Menteri Hal Ehwal Dalam Negeri v Raja Petra bin Raja Kamarudin

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NOS 05–130 OF 2008(B) AND 05–143 OF 2008(B)
NIK HASHIM, AUGUSTINE PAUL AND ZULKEFLI FCJJ
9 APRIL 2009

Civil Procedure — Court — Jurisdiction — Federal Court — Courts of Judicature Act 1964 s 78 — Sitting of three judges for hearing — Recusal application — At outset of hearing, judge recused himself — Remaining judges continued hearing — Whether absence of one judge during recusal proceedings fell within 'any other cause' in s 78(1) — Whether recusal was 'in the course of any proceeding' in same section

Civil Procedure — Judge — Application to recuse judge from sitting on panel of appeals — Respondent had been critical of judge in his website — Judge dismissed respondent's previous habeas corpus application — Whether there was 'real danger of bias'

Statutory Interpretation — Construction of statute — Penal statutes — Courts of Judicature Act 1964 s 78 — Judge recused himself during proceedings — Whether temporary absence of judge during proceedings permissible — Whether satisfied requirements of s 78(1)

A three-member panel consisting of Nik Hashim, Augustine Paul and Zulkefli FCJJ, was empanelled by the learned Chief Justice to hear the Federal Court Criminal Appeals No 05–130 of 2008(B) ('the first appeal) and No 05–143 of 2008(B) ('the second appeal') on 11 February 2009 at Putrajaya. The first appeal was the appellant's appeal against the High Court's decision allowing the respondent's application for a writ of habeas corpus for his release on 7 November 2008, whereas the second appeal was the respondent's cross-appeal specifically against the High Court's decision in holding that s 8 of the Internal Security Act 1960 did not contravene the Federal Constitution. When both the appeals were called up for hearing on 11 February 2009, learned counsel for the respondent, applied to recuse Augustine Paul FCJ from hearing the appeals on the ground that the respondent had been critical of the learned judge in his website in 2001 and that there might be a real danger of bias on the part of the learned judge if

he sat on the panel to hear the appeals. It was also contended that as a High Court judge, Justice Augustine Paul had dismissed the respondent's habeas corpus application in 2001 and that the Federal Court had allowed his appeal against the order made. Subsequently, Augustine Paul FCJ recused himself from the recusal proceeding leaving the bench with two remaining judges, Nik Hashim and Zulkefli FCJJ, to continue with the hearing of the application. The respondent argued that the hearing would be unconstitutional as the application could not be heard by the two remaining judges on the ground that s 74 of the Courts of Judicature Act 1964 ('the Act') requires the sitting of three Federal Court judges for a hearing. The issues considered herein were as follows: (i) whether the absence of Augustine Paul FCJ during the recusal proceeding would come within the words 'any other cause' in s 78(1) of the Act; (ii) whether the recusal of Augustine Paul FCJ was 'in the course of any proceeding' as required by the above section; and (iii) with respect to the merits of the recusal application, whether there was a real danger of bias on the part of the learned judge if he sat on the panel to hear the appeals.

Held, dismissing the application:

(1) The absence of a genus is clearly seen in s 78(1) of the Act. The specific reference to only 'illness' does not create a genus to limit the general words of the section to causes of the same kind as illness or have to be something akin to an illness. Thus, the words 'any other cause' are not ejusdem generis with the word 'illness' which preceded it. Therefore, the temporary absence of Augustine Paul FCJ to attend the proceedings for the stated reasons would be permissible under the words 'any other cause' in the section (see para 9).

(2) In this case, the hearing of the proceedings had already commenced when Augustine Paul FCJ recused himself. Thus, the recusal was '*in the course of any proceeding*' and the requirements of s 78(1) of the Act have been satisfied to enable the remaining two judges to continue with the proceedings (see para 11).

(3) It was the respondent who was critical of Augustine Paul FCJ in his website and there was no response by the learned judge against the criticism. The respondent was also never cited for contempt for the criticism. Further, a judge is not precluded from hearing a case against a person when he had in the past heard another case against the person if the facts in the cases are different (see para 13).

