Sri Sanjeevan a/l Ramakrishnan v ASP Poonnam E Keling & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(f)-4–02 OF 2024(W)
HARMINDAR SINGH, ABDUL KARIM AND VAZEER ALAM FCJJ
7 APRIL 2025

Tort — False imprisonment — Detention — Police obtained remand order to detain plaintiff for 21 days under Prevention of Crime Act 1959 — Plaintiff successfully applied for writ of habeas corpus releasing him from detention on ground detention warrant issued by magistrate when granting remand order was defective — Plaintiff then sued police and government for damages for false imprisonment — Whether plaintiff's release under habeas corpus writ meant he had an undefendable claim in an action for false imprisonment — Whether law required plaintiff to separately sue for false imprisonment and prove elements of that tort — Whether plaintiff's detention could not constitute false imprisonment if it was authorised by lawful judicial order

Following the appellant's arrest by the first respondent ('R1') under s 3 of the Prevention of Crime Act 1959 ('the POCA'), the magistrate granted R1's application to remand the appellant for 21 days and issued a detention warrant addressed to the police remand centre authorising them to detain the appellant during the remand period. The appellant successfully applied for a writ of habeas corpus to forthwith release him from detention on the ground that the detention warrant was defective in various respects. The appellant thereafter filed an action for false imprisonment against the respondents seeking a declaration that his 16 day remand was unlawful and in violation of his rights under art 5 of the Federal Constitution as well as general, aggravated and exemplary damages. The High Court allowed the appellant's claim, inter alia, on the ground that: (a) the habeas corpus application was allowed on the ground, inter alia, that the detention was unlawful; (b) the court was bound to follow the Federal Court's decision in *Nivesh Nair a/l Mohan v Dato' Abdul Razak bin Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors* [2021] 5 MLJ 320 ('Nivesh Nair') which held that s 4 of the POCA was unconstitutional; (c) the respondents' withdrawal of their appeal against the granting of the habeas corpus application was an admission of the unlawfulness of the appellant's detention; (d) the appellant was physically abused during his detention; and (e) the appellant's rights under art 5(1) of the Federal Constitution had been infringed. The Court of Appeal ('COA') set aside the High Court's decision holding that: (i) the High Court erred in applying the decision in *Nivesh Nair* retrospectively; (ii) the decision to allow the habeas corpus application was not conclusive evidence that the appellant was falsely

imprisoned; (iii) the High Court failed to appreciate that R1 had valid reasons to seek the appellant's remand; (iv) the appellant's remand was pursuant to the magistrate's remand order and detention warrant and therefore was not a false imprisonment; and (v) the appellant's claim that he was physically abused during his detention should not have been considered by the High Court in allowing the claim for false imprisonment. The instant appeal was against the COA's decision.

Held, dismissing the appeal and affirming the COA's decision:

(1) The appellant's detention was based on the magistrate's detention warrant and was not made in the absence of a lawful judicial order or in excess of jurisdiction. The first respondent ('R1') had merely executed the judicial order contained in the detention warrant. The fact that R1 had laid the complaint before the magistrate was irrelevant in a claim for false imprisonment. The application for habeas corpus was allowed on a technicality, ie that the place of detention stated in the detention warrant was not a gazetted place of detention. That mistake could not be attributed to R1 and, hence, neither he nor the other respondents were liable to the appellant for false imprisonment (see para 52).

(2) When dealing with a complaint of unlawful detention, the High Court was required under art 5(2) of the Federal Constitution ('the FC') to inquire into whether or not the detention was lawful. If it was unlawful and the person was released by issuance of a writ of habeas corpus, then by necessary implication it meant that the person's constitutional right to liberty under art 5(1) of the FC had been breached. Whether that breach was actionable in tort, be it in false imprisonment, malicious prosecution or breach of constitutional right had to be determined in accordance with the elements of the specific tort as well as the facts and circumstances of the particular case. To establish a claim for false imprisonment, the claimant had to prove that there was no lawful authority to justify the imprisonment. Once a judicial act interposed, liability for false imprisonment ceased on the part of the person who took proceedings to obtain a judicial order of detention (see paras 37–38, 42 & 50).

(3) Section 365(1)(b) of the Criminal Procedure Code, which governed an application for habeas corpus, did not provide for the High Court to award damages or monetary compensation when granting a writ of habeas corpus. The only order the High Court could make on a successful habeas corpus application under s 365(1)(b) was that the detainee be freed from his detention. Hence, it was necessary for the person so released to file a separate action in tort to claim for damages. The fact that a habeas corpus order was issued did not automatically translate to liability for false imprisonment. The tort of false imprisonment was not one of strict liability that necessarily flowed from an order of habeas

corpus. Here, there were two different processes under the law — habeas corpus under criminal law and the tort of false imprisonment under civil law. Both dealt with the lawfulness of detention, but between both, there were different constituent elements that had to be established and different remedies that might be granted by the court. The success of one did not invariably lead to the success of the other (see paras 39–40, 44 & 46).

[Bahasa Malaysia summary

Selepas penahanan perayu oleh responden pertama ('R1') menurut s 3 Akta Pencegahan Jenayah 1959 ('AKJ'), majistret membenarkan permohonan R1 untuk menahan perayu selama 21 hari dan mengeluarkan waran tahanan yang dialamatkan kepada pusat tahanan reman polis yang memberi kuasa untuk menahan perayu semasa tempoh reman. Perayu berjaya memohon writ habeas corpus untuk membebaskannya dengan segera daripada tahanan atas alasan bahawa waran tahanan itu defektif dalam pelbagai aspek. Perayu selepas itu memfailkan tindakan untuk tort pemenjaraan palsu terhadap responden untuk mendapatkan pengisytiharan bahawa reman 16 harinya adalah menyalahi undang-undang dan melanggar haknya di bawah perkara 5 Perlembagaan Persekutuan dan menuntut ganti rugi am, teruk dan teladan. Mahkamah Tinggi membenarkan tuntutan perayu, antara lain, atas alasan bahawa: (a) permohonan habeas corpus dibenarkan atas alasan, antara lain, bahawa penahanan itu menyalahi undang-undang; (b) mahkamah terikat untuk mengikuti keputusan Mahkamah Persekutuan dalam kes *Nivesh Nair a/l Mohan v Dato' Abdul Razak bin Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors* [2021] 5 MLJ 320 ('Nivesh Nair') yang memutuskan bahawa s 4 APJ adalah tidak berperlembagaan; (c) penarikan balik rayuan responden mengenai keputusan permohonan habeas corpus yang dibenarkan adalah pengakuan bahawa penahanan perayu menyalahi undang-undang; (d) perayu telah didera secara fizikal semasa penahanannya; dan (e) hak perayu di bawah perkara 5(1) Perlembagaan Persekutuan telah dilanggar. Mahkamah Rayuan ('MR') mengenepikan keputusan Mahkamah Tinggi yang memutuskan bahawa: (i) Mahkamah Tinggi terkhilaf dalam menggunakan keputusan dalam kes *Nivesh Nair* secara retrospektif; (ii) keputusan untuk membenarkan permohonan habeas corpus bukanlah bukti konklusif bahawa perayu telah dipenjarakan secara palsu; (iii) Mahkamah Tinggi gagal meneliti keterangan bahawa R1 mempunyai alasan yang sah untuk mendapatkan reman perayu; (iv) reman perayu adalah menurut perintah reman dan waran penahanan oleh majistret dan bukanlah satu pemenjaraan palsu; dan (v) dakwaan perayu bahawa dia didera secara fizikal semasa penahanannya tidak sepatutnya dipertimbangkan oleh Mahkamah Tinggi dalam membenarkan tuntutan untuk pemenjaraan palsu. Rayuan ini adalah untuk keputusan MR.

