A **KARPAL SINGH RAM SINGH v. PP & ANOTHER APPEAL**

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
TENGKU MAIMUN TUAN MAT JCA
KAMARDIN HASHIM JCA
B [CRIMINAL APPEALS NO: W-05(S)-66-03-2014
& W-05-78-03-2014]
31 MAY 2016

C ***CRIMINAL LAW:*** *Sedition Act 1948 – Section 4(1)(b) – Appellant accused of making seditious comments at a press conference – Whether appellant questioned prerogative powers of Sultan of Perak – Whether Sedition Act unconstitutional and contrary to art. 10(2) of the Federal Constitution – Whether charge against appellant defective – Whether statements made had seditious tendency within ambit of s. 3(1)(a), (d) and (f) of Sedition Act 1948 – Whether appellant's speech intended*
D *to bring hatred or contempt or to excite disaffection against Ruler of State or Government – Whether appellant succeeded in establishing defence under s. 3(2)(a) of the Sedition Act 1948 – Whether appellant denied a fair trial – Whether conviction safe*

E ***CRIMINAL PROCEDURE:*** *Appeal – Appeal against conviction and sentence – Appellant accused of making seditious comments at a press conference – Sedition Act 1948, s. 4(1)(b) – Whether appellant questioned prerogative powers of Sultan of Perak – Whether Sedition Act unconstitutional and contrary to art. 10(2) of the Federal Constitution – Whether charge against appellant defective – Whether appellant had mens rea in making statements which had seditious tendency within*
F *ambit of s. 3(1)(a), (d) and (f) of Sedition Act 1948 – Whether appellant's speech intended to bring hatred or contempt or to excite disaffection against Ruler of State or Government – Whether appellant succeeded in establishing defence under s. 3(2)(a) of the Sedition Act 1948 – Whether appellant denied a fair trial – Whether conviction safe*

G The appellant was charged under s. 4(1)(b) of the Sedition Act 1948 ('Sedition Act'). The charge was based on certain seditious comments made by the appellant at a press conference held by him due to the removal of the then Perak Menteri Besar by His Royal Highness ('HRH') Sultan of Perak. At the close of the prosecution's case, the appellant was acquitted by the High
H Court. Aggrieved by the said decision, the prosecution appealed. The appeal by the prosecution was allowed and the appellant was ordered to enter upon his defence at the High Court before the same trial judge. The appellant had two issues in his defence (i) that the appellant was not questioning the prerogative power of HRH the Sultan in dissolving the State Assembly, but
I just the manner the prerogative was exercised and (ii) that the charge against the appellant under the Sedition Act 1948 was unconstitutional and there was selective prosecution by the Attorney General. On the issue of selective prosecution, quoting art. 145(3) of the Federal Constitution, the High Court

found no reason and power to rule that the appellant ought not to have been charged on the ground that there had been selective and *mala fide* prosecution against the appellant. The High Court Judge further decided that the appellant had failed to cast a reasonable doubt on the prosecution's case and held that the words the appellant had uttered in his statement had seditious tendency to bring into hatred or contempt or to excite disaffection against a Ruler and a government as provided under s. 3(1)(a) of the Act, had tendency to raise discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or of the Ruler of any State or amongst the inhabitants of Malaysia or of any State as provided under s. 3(1)(d) and finally as provided under s. 3(1)(f), had seditious tendency to question any matter, right, status, position, privilege, sovereignty or prerogative established or protected by art. 181(1) of the Federal Constitution. The appellant was convicted and fined RM4,000 in default of four months' imprisonment. Hence, this appeal. The issues that arose were (i) whether the Sedition Act was unconstitutional as it was contrary to art. 10(2) of the Federal Constitution and it prohibits freedom of expression and speech on matters provided in s. 4 read with s. 3 of the Sedition Act; (ii) whether the charge against the appellant was defective and (iii) whether the High Court Judge failed to make a finding whether or not the appellant had succeeded in establishing his defence under s. 3(2)(a) of the Sedition Act, thus he was denied a fair trial as his defence was not evaluated properly.

