

Yangon Northern District Court

2018 Criminal Case No. 4

2 July 2018

Deputy Commander Yu Naing

(The Complainant)

and

2 persons including Ko Wa Lone (aka) Thet Oo Maung

(The Accused)

Prosecution under Section 3(1)(c) of the Myanmar Official Secrets Act 1923

Submission pursuant to Section 253(1) of the Myanmar Code of Criminal Procedure

Summary of the Case

The prosecutor commenced this proceeding against Reuters reporters Ko Wa Lone (aka) Thet Oo Maung and Ko Kyaw Soe Oo (aka) Thet Moe Aung based on the complaint of Deputy Commander Yu Naing.

Deputy Commander Yu Naing claims that around 9 p.m. on the night of 12 December 2017, Wa Lone and Kyaw Soe Oo were walking near the junction of No. 3 Main Road and Nilar Road in northern Yangon, looking “suspicious,” so officers from the Htauk Kyant Police Force, who were conducting a vehicle checkpoint at that location, stopped the reporters, searched them on the side of the road, and found secret government papers in their hands. In less than an hour, officers say they searched the reporters, took inventory of each and every item in both reporters’ possession, including the contents of their wallets and other personal belongings, totaling 20 items, completed the search forms, brought the journalists back to the police station and, by 10 p.m., sought permission to prosecute them under Section 3(1)(c) of the Official Secrets Act.

At the time of their arrest, Wa Lone and Kyaw Soe Oo had been investigating events in the village of Inn Din, in the Maung Daw Township in Rakhine State, including the killing of 8 Muslim men and 2 high school boys on 2 September 2017 by security forces, the role of some officers in the burning of Muslim homes in the village and throughout the Maung Daw Township, and other activities potentially indicative of corruption or misconduct, such as looting, cattle theft, and officers wearing civilian clothes to avoid detection. During the course of their reporting, they talked with Buddhist villagers, paramilitary police, soldiers, and the gravediggers of the men and boys who were killed, among others. One of their sources, a Rakhine villager, gave them graphic photographs of the 2 September killings. The Reuters news report was published on 8 February 2018.

The day after the reporters' arrest, police searched the home of Wa Lone's brother, in an effort to find evidence related to the Inn Din story. They also searched the East Hotel, where Kyaw Soe Oo had been staying while he was in Yangon. In neither case did the officers find any government secret papers or indicia that Wa Lone or Kyaw Soe Oo intended to harm Myanmar or aid Myanmar's enemies.

On 14 December, officers searched the mobile phones of Wa Lone and Kyaw Soe Oo, including documents and photographic imagery on their devices. Four days later, on December 18, the Military announced the discovery of a mass grave in the village of Inn Din.

Wa Lone and Kyaw Soe Oo were held for two weeks, without access to lawyers or their families, and appeared for the first time before Judge Ohn Myint of the Mingalardon Court on 27 December. On 10 January, the prosecution announced its intent to pursue charges against both reporters under Section 3(1)(c) of the Official Secrets Act, telling this Court that the prosecution would show that each of the reporters had collected secret government documents with the intent to aid an enemy of Myanmar and harm Myanmar's security.

On the very same date, the Military announced that 10 Muslim terrorists had been killed at Inn Din on 2 September 2017.

It has been seven months since Wa Lone and Kyaw Soe Oo were arrested. For the last six months, this Court has heard the prosecution's evidence. After having called 22 of the 25 anticipated witnesses, not a single prosecution witness has provided this court with any evidence of: how Wa Lone and Kyaw Soe Oo "collected" the papers (other than by way of an orchestrated police set-up); the "enemy" whom Wa Lone and Kyaw Soe Oo intended to aid or how Wa Lone or Kyaw Soe Oo intended to harm Myanmar's security; or how the allegedly "secret" papers could possibly aid an (unspecified) enemy.

Instead, prosecution witnesses testified that:

1. The arrest was pre-planned;
2. The reporters were arrested immediately outside of the restaurant where they had met with Police Officer Naing Lin just moments before;
3. Police instructed search witnesses to complete their search forms before the reporters were even searched;
4. And the information in the secret papers had been previously published to the public, including in government newspapers, and was outdated (and therefore incorrect and useless) at the time of their arrest.

