death, when public attention was high and extensive media reporting of them was certain, one might have expected police to have been particularly careful to follow these basic requirements, had they understood them. But some statements indicated that police, or their lawyers, did not understand these requirements. For example, the media reported one lawyer acting for the police as saying that confiscation of immovable property requires permission, but not the seizure of movable property, particularly in pressing circumstances, provided that the search is subsequently reported to the relevant court.[62] Another lawyer suggested that court authorization is not required if the neighborhood head is present during a search.[63] Obviously, these views betray a misunderstanding of those provisions, mangling and combining various aspects of the rules on searches and house-entering. Also possible is that police thought that the Wongsos had consented to the search. After all, Wongso's father refused to allow police to enter until a lawyer was present. But consent does not obviate the need for a search warrant. Indeed, it is only relevant to house-entering—and even then only as to whether police must be accompanied by either two witnesses and the relevant neighborhood head (if the

60. Oscar Ferri, *Sepenting Apa Kesaksian Ketua RT di Praperadilan Jessica?*, LIPUTAN6 (Feb. 25, 2016), https://www.liputan6.com/news/read/2444795/sepenting-apa-kesaksian-ketua-rt-di-praperadilan-jessica.

61. Wibowo statement, *supra* note 24; Yosafati Gulo, *Asas Praduga Tak Bersalah Dijauhkan dari Jessica*, KOMPASIANA (Feb. 5, 2016), https://www.kompasiana.com/yosa/56b46200319373551175c9f96/asas-praduga-tak-bersalah-dijauhkan-dari-jessica?page=all%3E.

62. Pebriansyah Ariefana & Agung Sandy Lesmana, *Praperadilan Jessica, Polisi Serahkan 20 Bentuk Bukti*, SUARA (Feb. 25, 2016), https://amp.suara.com/news/2016/02/25/172539/praperadilan-jessica-polisi-serahkan-20-bentuk-bukti.

63. Faiz, *supra* note 59.

occupant or suspect does not consent) or just two witnesses (if the occupant or suspect does consent).

A second possibility is that police knew the Code requirements but simply chose not to comply with them. They might, for example, have had insufficient initial evidence upon which to base a search warrant request and, under very strong public pressure to continue the investigation and provide more evidence to prosecutors, proceeded with the search regardless. This is a feasible explanation, because, as mentioned, violation of procedures such as these rarely carries consequences for the officers in breach, and Indonesian courts almost never exclude evidence obtained from illegal searches.[64] Usually the worst possible outcome for police is short-lived negative media attention, which is forgotten, particularly if a conviction is eventually achieved. There are, therefore, no real incentives to comply with these provisions.

In any event, in Wongso's case, the search yielded no important information or evidence that prosecutors ultimately used to demonstrate her guilt at trial. Therefore, the judges did not need to consider whether evidence was obtained illegally and, if so, whether it was admissible.

D. Reconstructions

Wongso was involved in at least two reconstructions—once during the police investigation and again during her trial.[65] On February 7, 2016,

64. It bears noting that many civil law countries tend to have weaker exclusionary rules than common law countries. In civil law countries, where juries rarely feature, there is no obvious need to prevent laypersons from exposure to evidence that was illegally obtained or is unfairly prejudicial. Judges are usually expected to be able to objectively weigh the probative value of evidence alongside any procedural breaches to determine whether using illegally obtained evidence "would violate the fairness of the proceedings as a whole." Lorena Bachmaier, *Rights and Methods to Challenge Evidence and Witnesses in Civil Law Jurisdictions*, *in* THE OXFORD HANDBOOK OF CRIMINAL PROCESS 841–65, 853 (Darryl K. Brown, Jenia I. Turner, & Bettina Weisser eds., 2019). In recent years, however, some European civil law countries, such as Spain, Germany, Italy, have adopted U.S.-influenced exclusionary rules, including to exclude illegally obtained evidence, including from unlawful searches. Eliabetta Grande, *Comparative Approaches to Criminal Procedure: Transplants, Translations, and Adversarial-Model Reforms in European Criminal Process*, *in* THE OXFORD HANDBOOK, *id.* at 67–88, 71.

65. Reconstructions are a permitted form of "investigation" under Police Chief Decision Pol.Skep/1205/IX/2000 on the Revision of the Collection of Implementation and Technical Guidelines for the Investigation of Crimes (part 8.3.d).

about a week after being named as a suspect, police took Wongso to Café Olivier, the very place where Salihin collapsed, for a crime reenactment, which took several hours.[66] According to media reports, Wongso only agreed to demonstrate her own version of events leading up to Salihin's death; she did not participate in the police version, which was based on witness statements and CCTV footage, so the police used an actress for her role.[67] Wongso's lawyer at that time, Sukinto, suggested that the police reconstruction was a "trap": if Wongso had participated, she would have appeared to have admitted killing Salihin.[68] Police denied this, saying that the reconstruction was merely intended to allow police to "synchronize" witness statements and other evidence obtained during their investigation.[69] Both Wongso's and the police reconstruction versions were handed over to prosecutors,[70] although it is not clear for what purpose they were used, if at all, and even whether they were in video, photographic, documentary, or some other form.

Police asserted that they maintained Wongso's human rights—including the presumption of innocence—during the reconstruction process, emphasizing that they had allowed her to present her own version of events,[71] and that the café was closed to the public during the reconstruction.[72] But whether the presumption was, in fact, maintained during the café reconstruction is highly doubtful. After all, the reconstruction was widely reported in the media: her arrival at the Mall was televized,[73] and

66. Suut Amadani, *Jessica Menolak Rekonstruksi Versi Polisi, Perannya Digantikan Orang Lain*, TRIBUNE NEWS BOGOR (Feb. 7, 2016), https://bogor.tribunnews.com/2016/02/07/jessica-menolak-rekonstruksi-versi-polisi-perannya-digantikan-orang-lain.

67. *Id.*

68. Joko Panji Sasongko, *Pihak Jessica Anggap Rekonstruksi Jadi Alat Jebak Polisi*, CNN INDONESIA (Feb. 8, 2016), https://www.cnnindonesia.com/nasional/20160208144245-12-109578/pihak-jessica-anggap-rekonstruksi-jadi-alat-jebak-polisi.

69. Joko Panji Sasongko, *Rekonstruksi Versi Jessica Akan Diserahkan Ke Kejaksaan*, CNN INDONESIA (Feb. 9, 2016), https://www.cnnindonesia.com/nasional/20160209122159-12-109715/rekonstruksi-versi-jessica-akan-diserahkan-ke-kejaksaan.

70. *Id.*

71. Mei Amelia, *Rekonstruksi Kasus Kematian Mirna Pakai 2 Versi, Polisi: Justru Kami Menjunjung HAM*, DETIK NEWS (Feb. 9, 2016), https://news.detik.com/berita/3137943/rekonstruksi-kasus-kematian-mirna-pakai-2-versi-polisi-justru-kami-menjunjung-ham.

72. Amadani, *supra* note 66.

73. Some of this footage is archived at *Gelar Rekonstruksi, Jessica Tiba di TKP*, BERITASATU.COM (Feb. 6, 2016), https://www.youtube.com/watch?v=k6Mj65tnJ98.

photographs of her sitting at Table 53 at Café Olivier behind three paper bags were published in most national newspapers.[74] In those pictures, Wongso is dressed in an orange prison suit, with a sign around her neck reading "(Suspect, Jessica)."[75] This coverage is consistent with Indonesia's lack of *sub judice* rules to prevent the publication or broadcast of potentially prejudicial material.[76]

During the trial itself, Wongso was again required to reenact what happened at the café on the day of Salihin's collapse, this time with the café barista, server, runner, waiters, and bar manager on duty the day Salihin died. Incredibly, the judges, not the prosecutors, directed the witnesses in the reenactment, apparently based on the prosecution's version of events.[77] For example, the judges told Jessica where to sit and where to put the shopping bags on the table.[78] They also told café staff where on the table to place the drinks Wongso ordered along with the packaged drinking straws accompanying those drinks. They then told them where to move the drinks and straws, corresponding with the testimony of café staff, discussed below, implying that Wongso had tampered with the glass and the straw. Of course, this reconstruction was highly prejudicial against Wongso, particularly given that, as mentioned, the trial was live-broadcast across Indonesia to millions of viewers. The defense lawyers objected, but to no avail. (It bears noting that judges in Indonesia, and many other civil law countries, are often active in their questioning of witnesses and defendants—far more than in many common law countries, for example—and sometimes even call their own witnesses.[79] But the intervention in

74. A.R. Muslim, *Digantikan Orang, Jessica Wongso Tetap Awasi Rekonstruksi Polisi*, LIPUTAN6 (Feb. 7, 2016), https://www.liputan6.com/news/read/2430701/digantikan-orang-jessica-wongso-tetap-awasi-rekonstruksi-polisi.

75. Ghoida Rahmah & Yohanes Paskalis, *Kata Polisi Soal Jessica Tolak Rekonstruksi*, TEMPO.CO (Feb. 9, 2016), https://metro.tempo.co/read/743308/kata-polisi-soal-jessica-tolak-rekonstruksi.

76. OEMAR SENO ADJI & INDRIYANTO SENO ADJI, PERADILAN BEBAS & CONTEMPT OF COURT 257 (2007). In this environment, Salihin's grieving father was able to appear on television and blame Wongso, before her trial, for Salihin's death. Wibowo statement, *supra* note 24.

77. Interview with Otto Hasibuan, Jakarta (Dec. 2, 2019).

78. Callistasia Anggun Wijaya, *Olivier staff, Jessica reenact 'Vietnamese coffee' incident in court*, JAKARTA POST (July 26, 2016), https://www.thejakartapost.com/news/2016/07/27/olivier-staff-jessica-reenact-vietnamese-coffee-incident-in-court.html.

79. BUTT & LINDSEY, *supra* note 9, at 226–28.

Wongso's case was extraordinary, even by these standards.) The very public depiction of Wongso as the perpetrator in these reconstructions raises doubts about whether she was accorded the presumption of innocence during her investigation and trial.

In Indonesia, the potential of reconstructions or reenactments to compromise the presumption of innocence of suspects and defendants is rarely raised, much less discussed or challenged. The same can be said about another commonly employed event in Indonesia that can undermine the presumption of innocence: police-run press conferences, where criminal suspects are presented before the media in cases attracting public attention, often handcuffed and wearing a detention suit, and sometimes even with evidence associated with their alleged crime laid out on a table in front of them.[80] This is particularly common in narcotics and corruption cases, for example. Journalists are sometimes even permitted to ask suspects questions about their alleged crime, well before their guilt or innocence has been established at trial.[81]

Indonesia is certainly not the only country where reenactments take place. Judges can order them in some European civil law jurisdictions,[82] but rarely do so, apparently for fear of violating the presumption of innocence or even putting the safety of suspects or defendants at risk from being attacked during the reconstruction by victims or outraged members of the public.[83] Although reconstructions are used in some countries outside of Europe,[84] they are comparatively rare in developed legal systems.[85]

80. A. Pangaribuan, *Presumption of suspects: The Paradox of Presumption of Innocence*, *in* LAW AND JUSTICE IN A GLOBALIZED WORLD 149–56, 153 (Harkristuti Harkrisnowo, Hikmahanto Juwana, & Yu Un Opposunggu eds., 2018).

81. *Id.* at 149.

82. *See*, *e.g.*, Preamble (26) and Art. 3(3)(c) of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0048), which refers to the right to legal representation, including during "reconstructions of the scene of a crime."

83. There are notable exceptions, however, such as France: Charlotte Harris, *Investigating homicide investigation in France*, 23(3) POLIC. SOC. 328–45, 331 (2013); Robert Hazan & Thomas Cassuto, *La reconstitution en procédure pénale*, 86 EXPERTS 4–9 (2009).