Held (dismissing appeal; affirming conviction)
Per Mohtarudin Baki JCA:

(1) The constitutional issues raised had been ventilated and settled by the Federal Court in various decided cases in an extensive manner. There was no reason to go against the principles established in the case of *PP v. Azmi Sharom* with regards of modification of the Sedition Act in accordance with the Federal Constitution and on the proportionality test as to whether s. 3(3) of the Sedition Act imposes a total prohibition or proportionate restriction. The appellant's submission on these grounds had no compelling merits. Further, for the issue of defective charge, in a prosecution under s. 4(1)(b) of the Sedition Act, the Public Prosecutor was not bound to specify in the charge on which of the six tendencies set out in s. 3(1) he relied on and it was open to him during the course of the trial to pick and choose. Thus, this issue was bereft of any merit. (paras 14 & 15)

(2) This was a serious offence involving sovereignty of a Ruler and his prerogative powers. The appellant had crossed his limits when he uttered phrases such as (i) "firm reminder to him"; (ii) "he had no right to dismiss the government rather the State Government of MB Nizar Jamaludin"; (iii) "I've stated very clearly that we will sue the Sultan together with the new State Government as defendants if they persist" and (iv) "He is not immune from being taken to the court".

The appellant clearly had *mens rea* in making such statements which had seditious tendency within the ambit of s. 3(1)(a),(d) and also (f) of the Act. (paras 17 & 18)

(3) In making any statement especially in a press conference against the Ruler and his prerogative powers, one has a responsibility to be absolutely sure that it has no serious tendency as laid out by s. 3(1) of the Act. The appellant's continuous and repeated averments that the Ruler has no power and that he was not immune from being taken to court only showed that he had crossed the line between uttering words that were legally permitted and the ones that had seditious tendency. It was unreasonable for the appellant who was from a legal background, especially with vast knowledge in constitutional law, to have come up with such statements. (para 20)

(4) The statements were very disrespectful to be made against any Ruler of State and sufficed to constitute an offence under s. 4(1) of the Act. The statements made by the appellant did not fall under s. 3(2)(a) as they were farfetched from only showing that the Ruler had been misled or mistaken in dissolving the State Assembly and to appoint the new Menteri Besar. Thus, the appellant's argument that the High Court Judge had failed to make a finding whether the appellant had made out a defence under s. 3(2) of the Act did not entitle him to be exonerated from the offence. The non-direction did not tantamount to a serious misdirection. Therefore, the conviction against the appellant was safe. (para 22)

Per Kamardin Hashim JCA (concurring):

(1) The restrictions imposed by s. 4(1) of the Sedition Act 1948 did not infringe the reasonable test and the proportionality test. Thus, the restrictions imposed in s. 4(1) of the Act fell squarely within the ambit or parameter of art. 10(2)(a) of the Federal Constitution. The restrictions imposed did not run counter to art. 10(2)(a). The Act was therefore constitutionally enacted by Parliament and remain a valid and enforceable law. (para 90)

(2) The court of law is duty bound to interpret the law as it is and to give effect to its provisions. In cases where there are nugatory provisions, it is the duty of the legislator to make some amendments. Section 3(2) of the Act is valid and in the spirit and purpose of in enacting the Act by Parliament, *ie* to curb any act, word or publication having a seditious tendency as defined in s. 3(1) paras (a) to (f) of the Act. (para 91)

(3) Upon reading the impugned speech as a whole, it was intended to bring into hatred or contempt or to excite disaffection against HRH the Sultan of Perak, to raise discontent or disaffection amongst the subjects of His Majesty besides to question any matter, right, status, position,

privilege, sovereignty or prerogative established or protected by the provisions of Part III of the Federal Constitution of the Ruler of Perak. Intention was irrelevant. The truth or falsity of the words mattered was immaterial nor was the after effect of it. There was thus no substantial miscarriage of justice occurring in this case. The conviction was safe. (paras 99 & 100)

Per Tengku Maimun Tuan Mat JCA (dissenting):

(1) The issue of modification of the Sedition Act as an existing law had been decided by the Federal Court. It was not for this court to "revisit" the issue on the premise that the Federal Court had failed to consider the issue in the context of *Tan Eng Hong*. The issue on proportionality or whether s. 3(3) of the Sedition Act imposes a total prohibition or proportionate restriction had similarly been decided in *PP v. Azmi Sharom*, where it was clearly stated that as s. 3(2) provides for exceptions, s. 4(1) of the Sedition Act was not a total prohibition. Further, guided by the Federal Court case of *Fan Yew Teng v. PP* the issue of defective charge was devoid of merit. (paras 60, 61, 64 & 65)