One police officer, Captain Moe Yan Naing, testified at length as to how Brigadier General Tin Ko Ko directed the interrogation of police officers from Battalion 8, which was assigned to the Maung Daw Township at the time of the Inn Din killings on 2 September 2017, about whether they had talked to Wa Lone. In response to some of their answers to his questions, Tin Ko Ko ordered Naing Lin to plant the "secret" papers on Wa Lone, and threatened him and other officers that if they didn't "catch" Wa Lone, they would go to jail. Naing Lin denies having planted documents on the reporters, but admits he met with them just moments before they were arrested. Prosecution witness Officer Khin Maung Lin, whom Naing Lin said provided his phone number to Wa Lone, and

whom Moe Yan Naing said also knew of the set-up, did not appear to testify, despite being listed by the prosecution and being detained by police until at least May this year.

Summary of Argument

We now move to discharge this proceeding against journalists Wa Lone and Kyaw Soe Oo. Their continued prosecution would violate Myanmar's stated commitment to the rule of law. There are four separate and independent reasons why this Court, applying Section 3(1)(c) of the Official Secrets Act (the "Act") and Section 253(1) of the Myanmar Code of Criminal Procedure does not have grounds to impose charges and must dismiss.

To charge Wa Lone and Kyaw Soe Oo, this Court must conclude that the prosecutor has presented it with credible evidence supporting each and every one of the four required elements of the Act.

The prosecution bears the burden of proof, and if it cannot satisfy even one of the critical elements, this case cannot proceed. Here, the prosecutor has failed to adduce evidence for any of the required elements, let alone proof for all of them.

Taking each of the required elements in turn: First, there is not a shred of evidence before the Court that either journalist ever obtained, collected, recorded, published or communicated the documents at issue. Second, the documents aren't secret at all; their contents were published in government newspapers and are widely known. Third, the prosecution has not identified an actual or alleged "enemy," but even if it had, the documents found on Wa Lone and Kyaw Soe Oo couldn't have possibly been useful to an enemy, as they are so out-of-date as to be irrelevant. Fourth, the prosecution hasn't offered this Court any evidence that Wa Lone or Kyaw Soe Oo intended to harm Myanmar or assist an enemy. Even the prosecution's witnesses agree that the defendants were, at all times, acting as journalists reporting the news – a constitutionally protected activity in Myanmar.

Standing alone, the remarkable absence of evidence against Wa Lone and Kyaw Soe Oo justifies – indeed requires – dismissal. There are not one, but four reasons under the Official Secrets Act, why this case cannot proceed. While the court does not require a further reason, there is still another compelling justification for dismissal: The prosecution presented this Court with credible evidence that Wa Lone and Kyaw Soe Oo were the victims of a staged arrest. A police captain told this Court that a police officer in his battalion planted the documents on the journalists upon instructions by a superior officer and, within moments, the journalists were arrested for possessing those very same documents.

Against this background, it is not surprising that prosecution witnesses have not been able to maintain their implausible tale. The witnesses contradicted one another and fell apart when challenged: one police officer confessed to having burned his notes of the arrest, and another witness read from notes scribbled on his hand while he was testifying. None of them agree on where the arrest really happened, with some of them admitting that Wa Lone and Kyaw Soe Oo were arrested just outside the restaurant where the documents had been planted on them moments before. There is no proof of a vehicle checkpoint, where officers claimed to have stopped Wa Lone and Kyaw Soe Oo. And several witnesses admitted that the arrest was a pretext for police to find out more about the journalists' investigation into the crimes committed at Inn Din.

The arrest of Reuters journalists Wa Lone and Kyaw Soe Oo should never have transpired. It was pre-planned and staged, and the product of an effort by police to stymie or even silence truthful, responsible reporting in the public interest. Most critically, none of the evidence put forward by the

prosecution could sustain a finding that the journalists are guilty of an offense under Section 3(1)(c) of the Official Secrets Act 1923. Accordingly, in the interests of justice and in keeping with the rule of law, the Court should grant this application and discharge the journalists.