84. Such as in Israel: Stuart Winer, *Suspects cop to killing of Arab teen, reenact it*, TIMES OF ISRAEL (July 7, 2014), https://www.timesofisrael.com/suspects-cop-to-killing-of-arab-teen-reenact-it/.

85. The closest equivalent in the United States, for example, is the "perp walk"—the parading or placement of an alleged perpetrator, usually handcuffed, in a prison or other

Reconstructions for criminal investigations and trials, and presentations of suspects or defendants for the media, are perhaps most commonly and controversially used in Asian countries, including other Southeast Asian countries.

For example, police in Thailand have drawn significant media and academic attention for requiring suspects and defendants to reenact their alleged crimes in some cases.[86] There, the reenactments are often in public and covered by the media, sometimes even live-broadcast.[87] Suspects have been heckled and even assaulted by members of the public during reenactments.[88] Inappropriately, reenactments of very serious crimes have involved almost comical elements, including hired stand-in rape victims wearing wigs, and even dolls representing murdered children.[89] Unsurprisingly, the process is criticized for undermining the presumption of

uniform and under police control, where they can be filmed or photographed by the media. This can be more humiliating for the suspect than the trial itself, where the suspect can at least dress formally and appear without physical restraints. S.R. Van Slyke, W.M. Virkler, & M.L. Benson, *Confidence in the Police, Due Process, and Perp Walks: Public Opinion on the Pretrial Shaming of Criminal Suspects*, 17(1) CRIMINOLOGY & PUB. POL'Y 605–34, 606 (2018). Of course, shaming the suspect appears to be the main purpose here, rather than testing the plausibility of statements and evidence, but like reconstructions, perp walks are criticized for compromising the presumption of innocence, privacy rights, and fair trial guarantees. American courts appear to have drawn a distinction between alleged-perpetrator exposure that is necessary or incidental to a legitimate law enforcement purpose (for example, during a transfer from prison to a courthouse), which is permissible, and a deliberate exposure, which is unconstitutional. *Id.* at 610; Kyle J. Kaiser, *Twenty-First Century Stocks and Pillory: Perp Walks as Pretrial Punishment*, 88(5) IOWA L. REV. 1205–41, 1211 (2003).

86. *See*, *e.g.*, SAMSON LIM, SIAM'S NEW DETECTIVES: VISUALIZING CRIME AND CONSPIRACY IN MODERN THAILAND (2016); Siporn Kowit, *The Development of Criteria for Crime Scene Re-Enactment*, 5(2) INT'L J. CRIME, L. & SOC. ISSUES 12–24 (2018).

87. *Drama Mixes with Crime in Thailand's Public Re-enactments*, VOANEWS (Sept. 11, 2015), https://www.voanews.com/east-asia-pacific/drama-mixes-crime-thailands-public-re-enactments.

88. Some suspects are made to wear protective clothing in case of attack. Jakkrit Waewkraihong, *Crowd mobs Trat rape suspects at reenactment*, BANGKOK POST (Feb. 29, 2016), https://www.bangkokpost.com/thailand/general/880488/crowd-mobs-trat-rape-suspects-at-reenactment; *Angry mob try to attack rape suspect*, BANGKOK POST (Jan. 11, 2015), https://www.bangkokpost.com/archive/angry-villagers-try-to-attack-suspect-in-girl-rape-and-murder/456015.

89. *Koh Pha Ngan rapist participates in reenactment of rape of Norwegian tourist*, THE THAIGER (May 15, 2019), https://thethaiger.com/news/samui/koh-pha-ngan-rapist-participates-in-reenactment-of-rape-of-norwegian-tourist.

innocence and has become increasingly controversial after some paradees were subsequently acquitted.[90] In response, the International Commission of Jurists has recommended that reenactments take place in Thailand only in private and if the accused: has voluntarily confessed to the crime being reenacted; agrees to be present at the reenactment; has been advised of his or her rights; has his or her identity kept secret; and is protected against violence.[91] Recognizing that these conditions are unlikely to be met in Thailand, the Commission recommended the complete abolition of reenactments there.[92] The same criticisms, and recommendations, could be made about reenactments in Indonesia.[93]

Another country that uses reconstructions is Malaysia. In a widely reported incident in 2017, an Indonesian woman and a Thai woman, on trial for murdering the half-brother of North Korean leader, Kim Jong-un, visited Kuala Lumpur airport, where prosecutors alleged they had smeared

90. Chularat Saengpassa, *Crime re-enactments: A violation of suspects' rights?*, THE NATION THAILAND (Oct. 27, 2014), https://www.nationthailand.com/national/30246398.

91. International Commission of Jurists, *Recommendation concerning the Draft Criminal Inquiry Act and Draft National Police Act*, 2–3 (Aug. 15, 2018), https://www.icj.org/wp-content/uploads/2018/08/Thailand-Draft-Police-Code-Advocacy-Open-letters-2018-ENG.pdf.

92. *Id.* at 3.

93. South Korea is also relatively notorious for reenactments. As in Thailand, the practice has generated controversy when suspects or defendants are publicly paraded before large crowds of sometimes menacing, often verbally abusive onlookers, but are later acquitted. Steven Borowiec, *When Murder Investigation Becomes a Spectator Sport*, KOREA EXPOSE (Oct. 12, 2017), https://www.koreaexpose.com/murder-crime-scene-reenactment-spectacle. In one case, an alleged perpetrator was arrested for raping a girl whose father was a senior policeman. He was led around his village handcuffed and tied with rope, shouted at by dozens of onlookers, and then forced to reenact the crime. However, he did not commit the crime; though initially convicted, he was ultimately acquitted after serving 15 years. John Glionna, *South Korea crime 'reenactment' practice gets boost*, LOS ANGELES TIMES (Aug. 8, 2010), https://www.latimes.com/archives/la-xpm-2010-aug-08-la-fg-korea-suspects-20100808-story.html. Also problematical in South Korea has been victim humiliation, particularly in reenactments of alleged rape. In one well-known case, a gymnastics coach, who alleged that a senior gymnastics administrator had attempted to rape her, participated in a reenactment twice, once with a stand-in perpetrator, and another with her pants being pulled down. Kim Jae-heun, *Reenactments of sex crimes violate human rights*, KOREA TIMES (Mar. 11, 2019), http://www.koreatimes.co.kr/www/nation/2019/03/251_265151.html. After investigating the case, the National Human Rights Commission of Korea did not condemn reenactments, but chided police for further traumatizing alleged victims, and urged them to minimalize humiliation. *Id.*

a nerve agent on his face, causing his death. They were accompanied by the judges, prosecutors, and defense lawyers. Strictly speaking, they did not reenact the alleged crime, but they did attend places relevant to the prosecution's case theory, including the check-in counter where the poisoning allegedly occurred, a restaurant where one defendant met an unidentified man, and the toilets where police claimed they washed the poison off their hands.[94] There was no press conference at which they were presented as perpetrators, but the two defendants were handcuffed and surrounded by dozens of police, and the event was filmed by journalists for wide distribution on broadcast television and online.[95] Ultimately, their trials were aborted as a result of diplomatic efforts from the Indonesian and Thai governments.[96] (Both defendants were unlikely perpetrators—they were housewives who maintained that they had been "set up," having been convinced that their acts were pranks for a Japanese comedy show.) But if their trials had continued, the airport tour could well have been prejudicial. Being paraded around the airport so publicly for so long could certainly have created the impression of guilt and an expectation of conviction.

Given the humiliation and prejudice reenactments can bring, what purposes do they serve? The conventional justification for reenactments is that they publicly demonstrate that the police are actively working to pursue a crime and that justice is being done.[97] On this view, reenactments mainly serve as public relations exercises to promote law enforcers and their work. Other explanations are that reenactments give opportunities to defendants to display remorse and to the public to participate in the criminal justice process.[98] However, these purposes can be achieved through a public trial. Of course, police are likely to prefer a reenactment over a trial for public relations purposes. This is because they can usually control or manage a reenactment much better than a trial, which might be

94. Oliver Holmes, *Chaotic scenes at re-enactment of Kim Jong-nam killing*, THE GUARDIAN (Oct. 24, 2017), https://www.theguardian.com/world/2017/oct/24/women-accused-killing-kim-jong-nam-malaysia-airport-reconstruction.

95. A report on the airport visit can be read, and seen, at Holmes, *id.*

96. Hannah Ellis-Petersen, *Kim Jong-nam death: Suspect Siti Aisyah released after charge dropped*, THE GUARDIAN (Mar. 11, 2019), https://www.theguardian.com/world/2019/mar/11/kim-jong-nam-trial-siti-aisyah-released-after-charge-dropped.

97. VOANEWS, *supra* note 87.

98. LIM, *supra* note 86, at III.

counterproductive as a publicity exercise if the defense can cast doubt on how police handled the case.

The evidentiary value of reenactments also appears to be highly questionable, at least in some legal systems, which appears to further undermine their utility. At best, they could help police or judges to cross-check related evidence admitted in the case—for example, whether an eyewitness could have seen the crime from a particular vantage point, as he or she may have claimed in a police statement. In Thailand, the Supreme Court has in at least one case refused to accept that a reenactment by a defendant could support or strengthen a confession.[99] As discussed below, they probably have no evidentiary value under Indonesian law.[100]

E. Discovery of Police Evidence

Despite extensive searching, no media reports or statements indicated that police seriously investigated anyone but Wongso for Salihin's murder. There were, for example, no reported searches of the café itself or forensic examinations of the drink preparation area for traces of cyanide, if only to exclude other suspects or causes of death. This is relevant because multiple alternative explanations for Salihin's death were reported in the media. According to one of these,[101] Salihin's husband, Arief Soemarko, was behind the murder, hoping to claim Salihin's $5 million life insurance policy.[102] More specifically, some media outlets reported that he had conspired with Café Olivier barista, Rangga Dwi Saputra, to kill Salihin, paying him Rp 140 million to put the cyanide in her coffee.[103] According

99. Supreme Court judgment 7562/253 and Order of the Royal Thai Police No. 855/2548 § 2.4, *cited in* ICJ, *supra* note 91, at 3.

100. Sasongko, *supra* note 68.

101. Another rumor was that the murder was the result of a family business rivalry. Johannes Nugroho, *Indonesia's Murder Melodrama has the Whole Country Watching*, Foreign Policy (Nov. 17, 2016), https://foreignpolicy.com/2016/11/17/indonesias-murder-melodrama-has-the-whole-country-watching/.

102. Alin Almnar, *Police Deny $5m Insurance Claim in Cyanide Coffee Case*, Jakarta Globe (Mar. 18, 2016), https://jakartaglobe.id/context/police-deny-5m-insurance-claim-cyanide-coffee-case. Police claimed to find no evidence of such a policy.

103. Randy Wirayudha, *FOKUS: Flashback Kasus Kopi Maut Sianida yang Merenggut Nyawa Mirna*, Okezone News (Oct. 26, 2016), https://megapolitan.okezone.com/read/2016/10/26/338/1525246/fokus-flashback-kasus-kopi-maut-sianida-yang-merenggut-nyawa-mirna.

to Wongso's lawyers, some evidence supported this version of events. For example, Saputra threw away the hot water in the kettle used to make Salihin's coffee, which, Wongso's lawyers suggested, could have been a deliberate attempt to make it impossible to test the water for cyanide.[104] Also, a self-described journalist, Amir Papalia, claimed to have seen Soemarko pass a package to Saputra at the Sarinah shopping mall parking lot on the day before Salihin died, leading some to speculate that the package may have contained the cyanide.[105]

During Wongso's trial, her lawyer claimed that Saputra had admitted his involvement in Salihin's death to police and that his confession was contained in an alternative case dossier.[106] The police and Saputra denied this. At trial, Saputra explained that had he taken the money, he would not have needed to keep working, and pointed out that he was still employed at Café Olivier.[107] However, he also cast doubt on his own credibility, by giving inconsistent testimony about whether he discarded the water, initially saying that he had, but later saying that he was not sure.[108]

Even if this alternative explanation is untrue, the claim that Saputra admitted to police his involvement in the murder raises an important shortcoming of Indonesian criminal procedure: the defense is not entitled to view or obtain *all* evidence that police and prosecutors collect during their investigations. Rather, they can access only the evidence in the "case dossier" (*berkas perkara*), which is compiled by police and prosecutors, who then submit it to the court before the trial.[109] Police and prosecutors can,

104. Devina Heriyanto, *Q&A: Looking into Jessica's harrowing hours—is she guilty?*, JAKARTA POST (Aug. 24, 2016), https://www.thejakartapost.com/academia/2016/08/24/qa-looking-into-jessicas-harrowing-hours-is-she-guilty.html.

