



6 OCTOBER 2015

PRESS SUMMARY

**PUBLIC PROSECUTOR V. AZMI BIN SHAROM
(CRIMINAL REFERENCE NO.: 06-5-12/2014(W))**

JUSTICES: Arifin Zakaria **(CJ)**, Raus Sharif **(PCA)**, Zulkefli Ahmad Makinudin **(CJM)**, Abdull Hamid Embong, Suriyadi Halim Omar **(FCJJ)**.

BACKGROUND FACTS

The defendant (accused in the Sessions Court) was charged in the Kuala Lumpur Criminal Sessions Court for an offence under section 4(1)(b) and alternatively under section 4(1)(c) of the Sedition Act 1948 (the Act). The principal charge proffered against the defendant reads “PERTUDUHAN - Bahawa kamu, pada 15 Ogos 2014 jam lebih kurang 12.30 tengahari di pejabat Jabatan Siasatan Jenayah, Ibu Pejabat Polis Kontijen Kuala Lumpur, Jalan Hang Tuah, Bandaraya Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur, telah menyebut perkataan menghasut seperti ayat-ayat yang bergaris dalam LAMPIRAN A kepada pertuduhan ini; dan oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 4(1)(b) Akta Hasutan 1948 dan boleh dihukum di bawah seksyen 4(1) Akta yang sama.” The alternative charge reads “PERTUDUHAN PILIHAN - Bahawa kamu, pada 15 Ogos 2014 jam lebih kurang 12.30 tengahari di pejabat Jabatan Siasatan Jenayah, Ibu Pejabat Polis Kontijen Kuala Lumpur, Jalan Hang Tuah, Bandaraya Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur, telah menerbitkan perkataan menghasut seperti ayat-ayat yang bergaris dalam LAMPIRAN A kepada pertuduhan ini; dan oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 4(1)(c) Akta Hasutan 1948 dan boleh dihukum di bawah seksyen 4(1) Akta yang sama.” [1]

The charges relate to two seditious statements made by the defendant as reported by the Malay Mail online on 14.8.2014. The statements read: *“You don’t want a repeat of that, where secret meeting took place,... I think what happened in Perak was legally wrong. The best thing to do is do it as legally and transparently as possible.”* [2]

The defendant claimed trial to the charges. Prior to the commencement of the trial, the defendant applied to the Sessions Court to refer the question on the constitutionality of the Act to the High Court. [3]

On 5.11.2014, pursuant to section 84 of the Court of Judicature Act 1948 (the CJA), the High Court by way of a special case referred the following questions to this Court: *“(i) Sama ada Seksyen 4(1) Akta Hasutan 1948 bercanggah dengan Perkara 10(2) Perlembagaan Persekutuan dan dengan itu terbatal menurut Perkara 4(1)*

Perlembagaan Persekutuan; and (ii) Sama ada Akta Hasutan 1948 suatu Akta yang sah dan berkuatkuasa menurut Perlembagaan Persekutuan". [4]

Considering the two questions posed to us, we agree with the plaintiff that it is more appropriate to consider the second question first as it concerns the validity or enforceability of the entire Act. In the event that we answer the second question in the negative then the first question no longer arises. [5]

Second Question

The second question concerns the validity or enforceability of the entire Act against the relevant constitutional provisions. At this juncture, it would be pertinent to briefly consider the origin of the Act. The Act was first enacted as the Sedition Ordinance 1948 (the Ordinance) by the Federal Legislative Council and came into force on 17.7.1948. The Ordinance had effect throughout the Federation of Malaya. The Ordinance sought to consolidate the various existing Sedition Enactments in the Malay States and in the Straits Settlements into a single law. The Ordinance was later revised in 1969 under the Revision of Law Act 1968 and renamed as the Sedition Act 1948 (the Act). It is therefore a pre-Merdeka law. Undeniably, the Act has the effect of restricting the freedom of speech and expression as enshrined in Art.10 (1) (a) of the Constitution. Being a pre-Merdeka law, naturally the Act was not enacted by Parliament as Parliament was only established after Merdeka. [6] – [10]

Premised on the terms "Parliament may by law" and "Parliament may pass law" appearing in Art. 10(2) and Art. 10(4), learned counsel for the defendant contended that only Parliament has the sole authority to make law to restrict freedom of speech and expression and not any other bodies or authorities. This the defendant contended is clear from the plain language of clauses (1), (2) (a) and (4) of Art.10. Further, learned counsel contended that it is for Parliament to consider whether such a law is necessary or expedient on the grounds listed in the said Article. No other body is clothed with that authority. In support, learned counsel referred us to the case of *Dewan Undangan Negeri Kelantan & Anor. V. Nordin bin Salleh & Anor.* (1) [1992] 1 CLJ Rep 72. That is a case concerning freedom of association as provided under Art. 10 (1) (c) of the