[Bahasa Malaysia summary

Sebuah panel dengan tiga orang ahli yang terdiri daripada Nik Hashim,

Augustine Paul dan Zulkefli HHMP, telah dipilih oleh Ketua Hakim yang bijaksana untuk mendengar Rayuan Jenayah Mahkamah Persekutuan No 05–130 Tahun 2008(B) ('rayuan pertama') and No 05–143 Tahun 2008(B) ('rayuan kedua') pada 11 Februari 2009 di Putrajaya. Rayuan pertama merupakan rayuan perayu terhadap keputusan Mahkamah Tinggi yang membenarkan permohonan responden untuk writ habeas corpus untuk dilepaskan pada 7 November 2008, rayuan kedua pula merupakan rayuan balas responden terhadap keputusan Mahkamah Tinggi dalam memutuskan bahawa s 8 Akta Keselamatan Dalam Negeri 1960 tidak melanggar Perlembagaan Persekutuan. Apabila kedua-dua rayuan dipanggil untuk perbicaraan pada 11 Februari 2009, peguam kepada responden memohon agar Augustine Paul FCJ disingkirkan daripada perbicaraan rayuan atas alasan responden telah mengkritik hakim yang bijaksana itu di dalam laman sesawang beliau pada tahun 2001 dan terdapat kemungkinan berlaku berat sebelah bagi pihak hakim sekiranya beliau berada dalam panel untuk mendengar rayuan-rayuan. Ditegaskan bahawa sebagai Hakim Mahkamah Tinggi, Yang Arif Augustine Paul telah menolak permohonan habeas corpus responden pada tahun 2001 dan bahawa Mahkamah Persekutuan telah membenarkan rayuannya terhadap perintah yang dibuat. Selepas itu, Augustine Paul FCJ telah menarik diri daripada prosiding penyingkiran meninggalkan mahkamah dengan dua orang hakim, Nik Hashim dan Zulkefli HHMP untuk meneruskan perbicaraan permohonan itu. Responden mendakwa bahawa perbicaraan tersebut tidak mengikut perlembagaan memandangkan permohonan itu tidak boleh didengar oleh dua orang hakim atas alasan bahawa s 74 Akta Mahkamah Kehakiman 1964 ('Akta') memerlukan tiga orang hakim Mahkamah Persekutuan bersidang. Isu-isu yang dipertimbangkan di sini adalah seperti berikut: (i) sama ada ketiadaan Augustine Paul HMP semasa prosiding penyingkiran termasuk dalam perkataan 'any other cause' dalam s 78(1) Akta; (ii) sama ada penyingkiran Augustine Paul HMP adalah 'in the course of any proceeding' seperti yang diperlukan oleh seksyen di atas; and (iii) mengenai merit permohonan penyingkiran, sama ada terdapat kemungkinan berlaku berat sebelah bagi pihak hakim yang bijaksana sekiranya beliau berada di dalam panel untuk mendengar rayuan-rayuan.

Diputuskan, menolak permohonan:

(1) Ketiadaan genus boleh dirujuk pada s 78(1) Akta. Rujukan yang spesifik kepada hanya 'illness' tidak mewujudkan genus untuk mengehadkan perkataan umum seksyen tersebut kepada sebab-sebab yang sama jenis seperti penyakit atau sesuatu berkaitan dengan penyakit. Oleh itu, perkataan 'illness' bukanlah ejusdem generis yang mendahuluinya. Oleh itu, ketiadaan sementara Augustine Paul HMP

dalam prosiding-prosiding bagi sebab-sebab yang dinyatakan boleh dibenarkan berikutan perkataan 'any other cause' dalam seksyen tersebut (lihat perenggan 9).

(2) Dalam kes ini, perbicaraan prosiding telah bermula apabila Augustine Paul HMP menarik dirinya. Oleh itu, penarikan diri itu adalah 'in the course of any proceeding' dan kehendak s 78(1) Akta telah dipenuhi untuk membolehkan dua orang hakim yang tinggal meneruskan prosiding tersebut (lihat perenggan 11).