105. *Mirna's husband reported journalist to police*, JAKARTA POST (Nov. 3, 2016), https://www.thejakartapost.com/news/2016/11/03/mirnas-husband-accuses-journalist-of-bribery-1478171558.html.

106. Callistasia Anggun Wijaya, *Defense lawyer tells court Olivier barista paid to kill Mirna*, JAKARTA POST (July 28, 2016), https://www.thejakartapost.com/news/2016/07/28/defense-lawyer-tells-court-olivier-barista-paid-to-kill-mirna.html.

107. *Id.*

108. Callistasia Anggun Wijaya, *Olivier's barista keeps changing answers in the trial*, JAKARTA POST (July 21, 2016), https://www.thejakartapost.com/news/2016/07/21/oliviers-barista-keeps-changing-answers-in-the-trial.html.

109. In some civil law countries, the court keeps the dossier as police and prosecutors compile it; in others, the defense obtains full access to the dossier only after the first hearing. Bron McKillop, *The Position of Accused Persons under the Common Law System in Australia*

therefore, simply not include in that dossier any information that does not help demonstrate the defendant's guilt or otherwise assist their case. This will disadvantage the defendant, through no fault of his or her own, if police-sourced evidence is exculpatory, because the defendant will not usually know about it, much less be able to access it for presentation at trial. Applied to the Wongso case, for example: if Saputra did, in fact, admit to murdering Salihin, but police nevertheless thought that their overall case against Wongso was stronger, police could have simply kept Saputra's admission from Wongso's lawyers, who would then not have known to question Saputra about this at trial. Of course, this would have been highly prejudicial against Wongso. It is unclear how the defense discovered Saputra's alleged admission, but it was not included in the case file submitted to the court. Other material was also not in the file, including the results of Wongso's lie detector tests and her record of interview during her alleged hypnotism. If, as her lawyers claimed, she passed the tests and said nothing incriminating under hypnosis, then this information should have been made available to the defense, even if the court may ultimately have accorded little weight to it.

Police and prosecutors can keep information from the defense because of the particular way Indonesia has applied the "dossier" system, which is a feature of the civil law tradition in criminal cases. Although there is significant variation among countries,[110] an investigating judge or prosecutor will usually compile a brief of evidence, or dossier, that becomes the primary evidentiary focus of a criminal trial, such that trials are sometimes described as "audits" of the dossier.[111] The prosecution's main function is defending the evidence in the dossier that establishes the guilt of the defendant; the defense's is casting doubt on that evidence and defending any exculpatory evidence the dossier contains from attack by prosecutors. Both prosecution and defense can exercise these functions by calling witnesses to confirm or challenge the contents of the dossier, usually under the control of an active judge or panel of judges. Critical to this process is a highly professional, thorough, and independent investigating judge or

(More Particularly in New South Wales) and the Civil Law System in France, 26(2) U. N.S.W. L.J. 515–39, 536–37 (2003).

110. *See* THE OXFORD HANDBOOK, *supra* note 64.

111. MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 195 (1986), *cited in* McKillop, *supra* note 109, at 517.

prosecutor, who collects *all* relevant evidence that demonstrates the truth of what happened, even if it exculpates the defendant.[112] When deciding cases, judges make primary reference to the dossier in light of the evidence presented by the parties during the trial.

Common law systems operate with different actors and presuppositions. Prosecutors produce evidence pointing toward the defendant's guilt, while the defense can attempt to challenge that evidence and can put forward its own exculpatory evidence. Here, the prosecution and defense are adversaries, with the main purpose of the judge being to help enforce procedural rules and, ultimately, to decide, sometimes helped by a jury, whether the evidence presented supports a conviction. With no objectively compiled dossier as the focal point, prosecutors will prefer to adduce at trial only the evidence consistent with the defendant's guilt. However, unfairness to the defendant can result if prosecutors have exculpatory evidence, about which the defendant is unaware, and which they do not present at trial.[113] To prevent this unfairness, and the wrongful convictions that might ensue from it, many common law countries require prosecutors to disclose all evidence obtained during investigations to the defense.[114]

A hybrid system that is unfair to defendants appears to have emerged in Indonesia. On the one hand, apparently influenced by the civil law dossier system, the KUHAP refers to a case file or dossier (*berkas perkara*), which is initially compiled by the police and, once sufficient evidence is obtained, handed to the prosecution.[115] After the prosecution has examined it, and in some cases, added its own evidence, prosecution can commence with the

112. Michele Caianiello, *Access to and Limits on Evidence Dossiers in Civil Law Systems*, *in* THE OXFORD HANDBOOK, *supra* note 64, at 563–85, 566, 572. However, there is usually no obligation on the prosecution to communicate the strategy it will use to present the case at trial. *Id.* at 564.

113. It bears noting that prosecutors might not disclose evidence solely because it makes proving their case more difficult. They might also see it as being immaterial. Darryl K. Brown, *Evidence Discovery and Disclosure in Common Law Jurisdictions*, *in* THE OXFORD HANDBOOK, *supra* note 64, at 543–61, 544, 548; Ed Cape, *Defense Rights, Duties, Norms, and Practices in Common Law and Civil Law Jurisdictions*, *id.* at 189–208, 201.

114. Jarryd Bartle, Greg Stratton, & Michele Ruyters, *Why police and prosecutors don't always disclose evidence in criminal trials*, THE CONVERSATION (Oct. 11, 2018), https://theconversation.com/why-police-and-prosecutors-dont-always-disclose-evidence-in-criminal-trials-104317.

115. *See* Arts. 8, 14, 110.

submission of the dossier to the Court.[116] Judges then have primary reference to the dossier during trials, and will question witnesses and even call their own, when necessary. But on the other, Indonesian police or prosecutors are not explicitly required to be objective, unlike investigating judges or prosecutors in other civil law countries. Like in common law countries, the main function of Indonesia's prosecutors is more to establish guilt than to determine the "truth," which is a judicial function. Yet, unlike in many common law systems, no safeguards require the disclosure of police evidence, including exculpatory evidence: "neither party has a duty to assist the other."[117] The result, then, is that dossiers occupy a central position in Indonesian trials, but their contents will usually support only the prosecution case, and judges appear to prefer prosecution evidence over defense evidence. The presumption of innocence demands more objectivity than this.

II. TRIAL

Prosecutors submitted the dossier to the Central Jakarta District Court on June 8, 2016, for a trial that began one week later.[118] Three TV stations live-broadcast the proceedings.[119] In this part, the evidence that prosecutors said established Wongso's guilt is examined. None of this evidence was convincing, much less incontrovertibly indicated her guilt. Indeed, prosecutors could not even clearly demonstrate that Salihin died from ingesting poison, let alone cyanide. Critically, no autopsy was conducted, so her official cause of death was never determined. To be sure, an expert from the National Police Hospital testified that Salihin's intestines were corroded, and her mouth was blackened, which is consistent with cyanide poisoning. The Court accepted this testimony. But, in doing so, the Court ignored the mountain of expert testimony called by the defense, which raised serious doubts about whether Salihin died from ingesting

116. *See* Arts. 14, 110. Prosecutors can also drop the case or hand the case back to police to discover more evidence (Arts. 14(b), 110(2), 138(2)).

117. Interview with retired Indonesian Supreme Court Judge Artidjo Alkostar, Yogyakarta, Indonesia (July 2, 2019).

118. Abdul Manan & Erwan Kurniawan, *Faktor 55 menit Jessica*, TEMPO.CO (Oct. 31, 2016), https://majalah.tempo.co/read/151853/faktor-55-menit-jessica?read=true.

119. *Id.*

cyanide.[120] Toxicology tests conducted by police 70 minutes after her death revealed no cyanide in her gastric fluid, bile, liver or urine.[121] Only small traces of cyanide—0.2 mg/l—were detected in Salihin's stomach fluid in tests conducted several days after her death. But, as University of Indonesia forensic pathologist Jaya Surya Atmaja testified, this was probably from the embalming chemicals used to preserve her body.

The possibility remains, then, that Salihin died from natural causes, such as a heart attack or stroke.[122] An Australian expert pathologist supported these conclusions, testifying that a person fatally poisoned would have much higher levels of cyanide in their stomach and detectable levels in their bowel and liver.[123] Other indications typical of cyanide poisoning mentioned by defense experts—including red skin and the burnt-almond smell of cyanide—were observed neither on Salihin nor in the café.[124]

A. Forensic Tests of the Coffee

The prosecution case also heavily relied on a police laboratory report indicating that a lethal dose of cyanide was in the coffee Salihin drank. Café staff testified that they gave to police: the coffee remaining in Salihin's glass, poured into an empty water bottle so the police could transport it for

120. Mohamad Agus Yozami, *Ahli: Mirna Meninggal Belum Tentu Karena Sianida*, HUKUMONLINE (Sept. 1, 2016), https://www.hukumonline.com/berita/baca/lt57c6e450158f4/ahli—mirna-meninggal-belum-tentu-karena-sianida.

121. Jewel Topsfield & Karuni Rompies, *Alleged cyanide coffee murder: Jessica Wongso prosecutors call for 20 years' jail*, SYDNEY MORNING HERALD (Oct. 6, 2016), https://www.smh.com.au/world/alleged-cyanide-coffee-murder-jessica-wongso-faces-20-years-jail-20161005-grv410.html.

122. Fitri Novia Heriani, *Ahli Forensik Sebut Efek Samping Pengawetan Mayat*, HUKUMONLINE (Sept. 8, 2016), https://www.hukumonline.com/berita/baca/lt57d08aa5df259/ahli-forensik-sebut-efek-samping-pengawetan-mayat; Jewel Topsfield & Karuni Rompies, *Australian expert questions cyanide poisoning in alleged coffee murder in Indonesia*, SYDNEY MORNING HERALD (Sept. 6, 2016), https://www.smh.com.au/world/australian-expert-questions-cyanide-poisoning-in-alleged-coffee-murder-in-indonesia-20160906-gra5cm.html. Indeed, the defense called a witness who claimed to have had a particular sensitivity to caffeine, testifying that she had collapsed after one sip of coffee, but was successfully revived.

123. He also explained that the onset of cyanide poisoning typically occurred up to 30 minutes after ingestion, not two minutes as the prosecution claimed. Topsfield & Rompies, *supra* note 122.

124. Heriani, *supra* note 122.

testing, and the glass itself, cling-wrapped.[125] The lab results detected 7400 mg/l of cyanide in the glass and 7900 mg/l in the bottle.

The Court did not bring the test results into question in its decision. This is hardly surprising, because the defense was unable to access the coffee to independently test it. However, how the coffee was handled before testing was highly problematical and was contested at trial. For example, contrary evidence was presented about the bottle and glass that were handed over to police. Contradicting other café staff, the bartender testified that he had poured all the coffee into a bottle and then returned the empty glass to the pantry.[126] If this testimony is true, then what glass was cling-wrapped and used for the forensic testing?