Constitution. The relevant facts in that case were as follows. The Kelantan State Constitution by Art. XXXIA provides that a member of the State Legislative Assembly who is a member of a political party, shall cease to be a member of the legislative assembly if he resigns or for any reason ceases to be a member of such political party. The issue in that case was whether such a provision was inconsistent with Art 10 (1) (c) of the Constitution and if so, to that extent invalid by virtue of Art. 4(1) of the Constitution. This Court held, inter alia, that the restriction sought to be imposed by the State Constitution was invalid as the State Constitution, being State law, could not impose such a restriction. [12]

Relying on that case, learned counsel submitted that only Parliament has the exclusive authority to enact law to restrict the rights as enshrined under Art.10 of the Constitution. Since the Act was not enacted by Parliament, therefore, it was not a valid law. In our view, that case may be distinguished from the present case on two grounds. First, as stated in that case the impugned law was a State law and not a Federal law and secondly, it is a post-Merdeka law. Hence, the impugned law in that case clearly runs counter to Art 10 (2) and Art. 10 (4) of the Constitution, accordingly it is void under Art. 4(1). [14] – [15]

Having said that, the Act in the present case is a pre-Merdeka law, the issue, therefore, is whether it is saved by Art. 162 of the Constitution. “*Existing law*” is defined in Art.160 (2) to mean “...*any law in operation in the Federation or any part thereof immediately before Merdeka Day;*”. The word “*law*” “... *includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof;*”. [16] – [17]

The Act, being a written law which was in operation in the Federation immediately prior to Merdeka Day clearly comes within the meaning of the term “*existing law*” as defined in Art. 160(2). On that premise, learned counsel for the plaintiff submitted that the Act was saved by Art.162 of the Constitution. [18]

What is the purport and intent of Art. 162? When Malaya achieved her independence on 31.8.1957, it is not possible for a new set of legislations to be immediately enacted

by Parliament to replace the “*existing law*”. In the circumstances, it is inevitable that all laws then in operation will have to be continued until they are repealed. This is provided in Art. 162 which is a transitional provision intended to ensure the continuance of all existing laws after Merdeka Day with such modifications as may be made under the said Article and subject to any amendment as may be made by Federal or State law. Under Art.162 (6), the court or tribunal are given further powers to make any necessary modification to any such law to bring it into accord with the Constitution. This was in fact done in the case of *Assa Singh v Mentri Besar, Johore* [1969] 2 MLJ 30. In that case, the applicant was arrested and detained under the Restricted Residence Enactment (Enactment). It was argued in that case that the Enactment has no provision: (i) for informing the person concerned of the grounds of his arrest and detention; (ii) for presenting him before a magistrate or for an enquiry at which the detained person could answer the allegations made against him; (iii) for review and (iv) for limitation of the period of detention. Because of these reasons, it was submitted that the provisions of the Enactment were inconsistent with the provisions of Arts. 5 and 9 of the Constitution. In that case, it was held, *inter alia*, that even though the Enactment did not have provisions similar to those of clauses (3) and (4) of Art. 5 of the Constitution, this does not render it unconstitutional despite such difference. However, it must be applied with such adaptations as may be necessary to bring it into accord with the Constitution. In the circumstances, the court held that the provisions of clauses (3) and (4) of Art. 5 of the Constitution must therefore be read into the provisions of the Restricted Residence Enactment. [19]

Following the above authorities, we agree with the submission of learned counsel for the plaintiff that the term “*Parliament may by law*” as appearing in Art.10 (2) should not be read restrictively but must be read harmoniously with the other provisions of the Constitution such as Art. 162. To say that the Act does not come within the ambit of Art. 10(2) of the Constitution as it was not made by Parliament would give it a highly restrictive and rigid interpretation to the phrase “*Parliament may by law*” as appearing in the said Article. We are of the view that the framers of the Constitution in drafting Art 162 would have in their contemplation the provision of Art. 10(2), and had they indeed intended that the phrase “*the existing laws*” in Art. 162 is not to include the Act they could have done so in no uncertain term. [23] – [24]

On the contrary, we are of the view that the intention of the framers of the Constitution is to provide for the continuance of all existing laws including the Act, subject to any modifications as may be made so as to bring it into accord with the Constitution. The existing law is only rendered void or invalid if it could not be brought into accord with the Constitution. This is to be contrasted with the treatment of post Merdeka Day legislation which by virtue of Art.4 (1) is rendered null and void to the extent of its inconsistency with the Constitution. [25]

