

Examination of Witnesses in Criminal Case Trials during the Covid-19 Pandemic in Progressive Legal Perspective

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Abstract. Law is continuously changing, including in terms of the criminal justice system. In this case, the examination of witnesses in court must also adjust to the actual health conditions, mainly related to the Covid-19 pandemic. This article proposes to find out the judge's obligation to present the witness Mardani Maming while there are juridical reasons for allowing a witness to give testimonies virtually. In this context, the legal status of the summons has been signed by the panel of judges at the Banjarmasin Anti-Corruption Court. At the previous trial, there was an agreement that witnesses could provide information online. Based on the analysis, it is known that the judge does not have a firm basis for delivering a forced summons to Mardani Maming to attend the trial since, according to the provisions of the Regulation of the Supreme Court No. 4 of 2020, trials can be conducted virtually. Therefore, sending a summons to Mardani Maming puts law enforcement ahead of humanity; this action is contrary to progressive law.

Keywords: Examination of Witnesses, Criminal Case, Covid-19 Pandemic, Progressive Law

1 Introduction

Change is a necessity. The world is flux, says Heraclitus (5 BC), flowing endlessly. Another greatly popular sentence is: "One cannot enter the same river twice". That is change, and change is eternity itself [1]. As historical actors, we have witnessed how human civilization has experienced ups and downs; adversity and resurrection always come and go. The legal world has also changed, ranging from paradigms to technical issues in judicial practice.

In Indonesia, the examination of the parties has been carried out offline for decades. On the other hand, the world is experiencing changes that require new orders so that various lines can survive within certain limitations [2]. One of these aspects is law, especially regarding the judicial practice process.

The need for new orders is getting more urgent due to the Covid-19 pandemic. In this case, the law must have a progressive character in terms of rules and enforcement. Progressive law is present, not merely desiring to violate the existing legal authorities. Instead, it tries to use the current legal rules to realize justice. It does not only target procedural fairness but prioritizes substantive justice.

When progressive law is faced with certain legal facts, the issue of justice will be prioritized compared to legal certainty. This situation happens when legal certainty is not able

to bring justice. In this case, Gustav Radbruch stated, “where statutory law is incompatible with justice requirements, statutory law must be disregarded by a judge”[3].

Numerous cases can be used as progressive legal studies, one of which is a forced summons to appear in court. Mardani Maming, a Regent of Tanah Bumbu for the 2010-2015 period, experienced this case. He was forcibly summoned for questioning with the position mentioned.

In principle, the judge of the Banjarmasin Anti-Corruption Court would like to clarify the issuance of the Decree of the Tanah Bumbu Regent No. 296 of 2011 on the Approval of the Delegation of the Production Operation Mining Business Permit of Bangun Karya Pratama Lestari Ltd. No. 545/103/IUP-OP/D.PE/2010 to Prolindo Cipta Archipelago Ltd. The questions are: should the judge present the witness Mardani Maming, while there are juridical reasons allowing him to testify virtually? Then, what is the legal status of the summons that has been signed by the Panel of Judges at the Banjarmasin Anti-Corruption Court, while at the previous trial, there was an agreement that witnesses could provide information online?

2 Discussion

In the Banjarmasin Anti-Corruption Court trial involving Mardani Maming as a witness, there were three other (virtual) witnesses, namely Lena Komala, Miranti, and an expert Silhon Junior. The two fact witnesses, who were physically present at the court, were Muhammad Suhairin and Artika. In this case, the defendant’s lawyer objected if Mardani Maming was only present virtually and asked the judge to physically invite him as the fact witness. This was the request of a member of the attorney for the defendant Dwidjono to the panel of judges during the trial at the Banjarmasin Corruption Court (Monday night, 18 April 2022).

Chief of the Panel of Judges, Yusriansyah, responded to the objections of the defendant’s attorney. Yusriansyah then asked Mardani about the witness’s actual address. Here is the dialogue:

“Mardani, where is your recent location actually?” (Yusriansyah)

According to the examination file read by Yusriansyah, Mardani’s address is in Batulicin District, Tanah Bumbu Regency, South Kalimantan Province.

“I am in Singapore right now.” (Mardani)

“When will you go home? Mardani, you are in a direct correlation with this case.” (Yusriansyah)

“Two or three more days.” (Mardani).

Members of the public prosecutor indeed offered the option for the examination of witness Mardani Maming to continue, albeit virtually. However, after three judges deliberated for a while, Yusriansyah issued a forced summons on Mardani Maming. The panel of judges eventually signed the summons at the Banjarmasin Anti-Corruption Court.

The judges reasoned that they had the right to forcefully summon Mardani to attend as other witnesses were sworn in and attended the trial. The judge wants to find evidence of whether the witness is related. Mardani’s physical presence is needed for the sake of this case. In the end, through a summons, Judge Yusriansyah ordered the Batulicin District Attorney to

summon Mardani H Maming forcibly to appear at the Banjarmasin Anti-Corruption Court on Monday, 25 April 2022.