(3) Responden yang telah mengkritik Augustine Paul HMP dalam laman sesawangnya dan tiada sebarang jawapan daripada hakim yang bijaksana terhadap kritikan itu. Responden juga tidak pernah dituduh menghina disebabkan kritikan itu. Tambahan pula, seorang hakim tidak dihalang daripada mendengar sesuatu kes terhadap seseorang apabila beliau pada masa lalu pernah mendengar kes lain terhadap orang itu sekiranya fakta di dalam kes-kes itu adalah berlainan (lihat perenggan 13).]

Notes

For cases on application to recuse judge from sitting on panel of appeals, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3748–3752.

For cases on jurisdiction, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2252–2255.

For cases on penal statutes, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1927–1945.

Cases referred to

Dato' Tan Heng Chew v Tan Kim Hor [2006] 2 MLJ 293, FC (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Berkerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1, FC (refd)

Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai Kg Sdn Bhd v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Interveners) [2007] 5 MLJ 501, FC (refd)

Mohamad Ezam Mohd Nor & Ors v Inspector General of Police [2001] 2 MLJ 481, HC (refd)

Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara [2002] 1 MLJ 321, FC (refd)

R v Gough [1993] AC 646, HL (folld)

Legislation referred to

Courts of Judicature Act 1964 ss 74, 74(1), 78, 78(1)
Internal Security Act 1960 s 8

Appeal from: Criminal Application No 44–217 of 2008 (High Court, Shah Alam)

Tun Abdul Majid Tun Hamzah (Senior Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Malik Imtiaz Sarwar (Azhar Azizan Harun, J Chandra, Amarjit Singh, Ashok Kandiah, Sreekant Pillai and Neoh Hor Kee with him) (Matthews Hun Kandiah) for the respondent.

Nik Hashim FCJ (delivering judgment of the court):

[1] A three-member panel consisting of Nik Hashim, Augustine Paul and Zulkefli FCJJ, was empanelled by the learned Chief Justice to hear the Federal Court Criminal Appeals No 05–130 of 2008(B) (the first appeal) and No 05–143 of 2008(B) (the second appeal) on 11 February 2009 at Putrajaya. The first appeal is the appellant's appeal against the High Court's decision allowing the respondent's application for a writ of habeas corpus for his release on 7 November 2008 whereas the second appeal is the respondent's cross-appeal specifically against the High Court's decision in holding that s 8 of the Internal Security Act 1960 did not contravene the Federal Constitution.

[2] When both the appeals were called up for hearing on 11 February 2009, learned counsel for the respondent, Encik Malik Imtiaz Sarwar applied to recuse my learned brother Augustine Paul FCJ from hearing the appeals on the grounds that the respondent had been critical of the learned judge in his website in 2001 and that there might be a real danger of bias on the part of the learned judge if he sat on the panel to hear the appeals. He also said that as a High Court judge, Justice Augustine Paul had dismissed the respondent's habeas corpus application in 2001 and that the Federal Court had allowed his appeal against the order made. Learned counsel then applied for a short adjournment of the hearing to enable him to submit a formal application and to file documents in support of the application.

[3] The learned senior deputy public prosecutor, Tun Abd Majid, objected to the application for the adjournment and argued that the question of bias did not arise in this case and urged the court to dismiss the recusal application.

[4] Having heard the parties, we at first dismissed the application for the adjournment, but upon reconsideration while still on the bench, we allowed the application for time for learned counsel for the respondent to file a formal application by the next day ie 12 February 2009 and we set Monday 17 February 2009 at 9.30am as the date and time for the continuation of the hearing of the recusal application. The application could not be set down for continued hearing on the 12 and 13 February 2009 (Thursday and Friday

respectively) as on those two dates the presiding judge Nik Hashim FCJ had to be in Kota Kinabalu together with the learned President of the Court of Appeal and the learned Chief Judge of Malaya to hear two election petition appeals No 01(F)–19 of 2008 and No 01(F)–20 of 2008.