Diputuskan, menolak rayuan dan mengekalkan keputusan MR:

(1) Penahanan perayu adalah berdasarkan waran tahanan oleh majistret dan tidak dibuat tanpa ketiadaan perintah kehakiman yang sah atau melebihi bidang kuasa. Responden pertama ('R1') hanya melaksanakan perintah kehakiman seperti yang dinyatakan di dalam waran penahanan. Fakta bahawa R1 telah mengemukakan aduan terhadap majistret adalah tidak relevan dalam tuntutan untuk pemenjaraan palsu. Permohonan untuk habeas corpus dibenarkan atas isu teknikal, iaitu tempat penahanan yang dinyatakan dalam waran tahanan bukanlah tempat penahanan yang diwartakan. Kesilapan itu tidak boleh dikaitkan dengan R1. Oleh itu, beliau mahupun responden lain tidak bertanggunggan kepada perayu untuk pemenjaraan palsu (lihat perenggan 52).

(2) Apabila menangani dakwaan penahanan yang menyalahi undang-undang, Mahkamah Tinggi dikehendaki menurut perkara 5(2) Perlembagaan Persekutuan ('PP') untuk menyiasat sama ada penahanan itu sah atau tidak. Sekiranya ianya menyalahi undang-undang dan sesorang itu dibebaskan melalui pengeluaran writ habeas corpus, maka kesannya ialah hak perlembagaan seseorang itu menurut perlembagaan untuk menurut perkara 5(1) PP telah dilanggar. Sama ada pelanggaran itu boleh diambil tindakan menurut tort, pemenjaraan palsu, pendakwaan berniat jahat atau pelanggaran hak perlembagaan perlu ditentukan mengikut unsur-unsur tort tertentu serta menurut fakta dan keadaan kes tertentu. Untuk membuktikan tuntutan pemenjaraan palsu, pihak yang menuntut perlu membuktikan bahawa tiada kuasa yang sah untuk mewajarkan pemenjaraan itu. Sebaik sahaja tindakan kehakiman dilakukan, tanggungan untuk pemenjaraan palsu berhenti di pihak orang yang memulakan prosiding untuk mendapatkan perintah penahanan secara kehakiman (lihat perenggan 37–38, 42 & 50).

(3) Seksyen 365(1)(b) Kanun Tatacara Jenayah yang berkaitan dengan prosedur permohonan habeas corpus tidak memperuntukkan ganti rugi atau pampasan kewangan oleh Mahkamah Tingggi apabila membenarkan writ habeas corpus. Satu-satunya perintah yang boleh dibuat oleh Mahkamah Tinggi ke atas permohonan habeas corpus yang berjaya di bawah s 365(1)(b) adalah tahanan itu dibebaskan daripada penahanannya. Oleh itu, adalah perlu bagi orang yang dibebaskan untuk memfailkan tindakan berasingan dalam tindakan tort untuk menuntut ganti rugi. Fakta bahawa perintah habeas corpus telah diberikan bukanlah secara automatik menunjukkan liabiliti untuk pemenjaraan palsu. Tort pemenjaraan palsu bukanlah salah satu liabiliti ketat yang dibuktikan melalui perintah habeas corpus. Di sini, terdapat dua proses berbeza menurut undang-undang — habeas corpus di bawah undang-undang jenayah dan tort pemenjaraan palsu di bawah undang-undang sivil. Kedua-duanya berkaitan dengan kesahihan penahanan, tetapi di antara kedua-duanya, terdapat ciri-ciri yang berbeza

yang perlu dibuktikan dan mungkin terdapat remedi yang berbeza yang boleh diberikan oleh mahkamah. Kejayaan di satu prosiding tidak membawa kepada kejayaan prosiding yang lain (lihat perenggan 39–40, 44 & 46).]

Cases referred to

Abdillah bin Labo Khan v PP [2002] 3 MLJ 298, CA (refd)
Aminah bt Ahmad (suing in her personal capacity and on behalf of 56 retired members of the public services) v The Government of Malaysia & Anor [2022] 4 MLJ 74, CA (refd)
Balakrishnan a/l Subramaniam v Penguasa Pusat Pemulihan Akhlak, Simpang Renggam, Johor Darul Takzim & Ors [2014] 10 MLJ 226; [2014] 2 CLJ 563, HC (folld)
Coghlan v Chief Constable of Cheshire Police and others [2018] EWHC 34 (QB), QBD (refd)
Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby (the administrator of the estate and dependent of Kugan a/l Ananthan, deceased) and another appeal [2015] 1 MLJ 353, CA (refd)
Hassan bin Marsom & Ors v Mohd Hady bin Ya'akop [2018] 5 MLJ 141, FC (refd)
Lei Meng v Inspektor Wayandiana bin Abdullah & Ors and other appeals [2022] 3 MLJ 203; [2022] 3 CLJ 177, FC (refd)
Muhamad Mustaqim bin Jidin v Mohd Zulfadhli bin Radzali & Ors [2017] MLJU 862; [2017] 1 LNS 919, HC (refd)
Nivesh Nair a/l Mohan v Dato' Abdul Razak bin Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors [2021] 5 MLJ 320; [2021] 8 CLJ 163, FC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393, FC (refd)
Sazali bin Mat Noh v Timbalan Menteri Dalam Negeri & Ors [1999] 1 MLJ 9, HC (refd)
Shahrudi Abidin v Datuk Wira Abu Seman Yusop Timbalan Menteri Dalam Negeri Kementerian Dalam Negeri Malaysia & Ors [2020] MLJU 2678; [2021] 1 CLJ 52, CA (refd)
Spectrum Plus Ltd, Re; National Westminster Bank plc v Spectrum Plus Ltd and others [2005] UKHL 41, HC (refd)
Sri Sanjeevan a/l Ramakrishnan v ASP Poonnam E Keling & Ors [2022] MLJU 2748, HC (refd)
Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases [2021] 3 MLJ 759, FC (refd)
Zenati v Commissioner of Police of the Metropolis and another [2015] 2 WLR 1563, CA (refd)

Legislation referred to

Criminal Procedure Code ss 117, 365(1)(b), Chapter XXXVI
Federal Constitution art 5, 5(2)
Government Proceedings Act 1956 s 5

Prevention of Crime Act 1959 ss 3, 3(1), 4, 4(1), (1)(a)

Appeal from: *ASP Poonnam E Keling & Ors v Sri Sanjeevan a/l Ramakrishnan* [2023] 6 MLJ 651 (Court of Appeal, Putrajaya)

Malik Imtiaz Sarwar (with Preakas Sampunathan, Satchitanandan Vedha Ratnam, Khoo Suk Chyi and Komal Vijay Sheth) (Preakas & Partners) for the appellant.