Adding further confusion was that police asked the café manager for a glass of Vietnamese coffee to use as a "reference" against which to test the coffee Salihin drank. She provided this. Two days later, when the café manager attended the police station for an interview, police asked her for another empty water bottle, into which the reference coffee could be poured. She provided this too. The police should, therefore, have had two bottles and two glasses. Yet, inexplicably, the police record of evidence refers to two glasses and one bottle, and, at trial, prosecutors produced two bottles and one glass.[127] Pointing to these handling problems, Wongso's lawyer suggested that police, or the café staff, could have added the cyanide to the coffee before testing, or that the water bottle into which the bartender initially poured the coffee could have been contaminated.[128] However, the Court seemed content to overlook the problems presented by the handling of the evidence, deciding that it need only focus on the laboratory results of the glass and bottle containing the coffee that Salihin drank.[129]

125. Priska Sari Pratiwi, *Bartender Kafe Olivier Pindahkan Kopi Beracun ke Dalam Botol*, CNN INDONESIA (July 21, 2016), https://www.cnnindonesia.com/nasional/20160721200459-12-146234/bartender-kafe-olivier-pindahkan-kopi-beracun-ke-dalam-botol.

126. Callistasia Anggun Wijaya, *Jessica's lawyer questions validity of coffee evidence*, JAKARTA POST (July 21, 2016), https://www.thejakartapost.com/news/2016/07/21/jessicas-lawyer-questions-validity-of-coffee-evidence.html.

127. Fitri Novia Heriani, *Teka Teki Bukti dalam Sidang Pembunuhan Berencana*, HUKUMONLINE (July 31, 2016), https://www.hukumonline.com/berita/baca/lt579d9d0abb1fc/teka-teki-bukti-dalam-sidang-pembunuhan-berencana.

128. Wijaya, *supra* note 126.

129. Central Jakarta District Court Decision 777/Pid.B/2016/PN.JKT.PST, at 310.

Putting these contradictions and inconsistencies to one side, it is at the very least unclear why some of the coffee in the bottle was poured back into the glass and then tested separately from the coffee remaining in the bottle. Why did police not just run a single test of the coffee in the bottle? The Court did not answer this question.

B. CCTV Footage and Café Staff Testimony

As mentioned, prosecutors alleged that Wongso knew that the café had CCTV cameras, and that she located them after arriving before her friends. She reserved a table for four,[130] and then went shopping at the mall in which the café was located, purchasing three bathroom soaps, each of which she carried into the café in a large paper shopping bag. Prosecutors alleged that Wongso put the three bags on the table in front of her to prevent the CCTV capturing her putting the cyanide in Salihin's coffee. One expert testified that the CCTV footage showed Wongso making "suspicious movements" when she opened her handbag, and said that perhaps she had put something on the table.[131] The testimony from café staff touched on two aspects of the café's straw-serving practices. The first was that straws were served alongside drinks and not in them. The second was that the straws were packaged in paper. Before delivering the drinks and straws to customers, staff would remove all but the top part of the packaging, which remained as a sheath for hygiene reasons. However, staff members testified that, before Salihin arrived, they noticed that the sheath had been removed and that the straw had been put in the coffee.[132]

The prosecution's case relied heavily on drawing implications from Wongso's deliberate placement of the bags, her movements behind the bags, and the straw being unsheathed and placed in the coffee. The implications here appear to be that Wongso either added cyanide to the coffee through the straw, replaced the café's straw with another straw containing

130. Syamsul Anwar Khoemaeni, *Resepsionis Beberkan saat Jessica Pesan Meja di Kafe Olivier*, Okezone News (July 20, 2016), https://megapolitan.okezone.com/read/2016/07/20/338/1442221/resepsionis-beberkan-saat-jessica-pesan-meja-di-kafe-olivier.

131. Fitri Novia Heriani, *Jaksa Beberkan Motif Jessica Lakukan Pembunuhan Berencana*, Hukumonline (June 16, 2016), https://www.hukumonline.com/berita/baca/lt5761c89ed3579/jaksa-beberkan-motif-jessica-lakukan-pembunuhan-berencana.

132. Callistasia Anggun Wijaya, *Straw already inserted in Mirna's coffee: Witness*, Jakarta Post (July 20, 2016), https://www.thejakartapost.com/news/2016/07/20/straw-already-inserted-in-mirnas-coffee-witness.html.

cyanide, or used the straw to stir the cyanide that had been placed in the drink in some other way. But the evidence presented at trial appeared to be insufficient to support any of these possibilities. Indeed, prosecutors did not prove, and in its decision the Court did not specify, how Wongso administered the cyanide. None of the footage played during the trial showed that she took anything from her handbag, much less that she pulled out cyanide and then stirred it into Salihin's drink. The straw was discarded by a café employee and could not be tested.[133] As for the movement behind the bags, Wongso's lawyer presented evidence—apparently not countered by the prosecution—suggesting that Wongso had sent a text message to Salihin on her phone when the bags obscured the CCTV view of her hands.[134] This could account for the so-called "suspicious" movements.

The claim that Wongso ordered the drinks before her friends arrived as part of a plan to put the cyanide in the coffee can also probably be discounted. Text messages produced by the defense indicated that Wongso returned to the café after buying the soap at the time Wongso, Salihin, and Juwita had agreed to meet, but that Salihin and Juwita were late, and that Wongso ordered the coffee so that it would be served at the time they arranged to meet.[135] If Wongso's friends had arrived on time—as she expected them to, and over which she had no control—Wongso would have had no opportunity to administer the cyanide.

C. Evidence about Wongso's Mental State

The prosecution called several psychologists to testify about Wongso's mental state in general and after Salihin's collapse in particular. This evidence was far from compelling, but the Court did not appear to deem it

133. Callistasia Anggun Wijaya, *Café employee unintentionally throws away important piece of evidence*, JAKARTA POST (July 28, 2016), https://www.thejakartapost.com/news/2016/07/28/caf-employee-unintentionally-throws-away-important-piece-of-evidence.html.

134. Anisyah Al Faqir, *Jessica pukul 16.29 WIB chat sama Mirna, bukan atur gelas kopi*, MERDEKA.COM (Aug. 15, 2016), https://www.merdeka.com/peristiwa/jessica-pukul-1629-wib-chat-sama-mirna-bukan-atur-gelas-kopi.html.

135. Hendra Gunawan, *Wajar Jessica Cemas Karena Mirna Telat Datang*, TRIBUNNEWS.COM (Sept. 20, 2016), https://www.tribunnews.com/metropolitan/2016/09/20/wajar-jessica-cemas-karena-mirna-telat-datang. However, the time they arranged to meet was a matter of some dispute at trial. Bayu Marhaenjati, *Hakim Pertanyakan Proses Pemesanan Kopi ke Pegawai Kafe Olivier*, BERITA SATU (July 27, 2016), https://www.beritasatu.com/megapolitan/376761/hakim-pertanyakan-proses-pemesanan-kopi-ke-pegawai-kafe-olivier.

problematic. None of the psychologists had examined Wongso themselves, and their testimony appeared crude and lay rather than based on scientific rigor, much less any expertise. It is difficult to see how the observations made by these witnesses fell within their expertise as psychologists. Their opinions should, therefore, have been given no weight as a matter of Indonesian law.[136]

For example, one psychologist identified Wongso's failure to immediately help Salihin after she collapsed as "strange," because Wongso had received first aid training when working in Australia as an administrator for the NSW Ambulance service.[137] For the witness, Wongso's inaction was consistent with guilt: if she wanted to kill Salihin, then helping revive her would be counterproductive. Another expert psychologist testified that people would usually not place their bags on a table when the seat beside them was vacant, implying that Wongso put the bags on the table to obscure the view of the CCTV camera.

Some of the evidence provided by non-expert witnesses, and the Court's apparent reliance on it, was even more problematic, albeit for different reasons. Particularly questionable was a statement—made by Jessica's former boss at the New South Wales (NSW) Ambulance Service, Ms. Kristie Carter—which a prosecutor read out during Wongso's trial. The statement, given under oath in Australia and apparently based on Carter's experiences working with Wongso, described Wongso as two-faced, manipulative, untruthful, hateful, crazy, and bad tempered. Carter even said that Wongso was capable of "killing someone like what happened in Jakarta" and that she was "not surprised" at Wongso's involvement.[138] Carter also revealed that Wongso had attempted suicide in Australia, and

136. Like many other countries, rules of evidence in Indonesia allow witnesses to testify only as to things that they directly saw, heard, or experienced (*see generally* Art. 1(26) of the KUHAP), although there appear to be exceptions in some circumstances. BUTT & LINDSEY, *supra* note 9, at 228. Only experts can give opinions; and to be valid under Art. 184 of the KUHAP, such opinions appear to be required to fall within the expertise of the witness. Muhammad Yasin & Fitri Novia Heriani, *Kedudukan Ahli dan Pendapatnya dalam Perkara Pidana*, HUKUMONLINE (Aug. 23, 2016), https://www.hukumonline.com/berita/baca/lt57bc379b6a154/kedudukan-ahli-dan-pendapatnya-dalam-perkara-pidana/. *See also* Art. 179(2) of the KUHAP.

137. Fitri Novia Heriani, *Psikolog Nilai Janggalnya Ketenangan Jessica Saat Mirna Kejang*, HUKUMONLINE (Aug. 15, 2016), https://www.hukumonline.com/berita/baca/lt57b165b3856ad/psikolog-nilai-janggalnya-ketenangan-jessica-saat-mirna-kejang.

138. Central Jakarta District Court Decision, *supra* note 129, at 61.

that she had been hospitalized after poisoning herself with carbon monoxide from a barbeque. On October 26, 2015, after this attempt, Carter claims to have visited Wongso in hospital. According to Carter's statement, when doctors refused to discharge her, Wongso said:

> The bastards in this hospital will not let me go home and they are treating me like a killer, but if I wanted to kill someone I certainly know how to do it. I could get a gun. And I know the right dosage.[139]

The Court expressly accepted the truth of the content of Carter's statement, including Carter's characterizations of Wongso, and Wongso's quote, which the Court repeated twice in its judgement.[140] Some of the facts conveyed in Carter's statement were confirmed by NSW police officer, Jesus John Torres, who attended the trial to give evidence.[141] These included suicide attempts and problems in her relationship with her ex-boyfriend. Other facts appear to have been established only on the basis of Carter's evidence. These included that Wongso: said the words comprising the extracted quote; lost her job because of her behavior; and threatened to kill Carter and her mother after Carter refused to help Wongso find somewhere to live.[142] For the Court, the statement established Wongso's increasingly aggressive "emotional escalation," which she had initially directed at herself, but then began directing at others.

The Court's main use of Carter's statement appears to have been to establish Wongso's motive. Although motive is not formally an element of the crime of premeditated murder, the Court argued that establishing it was necessary to explain the cause of a criminal act.[143]

It was against the background of Wongso's escalating problems in Australia and deteriorating mental state, described in the statement, that the Court discussed Wongso's first meeting with Salihin upon Wongso's

139. *Id.* at 63.

140. *Id.* at 316, 334.

141. Torres also listed other matters involving Wongso about which a NSW police report had been written, including incidents of driving under the influence, suicide attempts, and traffic accidents. He also explained that Wongso's behavior toward her ex-boyfriend lead him to apply for, and receive, an Apprehended Violence Order against her. *Id.* at 56–59.

142. *Id.* at 334–35. *See also* Egi Adyatama, *Public Attorney Presents Foreign Witness in Jessica's Trial*, TEMPO (Sept. 27, 2016), https://en.tempo.co/read/807659/public-attorney-presents-foreign-witness-in-jessicas-trial.