[5] The respondent's formal application which was filed was marked as encl 17(a). At the outset of the continued hearing on 17 February 2009, my learned brother Augustine Paul FCJ informed the court that he wished to recuse himself from the recusal proceeding as he considered that the nature of the application would not make his presence on the bench appropriate and his absence on the bench would be in line with the principle that justice must not only be done but also must be seen to be done. With the agreement of my learned brother Zulkefli FCJ, I then allowed my learned brother Augustine Paul FCJ to leave the bench leaving the two of us to continue with the hearing of the application.

[6] Then, learned counsel for the respondent contended that the hearing would be unconstitutional as the application could not be heard by the two remaining judges on the ground that s 74 of the Courts of Judicature Act 1964 ('the Act') requires the sitting of three Federal Court judges for a hearing. The section states:

> (1) *Subject as hereinafter provided*, every proceeding in the Federal Court shall be heard and disposed of by three Judges or such greater uneven number of Judges as the Chief Justice may in any particular case determine.
>
> (Emphasis added.)

[7] We dismissed learned counsel's contention and held that we were constitutionally empowered to continue hearing the recusal application by virtue of s 78 of the Act which provides:

> Continuation of proceedings notwithstanding absence of judge
>
> 78(1)If, *in the course of any proceeding*, or, in the case of a reserved judgment, at any time before delivery of the judgment, *any Judge of the Court hearing the proceeding is unable, through illness or any other cause, to attend the proceeding* or otherwise exercise his functions as a Judge of that Court, *the hearing of the proceeding shall continue* before, *and judgment* or reserved judgment, as the case may be, *shall be given by, the remaining Judges of the Court, not being less than two*, and the Court shall, for the purposes of the proceeding, be deemed to be duly constituted notwithstanding the absence or inability to act of the Judge as aforesaid.

(2) In any such case as it mentioned in subsection (1) the proceeding shall be determined in accordance with the opinion of the majority of the remaining Judges of the court, and, if there is no majority the proceeding shall be re-heard.

(Emphasis added.)

[8] Certain aspects of the section require to be considered. Firstly, the scope of the words '*illness or any other cause*' in s 78(1) of the Act needs to be considered to determine whether the absence of my learned brother Augustine Paul FCJ during the recusal proceeding would come within the words 'any other cause' in the section bearing in mind the principle of ejusdem generis. In this regard, reference may be made to *Statutory Interpretation In Australia*, by DC Pearce, (4th Ed 1996) where it says at pp 101–102 para 4.18:

.... the imposition of a limitation on the scope of a general expression by the application of the ejusdem generis principle presupposes the identification of a like group of matters. *If no genus is established, the rule cannot be applied*. In *R v Regos and Morgan* (1947) 74 CLR 613 Latham CJ at p 624 said that the specific things enumerated must 'possess some common and dominant feature'. An example of this approach is provided by *Stewart v Lizars* (1965) VR 210. There is a definition of 'litter', as meaning 'bottles, tins, cartons, packages, paper, glass, food or other refuse or rubbish' was held not to attract the *ejusdem generis* principle because no single relevant genus could be spelled out of the items specifically mentioned. Hence motor car sump oil could fall within the definition.

The absence of a genus is seen in acute form where only one word appears before the general expression. In *Allen v Emmersion* [1944] KB 362 the court had to consider the scope of the expression '*theatre or other place of public entertainment*'. *It held that the specific reference to 'theatre' did not limit the general words to places of the same genus as theatres*. A number of Australian decisions have adopted a like approach in regard to the scope of the words '*building or other place*'. *The 'place' does not have to be something akin to a building*: *Lake Macquarie Shire Council v Ades* [1977] 1 NSWLR 126; *Plummer v Needham* (1954) 56 WALR 1. Compare *Bond v Foran* (1934) 52 CLJ 364 where Dixon J at p 376, in considering the expression 'house, office, room, or other place' held that 'place' must be something *ejusdem generis* with the words which preceded it. There a genus was created and limited the general expression.