Mohammad Al-Saifi Hashim (with Liew Horng Bin and Nur Ezdiani bt Roleb) (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Vazeer Alam FCJ (delivering judgment of the court):

INTRODUCTION

[1] The appellant had commenced an action for false imprisonment against the respondents. The High Court, after full trial, had entered judgment in favour of the appellant. On appeal to the Court of Appeal, that decision was reversed and the judgment set aside. This appeal is in respect of that decision of the Court of Appeal.

[2] The Federal Court had on 20 February 2024 granted leave to the appellant on the following question of law:

> Where an order issuing the writ of Habeas Corpus is made in relation to the remand of a person, is it a necessary implication of such order that the detention was not effected in accordance with law under art 5(2) of the Federal Constitution and was thus unlawful for contravening art 5(1) of the Federal Constitution and amounting to false imprisonment.

BACKGROUND FACTS

The appellant's arrest and detention

[3] On 10 July 2016, the first respondent arrested the appellant under s 3 of the Prevention of Crime Act 1959 ('the POCA').

[4] On 11 July 2016, the first respondent applied for a remand order under s 4(1) of the POCA to the magistrates court. A remand order for a period of 21 days, ie 11–31 July 2016, and a detention warrant dated 11 July 2016 were issued by the magistrates court. The said warrant dated 11 July 2016 states as below:

> Kepada Pegawai yang menjaga Penjara di Police Remand Centre dalam Jalan Ipoh, KL
>
> ...

Bahawasanya Sri Sanjeevan A/L Ramakrishnan K/P 841009–05–5689 (kemudian daripada ini disebut orang yang dituduh) telah dibawa pada hari ini ke hadapan Mahkamah ini dipertuduh melakukan kesalahan s 4(1)(a) APJ dan adalah perlu ditahan orang yang dituduh itu. Ini adalah memberi kuasa dan menghendaki kamu pegawai yang tersebut menerima orang yang dituduh ini ke dalam jagaan kamu bersama waran ini dan mempenjarakannya dengan selamat dalam Penjara sehingga haribulan 31 Jul 2016 apabila kamu akan menyebabkannya supaya dibawa ke hadapan Mahkamah tersebut pada pukul (blank) pagi hari yang tersebut melainkan jika kamu diperintahkan selainnya buat sementara itu.

Writ of habeas corpus

[5] On 15 July 2016, whilst in detention, the appellant filed an application at the High Court for a writ of habeas corpus. The first respondent and second respondent were named as the respondents in the said application.

[6] On 26 July 2015, upon hearing the said application, the High Court in summary found as below:

(a) s 4(1)(a) of the POCA states that a magistrate is to '… remand the person in police custody for a period of twenty one days …'. By using the phrases 'Kepada Pegawai Yang Menjaga Penjara …' and '… dan mempenjarakannya dengan selamat dalam Penjara', the detention warrant dated 11 July 2016 clearly contradicted the wording used in s 4(1)(a) of the POCA;

(b) the detention warrant dated 11 July 2016 was issued to detain the appellant at the 'Police Remand Centre, Jalan Ipoh, KL'. However, the Police Remand Centre, Jalan Ipoh, KL was not a gazette detention centre. The Federal Counsel also failed to prove that the Police Remand Centre, Jalan Ipoh, KL stated in the detention warrant and the gazetted detention centre ie 'Lokap di Pusat Tahanan Polis Mukim Batu, Kuala Lumpur' as per Government Gazette PU(B) 126/16 referred to the same place; and

(c) the detention warrant dated 11 July 2016 stated that the appellant 'dipertuduh melakukan kesalahan s 4(1)(a) APJ dan adalah perlu ditahan orang yang dituduh itu … dan mempenjarakannya …'. However, the appellant was arrested under s 3(1) of the POCA for further investigation and no charges were levied against him. As such, the said warrant was confusing and prejudicial to the appellant.

[7] Based on the grounds above, the High Court was satisfied that the detention of the appellant through the detention warrant dated 11 July 2016 had contradicted the mandatory procedural requirement under s 4(1)(a) of the POCA, which rendered the appellant's detention unlawful and void. The High Court, therefore, allowed the appellant's application, issued a writ of

habeas corpus and ordered that the appellant be immediately released. (para 43 of the GOJ).

[8] The first and second respondents filed an appeal to the Federal Court against the High Court's decision but subsequently withdrew the said appeal.

THE HIGH COURT ACTION FOR TORT OF FALSE IMPRISONMENT

[9] Following the habeas corpus court's decision, the appellant filed an action in the High Court against the respondents. This action is the subject matter of the present appeal.

The appellant's claim — False imprisonment

[10] The appellant's action against the respondents was for damages premised on the tort of false imprisonment for the period of wrongful and/or unlawful detention between 10 July 2016 and 26 July 2016 (16 days). The first respondent was named as the primary tortfeasor and the second and third respondents were alleged to be vicariously liable for the acts of the first respondent. The appellant also pleaded that he was physically abused/assaulted during the detention period.

[11] Hence, the appellant prayed for, inter alia, the following reliefs:

(a) a declaration that the appellant's detention from 10–26 July 2016 by the first respondent was wrong and unlawful;

(b) a declaration that the appellant's right under art 5 of the Federal Constitution was violated by the first respondent;

(c) general damages; and

(d) aggravated and exemplary damages.

Findings of the High Court

[12] The learned High Court judge allowed the plaintiff/appellant's claim for false imprisonment based on the following primary reasons:

(a) the High Court was bound to follow the habeas corpus court's decision, that the impugned magistrate's detention warrant did not comply with the law. Consequently, the entire 16 day remand was unlawful;

(b) the High Court was also bound by the 2022 Federal Court decision in *Nivesh Nair a/l Mohan v Dato' Abdul Razak bin Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors* [2021] 5 MLJ 320; [2021] 8 CLJ 163 which

held that s 4 of the POCA was unconstitutional. As a result, the plaintiff/appellant's remand under the detention warrant was automatically unconstitutional;

(c) since the defendants/respondents withdrew their appeal against the habeas corpus court's decision, this was deemed an admission by the respondents that the entire remand was unlawful. In coming to that decision, the learned High Court judge relied on the dicta in the Court of Appeal case of *Shahrudi Abidin v Datuk Wira Abu Seman Yusop Timbalan Menteri Dalam Negeri Kementerian Dalam Negeri Malaysia & Ors* [2020] MLJU 2678; [2021] 1 CLJ 52, where Harmindar Singh JCA (as he then was) held as follows:

> The respondents, by not appealing against the order made in the habeas corpus proceedings, must be taken to have accepted the findings of the court as correct and valid. In the circumstances, it was not open to the respondents to suggest that the habeas corpus proceedings were irrelevant and could not be accepted as evidence.