What we can gather from the above is that, it is thus the intention of the framers of the Constitution to ensure that the existing law will continue to be valid and enforceable upon the coming into operation of the Constitution on Merdeka Day. It follows therefore that the Act being the “*existing law*” at the material date should continue to be valid and enforceable post-Merdeka Day. For the above reasons, our answer to the second question is in the positive. [27] – [28]

First question

The first question before us is whether s.4 (1) of the Act is consistent with Art.10 (2) (a) of the Constitution. Art. 10 (1) (a) provides for freedom of speech, assembly and association. It is, however, commonly acknowledged that the rights conferred by the said Article are not absolute (see *Public Prosecutor v Ooi Kee Saik & Ors* [1971] 2 MLJ 108; *Madhavan Nair & Anor v. Public Prosecutor* [1975] 2 MLJ 264). This is clear from Art. 10(2) itself which states that the rights conferred by Art. 10(1) (a) (b) and (c) are subject to clauses (2), (3) and (4). What concerns us here is the kind of restriction which may be imposed under Art.10 (1) (a). [29]

By Art. 10 (2), Parliament is given the right to impose such restrictions as it deems necessary or expedient in the interest of the security of the Federation and other grounds enumerated in clause (2)(a). What this means is that Parliament or the legislature is not free to impose any restrictions as they fancy; the restrictions must fall within the parameters set out by clause (2) (a) of Art. 10. [30]

The constitutionality of s.8A(1) of the Printing Presses and Publications Act 1984 came for consideration of the Supreme Court in *Public Prosecutor v. Pung Chen Choon*

[1994] 1 MLJ 566. In that case the Supreme Court laid down some of the tests to be applied in determining whether the impugned law is consistent with Art.10 (2) (a) of the Constitution. The Court held, firstly, that there is a strong presumption of the constitutionality of the impugned law and the burden of proof lies on the party seeking to establish the contrary. And in deciding whether a particular piece of legislation falls within the orbit of permitted restrictions, consideration must be given to the question whether such law is directed at a class of acts too remote in the chain of relation to the subjects enumerated under Art. 10(2) (a). The test as propounded by the Court is that the connection contemplated must be real and proximate, not far-fetched or problematical. [31]

However, since the Court of Appeal's decision in *Dr. Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia* [2007] 1 CLJ 19, the Court had imposed a further restriction on the law touching on the fundamental rights guaranteed by the Constitution by applying the "*reasonable*" and "*proportionality*" tests in determining whether the impugned law is consistent with the Constitution. [32]

In that case, Gopal Sri Ram JCA (as he then was) at pages 28 and 29 stated: "The other aspect to interpreting our Constitution is this. When interpreting the other parts of the Constitution, the court must bear in mind the all pervading provision of art. 8(1). That article guarantees fairness of all forms of State action. See, *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771. It must also bear in mind the principle of substantive proportionality that art. 8(1) imports. See, *Om Kumar v. Union of India* AIR [2000] SC 3689. This doctrine was most recently applied by this Court in the judgment of my learned brother Mohd Ghazali in *Menara Panglobal Sdn Bhd v. Ariokianathan* [2006] 2 CLJ 501. In other words, not only must the legislative or executive response to a state of affairs be objectively fair, it must also be proportionate to the object sought to be achieved. This is sometimes referred to as "the doctrine of rational nexus". See, *Malaysian Bar & Anor v. Government of Malaysia* [1987] 2 MLJ 165. A court is therefore entitled to strike down State action on the ground that it is disproportionate to the object sought to be achieved." The two tests were later affirmed by the Federal Court in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333. [33] – [34]

Learned counsel for the plaintiff urged us to depart from the reasonableness test as propounded by this Court in *Sivarasa Rasiah* on two grounds namely: (i) In *Sivarasa Rasiah*, this Court for some reason did not consider the earlier decision of the Supreme Court in the case of *Pung Chen Choon* where it was specifically held that the “*reasonableness test*” ought not to apply to restrictions imposed pursuant to Art. 10; and (ii) The framers of the Constitution had deliberately omitted the word “*reasonable*” from the final draft of Art. 10(2). This is to be contrasted with Art.19 (2) of the Indian Constitution which stipulates that such law may only impose reasonable restriction. This distinction was expressly acknowledged by the Supreme Court in *Pung Chen Choon*. [35]