The prosecution has failed to demonstrate a *prima facie* case under the Official Secrets Act

This application is made pursuant to Section 253(1) of the Myanmar Code of Criminal Procedure, which provides that a Magistrate must discharge the accused if, after hearing the evidence produced by the prosecution, he finds that “no case against the accused has been made out which, if unrequited, would warrant his conviction.” See *U Kyaw Shin and One v. The Union of Burma*, 1974 Burma Law Reports (CC) p. 16 (declining to charge the accused because the prosecution failed to provide sufficient evidence of guilt and therefore did not satisfy the required *prima facie* evidentiary showing); *U Ba Sein v. Union of Burma* (Rawsheik Ahmad), 1977 Burma Law Reports (CC) p. 12 (although charging does not amount to conviction, the accused should not be charged without *prima facie* evidence); see also *Maung Kyee Maung v. The Union of Burma*, 1968 Burma Law Reports (SCCAC) p. 16 (it is wrong to shift the burden and assume that the prosecution’s duty is complete after filing a complaint or that it is the duty of the accused to explain that he is innocent. The burden of proof always lies on the prosecution); *Sein Hla v. The Union of Burma*, 1951 Burma Law Reports (HC) p. 289 (the burden of proving the guilt of the accused beyond all reasonable doubt remains throughout the trial with the prosecution).

Section 3(1)(c) of the Official Secrets Act provides as follows:

If any person for any purpose prejudicial to the safety or interests of the State... obtains, collects, records or publishes or communicates to any other person any secret ... document or information which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy... he shall be punishable with imprisonment for a term which may extend... to fourteen years....

Before this Court can charge Wa Lone or Kyaw Soe Oo under the Act, the Act requires the Court to conclude that the prosecution has provided credible evidence to show each and every one of the following four elements:

- (1) The defendant “obtain[ed], collect[ed], record[ed], publish[ed] or communicat[ed]” documents or information;
- (2) The documents or information were “secret”;
- (3) The documents or information were “calculated to be or might be or [were] intended to be, directly or indirectly, useful to an enemy”; and
- (4) The defendant acted “for [a] purpose prejudicial to the safety or interests of the State”.

The prosecution has failed as to every one of these required elements and therefore this case must be dismissed. See Evidence Act Section 101 (“Whoever desires any court to give judgment...must prove those facts exist.”).

(1) *There is no evidence that the journalists “obtained, collected, recorded, published or communicated” the documents at issue.*

The prosecution asks this Court to believe that the reporters “collected” secret information. See First Information Report. Not a single witness testified that Wa Lone or Kyaw Soe Oo asked for “secret” papers, or that the witness gave secret government papers to the journalists. See Testimony of Naing Lin (Prosecution Witness (PW) 19) (“Would it be true to say that Wa Lone has never asked me for documents relating to the Police Battalion? Wa Lone didn’t asked for any document, and I didn’t give away any document”); Testimony of Moe Yan Naing (PW 18) (“I didn’t have to give away anything to Wa Lone and he didn’t ask anything from me” and that Naing Lin and Khin Maung Lin, who were his inferiors, never reported anything to him about Wa Lone asking them for documents). The prosecution failed to identify any person claiming to have provided any secret papers to Wa Lone or Kyaw Soe Oo; in fact, these papers were never reported missing. Also, the prosecution failed to provide evidence that Wa Lone or Kyaw Soe Oo engaged in any other prohibited activity; in fact, they did not record, publish or communicate the so-called “secret” papers. Standing alone, the total absence of evidence on the first required element under Section 3(1)(c) of the Official Secrets Act requires dismissal of the case.

Indeed, the only evidence before this Court as to how they “collected” the allegedly “secret” papers at issue in this case is that police planted the papers on the journalists, at the direction of a superior officer, just moments before their arrest.

Police Captain Moe Yan Naing – who was held from 12 December 2017 until testifying – gave detailed testimony that on 12 December, the day of Wa Lone and Kyaw Soe Oo’s arrest, Brigadier General Tin Ko Ko gave “secret documents from Battalion 8” to police officer Naing Lin, ordered Naing Lin to meet and give the papers to Wa Lone, and told Naing Lin that when Wa Lone left the meeting, the “regional police force ha[d] to entrap him and arrest him.” Tin Ko Ko also told the police officers at the meeting that “if you don’t get Wa Lone, you will go to jail.” Testimony of Moe Yan Naing (PW 18). Moe Yan Naing said that Naing Lin proceeded to plant the documents on Wa Lone and Kyaw Soe Oo just hours later, having been accompanied by another, superior officer to the meeting with the reporters. Testimony of Moe Yan Naing (PW 18).