(d) the burden of proof rested on the defendants/respondents to demonstrate that the plaintiff/appellant was not physically abused during the 16 day remand and found that the appellant had suffered physical abuse in the course of his detention. as such, the court surmised that this proves the claim of false imprisonment.

[13] The learned High Court judge went on to conclude that as the appellant's detention since his arrest by the first respondent, ie between 10 July 2016 to 26 July 2016, was unlawful, it follows that the appellant's detention during the said period had also contravened the appellant's rights under art 5(1) of the Federal Constitution as the appellant had been unlawfully deprived of his personal liberty.

[14] As to the liability of the second and third defendants/respondents, the learned High Court judge had relied on s 5 of the Government Proceedings Act 1956 and the case of *Muhamad Mustaqim bin Jidin v Mohd Zulfadhli bin Radzali & Ors* [2017] MLJU 862; [2017] 1 LNS 919, and held that the second and third respondents were vicariously liable.

[15] Please see *Sri Sanjeevan a/l Ramakrishnan v ASP Poonnam E Keling & Ors* [2022] MLJU 2748 for the full judgment of the High Court.

APPEAL TO THE COURT OF APPEAL

[16] The respondents lodged an appeal to the Court of Appeal against that decision of the High Court. The Court of Appeal unanimously allowed the

respondents' appeal and set aside the judgment of the High Court on essentially the following grounds.

Retrospectively applying Nivesh Nair's case

[17] The Court of Appeal was of the opinion that by virtue of the doctrine of 'prospective overruling', the High Court should not have relied on the Federal Court's ruling in *Nivesh* invalidating s 4(1) of the POCA, and thus, held that the High Court judge fell into error in applying the decision in *Nivesh* retrospectively to this case. The Federal Court in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393 said that the doctrine of prospective overruling was in appropriate cases a valuable judicial tool to mitigate the unfair or adverse consequences of retrospective application of a judicial decision invalidating any statutory law. Therefore, the Court of Appeal held that the learned High Court judge had erred in relying on *Nivesh*'s case as binding precedent to allow the plaintiff's claim for false imprisonment. In coming to this decision, the Court of Appeal had referred to its earlier decision in *Abdillah bin Labo Khan v Public Prosecutor* [2002] 3 MLJ 298 on the application of the doctrine of prospective overruling in constitutional matters, where it was held as follows:

> In the United States, in respect of constitutional matters, that is to say, where a statute is declared unconstitutional, the power to declare such a ruling to be prospective only was asserted in 1965 in the case of *Linkletter v Walker* (1965) 381 US 618 (at p 628). That principle has been adopted into our jurisprudence in *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311, where at pp 320–321, Abdoolcader SCJ said:
>
> > ... The doctrine — to the effect that when a statute is held to be unconstitutional, after overruling a long standing current of decisions to the contrary, the court will not give retrospective effect to the declaration of unconstitutionally so as to set aside proceedings of convictions or acquittals which had taken place under that statute prior to the date of the judgment which declared it to be unconstitutional, ...

[18] The House of Lords in the case of *Re Spectrum Plus Ltd; National Westminster Bank plc v Spectrum Plus Ltd and others* [2005] UKHL 41 had also discussed the usefulness of the doctrine of prospective overruling in overcoming the 'disruptive and seemingly unfair consequences' of the retrospective effect of a change in law following the court's declaration of unconstitutionality of any legislation, and held as follows:

> People generally conduct their affairs on the basis of what they understand the law to be. This 'retrospective' effect of a change in the law of this nature can have disruptive and seemingly unfair consequences. 'Prospective overruling', sometimes

described as 'non-retroactive overruling', is a judicial tool fashioned to mitigate these adverse consequences. It is a shorthand description for court rulings on points of law which, to greater or lesser extent.

[19] Closer to home, the Court of Appeal in the case *Aminah bt Ahmad (suing in her personal capacity and on behalf of 56 retired members of the public services) v The Government of Malaysia & Anor* [2022] 4 MLJ 74 had reaffirmed the position that a judicial decision declaring a legislation to be unconstitutional can fall within the doctrine of prospective overruling and ought not to be applied retrospectively. In *Aminah* the Court of Appeal held:

It is a fundamental principle of adjudicative jurisprudence that all judgments of a court are retrospective in effect'. However, the law has evolved to afford courts, in appropriate cases, with a discretion to mitigate foreseeable adverse consequences and hardship, especially if it would otherwise affect a class of the citizenry. This may sometimes be achieved by invoking the doctrine of 'prospective overruling'; a ruling that is to be effective only prospectively.

...

'Prospective overruling' is clearly an exception to the general rule ... In cases involving the avoidance of a law, which has stood for some time, for being in contravention of the Federal Constitution, the doctrine of prospective overruling would be available to give effect to the raison d'etre for its existence.

[20] Based on these precedents, the Court of Appeal in the present case was of the view that it was only just and fair to state that the ruling in *Nivesh*'s case does not retrospectively apply against the appellant's remand under s 4(1) of the POCA which took place more than five years before the Federal Court's finding of unconstitutionality in *Nivesh.* The Court of Appeal held that retrospective application of *Nivesh's* case would be utterly chaotic and problematic as it would then open the floodgates for any and all remands under the said provision to become the subject of a claim for false imprisonment despite the fact that the remand/detention orders were lawfully and constitutionally carried out during the time when the provision was still deemed lawful and constitutional. The Court of Appeal was of the view that it would be manifestly unjust to condemn the magistrate years later for issuing the impugned magistrate's detention warrant and the first respondent for holding the appellant under remand when they had only done so in reliance of the provision of law which was still lawful and constitutional at the time. Hence, the Court of Appeal held that the learned High Court judge had erred in relying on *Nivesh*'s case to allow the appellant's claim for false imprisonment.

Whether the habeas corpus decision was conclusive evidence of false imprisonment?

[21] The learned High Court judge had held that the habeas corpus decision was conclusive evidence of false imprisonment. In coming to this decision, the

A High Court had relied on the Court of Appeal case of *Shahrudi Abidin v Datuk Wira Abu Seman Yusop Timbalan Menteri Dalam Negeri Kementerian Dalam Negeri Malaysia & Ors* [2020] MLJU 2678; [2021] 1 CLJ 52, and in particular the following passage:

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> The respondents, by not appealing against the order made in the habeas corpus proceedings, must be taken to have accepted the findings of the court as correct and valid. In the circumstances, it was not open to the respondents to suggest that the habeas corpus proceedings were irrelevant and could not be accepted as evidence.

C **[22]** The Court of Appeal, however, disagreed with this pronouncement of the High Court. In dealing with this issue, the Court of Appeal was of the view that in *Shahrudi*'s case, the court did not state that the failure to appeal against a habeas corpus decision can automatically be deemed as an admission of false imprisonment. The Court of Appeal, instead, found that a successful habeas D corpus decision (even one which was not appealed against) is not conclusive evidence, but merely weighty evidence in a civil claim for damages. The success of a habeas corpus application does not *ipso facto* form the basis of a civil action for false imprisonment. This is borne out by the full ratio decidendi of the judgment in *Shahrudi,* the relevant parts of which read as follows:

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> [20] Since the High Court which heard the habeas corpus proceedings order ruled that the restriction order was made without following the law and was therefore invalid, it only stands to reason that that habeas corpus order is not just relevant and admissible but indeed provides compelling evidence as to the issue of whether the restraint was made with legal justification.