(2) The appellant had given evidence under oath and he was cross-examined. He stated that the real reason why he held the Press Conference was for public interest. It was meant to explain to the public the political crisis in the State of Perak and that he was giving his legal opinion. The appellant further stated that the Sultan of Perak could not be questioned on HRH's prerogative and that he did not question the power or prerogative of the Sultan of Perak but that he was questioning the manner HRH the Sultan of Perak applied the prerogative and resolved the crisis, which in the appellant's view was wrong. And whether his view was right or wrong, that was his opinion. (para 72)

(3) Surely the defence given on oath deserved to be analysed and evaluated by the High Court. However, there was simply no evaluation of the defence version and evidence. The High Court Judge's failure to consider the entire case against the appellant which included not only the case for the prosecution but also the case for the defence was a misdirection in law. Authorities are replete that the failure of a trial judge to consider the defence amounted to a miscarriage of justice which was sufficient on its own to have the conviction set aside. (paras 73 & 74)

(4) The defence of the appellant that he was stating his opinion on the political crisis in the State of Perak and that the act of HRH the Sultan of Perak was premature, fell under s. 3(2)(a) of the Sedition Act, namely that the appellant wanted to show that the Ruler had been mistaken in his measures. The miscarriage of justice occasioned to the appellant due to the misdirection of the trial judge had rendered the conviction unsafe. (paras 75 & 77)

A ***Bahasa Malaysia*** *Headnotes*

Perayu dituduh di bawah s. 4(1)(b) Akta Hasutan 1948. Pertuduhan adalah berdasarkan kenyataan-kenyataan menghasut yang dinyatakan oleh perayu di satu sidang akhbar berkenaan penyingkiran Menteri Besar Perak oleh DYMM Sultan Perak. Pada akhir kes pendakwaan, perayu telah dibebaskan
B oleh Mahkamah Tinggi. Terkilan dengan keputusan tersebut, pihak pendakwaan merayu. Rayuan oleh pihak pendakwaan dibenarkan dan perayu diperintahkan memasukkan pembelaan di Mahkamah Tinggi di hadapan hakim bicara yang sama. Perayu membangkitkan dua isu dalam pembelaannya (i) bahawa perayu bukan menyoal kuasa prerogatif DYMM
C Sultan dalam membubarkan Dewan Undangan Negeri, tetapi hanya cara hak itu dilaksanakan dan (ii) bahawa pertuduhan terhadap perayu di bawah Akta Hasutan 1948 tidak mengikut perlembagaan dan terdapat pendakwaan terpilih oleh Peguam Negara. Mengenai isu pendakwaan terpilih, memetik dari per. 145(3) Perlembagaan Persekutuan, Mahkamah Tinggi mendapati
D bahawa tiada alasan atau kuasa untuk memutuskan bahawa perayu tidak sepatutnya dipertuduh atas alasan bahawa ia adalah pendakwaaan terpilih dan *mala fide* terhadap perayu. Hakim Mahkamah Tinggi selanjutnya memutuskan bahawa perayu telah gagal menimbulkan keraguan munasabah ke atas kes pendakwaan dan menyimpulkan bahawa perkataan-perkataan
E yang digunakan oleh perayu dalam pernyataannya cenderung kepada hasutan yang boleh membawa kebencian atau penghinaan atau membangkitkan perasaan tidak setia kepada pemerintah dan Kerajaan seperti yang diperuntukkan di bawah s. 3(1)(a) Akta, mempunyai kecenderungan untuk menimbulkan perasaan tidak puas hati atau ketidaktaatan di kalangan rakyat
F kepada Yang di-Pertuan Agong atau Pemerintah Negeri atau di kalangan penduduk Malaysia atau negeri seperti yang diperuntukkan di bawah s. 3(1)(d) dan akhir sekali seperti yang diperuntukkan di bawah s. 3(1)(f), cenderung kepada hasutan untuk menyoal apa-apa perkara, hak, status, kedudukan, keistimewaan, kedaulatan atau prerogatif yang ditetapkan atau dilindungi oleh per. 181(1) Perlembagaan Persekutuan. Perayu telah
G disabitkan dan didenda RM4,000 jika ingkar penjara empat bulan. Oleh itu, rayuan ini. Isu-isu yang timbul adalah (i) sama ada Akta Hasutan adalah tidak berperlembagaan kerana bertentangan dengan per. 10(2) Perlembagaan Persekutuan dan melarang kebebasan bersuara dan ucapan mengenai perkara-perkara yang disediakan di dalam s. 4 dibaca bersama dengan s. 3 Akta
H Hasutan; (ii) sama ada pertuduhan terhadap perayu adalah defektif dan (iii) sama ada Hakim Mahkamah Tinggi gagal membuat dapatan sama ada perayu telah berjaya membuktikan pembelaannya di bawah s. 3(2)(a) Akta Hasutan, oleh itu perayu telah dinafikan perbicaraan yang adil kerana pembelaannya tidak dinilai dengan betul.