143. Central Jakarta District Court Decision, *supra* note 129, at 333, 337.

return to Indonesia. On December 8, 2015, they met for coffee in Jakarta, along with Arief Setiawan Soemarko. This was several days after Salihin and Soemarko were married. Wongso had not been invited to the wedding. For the Court, Wongso's personal setbacks, combined with Salihin's happiness, fueled the jealousy that prompted Wongso to kill Salihin.

However, the Court's use of Carter's statement to demonstrate motive is problematical, even if the contents of the statement were true. The statement portrays Jessica as mentally unstable, vindictive, and capable of murder, but only in a general sense. It draws no specific connection between Wongso and Salihin. Indeed, Jessica never mentioned Salihin to Carter—a fact emphasized in bold text in the statement appearing in the case transcript.[144] Also important is the context in which Wongso purportedly mentioned "killing someone" and "knowing the dosage." It is clear from Carter's statement that Wongso was referring to killing herself, not another person. Although she mentioned "the dosage," she did not mention cyanide. Her statement was a response to hospital staff refusing to discharge her, perhaps because they were concerned that she would attempt suicide once again. Yet the Court did not convey this context when it set out the extract quoted above in its judgement.[145] All this suggests that the statement had little probative value, but was highly prejudicial to Jessica, particularly in the way the prosecution and the Court used—or rather, misused—it.

Putting aside these complaints, Carter's statement also exposes serious shortcomings in the KUHAP's rules about using written statements as evidence in criminal trials when the person who made the statement does not attend the trial and testify. Carter did not come to Indonesia to give evidence. The presiding judges met behind closed doors to discuss whether Carter's statement could nevertheless be read out at trial. They agreed that it could, for two main reasons. First, Carter was Wongso's boss and knew her well. Second, Carter's statement supported, and was supported by, other testimony, including that of Torres.[146] However, this is inaccurate. As discussed, both Carter and Torres testified about Wongso's suicide attempts and relationship problems, but only Carter provided evidence

144. *Id.* at 66.

145. *Id.* at 316, 334.

146. Specifically, the Court said that Carter's statement corresponded with testimony given by NSW police officer John Jesus Torrens and Wongso herself. *Id.* at 308.

of Wongso's threats against her and her mother, and the statement that she "knows the right dosage."

Although witnesses who give statements should ordinarily testify at trial, Article 162(1) of the KUHAP creates exceptions, including illness, a "valid impediment," and the witness's place of residence being "far away" (*jauh*). The case documents provide no explanations for her absence, but the Court mentioned Article 162(1) and the distance exception, which suggests that the Court applied it. The Court also noted that the prosecutors "in good faith and with professionalism officially summoned Carter three times,"[147] though it did not specify the steps prosecutors took or whether the summons reached Carter.

The Court's application of Article 162(1) to excuse Carter's absence and allow her statement to be read out was not legally convincing. The Court did not establish what was too far for the purposes of Article 162(1), or even how far away Carter resided. The Court also did not reconcile Carter's absence with the attendance of several other Australia-based witnesses who traveled to Jakarta for the trial. Nevertheless, the statement was read out and appears in the case transcript as evidence. The Court did not explain how much weight it gave Carter's statement, but the number of times the Court referred to the statement, including the extracted quote from it, strongly suggests that the Court attributed significant weight to it. This is permissible under Article 162(2) of the KUHAP, which says that "if the statement was given under oath, then the statement is to be accorded the same value as a witness statement given under oath in court." Article 162(2) appears to upgrade any sworn witness statement that meets an Article 162(1) exception to witness testimony.

Some of the problems arising from Article 162(2) were raised in an unrelated 2017 constitutional challenge to the provision, brought by Emir Moeis.[148] He had been convicted of corruption, but two of several witnesses who gave statements against him did not attend his trial to give testimony. The Jakarta Corruption Court that convicted him had allowed these statements to be read out at his trial. Moeis contended that Article 162(2) violated his constitutional rights to due process and the rule of law, and contradicted other KUHAP provisions. He pointed out that if a witness's statement is simply read out, judges cannot test the demeanor of that

147. *Id.* at 59.

148. Constitutional Court Decision 74/PUU-XV/2017.

witness or ask questions about the statement, including to clarify passages and resolve potential inconsistencies. They cannot confront the witness with evidence that contradicts the statement, including testimony from other witnesses.[149] Here, Article 162(2) sits uncomfortably alongside Article 165(4) of the KUHAP, which entitles judges, prosecutors, and defense lawyers to confront a witness to test the truth of his or her statement.

Article 162(2) also seems to preclude a court from meeting its obligation to assess or evaluate witness testimony. Article 185(6) requires judges to consider: how witness explanations sit alongside other explanations and evidence; reasons why a witness might give a particular explanation; and even the "lifestyle and morality" of a witness and anything else that could generally influence whether his or her explanation should be believed. The explanatory memorandum to Article 185(6) says that the provision is intended to remind judges to ensure that witness explanations are given freely, honestly, and objectively. In this context, there seems little to prevent Indonesian courts from requiring witnesses to appear by teleconference if they genuinely cannot attend in person. Finally, Article 162(2) also seems to directly contradict Article 185(1), which states, "Witness explanations as evidence are what the witness states in court." Article 185(1) seems to suggest that a witness *statement* cannot constitute witness *testimony*.

Ultimately, the Constitutional Court dismissed the Moeis case on a technicality, holding that Moeis had not suffered sufficient constitutional damage from the application of Article 162(2) in his case, and therefore lacked standing. However, many criticisms he made of Article 162(2) also apply in the Wongso case. Because Carter did not attend, Wongso's lawyers and the judges could not question her and could not, therefore, probe the truth of the contents of her statement. They might have asked whether Wongso said the exact words quoted above when doctors refused to discharge her.

149. *Id.* at 14. Moeis also pointed out that Art. 162(2) provided scope for a witness to lie in a police statement and then avoid being held to account and any consequent criminal punishment for lying in the statement. *Id.* at 12. Avoidance is, of course, relatively straightforward if the witness is a foreigner and gives the statement overseas. Indonesian law enforcers will be less likely (if at all) to pursue a false or misleading statement made outside Indonesia than if made in Indonesia. Moeis even claimed that Arts. 161(1) and (2) would enable unscrupulous police or prosecutors to obtain particularly prejudicial but untrue statements as evidence without ever intending that the statement maker would appear to testify. This might, for example, be achieved if police or prosecutors did not legally summon the witness to appear, or did not summon the witness at all. *Id.* at 16.

They might also have probed the factual bases for some of the negative conclusions Carter drew about Wongso's character. The judges could not ask Carter about anything that might have affected the believability of her statement, as seems required under Article 185(6). A truly impartial panel of judges might have wanted to investigate why Carter's criticisms were so emotive that they suggested subjectivity or bias against Wongso.

D. Decision

Rather than critically examining the evidence, the judges appear to have swallowed the prosecution's case and drawn strange conclusions from Wongso's demeanor. They did this without duly considering the significant holes that the defense poked in that evidence during the trial. With little to go on, and refusing to accept that Salihin may have died of natural causes, the District Court adopted process-of-elimination reasoning. It deduced, using what it described as "simple logic," that only three parties could have put the cyanide in the coffee: café staff, police investigators, or Wongso.[150] The Court excluded café staff because:

> the milk and ice would be different from a standard coffee, but the CCTV showed that the milk and ice were very clear and not discolored, and if the cyanide was added beforehand, when the coffee was poured from the jug . . . there [would have been] steam and a stinging smell of bitter almonds, and all Café Olivier patrons would have collapsed, but instead when [the waiter] poured the coffee in front of Jessica, Jessica said that the coffee was fragrant and very strong. Also, if it was the café staff who added the cyanide into the coffee, then logically the remaining evidence would have been immediately thrown away and would not have been stored for police investigators . . . [151]

The District Court also eliminated the police, finding that they did not introduce cyanide into the coffee or glass when handling the evidence. The Court concluded this using evidence that suggested that the cyanide was in the coffee before it was given to police. This evidence was that café employees tried the coffee that Salihin drank and observed an unusual smell, color, and taste; and Salihin complained of discomfort and stinging around her

150. Central Jakarta District Court Decision, *supra* note 129, at 351.
151. *Id.* at 352.

mouth, and waived her hand in front of her mouth, after drinking the coffee.[152]

For the District Court, the only possible culprit was Wongso. She had "control over the glass for around 51 minutes" and thus had ample opportunity to administer the cyanide.[153] Her crime was also therefore premeditated: someone could not deliberately poison another person without planning.[154] To substantiate this conclusion, the Court relied on the results of the forensic tests, the CCTV footage, and the evidence about Wongso's mental state, mentioned above. But, presumably because this evidence was not strong, the Court also resorted to drawing implications from Wongso's behavior at the café and in the days after Salihin's death. Many of these implications are not convincing and do not withstand cursory scrutiny.

Six examples are discussed here. First, the Court pointed out that Wongso ordered Salihin's coffee and two cocktails for herself, which she paid for before Salihin arrived. For the Court, paying for the drinks up front was unusual at most cafés, where patrons pay on departure, but was part of Wongso's plan.[155] However, precisely why ordering and paying up front was to Wongso's advantage was never clear. When she ordered and paid would not have affected how long she waited for her friends and, hence, her window of opportunity to administer the cyanide. She might have done this for other reasons, including that Salihin and her husband had paid for Wongso's drink when they met in early December 2015. She might have wanted to ensure that she paid for the drinks this time, to return the favor; and the easiest way to achieve this was paying before Salihin arrived.

Second, the judges were skeptical about why Wongso purchased soap for her friends, claiming that it was "very inappropriate as a gift for a meeting between student friends."[156] The suggestion here was that Wongso bought the soap only to obtain the shopping bags she needed to obscure the CCTV. No evidence was offered on the appropriateness of giving soap as a gift, and the panel of judges—all middle-aged men—did not explain

152. *Id.*
153. *Id.*
154. *Id.* at 345, 347.
155. *Id.* at 340.
156. *Id.* at 356.

how they came to know what gifts were suitable for women in their twenties. Third, the Court held that after Salihin's collapse, Wongso's failure to help and general agitation indicated that Wongso was responsible. But her reaction could have easily resulted from shock at her friend's collapse. She might also have been affected after recently consuming two cocktails, a Sazerac and an Old Fashioned, which the Court repeatedly emphasized were high in alcohol.[157]

Fourth, the Court mentioned that Wongso had refused an offer to taste the coffee after Salihin said it tasted awful. The Court deduced that she refused because she knew the coffee contained poison. Wongso's explanation was that she did not want to taste the coffee, having already consumed two cocktails before Salihin arrived.[158] And, after all, it seems reasonable for Wongso to not want to taste bad-tasting coffee. Fifth, the Court pointed out that Wongso contacted Salihin's twin, Sandy, to ask about the laboratory tests the day after Salihin died. For the Court, this indicated that Wongso was concerned about being "found out" and wanted to know whether her plan had worked.[159] Of course, she could have simply wanted to know her friend's cause of death.

Finally, the Court accepted that, soon after Salihin died, Wongso sent Sandy a link to a news story about "fake" coffee containing cyanide being sold in Vietnam. The Court concluded that this was an "indication" that Salihin had died from cyanide poisoning. This is also difficult to sustain: sending this link to Sandy is consistent with Wongso looking for, and finding, information about what might have happened to Salihin. This says nothing about Salihin's cause of death or who was responsible for it.

Perhaps because the evidence against Wongso was so weak, aspects of the trial and decision verged on the farcical. For example, the judges suggested that Wongso had faked her tears during the trial, writing in their judgment that Wongso's crying had been a "stage show" because it had not "come from deep within her heart"; she had sobbed, but could produce no tears, no mucous had come from her nose, and she did not need a tissue to wipe tears from her face.[160] Bizarrely, the Court even accused the defense of knowing that Wongso had been proved guilty by the end of the trial.