F

> [21] Any other conclusion, we say would be akin to permitting a collateral attack on the earlier final decision of a court of competent jurisdiction. The implication, if we agree with the learned JC, is that the habeas corpus order could have been incorrectly decided. However, and this is highly significant, the respondents here did not appeal against the order made in the habeas corpus proceedings. They must G then be taken to have accepted the findings of the court as correct and valid (see *Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v Ong San Huei* [2018] 4 MLJ 673; [2018] 3 CLJ 509; and *Penguasa Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v Badrul Zaman PS Md Zakariah* [2014] 7 CLJ 533). In the circumstances, it is not open to the respondents here to suggest that the habeas H corpus proceedings are irrelevant and cannot be accepted as evidence in the instant case.

> [22] We must, however, hasten to add that the habeas corpus order is not conclusive in the instant proceedings but is only evidence which must be considered by the court. Put simply it is not res judicata as the habeas corpus proceedings provided a I different remedy compared to the instant proceedings. It is elementary that a person who claims to have been unlawfully imprisoned can either file habeas corpus proceedings which, if successful, will result in his immediate release or he can file a civil action for damages. It will not follow that success on the habeas corpus will form the basis of the civil action (see RJ Sharpe, *The Law of Habeas Corpus*, Clarendon Press Oxford (1976) at p 59).

> [23] It is our judgment, however, that s 43 of the Evidence Act 1950 was not envisaged for the kind of factual matrix as in the instant case. It was meant for the type of cases where a criminal conviction was being used for a subsequent civil proceeding as was the case in both *Hollington* and *Nallakaruppan. The upshot is that the habeas corpus proceedings and the habeas corpus order are not just relevant and admissible in the instant case but must also constitute, not conclusive evidence, but weighty evidence against the respondent such that failure to rebut must result in the success of the claim* (see *Stupple v Royal Insurance Co Ltd* [1971] 1 QB 50).

[23] Hence, the Court of Appeal held that the High Court had erred by relying on the mere fact that the habeas corpus decision was not appealed against or the fact that the habeas corpus order was granted to conclude that this was conclusive evidence of false imprisonment. The Court of Appeal further held that failure to appeal the habeas corpus order in itself cannot be construed as an admission or be the basis to make a finding of false imprisonment.

The learned High Court judge had erred in applying a restrictive interpretation of the element of 'organised violence'

[24] The Court of Appeal held that the learned High Court judge had primarily relied on the habeas corpus decision, without examining the legal grounds or justification upon which the first defendant/respondent had applied for the remand under s 4 of the POCA. In this regard, the Court held that the learned High Court judge had erred in applying a restrictive interpretation in construing the term 'organised violence' in s 4(1) of the POCA. The Court of Appeal was of the view that the term 'organised violence' under s 4(1) of the POCA cannot be interpreted in a strict and literal manner. And in this regard, the court referred to the Federal Court decision in *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759, where the words 'organised violence against persons or property' in POCA were construed expansively, in the following terms:

> The meaning of 'organised violence against persons or property' must be assessed through the context and the entire scheme of the POCA. The words 'organised violence against persons or property' must not be interpreted restrictively as suggested. Unlawful gaming activity has evolved into a much more sophisticated illicit activity that even in this present day constitutes a threat to public order and safety.
>
> The intent of the POCA as expressed in the long title of the Act is for effectual prevention of crime throughout Malaysia and for the control of criminals, members of secret societies, terrorists and other undesirable persons, and for matters incidental thereto.
>
> So, to return to the central issue — whether the crime of unlawful gaming falls within the category of 'organised violence against persons or property'. The word

'organised' means 'arranged or planned well in the way mentioned'. As an adjective, it is 'involving large numbers of people who work together to do something in a way that has been carefully planned' (*Oxford Learner Dictionaries*).

The word violence' literally means 'behaviour involving physical force that is intended to hurt, damage, or kill somebody or something'; physical or emotional force and energy; to damage something or have a bad effect on it (*Oxford Learner's Dictionaries*). 'Violence' has also been defined as consistent of a pattern of coercive behaviours used by a competent adult to establish and maintain power and control over about competent adult taking the form of physical and psychological damage to the person (N Ozbaci and Z Erkan: Metaphors for Violence, Coll. Antropol. 39(2015) 1:193–201). In this light, it can be appreciated that there are two aspects to violence — physical and non-physical.

In the context of the POCA 1959, the phrase 'organised violence against persons or property' must be juxtaposed with the meaning of the word 'unlawful gaming'.

[25] The Court of Appeal found that based on multiple police reports lodged by many complainants against the plaintiff/respondent, the first defendant/respondent had formed a reasonable believe that there were grounds to inquire into the allegations of organised violence perpetrated by the plaintiff/respondent to criminally extort the complainants for protection monies on account of fear of physical, financial, and reputational harm. The complainants were a class of citizens who were allegedly living in fear of the alleged criminal extortion pressed upon by the plaintiff. Thus, the first defendant clearly had valid reasons and grounds to seek for the remand order under s 4 of the POCA. Therefore, the Court of Appeal held that the learned High Court judge had erred in finding that the remand was unlawful on this ground.

The learned High Court judge had erred in failing to appreciate that a police officer carrying out a remand in adherence to a court order cannot be said to have falsely imprisoned the detenu

[26] The Court of Appeal held that the learned High Court judge had erred in failing to appreciate that first defendant/respondent, a police officer, carrying out a remand of a person in adherence to a court order cannot be said to have falsely imprisoned the detainee.

[27] The main ground that the habeas corpus court allowed the plaintiff's application was the error in the description of the place of remand entered in the impugned magistrate's detention warrant. The error as to the location of the remand was on the impugned magistrate's detention warrant which was prepared and issued by the magistrate and not the first defendant. Thus, the first defendant cannot be said to have falsely imprisoned the plaintiff as the first defendant was merely carrying out the remand in compliance to the order and warrant of the court.

[28] The Federal Court's decision in *Hassan bin Marsom & Ors v Mohd Hady bin Ya'akop* [2018] 5 MLJ 141 was referred to by the Court of Appeal, where it was held that even if it can be proven that a police officer had maliciously or wrongfully applied and caused the court to issue a remand order, that police officer cannot be said to have falsely imprisoned the detainee as the police was only carrying out the order of the court. Instead of false imprisonment, the proper cause of action in such a case of wrongly or maliciously causing the issuance of the remand order is an action for malicious prosecution. However, in the present case, the plaintiff/appellant did not plead a claim for malicious prosecution.

