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ABDUL GHANI HAROON

v.

KETUA POLIS NEGARA & ANOTHER APPLICATION (NO 4)

b

HIGH COURT MALAYA, SHAH ALAM
HISHAMUDIN YUNUS J
[CRIMINAL APPLICATION NO: 44-9-2001]
30 MAY 2001

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CONSTITUTIONAL LAW: *Fundamental liberties - Liberty of person - Application for an order to restrain police from re-arresting applicants following their release - Lack of assurance from prosecution that there would be no re-arrest - Heavy presence of police personnel in court grounds - Whether court should make order - Whether empowered to do so - Courts of Judicature Act 1964, s. 25(2) - Federal Constitution, art. 5*

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CONSTITUTIONAL LAW: *Courts - High Court - Jurisdiction - Power to order to restrain police from re-arresting detainees following release - Courts of Judicature Act 1964, s. 25(2) - Federal Constitution, art. 5*

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The applicants who were detained under s. 73(1) of the Internal Security Act 1960 were ordered to be released by the court after the hearing of their *habeas corpus* applications. The present application was their oral application for an order that the police be restrained from re-arresting them within the next 24 hours following their release.

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Held:

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[1] There was no assurance from the Senior Federal Counsel that there would not be any immediate re-arrest of the applicants following their release. Therefore, the court did not rule out the possibility of the immediate re-arrest of the applicants in view of the heavy presence of police personnel around the court at the material time. Should re-arrests immediately occur, that would be a grave injustice. Such an action on the part of the police would make a mockery not only of the court's judgment but also of the whole *habeas corpus* proceeding and of the constitutional guarantees under art. 5 of the Federal Constitution.

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[2] The court had the power to make the order asked for, particular in view of the words "... or any others, for the enforcement of the rights conferred by Part II of the Constitution ..." and the court would have failed in its duty to uphold the law and the Constitution if it were to decline to grant the order asked for. If the court were not to grant the order asked for, it

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would nevertheless be a contempt of court on the part of the police to re-arrest the applicants based on the reasons for the original arrest, which arrest and detention the court had earlier ruled was unlawful and *mala fide*. a

[Application allowed.] b

Case(s) referred to:

Abdul Ghani Haroon v. Ketua Polis Negara And Another Application (No 3) [2001] 2 CLJ 709 (refd)

Legislation referred to:

Courts of Judicature Act 1964, s. 25(2) c

Federal Constitution, arts. 2(2), 5

Government Proceedings Act 1956, s. 29

Human Rights Commission of Malaysia Act 1999, s. 4(2)(d)

Internal Security Act 1960, s. 73(1)

For the applicants - R Sivarasa (Malik Imtiaz Sarwar, Kamarul Hisham, Kandasamy Palaniandy, M Moganambal, Saiful Izham, Hamidzun Khairuddin); M/s Selvam Shanmugam & Partners d

For the respondent - Abdul Wahab Mohd SFC (Abdul Rashid Sudin SFC)

Reported by Usha Thiagarajah e

JUDGMENT

Hishamudin Yunus J:

(On the oral application by the applicants at 3.30pm for an order that the police be restrained from rearresting the applicants within a period of at least 24 hours with effect from 4pm 30 May 2001) f

Encik Abdul Ghani bin Haroon and Encik Gobalakrishnan a/l Nagappan are members of the political party, Parti Keadilan Nasional. They had been separately arrested under s. 73(1) of the Internal Security Act 1960. Encik Gobalakrishnan was arrested on 10 April 2001 at Kuah Police Station, Langkawi, whilst Encik Abdul Ghani was arrested on 11 April 2001 at Kuching International Airport. g

The families, on behalf of the two detainees, have separately applied to this court for a writ of *habeas corpus*, through Criminal Application 44-9-2001 and Criminal Application 44-10-2001. By consent, these two applications have been consolidated and are being heard together. h

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- a* The common respondent in the applications is the Inspector General of Police. From the day of arrest right until the last day of the hearing of this application (Tuesday 22 May 2001) the family members and the lawyers engaged by their respective families have been denied access by the police department; and so
- b* is the Human Rights Commission (SUHAKAM), notwithstanding the clear provisions of the Human Rights Commission of Malaysia Act 1999, in particular, s. 4(2)(d). On 30 May 2001 I delivered my judgment. The full written judgment (it has now been reported as *Abdul Ghani Haroon v. Ketua Polis Negara and Another Application (No. 3)* [2001] 2 CLJ 709) was read in open court around 11
- c* o'clock in the morning. I granted the applications of the applicants for a writ of *habeas corpus* to be issued. In accordance with the provision of cl. 2 of art. 2 of the Constitution, I ordered that both the applicants be produced before me at 3.30pm on the same day for a formal order that they be released. At
- d* 3.30pm when the applicants were produced before the court, upon the application of the learned counsel for the applicants, Encik Malik Intiaz, and after hearing arguments from both sides, apart from formally ordering their release, I also made a further order that the police be restrained from rearresting the applicants within the next 24 hours.
- e* As pointed out by Encik Malik – and this was not rebutted by Encik Abdul Rasid Sudin, Senior Federal Counsel – and based on my own personal observation, there was tremendous police presence around the court premises that afternoon. Encik Malik submitted that the applicants feared that they would immediately be rearrested once they leave the courtroom. Learned counsel
- f* urged me to exercise my inherent powers – which I take to mean s. 25(2) of the Courts of Judicature Act 1964 read with para. 1 of the Schedule of the same Act – to make a further order that the police be restrained from rearresting the applicants at least for a period of 24 hours. The purpose of the order, argued counsel, is not only to give fruits to my judgment earlier
- g* given in the morning but also on humanitarian grounds since the families of the applicants were then still outstation and were on their way from Penang and Kedah to Shah Alam to meet the applicants. The learned Senior Federal Counsel, Encik Abdul Rasid Sudin, contrary to my expectation, did not assure the court that the applicants had nothing to worry
- h* and that what they feared would happen to them would not happen. Instead, Encik Rasid submitted that I had no power to grant the order prayed for citing s. 29 of the Government Proceedings Act 1956.
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Subsection (2) of s. 25 of the Courts of Judicature Act reads:

(2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:

Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

Paragraph 1 of the schedule provides:

1. Prerogative writs

Power to issue to any person or authority directions, orders or writs, including writs of the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.

In my judgment, in view of the absence of the assurance (that there would not be any immediate rearrest) by Senior Federal Counsel, I did not rule out the possibility of immediate rearrest in view of the heavy presence of police personnel. I am of the view that, should rearrest immediately occur, that would have been a grave injustice. For such an action on the part of the police would make a mockery not only of my judgment which I had delivered in the morning but also of the whole *habeas corpus* proceeding and of the constitutional guarantees under art. 5 of the Constitution. I am of the view that I have the power to make the order asked for, particularly in view of the words “or any others, for the enforcement of the rights conferred by Part II of the Constitution ...” and that I would have failed in my duty to uphold the law and the Constitution if I were to decline to grant the order asked for.

Perhaps I should add that it is also my view that even if I were not to grant the order asked for that afternoon, it would, nevertheless, be a contempt of court on the part of the police to rearrest the applicants based on the reasons for the original arrest, which arrest and detention the court earlier in the morning had ruled unlawful and *mala fide*.

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