Basically, judges do have the authority to determine the presence of certain witnesses. It is legitimate to force a witness to be presented by means of a summons. However, other things must be considered, namely humanitarian considerations and witness objections. In this context, virtual presence already has a legal basis. Covid-19 has also made virtual attendance commonplace, including in court proceedings.

Sociologically, virtual justice (teleconference) is a progressive step amid a pandemic. This is because health is a crucial consideration. Other aspects, such as time and cost constraints, add to the legitimacy of the virtual presence position.

The use of the teleconference system as a solution or alternative in a series of trials has indeed been going on for quite a long time [4]. The sophisticated development of the internet can also be used as a medium for conducting a trial. This way, the trial can continue without delay even though it is still in a state of emergency due to Covid-19

Even in the Covid-19 pandemic, services to the public seeking court justice, including in criminal cases, must still be carried out properly. These demands require case administration services and court proceedings to be more effective and efficient, especially online. Therefore, examining witnesses using a teleconference (electronic trial) is a progressive step to bring justice and the truth to the people without reducing the meaning of a testimony [5].

Provisions regarding teleconferences are not regulated in the Indonesian Criminal Procedure Code (KUHAP). Article 184 paragraph (1) of the code states five types of evidence: witness statements, expert statements, letters, instructions, and statements of the defendant. Basically, the evidentiary system adopted by Indonesia is a system of evidence negatively relying on the law. This situation means that the results and strength of evidence are based on the evidence referred to in the law. This way, the judge can gain confidence that the defendant indeed committed the crime.

Meanwhile, in Article 160 paragraph (1) letter a, the Indonesian Criminal Procedure Code states that “witnesses are summoned into the courtroom one by one in the order deemed best by the head judge of the trial after hearing the opinion of the public prosecutor, defendant, or legal adviser”. Meanwhile, Article 167 paragraph (1) states that “after the witness gives testimony, he remains present at the trial unless the judge permits him to leave the trial”.

Based on the two articles mentioned, a witness must be physically present at the trial. However, the enforcement of material truth, which leads to justice, has been slightly abandoned. It can be seen in the Decision of the Supreme Court of the Republic of Indonesia No. 661K/Pid/1988 dated 19 July 1991, elaborating the testimony of the witness given during the investigation. When the witness has to give his testimony, he must have already taken an oath. However, when he is unable to appear at the trial due to a legal obstacle, his statement will be read out. The value of his account is similar to the testimony of a witness sworn in at trial.

Based on this context, it appears that the practice of the judiciary has made a breakthrough regarding the physical presence of witnesses in court, which can sometimes be ruled out. In the online trial process, the presence of witnesses and defendants remains under surveillance. Cross-checks between legal advisors, public prosecutors, and judges are carried out properly. Stakeholders verify that personnel replacement, either by means of live deepfakes or other technologies, can be avoided.

Referring to Article 1 No. 12 of the Regulation of the Supreme Court No. 4 of 2020 on the Administration and Trial of Criminal Cases in Courts Electronically, an electronic trial is a series of processes of examining and adjudicating, deciding cases by the court which is carried

out with the support of information and communication, audio-visual technology, and other electronic means.

The Regulation of the Supreme Court, which was signed by the Chairman of the Supreme Court M. Syarifuddin, on 25 September 2020, was compiled by the Working Group based on the KMA Decree No. 108/KMA/IV/2020 on the Administrative Working Group and the Trial of Criminal Cases in Courts Electronically. This online criminal trial regulation is a follow-up to the Memorandum of Understanding between the Supreme Court, the Attorney General's Office, the Police, the Directorate General of Corrections at the Ministry of Law, and Human Rights regarding the Implementation of Trials Through Teleconference in the Context of Preventing Covid-19 (13 April 2020).

In terms of the examination of witnesses and experts, compliant with Article 10 of this Regulation, every witness, expert, and the translator must take an oath/promise in advance according to their religion and belief guided by the judge/assessment of judges. If both give statements from the prosecutor's office or other places, the swearing-in process is directed by a judging panel with the assistance of a clergyman in those places.

Oaths/promises and procedures for swearing in are carried out under the applicable procedural law. The procedure for examining witnesses and/or experts is compliant with the procedural law's provisions. Examination of witnesses and/or experts is done in the courtroom even though the trial is conducted online. However, by Article 11 paragraph 3, online witness examination can be performed outside the courtroom.

Based on the consideration of progressive legal steps and The Regulation of the Supreme Court No. 4 of 2020, it can be concluded that witnesses of criminal cases residing abroad can be examined online. In this case, Mardani Maming—who was in Singapore—can be checked through communication media such as teleconference. The most important thing is that witnesses testify under oath. It is the judge who swears.

The question then: should there be a clergy who lifts the holy book and accompanies the witness? As a breakthrough, the clergy could be in the courtroom. The testimony (oath) of the witness is the most important, not the clergy. This situation will not reduce the validity and nature of the oath of a witness to tell the truth.