157. *Id.* at 322, 340.
158. *Id.* at 348.
159. *Id.* at 358.
160. *Id.* at 366.

The defense had claimed, in its closing statements, that Wongso had shown no remorse because she had not committed the crime. The Court said that the opposite was clear from another argument in the defense's closing statement: the defense had claimed that if Indonesia had a jury system, like in the United States, Wongso would certainly be freed. To be sure, this was an incendiary claim with no substance or relevance. However, the Court's response was remarkable:

> . . . this proves that the defense really knew that Indonesia followed the civil law system, not the common law system, meaning that Indonesia did not have a jury system like in America, proving that the defendant's legal advisers and the defendant herself knew that the defendant had been proven to be guilty and would be punished in accordance with the legal considerations in the prosecutor's indictment.[161]

III. CASSATION

Immediately after the judges finished reading their decision, the lawyer who represented Wongso during most of her trial, Otto Hasibuan, called the decision a "death knell" for justice[162] and announced that Wongso would appeal. The judges, he suggested, had acted as though they were prosecutors and ignored the defense's evidence.[163] He raised several grounds for the appeal, including the questionable admissibility of the CCTV video and Carter's testimony, problems with the handling of the coffee that was forensically tested, and the failure to definitively ascertain Salihin's cause of death. However, the appeal was unsuccessful, with the

161. *Id.* at 368.

162. Rina Atriana, *Otto: Hakim Binsar Sentimen Sekali Terhadap Jessica, Penuh Kebencian*, DETIK NEWS (Oct. 27, 2016), https://news.detik.com/berita/d-3331177/otto-hakim-binsar-sentimen-sekali-terhadap-jessica-penuh-kebencian.

163. Joe Cochrane, *'Coffee Murder' Case That Gripped Indonesia Ends With a Guilty Verdict*, NEW YORK TIMES (Oct. 27, 2016), https://www.nytimes.com/2016/10/28/world/asia/coffee-murder-case-that-gripped-indonesia-ends-with-a-guilty-verdict.html. Statements of similar import were made by Indonesian Legal Aid and Human Rights Association (Perhimpunan Bantuan Hukum Indonesia) member Nasrul Dongoran, who publicly announced that he thought the judges were biased against Wongso. Johnson Simanjuntak, *Majelis Hakim Perkara Jessica Dianggap Memihak Mirna*, TRIBUNE NEWS (Sept. 19, 2016), https://www.tribunnews.com/metropolitan/2016/09/19/majelis-hakim-perkara-jessica-dianggap-memihak-mirna.

Jakarta High Court upholding the Central Jakarta District Court's verdict and punishment.[164] The High Court held that the District Court judges had made no mistakes, and found that the defense had simply repeated arguments already made before the District Court.[165]

Wongso then appealed to the Supreme Court. The "cassation memorandum" (*memori kasasi*) that her lawyers wrote appears in the official case file and comprises over 60 pages of the 85-page judgement. Though the defense raised numerous arguments, two contentions were central to the cassation application. The first was that the District Court had ignored key defense-led evidence that cast significant doubt on whether Salihin died of cyanide poisoning and, if she did, whether Wongso administered it. The second was that the CCTV footage—which showed Wongso's movement behind the three paper shopping bags on the table, Salihin's collapse, and Wongso's reaction—was inadmissible. These two claims will now be discussed.

A. Ignoring Evidence

Wongso's lawyers claimed that the District Court had rejected the testimony of *all* ten defense witnesses, without explanation.[166] The defense lawyers argued that this violated Supreme Court jurisprudence and enabled the Court to ignore critical questions raised by that testimony.[167] As an example, the defense gave the District Court's rejection of its evidence about Salihin's cause of death. As mentioned, no autopsy was performed, leading to dispute about this. Although the judges admitted that an autopsy should have been conducted,[168] they were content instead to use the stomach-content toxicology test conducted by police 70 minutes after Salihin's death, even though it detected only a small amount of cyanide.[169] In the cassation memorandum, the defense emphasized the expert testimony it presented at trial, which indicated that the Court should not have

164. Jakarta High Court Decision 393/PID/2016/PT.DKI.

165. *Id.* at 18.

166. Manan & Kurniawan, *supra* note 118.

167. Jakarta High Court Decision, *supra* note 164, at 35. The defense cited Supreme Court Decision 218 K/Pid/2004. However, it is difficult to see how that decision, which related to a lower court's failure to properly consider documentary evidence, is relevant to Jessica's case.

168. Central Jakarta District Court Decision, *supra* note 129, at 311.

169. Supreme Court Decision 498 K/PID/2017 [hereinafter, Cassation decision], at 19, 38.

concluded that Salihin died from cyanide using this test: more cyanide would have been detected in Salihin's stomach if she had died from cyanide poisoning; and the small amount detected was the likely result of chemicals used in the embalming process. For the defense, the only way to reconcile the negligible amount of cyanide in Salihin's stomach with the lethal amount found in the coffee itself, was for the cyanide to have been added to the coffee after Salihin drank it.

Two further pieces of evidence supported this conclusion. First, Wongso's friend Juwita and café staff tasted the coffee after Salihin's collapse.[170] They said that the coffee tasted bad and that they felt sick after drinking it, but neither collapsed and died like Salihin. Yet they, too, might have been expected to have perished if there was such a high concentration of cyanide in the coffee.[171]

Second, expert toxicology testimony provided at trial by the defense indicated that having 7,400 mg/l and 7,900 mg/l of cyanide in the glass and bottle, respectively, would not have changed the color of the coffee from brown to yellow, which was the color of the coffee exhibited by the prosecution.[172] The implication here appears to be that police or prosecutors tampered with the coffee samples. Adding weight to this claim were discrepancies between the amount of coffee in the glass after consumption by Salihin, Juwita, and the café staff, and the amount of coffee tested. The defense pointed out that the capacity of the glass was 370 mls and that standard operating procedure at the café was for 1 cm to be left at the top of the glass, which meant that a "full" glass at the café was 320 mls.[173] However, the laboratory reports specified that the volume of coffee in the glass was 150 mls, and the volume in the bottle was 200 mls, which is more than a full glass. If the 20 mls estimated to have been drunk by Salihin, and the amounts consumed by others are also taken out, then even less coffee should have been available for testing.[174]

B. Holes in the Prosecution Case

The defense also suggested that prosecutors could not have proven, and the District Court could not have found, the element of premeditation under

170. *Id.* at 52.
171. Wibowo statement, *supra* note 24.
172. Cassation decision, *supra* note 169, at 63.
173. *Id.* at 62.
174. *Id.* at 63.

Article 340 of the Criminal Code, without establishing where Wongso obtained the cyanide, what form it took (for example, whether it was a powder or a liquid), and how she added it to the coffee.[175] The District Court had been content to conclude, simply: "The defendant certainly knows where she got the poison from, whether from her brown bag or the pocket of her pants or somewhere else."[176] Police found no cyanide in Wongso's possession or on her clothes or at the café.[177] It should be noted, however, that because Salihin's death was not immediately treated as a murder, Wongso was able to leave the café and return home without being searched, and would likely have had ample time to dispose of any incriminating evidence. Indeed, Jessica was even able to ask her house maid to dispose of the pants she wore to the café, claiming that they tore when she got into the car to take Salihin to hospital.[178] Yet establishing that Wongso had obtained or handled cyanide appeared to be critical, given the importance the prosecution placed on her "suspicious" movements behind the three shopping bags on the table. The defense also questioned why, if Wongso had in fact planned the murder, she would have chosen Café Olivier as the place to commit it, given its popularity and CCTV system, about which the prosecution claimed she knew.[179]

C. CCTV Evidence

The defense also argued that the thumb drive containing the CCTV footage produced by the prosecution was invalid evidence and hence inadmissible, for two main reasons. The first was that police had violated their own procedures when handling that evidence: the thumb drive contained a copy of the original CCTV footage, without the required "electronic evidence transfer record," detailing the source of the evidence, who handled

175. *Id.* at 51. It bears noting that the Jakarta District Court accepted expert testimony from toxicologists that cyanide was easily obtainable through illegal channels in Indonesia. Central Jakarta District Court Decision, *supra* note 129, at 353.

176. Central Jakarta District Court Decision, *supra* note 129, at 353.

177. Cassation decision, *supra* note 169, at 71. Police confiscated her bag for testing but found no residue. Nivell Rayda, *Police May Have Crucial Evidence to Pin Jessica in Coffee Murder Case: Report*, JAKARTA GLOBE (May 29, 2016), https://jakartaglobe.id/context/police-may-crucial-evidence-pin-jessica-coffee-murder-case-report/.

178. Central Jakarta District Court Decision, *supra* note 129, at 143.

179. Cassation decision, *supra* note 169, at 71.

it, and for how long.[180] However, the defense did not assert that the copy had been tampered with to incriminate Wongso, or even that it was different from the original.

The second was a decision of the Constitutional Court,[181] handed down during the trial at the Central Jakarta District Court, which cast some doubt over the constitutionality of using the CCTV footage recorded at Café Olivier in Wongso's trial. Before turning to discuss this case, it bears explaining why the case before the Constitutional Court was significant for Indonesian evidence law. The types of evidence admissible in criminal cases in Indonesia has traditionally been quite limited to documentary evidence or testimony (whether lay, expert, or from the defendant) and *petunjuk* (literally, "clue," but commonly translated as "circumstantial evidence"), following Article 184 of the KUHAP. Other "non-traditional" forms of evidence—photographs, videos, electronic data, sound recordings, and the like—are not specifically mentioned in Article 184. Whether they can formally be used in criminal proceedings has therefore long been uncertain in Indonesia and subject to judicial discretion and inconsistency, regardless of the providence of that evidence.[182] In some cases, judges have ignored these types of evidence, even if the providence of the evidence is incontrovertible; in others they have used them, usually as indication evidence, if they are supported by at least one other type of evidence recognized under Article 184, such as witness testimony.

This inconsistency and uncertainty led lawmakers to expressly recognize particular types of nontraditional evidence—including video evidence, sound recordings, and electronic information—in "special" (*khusus*) statutes enacted from the early 2000s to deal with particular offenses. However, these types of evidence could only be used to investigate and prosecute the offenses covered by those statutes, including terrorism, money laundering, narcotics, people smuggling, and corruption. The use of nontraditional evidence for all other crimes was finally permitted in 2008

180. In this context, the defense argued that police had violated Police Chief Regulation 10 of 2009. *Id.* at 25.

181. Constitutional Court Decision 20/PUU-XIV/2016.

182. Simon Butt, *Indonesian terrorism law and criminal process* (2008), https://ssrn.com/abstract=1400506; Ramiyanto, *Bukti Elektronik Sebagai Alat Bukti Yang Sah Dalam Hukum Acara Pidana*, 6(3) Jurnal Hukum Dan Peradilan [Journal of Law & Courts] 463–86 (2017).

with the enactment of the Electronic Information Law.[183] Article 5(1) of this Law states that "electronic information" and "electronic documents" are valid evidence, and Article 5(2) states that Article 5(1) is intended to expand the type of evidence that can be used in criminal procedural law.[184] Digital recordings, including video and sound, are included in the meaning of "electronic information" and "electronic documents".[185]

Importantly, Article 31(1) of the Law prohibits the "deliberate and unlawful interception or tapping of electronic information or documents in a computer and/or electronic system owned by another person."[186] The explanatory memorandum to Article 31(1) defines "interception or tapping" as "listening, recording, diverting, altering, impeding or noting the transmission of electronic information or documents which are not public, either using communication cable or wireless networks, such as electromagnetic broadcasts or radio frequencies." But Article 31(3) states that Article 31(1) does not apply to interceptions and taps performed in the context of law enforcement on the request of police, prosecutors, or other institutions whose authority is established by statute. Violating Article 31(1) is a criminal offense, unless Article 31(3) applies.[187]

The Electronic Information Law does not specify whether information obtained through criminal means can nevertheless be used as evidence in criminal proceedings. One might expect a court to reject evidence obtained using criminal means. However, some cases suggest that courts allow the use of illegally obtained electronic information. In one particularly notorious case involving indecency in private Facebook chats, for example, the Supreme Court ignored that the chats had been accessed without authorization from the Facebook account owner by her accuser, and allowed their use as electronic evidence to prove the indecency allegation against her.[188]

183. Law 11 of 2008, as amended by Law 19 of 2016.

184. Art. 44(b) restates that electronic information and documents can be used for investigations, prosecutions, and trials.