Having regard to the legislative history of Art.10(2), it would appear that in the initial draft the “*restriction*” was to be qualified by the word “*reasonable*”, as in the case of Art.19(2) of the Indian Constitution. The word was however omitted from the final draft by the Working Committee, adopting the dissenting opinion of Justice Abdul Hamid of Pakistan, a member of the Reid Commission. For those reasons, we are inclined to agree with the view of the Supreme Court in *Pung Chen Choon*, that it is not for the Court to determine whether the restriction imposed by the legislature pursuant to Art.10(2) is reasonable or otherwise. That, in our opinion, is a matter strictly within the discretion of the legislature and not within the purview of the court. Similarly, we are of the view that the reasoning in *Ooi Ah Phua v Officer in Charge Criminal Investigation Kedah/Perlis* [1975] 2 MLJ 198 does not justify the insertion of the word “*reasonable*” before the word “*restriction*” in Art. 10(2). In *Ooi Ah Phua*, the Federal Court was concerned with the interpretation of Art. 5(3), which reads: “*Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice*” [36] – [37]

Suffian LP construed that provision in the following words: “With respect I agree that the right of an arrested person to consult his lawyer begins from the moment of arrest, but I am of the opinion that that right cannot be exercised immediately after arrest. A balance has to be struck between the right of the arrested person to consult his lawyer on the one hand and on the other the duty of the police to protect the public from wrongdoers by apprehending them and collecting whatever evidence exists against

them. The interest of justice is as important as the interest of arrested persons and it is well-known that criminal elements are deterred most of all by the certainty of detection, arrest and punishment.” [38]

The learned Judge in Dr Mohd Nasir Hashim relying on the above statement by Suffian LP opined that:“So, although the Constitution did not have any words postponing the right to counsel, the Federal Court read those words into the article. So too here. We can read the word “reasonable” before the word “restriction” in art. 10(2)(c).” [39]

With respect, the reasoning of the learned Judge cited in Dr Mohd Nasir Hashim in our view is flawed since in Ooi Ah Phua the Court was concerned with the interpretation of the words “... as soon as may be...” which relates to the time within which a person arrested is to be allowed to consult his lawyer and the court opined that in the circumstances a balance need to be drawn between the interest of the accused and the interest of justice. Therefore the words “... as soon as may be...” cannot be construed to mean “immediately” upon arrest. That interpretation arose from the special wordings of Art. 5(3). It is, in our view, fallacious to use the reasoning in Ooi Ah Phua as warranting us to insert the word “reasonable” before the word “restriction” in Art. 10(2). That would be rewriting the provisions of Art.10 (2). For those reasons we depart from the view of the Court of Appeal in Dr Mohd Nasir Hashim as affirmed by this Court in Sivarasa Rasiah. [40]

The proportionality test

This Court in Sivarasa Rasiah also alluded to the proportionality test in determining whether a given law is consistent with the Constitution. This test emanates from the equality clause housed in Art. 8 (1). The learned Judge in Sivarasa Rasiah considered the statement of Gubbay CJ in Nyambirai v National Social Security Authority [1996] 1 LRC 64, the leading authority on the matter, which was approved by the Privy Council in Elloy de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing & Ors [1998] UKPC 30. [41]

The proportionality principle/test was explained by the Court of Appeal in Dr. Mohd Nasir Hashim in the passage we earlier quoted at para 33. In short, the learned judge

said that the legislation or executive action must not only be objectively fair but must also be proportionate to the object sought to be achieved. [42]

In this regard, we agree with the learned Judge in Sivarasa Rasiah, that the restriction that may be imposed by the legislature under Art. 10 (2) is not without limit. This means to say that the law promulgated under Art.10 (2) must pass the proportionality test in order to be valid. This, in our view is in line with the test laid down in Pung Chen Choon discussed earlier. Having said that, we will now consider whether s.4 (1) of the Act would pass the proportionality test. One thing is clear, this section is directed to any act, word or publication having a “*sedition tendency*” as defined in s.3 (1) paras. (a) to (f) of the Act. This in our view is consistent with Art. 10 (2) (a) and Art. 10(4) of the Constitution, as it cannot be said that the restrictions imposed by s. 4(1) is too remote or not sufficiently connected to the subjects/objects enumerated in Art.10 (2) (a). Furthermore, this is not a total prohibition as it is subject to a number of exceptions as provided in s.3(2) of the Act. As legislated, it is not seditious to show that any Ruler has been misled or mistaken in any of his measures, or to point out errors or defects in any Government or constitution as by law established. Upon close analysis, we agree with the plaintiff’s submission that the restrictions imposed in s.4 (1) fall squarely within the ambit or parameter of Art.10 (2)(a) of the Constitution. [43]

In the result, we hold that s.4 (1) of the Act does not run counter to Art. 10(2) (a) of the Constitution. Accordingly, our answer to the first question is in the negative. With the above findings, we now order that this matter be remitted to the Sessions Court for the proceedings to be continued without any further delay. [44] – [45]

References in square brackets are to paragraphs in the judgment

NOTE:

This summary is merely to assist in understanding the Court’s judgment. The full judgment of the Court is the only authoritative document.