The learned judge had erred in finding that the 'condition of detention' (physical abuse allegations) can be a ground for a claim for false imprisonment

[29] The Court of Appeal was of the view that physical abuse during detention cannot be the basis for a claim for false imprisonment nor did it negate the justifiability of the arresting officer's application and the magistrate's issuance of the remand order or detention warrant. The proper cause of action for the abhorrent 'condition of detention', including any physical abuse of the detainee, can only give rise to a claim for trespass against persons in assault, battery, and negligence but never for false imprisonment. In this regard, the Court of Appeal referred to its earlier decision in *Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby (the administrator of the estate and dependent of Kugan a/l Ananthan, deceased) and another appeal* [2015] 1 MLJ 353 (CA), where the court held as follows:

> [22] It is our respective view the abuses which the deceased endured do not and cannot give rise to a cause of action for false imprisonment. The cause of action for a tort of false imprisonment arises when a person has been imprisoned without lawful justification and that action is against the person who caused the imprisonment. Here the person who caused the detention is a magistrate exercising his judicial power and that judicial act had not been set aside or declared unlawful.
>
> [23] In *Regina v Deputy Governor of Parkhurst Prison and others, ex parte Hague Weldon Respondent and Home Office Respondent [Conjoined Appeals]* [1992] 1 AC 58 where a similar false imprisonment claim was made premised on the allegation that conditions of detention had become intolerable, the House of Lords held, inter alia, as follows:
>
> > That although, where the conditions of detention of a prisoner were such as to be intolerable an otherwise lawful detention was not rendered unlawful, such conditions might give rise to public law remedy and, where prisoner suffered injury to health, a remedy in private law as well; such a remedy would lie in negligence rather than in false imprisonment.
>
> Their Lordships also held that there must be a clear distinction between the 'nature of detention' and that of 'conditions of detention'. The nature of detention is a result of a judicial act and remains valid until set aside. The conditions of detention do not

relate to 'nature of detention' and if such conditions become intolerable or illegal, they give rise not to the tort of unlawful detention.

[30] The Court of Appeal was of the view that, since the plaintiff had not pleaded a claim for tortious assault or battery, it is not open for the court at the late stage of appeal to determine and rule on the same. Thus, the Court of Appeal held that the learned High Court judge had fallen into error in considering the alleged physical abuse of the plaintiff/appellant as basis for a claim for false imprisonment.

[31] Please see *ASP Poonnam E Keling & Ors v Sri Sanjeevan a/l Ramakrishnan* [2023] 6 MLJ 651 for the Court of Appeal's full judgment.

APPEAL TO THE FEDERAL COURT

[32] Aggrieved, the plaintiff/appellant filed an application for leave to appeal to the Federal Court. On 20 February 2024, the leave order was granted for the above-mentioned question of law.

Issues raised by the appellant

[33] The main issue raised by the appellant for this court's consideration concerns the inter-relationship between habeas corpus proceedings, in particular where such proceedings result in an order favouring the release of a detenu, and a subsequent claim for damages for false imprisonment based on the same factual circumstances.

[34] The Federal Court in *Lei Meng v Inspektor Wayandiana bin Abdullah & Ors and other appeals* [2022] 3 MLJ 203; [2022] 3 CLJ 177 made the following observation about the remedy of habeas corpus under art 5(2) of the Federal Constitution:

> [75] In this jurisdiction, art 5(2) of the FC makes express and mandatory provision for a court to inquire into a complaint of unlawful detention. As stated above, it then becomes incumbent upon the court to undertake an inquiry to satisfy itself that the detention is lawful. It is only if such satisfaction is met that the detention continues. Otherwise, the unlawfully detained person must be released.
>
> [76] It is therefore immediately apparent that the thrust of art 5(2) of the FC is the right and entitlement to have a full enquiry into the detention claimed to be unlawful. *The remedy of release which we commonly refer to as habeas corpus, is a consequence or remedy consequent upon an inquiry mandatorily required under art 5(2) of the FC, and only so available if the detention is found to be unlawful.* The jurisdiction of the High Court to grant a remedy of release or habeas corpus is therefore derived from art 5(2) of the FC.

[35] Thus, it is settled that an order of habeas corpus is only given when the detention is found to be unlawful. Now, if the habeas corpus court were to declare the detention unlawful and order the release of the detenu, does that automatically translate to an undefendable claim in an action for the tort of false imprisonment, bearing in mind that a claim for false imprisonment is a private law action and an application for a writ of habeas corpus is a public law proceeding?

[36] This is the crux of the matter in this appeal, and we shall answer that question with reference to the question of law posed for our consideration in this appeal. It must be noted that there are two parts to the said question of law; and they are where an order issuing the writ of habeas corpus is made in relation to the remand of a person:

(a) it is a necessary implication of such order that the detention was not effected in accordance with law under art 5(2) of the Federal Constitution and was thus unlawful for contravening art 5(1) of the Federal Constitution; and

(b) whether that contravention amounts to false imprisonment for the purposes of a claim under tort.

[37] The first part of the question has been answered by this court in *Lei Meng,* where in paras 75 and 76 of the judgment, the court held that the jurisdiction of the superior courts to grant a remedy of release or habeas corpus is derived from art 5(2) of the Federal Constitution. When a complaint of unlawful detention is laid before the High Court, art 5(2) requires the court to undertake an inquiry to satisfy itself that the detention is lawful. If the court determines the detention to be lawful, the detention continues; and if to the contrary the court determines the detention to be unlawful, then the detenu must be released by the issuance of a writ of habeas corpus. Accordingly, the court summarised as follows:

> [76] It is therefore immediately apparent that the thrust of art 5(2) of the FC is the right and entitlement to have a full enquiry into the detention claimed to be unlawful. *The remedy of release which we commonly refer to as habeas corpus, is a consequence or remedy consequent upon an inquiry mandatorily required under art 5(2) of the FC, and only so available if the detention is found to be unlawful. ...*

[38] Now, if the detention is held unlawful following an application for habeas corpus and the person is released pursuant to the dictates of art 5(2) then by necessary implication it would mean that there has been a breach of his constitutional right to liberty that is enshrined in art 5(1) of the Federal Constitution that provides:

> No person shall be deprived of his life or personal liberty save in accordance with law.

However, whether that breach of constitutional right to liberty is actionable in tort, be it false imprisonment, malicious prosecution or breach of constitutional right, would have to be determined in accordance to the elements of the specific tort, as well as the facts and circumstances of the particular case.

[39] The procedure to apply for habeas corpus is governed under Chapter XXXVI of the Criminal Procedure Code, and in particular s 365(1)(b) thereof. Thus, the High Court would be exercising its criminal jurisdiction. There is a co-relation between art 5(2) of the Federal Constitution and s 365(1)(b) of the CPC. This relationship was noted by KC Vohrah J (as he then was) in *Sazali bin Mat Noh v Timbalan Menteri Dalam Negeri & Ors* [1999] 1 MLJ 9:

> This provision is tied to art 5(2) of the Federal Constitution and must be read together with s 25(2) and para 1 of the Schedule to the Courts of Judicature Act 1964 and as modified by art 162(6) of the Constitution. ... s 365, as quoted, relates to a situation where a person is under detention and where it is alleged that the person is illegally or improperly detained in public or private custody within the limits of the Federation.

Section 365(1)(b) of the CPC reads as follows:

> The High Court may whenever it thinks fit direct —
>
> (1) that any person who:
>
> (a) ...
>
> (b) is alleged to be illegally or improperly detained in public or private custody within the limits of Malaysia,
>
> (c) be set at liberty;
>
> (2) ...