185. *See* Arts. 1(1) and 1(4).

186. Constitutional Court Decision, *supra* note 181, at 93.

187. Under Art. 46(1), illegal interception and tapping attracts up to six years' imprisonment and a fine of up to six hundred million rupiah.

188. *ICJR: Kasus Wisni Yetti Gambaran Buruknya Pengaturan dan Pembuktian Kasus UU ITE*, Institute for Criminal Justice Reform (Feb. 21, 2019), https://icjr.or.id/icjr-kasus-wisni-yetti-gambaran-buruknya-pengaturan-dan-pembuktian-kasus-uu-ite/.

1. The Novanto Case

The Constitutional Court application relevant to the Wongso case was brought by Setya Novanto, then Speaker of the national legislature, the *Dewan Perwakilan Rakyat*. He had met with Managing Director of Freeport Indonesia Maroef Sjamsudin and oil magnate Muhammad Riza Chalid at the Ritz Carlton hotel in Jakarta in June 2015.[189] At the time, Freeport was seeking a government extension of its contract to run the Grasberg mine in Papua.[190] Novanto allegedly asked Sjamsudin for 20 percent of Freeport Indonesia shares, then worth around USD 4 billion, in return for the extension. This, Novanto said, was a request on behalf of President Joko Widodo and Vice President Yusuf Kalla themselves,[191] though he later claimed that he intended this as a joke.[192] Unfortunately for Novanto, Sjamsudin had surreptitiously recorded the 80-minute meeting, clearly capturing Novanto's extortion attempt.[193] He then sent the recording to the Minister for Energy and Mineral Resources. Prosecutors called Novanto in for questioning,[194] but did not proceed with the investigation, even though the Attorney General himself confirmed that forensic testing had determined that the voices on the tape were those of Novanto, Sjamsudin, and Chalid.[195] Meanwhile, Novanto stepped down as Speaker but remained a member of parliament and was even appointed the Chairperson of Golkar, one of Indonesia's biggest political parties.

189. Rini Friastuti, *Kronologi Pertemuan Maroef Sjamsoeddin, Setya Novanto dan Reza Chalid*, DETIK NEWS (Dec. 3, 2015), https://news.detik.com/berita/d-3087343/kronologi-pertemuan-maroef-sjamsoeddin-setya-novanto-dan-reza-chalid.

190. PT Freeport Indonesia is a subsidiary of U.S.-based Freeport-McMoran Copper & Gold.

191. Joe Cochrane, *Secret Tape, TV Hearings and a Resignation: A Watergate Moment for Indonesia*, NEW YORK TIMES (Dec. 17, 2015), https://www.nytimes.com/2015/12/18/world/asia/indonesia-corruption-setya-novanto.html.

192. *Setya Novanto: I was just joking about wanting Freeport shares*, TEMPO.CO (Nov. 25, 2015), https://en.tempo.co/read/722139/setya-novanto-i-was-just-joking-about-wanting-freeport-shares.

193. Bayu Galih, *Ini Transkrip Lengkap Rekaman Kasus Setya Novanto*, KOMPAS.COM (Dec. 3, 2015), https://nasional.kompas.com/read/2015/12/03/06060001/Ini.Transkrip.Lengkap.Rekaman.Kasus.Setya.Novanto?page=all.

194. Constitutional Court Decision, *supra* note 181, at 9.

195. Dewi Suci Rahayu, *Rekaman Papa Minta Saham, Jaksa Agung: Positif Suara Novanto*, TEMPO.CO (Dec. 18, 2015), https://nasional.tempo.co/read/728948/rekaman-papa-minta-saham-jaksa-agung-positif-suara-novanto.

Novanto also brought an application before the Constitutional Court, apparently aimed at ensuring that prosecutors would never proceed with his case. He challenged the provisions in the Electronic Information Law that permitted the use of "recordings" as evidence in criminal cases, anticipating that the voice recording might be used against him, if he was prosecuted. He argued that, to be valid and admissible, a recording must be made in the course of law enforcement on the request of police, prosecutors, the Anti-corruption Commission (*Komisi Pemberantasan Korupsi*), or another law enforcement institution. Novanto argued that the voice recording was illegal, because the person who made it—the managing director of Freeport—was neither a law enforcement officer nor ordered by law enforcers to make the recording. Worse, the recording was made in a private place without his knowledge. Allowing its use against him, he argued, would violate due process and his right to privacy, both of which were constitutionally protected.

The Court agreed that tapping and interception violated citizens' right to privacy, but was permissible provided that statutory restrictions and procedures to prevent arbitrariness were established.[196] Indeed various statutes already prohibited interception or imposed restrictions on it, like Article 31(3) of the Electronic Information Law itself.[197] A majority of the Court emphasized the words of Article 31,[198] holding that if electronic information is obtained illegally, then "the evidence is to be set aside by the judge or considered to have no evidentiary value by the court."[199] The case against Novanto was dropped.[200]

A live question during Wongso's trial was whether Article 31(1) of the Electronic Information Law, as upheld by the Constitutional Court, rendered the CCTV footage invalid, because the CCTV was installed by Café Olivier, and not at the request of law enforcers as part of a criminal investigation. The

196. Constitutional Court Decision, *supra* note 181, at 90.

197. *Id.* at 90–92.

198. *Id.* at 96. The two dissenting judges said that they would not have allowed this case to proceed in the first place because what the applicant sought was already provided in the law, making the case redundant.

199. *Id.* at 95.

200. However, Novanto was subsequently convicted for corruption in another case. Joe Cochrane, *Top Indonesian Official, Long Seen as Untouchable, Gets Prison for Graft*, NEW YORK TIMES (Apr. 24, 2018), https://www.nytimes.com/2018/04/24/world/asia/indonesia-setya-novanto-corruption.html.

District Court dodged this issue in its judgment, responding to defense arguments that the CCTV footage was inadmissible, as follows:

> the Court is of the view that the CCTV in Café Olivier was not deliberately installed for this case, but it had been installed generally in that place to monitor every occurrence that occurred in Café Olivier. So the CCTV did not need to be produced by an authorized official.[201]

One senior lawyer, Hotman Paris Hutapea, issued a press statement in which he declared that the District Court should have excluded the CCTV evidence because the CCTV footage was not recorded on the request of law enforcement officers.[202] In media interviews, he argued that all prosecution evidence and arguments relying on the CCTV footage were also invalid, which destroyed the prosecution's case. After all, the Café Olivier CCTV footage was really the only piece of evidence that raised questions about Wongso's potential involvement in Salihin's death: the footage showed her putting the shopping bags on the table and making movements behind them, and it showed her reaction to Salihin's collapse. If the judges could not consider the footage, or had to give it little weight, if any, then Wongso must surely have been acquitted.

Hutapea's views were not shared universally in Indonesia's legal profession. Another lawyer, Nadia Saphira, argued that the need for law enforcement authorization applied only to transmissions made in private, where the right to privacy of the person being recorded might be compromised.[203] On this view, the Novanto case involved a recording that was illegal because it contained a private conversation; but the CCTV in Café Olivier was public and did not, therefore, violate privacy or human rights.[204]

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201. Central Jakarta District Court Decision, *supra* note 129, at 312.

202. Andri Donnal Putera, *Kata Hotman Paris, Jessica Harus Bebas karena Bukti Rekaman CCTV Tidak Sah*, KOMPAS (Oct. 7, 2016), https://megapolitan.kompas.com/read/2016/10/07/10461931/kata.hotman.paris.jessica.harus.bebas.karena.bukti.rekaman.cctv.tidak.sah.

203. Gede Moenanto, *CCTV Merupakan Alat Bukti yang Sah, Hotman Paris Diminta Baca Berkas Secara Teliti*, WARTAKOTALIVE (Oct. 9, 2016), https://wartakota.tribunnews.com/2016/10/09/cctv-merupakan-alat-bukti-yang-sah-hotman-paris-diminta-baca-berkas-secara-teliti.

204. Poskota News, *Kasus Jessica, CCTV Sah Jadi Alat Bukti*, POSKOTA NEWS (Oct. 9, 2016), http://lucasshpartners.com/testinews/index.php/id/berita/item/43-kasus-jessica-cctv-sah-jadi-alat-bukti.

It is true that only private conversations fall within the prohibition of Article 31(1) of the Electronic Information Law. As mentioned, the explanatory memorandum to Article 31(1) prohibits "interception" and "tapping" of electronic information that is "not public." However, it is by no means clear what constitutes a public or private place for the purposes of the explanatory memorandum to Article 31(1). Whereas CCTV footage from a camera installed on a public street would presumably be public, and a surreptitiously made audio recording would likely be private, where is the distinguishing line to be drawn? Is a café public or private? Is a conversation in a café public, such that recording it would be legal? (In Novanto's case, for example, if the conversation took place in a quiet corner of a café rather than a hotel room, would the recording have been legal?) Is there a difference between intercepting a conversation and intercepting TV footage? Wongso's case offered a good opportunity for the Indonesian Supreme Court to clarify this area of law, about which there is much uncertainty.

Even presuming the validity and admissibility of the CCTV footage, the defense also argued that nothing in it showed Wongso tampering with Salihin's coffee.[205] Indeed, the defense emphasized, not one of the 24 witnesses who testified at Wongso's trial saw her put anything in the coffee.[206] The only evidence about what she did behind the shopping bags came from two witnesses, who testified that they saw Wongso using her phone when the prosecution claims she was putting cyanide in the coffee.[207]

IV. DECISION

The panel of Supreme Court judges that considered the case was chaired by one of Indonesia's most respected judges, Artidjo Alkostar. Disappointingly, however, the panel's decision did not attempt to directly refute the defendant's contentions, or acknowledge weaknesses in the evidence the prosecution had put forward. Of course, the defense had, in their *memori*, complained about the very same treatment from the lower courts.