The fact of the set-up is further corroborated by the remainder of the evidence heard by the Court:

- Prosecution witnesses engaged in highly irregular conduct to conceal the set-up. One police witness admitted that he burned his notes. Testimony of Tin Htwe Oo (PW 3) (“It is true that I burned to destroy these records related to detail incidents of this case.”) While testifying, a village elder read from notes scribbled on his hand so that he could remember the false arrest location. Testimony of U Kyaw Shein (PW 8).
- Naing Lin admitted he conferred with Wa Lone via telephone at precisely the time on the day of their arrest that, according to Moe Yan Naing, Tin Ko Ko ordered Naing Lin to contact Wa Lone to set up a meeting with Wa Lone.
- Naing Lin admitted that he met with Wa Lone and Kyaw Soe Oo just moments before they were arrested, immediately outside the restaurant where their meeting took place. See *also* Testimony of Yu Naing (PW 1) (“I know they were arrested near the restaurant”); Testimony of Win Lwin Oo (PW 6) (“The actual site of arrest ... it is in front of Sin Gyi shop,” which is adjacent to Saung Yeik Mon beer station); see *also* Search Form in respect of Kyaw

Soe Oo, dated 12 December 2017, Exhibit D (“Place of search... in front of Saung Yeik Mon Beer station”).

- Moe Yan Naing testified that Officer Khin Maung Lin was also aware that Tin Ko Ko ordered Naing Lin to plant “secret” documents on Wa Lone. Testimony of Moe Yan Naing (PW 18). While Khin Maung Lin was in prison and under the command and control of the authorities (Exhibit 3; Testimony of Moe Yan Naing (PW 18)), the prosecution, fully aware of Moe Yan Naing’s testimony, did not call Khin Maung Lin as a witness. The Court should presume that his testimony would have corroborated Captain Moe Yan Naing’s account of the set-up and would have been favorable to the defense. Under Evidence Act Section 114, “[t]he Court may presume the existence of any fact which it thinks likely to have happened.” Illustration (g) explains that “evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.”
- Other prosecution witnesses confirmed that the arrest was pre-planned. U Kyaw Shein, a civilian who was called to assist the police on 12 December, testified that “the police called us to arrest the journalists” at around 7 p.m. that evening, which was several hours before they met with Naing Lin and their actual arrest. Testimony of U Kyaw Shein (PW 8); Testimony of Naing Lin (PW 19). Village Elder U Win Lwyn Oo also testified that he was instructed to sign search forms concerning the reporters’ arrest while the forms were blank. Testimony of U Win Lwin Oo (PW 6) (“we were asked to sign the form at the site of arrest, in advance”).
- The vehicle checkpoint at which the journalists were purportedly stopped, searched and arrested did not exist; there’s no evidence of it at all. The prosecutor has failed to provide this Court with the logbook or other records that would prove that there was a vehicle checkpoint. See Testimony of Yu Naing (PW 1) (“Asked if it is true that the record on the duty assignment of the vehicle search team on that particular location at the night of incident cannot be presented to the court, it is correct”); Testimony of Min Thant (PW 2) (“If I am asked whether I can submit my course of actions to the court as I stated on the day of incident, I cannot submit to the court for now, but there is a record being written at the station.”). Witnesses working at the restaurant nearby the purported checkpoint said they did not see a checkpoint (Testimony of Htay Htay Myint (PW 7)), and that it would be unusual for a checkpoint to be set up at that location (Testimony of Kyaw Min (PW 9)). Other records refer to other arrest locations that no other source has corroborated: The computer-drawn map in the court file indicates that the arrest was in a third location, and one of the witnesses testified that the arrest took place on a street lined by factories (Testimony of Myo Ko Ko (PW 4)), which is not the case for either the area nearby the restaurant or the junction where the checkpoint allegedly operated.
- Not a single witness has been able to explain why Wa Lone and Kyaw Soe Oo looked “suspicious,” thereby warranting the alleged stop and search, and there is no agreement among the prosecution’s witnesses as to the direction in which the reporters were walking when they were stopped. The motive for police to trap and stage the arrest of the reporters: Officers wanted to uncover information about the article that Wa Lone was working on, which looked into the deaths of ten men and boys from Inn Din village, cow smuggling, corruption and misconduct by security forces, and the burning of villages. See Testimony of Soe Aung (PW 10) (describing the search of Wa Lone’s family residence on 13 December 2017, “we looked for the information related to the news ... we were searching for everything related to the news article Wa Lone has been writing”); Exhibit 23.