[40] Now, s 365(1)(b) of the CPC does not provide for the High Court to award damages or monetary compensation consequent to an order that the detenu be set at liberty in a habeas corpus application. The only order that the High Court can issue in a successful application for habeas corpus pursuant to s 365(1)(b) is to set at liberty the detenu. Hence, the need for the person so released to file a separate action in tort to claim damages. In *Hassan Marsom* the Federal Court noted the two distinct and separate modes available to a detenu who claims unlawful detention:

> In law, he has a choice either to pursue his cause either by way of the procedures provided under Chapter XXXI of the CPC or by the very action he undertook in this case. He must be allowed to have the choice of bringing an action in a civil court as an alternative to the procedures provided under Chapter XXXI of the CPC

This was also noted by the Court of Appeal in *Shahrudi Abidin v Datuk Wira*

Abu Seman Yusop Timbalan Menteri Dalam Negeri Kementerian Dalam Negeri Malaysia & Ors [2020] MLJU 2678; [2021] 1 CLJ 52, where in a claim for damages for false imprisonment the court noted that:

> [22] We must, however, hasten to add that the habeas corpus order is not conclusive in the instant proceedings but is only evidence which must be considered by the court. Put simply, it is not res judicata as the *habeas corpus proceedings provided a different remedy compared to the instant proceedings. It is elementary that a person who claims to have been unlawfully imprisoned can either file habeas corpus proceedings which, if successful, will result in his immediate release or he can file a civil action for damages. It will not follow that success on the habeas corpus will form the basis of the civil action* (see RJ Sharpe, *The Law of Habeas Corpus*, Clarendon Press Oxford (1976) at p 59).

[41] We agree with the above dicta of the Court of Appeal in *Shahrudi,* and adopt the same. The detenu who claims to have been unlawfully detained and is successful in a claim for habeas corpus will have to mount a separate action in tort for damages or monetary compensation. The success on a habeas corpus application will not necessarily form the basis of the civil action for damages.

[42] The cause of action for a tort of false imprisonment arises when a person has been imprisoned without lawful justification or just cause and that action is against the person who caused the imprisonment. And the law is well settled, in that, to establish a claim for the tort of false imprisonment, the claimant must prove:

(a) the fact of imprisonment; and

(b) the absence of lawful authority to justify that imprisonment.

[43] The law on this is well settled, as was stated by the Court of Appeal in *Shahrudi*'s case:

> [25] Coming now to the instant claim, the law on false imprisonment is settled in that once a plaintiff establishes the imprisonment, the burden of proving justification lies with defendant (see *Hicks v Faulkner* (1878) 8 QBD 167 at p 170). As stated by Lord Atkin in *Liversidge v Anderson* [1942] AC 206 at p 245 (dissenting): 'one of the pillars of liberty is that in English law, every imprisonment is prima facie unlawful and that it is for the person directing the imprisonment to justify his act', (as observed in Judith Farbey, RJ Sharpe and Simon Atrill, *The Law of Habeas Corpus* (3rd Ed) Oxford (2011) at p 88).
>
> ...
>
> [28] As mentioned earlier, it was for the respondents to establish that they had acted in accordance with the law ...

[44] Thus, in a tortious claim for false imprisonment, the law affords the defendant the opportunity to raise a defence to the claim and establish that he

had acted in accordance with the law or in other words that there was justification for the detention. The defendants would have the right to establish their pleaded defence. Hence, whilst the order of habeas corpus is strong evidence in favour of the plaintiff, it is not conclusive to establish the case for false imprisonment. The fact that a habeas corpus order was issued does not automatically translate to liability for false imprisonment.

[45] Learned counsel for the appellant submitted that the question of justifying the detention does not arise. Counsel argued that if the detention is found to have been unlawful within the meaning of art 5(2) of the Federal Constitution, such that a writ of habeas corpus is issued, it is of no consequence that the detention was effected in good faith. We are disinclined to accept this argument for the following reasons.

[46] The tort of false imprisonment is not one of strict liability that necessarily flows from an order of habeas corpus as contended by learned counsel. Here, there are two different processes under the law, and they are: (a) habeas corpus under criminal law, and (b) tort of false imprisonment under civil law. Generally both deal with lawfulness of detention, but between both, there are different constituent elements that must be established and different remedies that may be granted by the court. The success of one, does not invariably lead to success of the other.

[47] The High Court in *Balakrishnan a/l Subramaniam v Penguasa Pusat Pemulihan Akhlak, Simpang Renggam, Johor Darul Takzim & Ors* [2014] 10 MLJ 226; [2014] 2 CLJ 563 had occasion to consider this issue and held as follows, which we fully endorse:

> [38] The proceedings in the habeas corpus ought to be distinguished from the writ action for common law tort of false imprisonment such as the case at hand. In a habeas corpus, the challenge was only in respect of procedural non-compliance by the detaining authority whereas in an action under the common law tort of false imprisonment, the plaintiff would have to show absence or excess of jurisdiction on the part of the defendants. The remedy in a habeas corpus is the immediate release of the corpus from a restraint. This principle had been well illustrated by RJ Sharpe in the learned author's book entitled *The Law of Habeas Corpus* as follows:
>
> > False imprisonment is not a remedy which takes the place of habeas corpus as it will not ordinarily be used to obtain immediate release from a restraint, but it does afford one means of redress for anyone who has been unlawfully imprisoned. The civil action in damages will only succeed where there has been absence or excess of jurisdiction. Moreover, it by no means follows that success on habeas corpus, even on the grounds of jurisdictional error will afford the basis for an action in false imprisonment. The matter is not res judicata ...
>
> [39] Hence the fact that a habeas corpus had been issued by the High Court would not grant an automatic right to the plaintiff to damages as claimed herein. In the

common law tort of false imprisonment, the plaintiff still had the evidentiary burden to prove that his detention was unlawful and for this court to decide on the issue of liability first before making the award for damages as prayed. The plaintiff has a duty to prove his case on the balance of probabilities that he was unlawfully arrested and/or detained, demonstrating that there was absence or excess of jurisdiction on the part of the defendants.

[48] Similarly, the Court of Appeal in this instant case, after having referred to its earlier decision in *Shahrudi,* had expressed the same view, which we accept as the correct proposition of the law:

> [19] As astutely explained by the Court of Appeal in *Shahrudi,* the nature of false imprisonment as remedy is starkly different from the nature of habeas corpus. A habeas corpus as remedy can be applied for and be allowed by the court to free a detainee if there were matters both technical and substantive which would entitle the detainee to be immediately released. On the other hand, the tort of false imprisonment transcends beyond mere technicalities and encroaches the issue on the justifiability of the detention itself
>
> [20] Thus, even if we are bound to accept the habeas corpus decision, the same decision is hardly conclusive evidence to establish a case for false imprisonment. It still remains solely incumbent upon the plaintiff to prove that the detention or imprisonment of the plaintiff was without any legal or just grounds. It is sorely insufficient for the plaintiff to merely rely on the technical grounds of the habeas corpus decision to ultimately prove a case for false imprisonment. The impugned magistrate's warrant might be in error, but the error does not at all diminish or negate the first defendant's legal justification to detain the plaintiff under s 4(1) of the POCA.