Theoretically, the defendant, the complainant, or other interested parties can submit a request for the examination of the witnesses to be conducted online to the Panel of Judges who examine and hear the case. Therefore, it can be considered and agreed upon by the parties and set the time. This process is substantial so that witnesses residing abroad can adjust the time of the trial, considering the time difference in certain regions and Indonesia. That way, the trial process/witness examination can run accordingly [6].

It should also be noted that there is no significant difference in the results and the validity of the witness statements—in terms of their physical and virtual presents. The only difference is the support of information and communication technology platforms and other electronic means. This is under the provisions of Article 1 of The Regulation of the Supreme Court 4/2020, which emphasizes that the strength of evidence between face-to-face (physical) and virtual (online) witness examinations is just the same.

In this case, according to the widely-published news, several parties urged the judge not to hesitate to issue a forced summon on the General Treasurer of PBNU Mardani H Maming to attend the trial of the bribery case for the mining business permit at the Banjarmasin Anti-Corruption Court. This summon is encouraged because Mardani H Maming had neglected his legal obligations by being absent three times as a witness, which considerably means a bad signal for law enforcement in the country, especially from the perspective of the Attorney General's Office (AGO).

Our questions then: what does it mean to be present? Does it have to be physically present, or can it be done virtually? If referring to the Regulation of the Supreme Court No. 4 of 2020, the meaning of “present” can also be interpreted as being present virtually or online—as was done by Mardani Maming at the trial on 18 April 2022.

Therefore, the insistence of many parties does not have a strong legal basis, especially if the witness has objections or because there are obstacles that can be legally accounted for. These obstacles include the witness abroad, health problems, or the witness carrying out activities in the state’s interest.

In accordance with the provisions, evidence related to examinations outside the presence of witnesses has also been regulated in Article 162 of the Criminal Procedure Code. Paragraph 1: if a witness is not present for a valid reason, then the information made at the time of the investigation can be read out. The legitimate reasons in question include legal obstacles, distant residence, or other reasons related to the state’s interests.

Based on information in the mass media, the absence of the witness (Mardani Maming) was due to illness or health reasons or a follow-up examination related to health. In addition, he is also in the middle of an agenda that is categorized as a state interest.

During the trial on 18 April 2022, information says that the presence of the witness in the virtual trial was at the same time the witness was undergoing treatment in Singapore (abroad). Therefore, physical absence (face to face) is perfectly legal and recognized by law. His position is getting stronger when viewed from the human side. His absence is not worthy of being called an “intentional absent”, let alone being summoned forcibly and even threatened with proper qualification for failing to fulfill obligations with a criminal threat under Article 224 of the Criminal Code. This article contains a maximum prison sentence of nine months—for criminal cases. Meanwhile, the article mentions a maximum prison sentence of six months in other cases.

From the perspective of progressive law, this kind of treatment cannot be justified. The law is for humans; it is not humans for the law. The law’s implementation must remain oriented towards human dignity, not for the sake of regulation. Law enforcement must not ignore the human aspect that can be legally accounted for.

The judge must act progressively when examining each case, especially toward a witness. Witness testimony is needed as evidence for consideration in deciding a case. The judge even has to pay attention to the rights of the accused.

In this context, a summons will harm the psychology of a witness. If there is a valid reason, it is better for the Chief of the Panel of Judges, Yusriansyah, not to force him and ask Mardani Maming to be physically present at the next trial. In fact, if someone is absent again because he is sick, the judge should ask the doctor who examines or provides a sick certificate also to be summoned. This action is more humane and in itself more progressive. Article 5 paragraph 1 of Law No. 48 of 2009 states that judges and constitutional judges must explore, understand, and follow legal values and a sense of justice in society. Every judge’s decision also follows typical instructions: “For the sake of Justice Based on the One Godhead”. For this reason, it is inappropriate for the judge to position himself as the mouthpiece of the Act (*la bouche de la loi*). Instead, judges must be champions of truth and justice to:

- 1) Not confined to conventional methods that do not favor truth and justice;
- 2) Use a deeper interpretation in understanding a regulation, for example, on the words *intentional absent* and *present*;
- 3) Enforcing the law does not only use logic but must also involve a sense of compassion.

The principle of “*fiat justitia ruat caelum*” should not make judges rely only on the regulations’ sounds by ignoring the human side [7]. The court will not lose its legitimacy and

dignity just because it tolerates the online presence of Mardani Maming as a witness in the trial of this corruption case. Moreover, there are reasons that can be justified legally.

3 Conclusion

If reasons for the absence of witness Mardani Maming can be recognized valid according to law, then there is no reason for the judge to issue a Forced Summons to be physically present at the trial. The Regulation of the Supreme Court No. 4 of 2020 states that the presence of witnesses can be done virtually with the guarantee that the process and results will not be different from offline examinations. Therefore, no reason can be legally justified if the judge forces the witness Mardani Maming to be physically present. Delivering a Forced Summons implies the judge's tendency towards power instead of humanity. This action does not include the implementation of progressive law as the spirit of The Regulation of the Supreme Court No. 4 of 2020 on the Administration and Trial of Criminal Cases in Courts Electronically.

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