The reporters' unintentional, momentary possession of papers, wrongfully planted on them by police as part of an orchestrated trap, and without any knowledge of their contents, cannot be a basis for criminal charges under the Official Secrets Act. See Section 80 of the Myanmar Penal Code ("Nothing is an offence, which is done by accident or misfortune, and without any criminal intention or knowledge, in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution"); *Bayin Ma and Chit Aung*, 1872-1892 Selected Judgments and Rulings of Lower Burma p. 573 ("the basic principle is if someone is in possession of an item without the knowledge of having it, it shall not be established as in possession... [possession] requires to prove that the accused person has given the agreement to have the item in its possession need to be established").

(2) *There is no evidence that the documents or information were "secret."*

There is still another basis on which to dismiss this case: The Official Secrets Act Section 3(1)(c) requires that the documents or information at issue are "secret." But the prosecution has not met its burden of proof on this element either. On the contrary, by the time the police planted the documents on Wa Lone and Kyaw Soe Oo on 12 December 2017, media reports widely distributed in Myanmar and by various Myanmar officials, acting in their official capacity, had already disclosed the information to the public. Testimony of Min Thant (PW 2); Testimony of U Min Aung (PW 11); Testimony of Moe Yan Naing (PW 18).

The absence of secrecy is further confirmed by several news reports that are a part of the court record. See Exhibits 5-11.

And throughout these court proceedings, the prosecution made no effort to safeguard the "secrecy" of the documents, despite the fact that it could have requested protective measures under Section 14 of the Official Secrets Act. One prosecution witness after another has discussed the contents of those documents in open court, before dozens of spectators, on a weekly basis. See *e.g.*, Testimony of Yu Naing (PW 1); Testimony of Min Thant (PW 2); Testimony of Tin Htwe Oo (PW 3); Testimony of Myo Ko Ko (PW 4); Testimony of Kyaw Lwin (PW 5); and Testimony of Moe Yan Naing (PW 18).

Absent the crucial showing of secrecy, this case cannot proceed, and no charges can be imposed against the two journalists.

(3) *There is no evidence that the documents or information were "calculated to be or might be or [were] intended to be, directly or indirectly, useful to an enemy."*

Even if the prosecution had shown that the journalists collected, obtained, communicated or recorded documents or information, which it has not, and even if the prosecution had shown that those documents or information were secret, which it has not, and even if this Court were to disregard compelling evidence that police trapped the reporters and staged the arrest, there is still another, entirely separate and third reason why this Court should dismiss: Section 3(1)(c) of the Official Secrets Act also requires that the documents or information are "calculated to be or might be or [were] intended to be, directly or indirectly, useful to an enemy."

At no point in time has the prosecution proven, alleged or even identified an "enemy." And even beyond that crucial failure, not a single prosecution witness or document shows how the papers planted on Wa Lone and Kyaw Soe Oo could be useful to an enemy. Nor could they: The papers, dated 27 August 2017 describe the impact of events of 25 August 2017 in Maung Daw Township, Rakhine State on the officers and ammunitions of Security Police Unit 8 ("Battalion 8"). But Battalion

8 withdrew from Rakhine State on November 11 or 12, 2017, meaning that by December 12, 2017, when Wa Lone and Kyaw Soe Oo were arrested, the information in the allegedly secret papers was neither relevant nor accurate, rendering them useless to an enemy. Testimony of Min Thant (PW 2); Testimony of Moe Yan Naing (PW 18); Testimony of Naing Lin (PW 19).