[49] The Federal Court in *Hassan bin Marsom & Ors v Mohd Hady bin Ya'akop* in dealing with the issue of whether damages for false imprisonment can be awarded for detention under an order of the magistrate under s 117 of the Criminal Procedure Code, held that since the respondent was remanded under a judicial order of a magistrate, it could not be false imprisonment. The remand order might have been wrongly applied. It might even have been that there was no reasonable cause or basis for a remand order. The remand order might have been applied and/or issued without compliance with s 117 of the CPC. The remand order might even have been set aside. However, that was all inconsequential in a claim for false imprisonment. Rather than false imprisonment, if at all, it was malicious prosecution.

[50] The law is well settled in that once a judicial act interposes, liability for false imprisonment ceases on the part of the person who takes proceedings before a magistrate or judge to obtain a judicial order of detention. This is also the position in England. In *Halsbury's Laws of England* (5th Ed, Vol 97) at para 544 it is stated:

A No claim for false imprisonment otherwise lies against a person who takes proceedings before a magistrate or judge in respect of imprisonment which is caused by the order of the magistrate or judge; the remedy, if any, of the person imprisoned in such a case, is a claim for malicious prosecution against the person who instituted the proceedings.

B Similarly, in the leading text *The Law of Torts* by Fleming it is observed at p 38:

A person who brings about an arrest by merely setting in motion the formal process of law, as by making a complaint before a justice of the peace or applying a warrant is not liable for false imprisonment because courts of justice are not agents of the C prosecutor and their acts are not imputable to him. He is liable, if at all, only for the misuse of legal process by procuring an arrest for an improper purpose for which the appropriate remedy is an action for malicious prosecution. This rule provides a valuable protection against liability for error in the course of legal proceedings.

D Further, in *Civil Actions Against the Police* by Richard Clayton and Hugh Tomlinson at p 116, the learned authors state the law as follows:

... where an imprisonment is effected through judicial proceedings, liability for false imprisonment virtually disappears', on account of the following dicta of Willes J in *Austin v Dowling* (1870) LR 5 CP 534 at p 540:

E The distinction between false imprisonment and malicious prosecution is well illustrated by the case where the parties being before a magistrate, one makes a false charge against another, whereupon the magistrate orders the person to be charged and taken into custody until the matter is investigated. The person making the charge is not liable for the action because he does not set a ministerial F officer in motion but a judicial officer is interposed between the charge and the imprisonment.

And in another leading text *Salmond & Heuston on the Law of Torts* (21st Ed), at pp 126–127 the principle was stated as follows:

G *No action for false imprisonment will lie against a person who has procured the imprisonment of another by obtaining against him a judgment or other judicial order of a court of justice even though that judgment or order is erroneous, irregular, or without jurisdiction.* The proper remedy in such a case is an action for malicious prosecution or other malicious abuse of legal process. In an action of that description that plaintiff can succeed only if he proves both malice and the absence of any reasonable H and probable cause for the proceedings complained of; whereas in an action for false imprisonment, just as in all other cases of trespass to person or property, liability is created, in general, even by honest and inevitable mistake. The rule, therefore, that no action for false imprisonment will lie against a litigant in respect of judicial imprisonment procured by him is a valuable protection against liability for error in the course of legal proceedings. Accordingly, if the plaintiff has been wrongly I arrested without warrant and taken before a magistrate, who remands him in custody, he must sue in respect of his imprisonment before the remand in an action for false imprisonment, but in respect of that which is subsequent to the remand in an action for malicious prosecution. The reason for this distinction is that *a man cannot be sued in trespass (and so not for false imprisonment) unless he himself, whether*

personally or by his agent, has done the act complained of. A court of justice, however, is not the agent of the litigant but acts in the exercise of its own independent judicial discretion. The litigant can be charged only with having maliciously and without reasonable cause exercised his rights of setting a court of justice in motion. *This exemption of the litigant from any liability for false imprisonment extends even to cases in which the court ordering the imprisonment has acted without jurisdiction*. It is the right of every litigant to bring his case before the court, and it is for the court to know the limits of its own jurisdiction and to keep within them.

[51] The above statements of the law on false imprisonment were referred to with approval by the Federal Court in *Hassan Marsom,* where the court noted that the common law rule stated in *Austin v Dowling* is still good law (see *Zenati v Commissioner of Police of the Metropolis and another* [2015] 2 WLR 1563 at p 1580 (CA); *Coghlan v Chief Constable of Cheshire Police and others* [2018] EWHC 34 (QB)). The Federal Court in *Hassan Marsom* concluded:

[141] In short, a judicial order provides the defence of lawful authority for the detention or imprisonment (see *Hepple and Matthews' Tort Law: Cases and Materials by David Howarth, Martin Matthews, Jonathan Morgan, Janet O'Sullivan, Stelios Tofaris* (2016 Publication) at p 750).

[142] In the instant case, the respondent was remanded under the judicial order of a magistrate. The remand order might have been wrongly applied. It might even have been that there was no reasonable cause or basis for a remand order. The remand order might have been applied and or issued without compliance with s 117 of the Criminal Procedure Code. The remand order might even have been set aside. But that, with respect, was all inconsequential in a claim for false imprisonment, ...

...

[151] What was only pertinent was whether the respondent was remanded under lawful authority at the material time of the remand. Since the respondent was remanded under a judicial order, it could not be false imprisonment.

[52] We do not see any reason to depart from this well-established principle. And for these reasons we affirm the concluding findings of the Court of Appeal in this case at para 25 of the grounds of judgment:

[25] ... it must be emphasised that the sole ground that the habeas corpus court allowed the plaintiffs application was not at all the technical error committed by the first defendant. The error as to the location of the remand was on the impugned magistrate's warrant which was prepared and issued by the magistrate (not the first defendant). Thus, in actuality the first defendant cannot be said to have falsely imprisoned the plaintiff as the first defendant was merely carrying out the arrest and remand in due compliance of the order and warrant of the court.

The plaintiff/appellant's detention was based on the magistrate's detention warrant. Hence, the detention was not made in the absence of a lawful judicial order or in excess of jurisdiction. The first defendant was merely executing the

judicial order contained in the magistrate's detention warrant. The fact that the first defendant laid the complaint before the magistrate is irrelevant in a claim for false imprisonment. The application for habeas corpus was allowed on a technicality, ie that the place of detention stated in the detention warrant was not a gazetted place of detention. That mistake cannot be attributed to the first defendant. Thus, the first respondent cannot be held liable in an action for false imprisonment, nor would the second and third respondents be vicariously liable in the absence of liability on the part of the alleged primary tortfeasor.

ANSWER TO THE LEAVE QUESTION

[53] For the reasons stated above, our answer to the leave question is in the negative.

CONCLUSION

[54] In the premise of the foregoing, the appeal is dismissed and the judgment and order of the Court of Appeal is affirmed.

Appeal dismissed and COA's decision affirmed.

Reported by Ashok Kumar