205. Cassation decision, *supra* note 169, at 26.
206. *Id.* at 29.
207. *Id.* at 29.

The Supreme Court rejected the appeal in only a few pages, finding that the lower courts had not made an error in applying the law. For the Supreme Court, the District Court had in fact

> considered legally relevant issues correctly, by verifying the testimony of witnesses, experts and the defendant, documents, circumstantial evidence and exhibits appropriately and correctly, so that correct legal facts about the case were obtained that were relevant to the indictment [presented by] the public prosecutor.[208]

The Court set out the facts that it accepted to have been proved: that Wongso arrived at the café before her friends and ordered for them; that the coffee delivered to her was brown, but after she had been alone with the coffee, it had become yellow and foul smelling; that the drink was served with a straw that was not in the glass and that Wongso had put the straw in the glass; that Salihin drank the coffee, then foamed from the mouth and began convulsing; that others tried the drink and felt sick; that initial reports indicated that Salihin's lips were blue and that her intestines had corroded; and that the police laboratory tests detected cyanide in the coffee sample and organs of the victim.[209] Specifically, the Court rejected the defense claim that because the initial laboratory tests of her stomach contents did not detect cyanide, Salihin could not have died from cyanide poisoning. This was because cyanide was found in the coffee sample.[210]

The Supreme Court criticized the defense for using the laboratory results "selectively" to conclude that Salihin did not die of cyanide poisoning, even though prosecutors pointed to the same test results, along with Salihin's stomach corrosion, to conclude that she had. The Court also refused to accept that 0.2 mg/l of cyanide—the level found in her stomach fluids several days after her death—could not have caused death, despite contrary testimony from several experts. Given the amount of cyanide detected in the coffee itself, the Court accepted that, from a single sip of the straw, Salihin would have ingested more than enough cyanide to kill her.[211] The Court flatly stated that it would not consider any more of the defense's

208. *Id.* at 76–77.
209. *Id.* at 77.
210. *Id.* at 78–79.
211. *Id.* at 81.

arguments, labelling them "mere repetition of facts brought forward at the trial that were dealt with by the district court."[212]

The decision contained serious contradictions, finding, on the one hand, that a sip of the coffee had enough cyanide to kill Salihin, but on the other hand, that others had also tasted the coffee, but had not died. It did not entertain the possibility that the small amount of cyanide in Salihin's stomach contents was insufficient to cause her death and was likely from the chemicals used for her embalming, as expert witnesses had testified. Perhaps the most conspicuous omission in the Supreme Court judgement was consideration of whether the CCTV footage was a type of "valid" evidence recognized under Indonesian law. The Supreme Court did not even mention the admissibility of the CCTV and, indeed, appears to have simply presumed that it was valid and admissible, entirely ignoring the controversy.

CONCLUSION

Wongso's case may not yet be over. A new legal team appealed again to the Supreme Court in 2018. The Court agreed to re-examine her case but did not disturb its initial decision.[213] Her trial lawyers are said to be considering another appeal.[214] Given her defeat in the pretrial hearing, trial, appeal, cassation, and the reexamination, it seems unlikely that a new appeal will succeed. However, Indonesia's judicial process is nothing if not unpredictable.

Whether she is guilty or innocent, Wongso should not have been convicted. As has been shown, her trial was unfair, as was her treatment by police. Wongso's case illustrates that Indonesia's laws of criminal procedure require an urgent overhaul to better protect the rights of suspects and defendants, though this is unlikely in the foreseeable future.[215] At present,

212. *Id.* at 84.

213. Supreme Court Decision 69 PK/PID/2018. This decision is not available on the Supreme Court's website. Despite extensive searching, a copy of it could not be obtained. For discussion of the reexamination process, see BUTT & LINDSEY, *supra* note 9, at 93–95.

214. Interview with Otto Hasibuan, Jakarta (Dec. 2, 2019).

215. The need to reform criminal procedural law has long been recognized, and various drafts have been produced. The national parliament has included the KUHAP on its list of national legislative priorities for several years. However, legislators have indicated that they

police can simply ignore KUHAP provisions relating to legal representation, arrests, and detentions, as happened in Wongso's case. Although a Police Commission exists to examine allegations of police misconduct, its commissioners complain of being "all bark and no bite."[216] Indeed, it appears that even the most senior police have little regard for procedural safeguards, and sanctions are not applied for non-compliance. In the Wongso case, for example, the Police Commissioner himself was said to try to force Wongso to confess and may have signed off on an illegal search. Worse, the judiciary appears willing to paper over these flaws, failing to adequately scrutinize the validity of police action during pre-trial hearings, which have become notorious for low success rates,[217] and have led to the perception that they merely rubber stamp police action, no matter how egregious.[218]

Wongso's case also brings into sharp relief the rationale for *sub judice* rules, and the pressing need for their introduction in Indonesia. There is very little, if any, public or academic support for introducing such laws. But in this case, there was very intense media coverage of Wongso's arrest by police, her appearance in a prison jumpsuit during a reconstruction, and her accusing questioning by judges during the widely broadcast trial. There were no restrictions on the media openly referring to her as the perpetrator, even before her conviction. In this context, it seems reasonable to conclude that the media coverage, which appeared to be embraced by the court as a public relations exercise, created an assumption that she was guilty and hence an expectation that the judges would convict her. If they had not, then they would likely have faced criticism for being soft on crime or not adequately performing their function. Indeed, her case indicates a much broader legal problem that appears to be emerging in Indonesia: an

will revise the Criminal Procedural Code only after they have replaced the Criminal Code itself. This means that reform of Indonesian criminal procedural law is probably still years away. Attempts to replace the Criminal Code drew nationwide protests in 2019, forcing the parliament to indefinitely postpone passage. It bears noting, too, that even if a new KUHAP is enacted, there are no guarantees that it will address any of the problems identified here, or whether it will affect police and prosecutor practices.

216. Laban Laisila & Nikolaus Tolen, *Dianggap Kurang Menggigit, Kompolnas Minta Kewenangan Ditambah*, SUARA.COM (Sept. 3, 2015), https://www.suara.com/news/2015/09/03/210251/dianggap-kurang-menggigit-kompolnas-minta-kewenangan-ditambah.

217. Fitzpatrick, *supra* note 13, at 506.

218. On pre-trial hearings generally, see SUPRIYADI WIDODO EDDYONO ET AL., PRAPERADILAN DI INDONESIA: TEORI, SEJARAH DAN PRAKTIKNYA (2014).

increasing expectation that judges will convict, barring mistaken identity or some serious error by police or prosecutors, particularly in corruption cases.[219]

Of course, if this is correct, then there is hardly a level playing field upon which the defense can compete against the state in criminal cases. The inferior position of the defense was on clear display in the Wongso case. For example, it was not, under Indonesian law, entitled to discovery of all evidence obtained by the police during the investigation, some of which might have helped the defense case. Most problematic, however, was the refusal of all courts to properly consider the defense arguments. Even if the courts disagreed with the defense evidence or arguments, they should have explained why. The Supreme Court, in particular, might have been expected to more deeply engage with compelling defense evidence about the handling and admissibility of evidence. This is particularly true of the CCTV footage, about which there is much legal confusion in Indonesia. After all, one of the Supreme Court's most important functions is clarifying and ensuring the uniform application of the law.[220] Reading the judgments, one gets the impression that the judges, at all levels, were annoyed at the defense for simply performing its function—interrogating prosecution evidence and adducing contrary evidence.

Though there were never any allegations of corruption in the handling of the Wongso case, her lawyers reported the Central Jakarta District Court Chairperson who presided over her trial, Binsar Gultom, to the Judicial Commission, alleging bias against Wongso during her trial.[221] Although, to my knowledge, no action was taken against him, some of the extrajudicial statements made by judges handling her case seem to betray prejudgment and a lack of understanding of the complexity of her case. Several days after the District Court decision was handed down, an interview with Gultom was published in *Tempo* magazine, one of Indonesia's most respected news sources.[222] The interview was entitled: "Jessica case judge,

219. Simon Butt & Sofie Schutte, *Assessing judicial performance in Indonesia: The court for corruption crimes*, 62(5) CRIME, LAW & SOC. CHANGE 603–19 (2014).

220. R. SUBEKTI, LAW IN INDONESIA (3rd ed. 1982).

221. Wirayudha, *supra* note 103.

222. Abdul Manan & Erwan Kurniawan, *Hakim Kasus Jessica, Binsar Gultom: sejak awal kami yakin siapa pelakunya*, TEMPO MAGAZINE (Oct. 31, 2016), https://majalah.tempo.co/read/151854/hakim-kasus-jessica-binsar-gultomsejak-awal-kami-yakin-siapa-pelakunya.

Binsar Gultom: From the beginning we were convinced who the perpetrator was." He said:

> For me, this case was very simple. The relationship between the defendant and the victim was very close. A person who poisons another person is acquainted with that person. Just look at it from when the defendant came until [she] ordered a drink. That's the extent of it. The poison was put in when the drink was cold. If cyanide is put into hot water, everyone around would have been poisoned by inhaling the steam. It is as simple as that.[223]

Worse, the most senior Supreme Court judge hearing Wongso's cassation appeal, Artidjo Alkostar, was reported to have discussed the case with then–police chief General Tito Karnavian. Their conversation took place at a wedding when Wongso's trial was underway in the Central Jakarta District Court in 2016,[224] and parts of it were reproduced in a book published by the Supreme Court to celebrate Alkostar's retirement in 2019.[225] In an interview with Karnavian for the book, he said that he asked Alkostar about the case, who replied:

> After observing several sessions, I can already conclude that Jessica Wongso is guilty. The reason is that the poisoned coffee was held by many people: the maker, the waiter, Jessica, and the drinker. Of these four people, in my analysis, it is not possible that the drinker did it, leaving three people. The maker and the waiter had no motive to do this. But Jessica had a motive and a close connection with the drinker.

Karnavian continued:

> Hearing Artidjo Alkostar's answer made me salute him, his analysis was indeed sharp, simple, but very clear . . . According to me, if the person analyzing [a case] is a senior judge of Artidjo Alkostar's class, then cases such as these become very simple.[226]

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223. *Id.* Gultom made similar comments in other media fora, where he said that the case was simple. *See*, *e.g.*, an interview with Gultom on Indonesia Lawyers Club, Andinni, *supra* note 55.

224. Sujud Dwi Pratisto, *Kapolri Tito Karnavian: Artidjo Sosok yang Sederhana*, GATRA (June 2, 2018), https://www.gatra.com/detail/news/325533-Kapolri-Tito-Karnavian-:-Artidjo-Sosok-yang-Sederhana.

225. ARTIDJO ALKOSTAR, ROKI PENJAITAN, & AHMAD SAFITRI, ARTIDJO ALKOSTAR: TITIAN KEIKHLASAN, BERKHIDDMAT UNTUK KEADILAN (2019).

226. *Id.* at 94.

As discussed above, Wongso's case was, in fact, far from simple, and the judicial decisions, and processes, by which she was convicted were highly questionable. The comments made by both Gultom and Alkostar appear to violate Indonesia's Judicial Ethics Code (2009),[227] which clearly prohibits judges talking extra-judicially about a case they or other judges have handled or are handling.[228] Of course, these principles appear, in part, designed to prevent any perception of predetermination by judges—that is, that they have already come to a decision about a matter, even before hearing all relevant evidence and arguments.

But there are other rationales for these rules, which are brought into sharp relief by the conversation between Alkostar and Karnavian. The chief of police could, for example, have passed Alkostar's views to prosecutors—had Wongso won at first instance or on appeal to the Jakarta High Court, this would have been valuable information to help prosecutors decide whether to appeal to the Supreme Court, where the case might be heard by Alkostar. This incident is all the more concerning because Alkostar was, for many years, held up as an example of a model judge. If this is the pinnacle of judicial professionalism in Indonesia, then unfair trials—and wrongful convictions—can be expected in Indonesia for many years to come.

227. Joint Decision of the Supreme Court Chief Justice and Judicial Commission Chairperson, No. 047/KMA/SKB/IV/2009 dan 02/SKB/P.KY/IV/2009 (Apr. 8, 2009). This Code applies to all Indonesian judges except Constitutional Court judges, who are subject to Constitutional Court Regulation No. 2/PMK/2003 of 2003 on the Ethics Code and Behavior Guidelines for Constitutional Court Judges. The Code is said to adopt the Bangalore Principles of Judicial Conduct (2002). *MA-KY Terbitkan Kode Etik Hakim*, HUKUMONLINE (Apr. 8, 2009), https://www.hukumonline.com/berita/baca/hol21677/maky-terbitkan-kode-etik-hakim/.

228. Joint Decision of the Supreme Court Chief Justice and Judicial Commission Chairperson, No. 047/KMA/SKB/IV/2009 dan 02/SKB/P.KY/IV/2009, at ¶3.2.2 and ¶3.2.5.