(4) *There is no evidence that the journalists acted “for any purpose prejudicial to the safety or interests of the State”*

Finally, the journalists cannot be charged because Section 3(1)(c) of the Official Secrets Act requires a person to have acted “for any purpose prejudicial to the safety or interests of the State.” Here again, the prosecution has failed to present any evidence. To the contrary, prosecution witnesses agree that Wa Lone or Kyaw Soe Oo were working as journalists, and there is no evidence that they acted as spies or sent information to enemies of Myanmar, or had any intent to harm the nation or its people. See Testimony of Yu Naing (PW 1); Testimony of Min Aung (PW 11); Testimony of Min Min (PW 12); Testimony of Pyay Nyein (PW 14); Testimony of Thura Aung (PW 13); Testimony of Daw May Thet Htar Lwin (PW 15); Testimony of Win Ko Ko (PW 17).

The lawful exercise of journalism – an activity protected by the fundamental right to freedom of expression in Article 354(a) of the Myanmar Constitution, Sections 3 and 4 of the Media Law 2014 and Article 23 of the ASEAN Human Rights Declaration – is not prejudicial to the safety or interests of the State. To the contrary, it is a fundamental precondition to a functioning democracy.

The electronic documents do not support charges.

The “secret” papers that are the subject of this case, and which were found in the reporters’ hands at the time of their arrest, were not in the journalists’ mobile phones. See Testimony of Police Major Aung Kyaw San (PW 23) (confirming that Exhibits C-1, C-2, D-1, D-2, D-3 and D-4 were not found on the journalists’ mobile phones).

The 23 electronic documents that Officer Aung Kyaw San claims to have found on Wa Lone and Kyaw Soe Oo’s hand phones also do not justify charges, whether under the Official Secrets Act or any other law.

The 23 documents are admissible only as circumstantial evidence because the First Information Report and the Charging Papers do not refer to any of these items. But whether viewed as circumstantial evidence or otherwise, those documents cannot be proof of criminal activity for the simple reason that the prosecutor has not shown that they are “secret.” CID Officer Aung Kyaw San discussed all of those documents freely, in open court, over six days of direct and cross-examination, without any objection by the prosecutor.

Further, as to the records allegedly found on Wa Lone’s phone:

- The electronic document reflecting the promotion of Moe Yan Naing from a two-star officer to a three-star officer (Exhibit J) is not secret. Moe Yan Naing testified that he knew it was available on Facebook, and it was in the public domain for almost 6 months when it was allegedly uploaded to Facebook Messenger.
- The electronic document reflecting an aerial view of a stadium where Pope Frances visited (Exhibit J-1) is also not secret. It is not a government document, and was released publicly,

including in pages 14-16 of the *Myanmar Times* daily newspaper on 24 November 2017 (Exhibit 12), on the minute-by-minute schedule published on this Catholic news website, <https://cruxnow.com/cns/2017/10/10/vatican-releases-popes-schedule-visit-myanmar-bangladesh/> (Exhibit 13), and in the map published on this German-language Catholic website, www.gemeinde-bangkok.com/rangun.

And as to the records allegedly found on Kyaw Soe Oo's phone:

- The electronic document reflecting permission from the Union government office to confirm that journalists have permission to visit Rakhine state (Exhibit J-2) is also not secret. The government wanted journalists to know this information, journalists in Rakhine State needed to know this information to obey the law and do their jobs, and the document was in the public domain for almost 8 months when it was allegedly uploaded to Facebook Messenger.
- The electronic documents reflecting the creation of a team to investigate Minister U Min Aung (Exhibits J-3, J-7) are not secret. This information was announced by Regional Parliament Member Naing Kway Aye, as later published in the *Myanmar Times* daily newspaper on 7 December 2017 (Exhibit 14). This information was in the public domain before these documents were allegedly uploaded to Facebook Messenger.
- The electronic documents reflecting the process for national verification cards (Exhibit J-4, J-5, J-6) are not secret. This information was published on page 11 of the *New Light of Myanmar* newspaper on 10 November 2017 (Exhibit 15) and was in the public domain for almost a month when these documents were allegedly uploaded to Facebook Messenger.
- The electronic document reflecting reports of cow thefts (Exhibit J-8) is not secret, as it is a simple report of criminal activity in the community.
- The electronic documents reflecting the visit of Minister Win Myat Aye to southern region of Rakhine (Exhibits J-9, J-23) is not secret. This information was uploaded to the "Prof Win Myat Aye" Facebook account on 8 July 2017, and that post provides full details about the trip, including the specific locations visited. See Testimony of Police Major Aung Kyaw San (PW 20) (acknowledging that the locations were published). This information was in the public domain for 4 months when these documents were allegedly uploaded to Facebook Messenger.
- The electronic document reflecting the shooting and hospitalization of Maung Phyu Daung (Exhibit J-10) is not secret, as it is a simple report of criminal activity, as reported to law enforcement by members of the public, including his family.
- The electronic document reflecting the visit of Vice President Myint Swe to Maungdaw (Exhibit J-11) is not secret. This information was published on pages 1 and 6 of the *New Light of Myanmar* newspaper on 16 February 2017 (Exhibit 16), which provides full details about the trip, including the specific locations visited. This information was in the public domain days before it was allegedly uploaded to Facebook Messenger.