(Emphasis added.)

[9] The absence of a genus is clearly seen in s 78(1) of the Act. The specific reference to only 'illness' does not create a genus to limit the general words of the section to causes of the same kind as illness or have to be something akin to an illness. Thus, the words 'any other cause' are not ejusdem generis with the word 'illness' which preceded it. Therefore, the temporary absence

of my learned brother Augustine Paul FCJ to attend the proceeding for the stated reasons would be permissible under the words 'any other cause' in the section.

[10] Secondly, what must be considered is whether the recusal of my learned brother Augustine Paul FCJ was '... in the course of any proceeding ...' as required by the section. The words refer to a proceeding which has already commenced.

[11] In this case the hearing of the proceeding had already commenced when my learned brother Augustine Paul FCJ recused himself. It had been fixed for continued hearing. Prior to that he had participated in the proceeding. He took part in the decision made on 11 February 2009 to allow the adjournment to enable the respondent to file a written application for his recusal on 12 February 2009. That decision was the exercise of a discretionary power agreed to by all three of us. It need not necessarily find favour with another judge if appointed to take the place of my learned brother Augustine Paul FCJ. The requirements of s 78(1) of the Act have therefore been satisfied to enable the remaining two judges to continue with the proceeding.

[12] It is true that s 74(1) of the Act provides that every proceeding in the Federal Court shall be heard and disposed of by three judges or such greater uneven number of judges as the Chief Justice may in any particular case determine, but by its term, the section is a general provision which is subject to other provisions under Part IV of the Act that includes s 78. Thus, for the purposes of the recusal proceeding, the court, consisting of the remaining two judges: Nik Hashim and Zulkefli FCJJ, was duly constituted notwithstanding the absence of my learned brother Augustine Paul FCJ.

[13] It is now necessary to deal with the merits of the recusal application. On the question of judicial bias, the law in this area is settled. The test is premised on the 'real danger of bias' as propounded in *R v Gough* [1993] AC 646 which was approved and applied by the Federal Court in numerous cases such as *Majlis Perbandaran Pulau Pinang v Syarikat Berkerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1; *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321; *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293 and recently in *Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai Kg Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Interveners)* [2007] 5 MLJ 501. In this case, the court was urged to recuse my learned brother Augustine Paul FCJ from being one of the panel members to hear the appeals on the grounds that the respondent had been critical of the learned judge in his website and that there might be a real danger of bias on the part of the learned judge if he sat on the panel to hear

the appeals. Be it noted that it is the respondent who was critical of my learned brother Augustine Paul FCJ in his website in 2001. And there was no response by the learned judge against the criticism. Furthermore, the respondent was never cited for contempt for the criticism. With regard to the objection raised by learned counsel about my learned brother Augustine Paul FCJ having dismissed the previous application for habeas corpus by the respondent, it is our view that a judge is not precluded from hearing a case against a person when he had in the past heard another case against the person if the facts in the cases are different. It must also be observed that in the previous habeas corpus application by the respondent, my learned brother Augustine Paul FCJ did not go into the facts of the case as it was agreed by the parties in that case that the decision in one case that was being heard shall be binding on the respondent's application (see *Mohamad Ezam Mohd Nor & Ors v Inspector General of Police* [2001] 2 MLJ 481). So, how on earth might there be a real danger of bias on the part of my learned brother Augustine Paul FCJ to sit on the panel to hear the appeals? On the facts submitted by learned counsel, we found the grounds of the application far-fetched and ludicrous.

[14] Having said that, we (Nik Hashim and Zuikefli FCJJ) unanimously held that the recusal application was wholly without merit and as such, we dismissed the application. We then invited our learned brother Augustine Paul FCJ to take his rightful place on the bench to hear the other applications by the respondent.

Application dismissed.

Reported by Ashgar Ali Ali Mohamed