- The electronic document reflecting travel of the members of the Investigation Commission to Maung Daw on 10 February (Exhibit J-12) is not secret. This information was published on page 9 of the *New Light of Myanmar* newspaper on 12 February 2017 (Exhibit 17), and the travel had concluded before the document was allegedly uploaded to Facebook Messenger.
- The electronic documents reflecting drug seizures (Exhibits J-13, J-15, J-16) are not secret, as they are simple reports of criminal activity. This information was published on page 9 of the *New Light of Myanmar* newspaper on 7 February (Exhibit 18), page 15 of the *Daily Eleven* newspaper on 18 October 2016 (Exhibit 20), and in other publications. This information was in the public domain when these documents were allegedly uploaded to Facebook Messenger.
- The electronic document reflecting the filing of the case against Eleven Media (Exhibit J-14) is not secret. This information was announced by Chief Minister Phyo Min Thein on 9 November 2016 at a press conference in which he said he was filing a complaint under Section 66(d) of the Telecommunications Act and was also published on page 17 of the *Daily Eleven* newspaper on 11 November 2016 (Exhibit 19). This information was already in the public domain before it was allegedly uploaded to Facebook Messenger.
- The electronic documents reflecting the Man Aung island tourism development project (Exhibits J-17, J-18, J-19, J-20, J-21, J-22) are not secret. This information was published on the cover and in page 26 of *Thazin Pann Khine* newspaper on 15 October 2017 (Exhibit 21) and page 20 of the *Rakhine Gazette* on 12 December 2017 (Exhibit 22). These electronic documents, especially Exhibit J-18 at paragraph 2(c), confirm that the government wanted the project to be implemented transparently and with the approval of the local people. This information was in the public domain for multiple months when these documents were allegedly uploaded to Facebook Messenger.

An equally significant obstacle for the prosecutor, though, is that Officer Aung Kyaw Saw is not an “expert” under Myanmar law. He does not have a degree in computer science. Testimony of Aung Kyaw San (PW 20). Under Section 2(f) of the 1996 Computer Science Development Law, an expert witness must have a computer science degree or be conversant in computer programming to be accepted as an expert. His Cellebrite certification expired and is no longer valid. Testimony of Aung Kyaw San (PW 20). There is no evidence before the Court that he has any computer-programming skills, and throughout the course of his testimony, his lack of qualification was clear: He could not unlock the hand phones, and he struggled with basic questions of mobile telephone technology. Testimony of Aung Kaw San (PW 20) (*e.g.*, failing to explain the difference between a Samsung or Vivo phone, or why one extraction report was created in 3 minutes, whereas the other supposedly required 22 hours).

Even beyond his lack of qualification, the scientific expert and police didn’t follow basic procedures for electronic evidence as required by law. Officer Aung Kyaw San admitted that he could not provide the court with a warrant or other permission from to search the journalists’ mobile phones, as required by Sections 8(c) and (d) of the 2017 Law Protecting the Privacy and Security of Citizens. Testimony of Aung Kyaw San (PW 20). In violation of Section 1319 of the Police Manual (1940), which provides that “exhibits in criminal cases will pass through as few hands as possible, and care will be taken that there is a complete chain of evidence to connect the article before the Court with

the article found at the investigation,” he could not establish who was in possession of the phones before they arrived in his unit, or why the extraction report was run hours before the phones purportedly arrived in his unit. Specifically, Officer Aung Kyaw San testified that his unit received the phones at 9:30 a.m. on 14 December, but later admitted that the extraction reports show that the analysis was performed at 2:43 a.m. and 3:14 a.m. on that same day. He had no explanation for this discrepancy. Testimony of Aung Kyaw San (PW 20).

Section 114(a) of the Amended Evidence Act requires him to have submitted original PDFs of the extraction reports, but he didn’t do so. Testimony of Aung Kyaw San (PW 20). Officer Aung Kyaw San was also unable to provide the court with Myanmar language translations of the PDFs, as required by Paragraph 57 of the Courts Manual. The extraction reports are missing key sections that police, without meaningful explanation, withheld – this includes central evidence like the call log and proof that electronic files were added and deleted after 12 December. Testimony of Aung Kyaw San (PW 20).

Even beyond those legal and procedural failures, the phones were so mishandled by police and investigative authorities that any records found on the phones are too unreliable to be considered as evidence. There is no way for this Court to know who uploaded the electronic documents to their phones; Officer Aung Kyaw San admitted that the original uploaders could not be identified. Files were added to or deleted from their phones even after their arrests because the phones continued to be connected to mobile towers. Testimony of Aung Kyaw San (PW 20). Third parties sent nearly all of the electronic documents to the phones of Wa Lone and Kyaw Soe Oo, primarily through Facebook Messenger. But Facebook Messenger automatically uploads files so long as the phones are connected to the Internet, which was the case here even after they were arrested on 12 December, and Officer Aung Kyaw San had no proof that Wa Lone or Kyaw Soe Oo did so. Finally, one or more officers must have tampered with at least Wa Lone’s phone after taking it from him; Officer Aung Kyaw San could not explain who sent a WhatsApp message from Wa Lone’s phone after Wa Lone’s arrest, or why files documenting Wa Lone and Kyaw Soe Oo’s arrest were also on Wa Lone’s phone – which Wa Lone could not have possibly uploaded. Testimony of Aung Kyaw San (PW 20).

For all of these reasons, the testimony and records offered by the prosecution’s scientific expert do not provide this Court with any evidence that either Wa Lone or Kyaw Soe Oo violated the Official Secrets Act or any other Myanmar law.

Conclusion

The Official Secrets Act requires the prosecution to present this Court with credible evidence for each and every of the four elements of the offence contemplated by Section 3(1)(c). *See U Kyaw Shin and One v. The Union of Burma*, 1974 Burma Law Reports (CC) p. 16 (declining to charge the accused because the prosecution failed to provide sufficient evidence of guilt and therefore did not satisfy the required *prima facie* evidentiary showing); *U Ba Sein v. Union of Burma* (Rawsheik Ahmad), 1977 Burma Law Reports (CC) p. 12 (although charging does not amount to conviction, the accused should not be charged without *prima facie* evidence); *see also Maung Kyee Maung v. The Union of Burma*, 1968 Burma Law Reports (SCCAC) p. 16 (it is wrong to shift the burden and assume that the prosecution’s duty is complete after filing a complaint or that it is the duty of the accused to explain that he is innocent. The burden of proof always lies on the prosecution); *Sein Hla v. The*

Union of Burma, 1951 Burma Law Reports (HC) p. 289 (the burden of proving the guilt of the accused beyond all reasonable doubt remains throughout the trial with the prosecution).

Here, there is no evidence, of any kind, on any one of the four crucial showings. There are four separate and distinct reasons for dismissing this case, and any one of them, standing alone, necessitates dismissal. At the same time, there is credible evidence of a set-up. The inescapable conclusion is that journalists Wa Lone and Kyaw Soe Oo were the victims of an orchestrated scheme by police to trap them and silence truthful reporting. Their six-month imprisonment is an ongoing miscarriage of justice that violates Myanmar's stated commitment to the rule of law.

Applying Section 253(1) of the Myanmar Code of Criminal Procedure, no case against Wa Lone or Kyaw Soe has been made out which, if unrequited, would warrant either of their convictions. Accordingly, they must be discharged.

U Than Zaw Aung and U Khin Mg Zaw
Counsel for the journalists

Insein Township, Yangon Northern District

2 July 2018