I

Diputuskan (menolak rayuan; mengesahkan sabitan)
Oleh Mohtarudin Baki HMR:

(1) Isu-isu perlembagaan yang dibangkitkan telah dihuraikan dan dilangsaikan di Mahkamah Persekutuan dalam beberapa kes dengan cara meluas. Tiada alasan untuk menentang prinsip-prinsip yang telah ditentukan di dalam kes *PP v. Azmi Sharom* berkenaan modifikasi Akta Hasutan menurut Perlembagaan Persekutuan dan berkenaan ujian kekadaran sama ada s. 3(3) Akta Hasutan mengenakan larangan sepenuhnya atau sekatan berkadar. Hujahan perayu atas alasan-alasan ini tidak mempunyai merit. Selanjutnya, berkenaan isu pertuduhan defektif, dalam pendakwaan di bawah s. 4(1)(b) Akta Hasutan, Pendakwa Raya tidak terikat untuk mengkhususkan pertuduhan mana yang dirujuknya daripada enam kecenderungan yang dinyatakan di dalam s. 3(1) dan ia adalah terbuka kepadanya semasa perbicaraan untuk membuat pemilihan.

(2) Ini adalah satu kesalahan yang serius yang melibatkan kedaulatan seorang Pemerintah dan kuasa-kuasa prerogatifnya. Perayu telah melampaui batas apabila dia mengungkap kata-kata seperti (i) "firm reminder to him"; (ii) "he had no right to dismiss the Government rather the State Government of MB Nizar Jamaludin"; (iii) "I've stated very clearly that we will sue the Sultan together with the new State Government as defendants if they persist" and (iv) "He is not immune from being taken to the court". Perayu dengan jelasnya mempunyai *mens rea* apabila membuat kenyataan-kenyataan sebegitu yang cenderung kepada hasutan dalam lingkungan s. 3(1)(a), (d) dan juga (f) Akta.

(3) Dalam membuat apa-apa kenyataan terutama sekali semasa sidang akhbar terhadap Pemerintah dan kuasa-kuasa prerogatifnya, seseorang mempunyai tanggungjawab untuk memastikan bahawa ia tidak cenderung kepada hasutan seperti yang dibentangkan oleh s. 3(1) Akta. Penegasan yang berterusan dan berulang perayu bahawa Pemerintah tidak mempunyai kuasa dan bahawa beliau tidak terkecuali daripada dibawa ke mahkamah hanya menunjukkan bahawa perayu telah melampaui batas di antara mengungkap kata-kata yang dibenarkan secara undang-undang dan kata-kata yang cenderung kepada hasutan. Tidak munasabah untuk perayu yang berasal dari latar belakang undang-undang, terutama sekali dengan pengetahuan luasnya berkenaan undang-undang perlembagaan untuk membuat kenyataan-kenyataan sedemikian.

(4) Kenyataan-kenyataan yang dibuat sangat tidak menghormati Pemerintah Negeri dan memadai untuk menjadi satu kesalahan di bawah s. 4(1) Akta. Kenyataan-kenyataan yang dibuat oleh perayu tidak terjatuh di bawah s. 3(2)(a) kerana ia adalah jauh daripada menunjukkan bahawa Pemerintah telah tersalah arah atau terkhilaf apabila membubarkan

Dewan Undangan Negeri untuk melantik Menteri Besar yang baru. Oleh itu, hujahan perayu bahawa hakim Mahkamah Tinggi telah gagal membuat dapatan sama ada perayu telah membuktikan pembelaannya di bawah s. 3(2) Akta tidak memberikan hak kepadanya untuk dilepaskan daripada kesalahan itu. Bukan arahan tidak sama dengan salah arahan yang serius. Oleh itu, sabitan terhadap perayu adalah selamat.

Oleh Kamardin Hashim HMR (menyetujui):

(1) Sekatan yang dikenakan oleh s. 4(1) Akta Hasutan 1948 tidak melanggar ujian munasabah dan ujian perkadaran. Oleh itu, sekatan yang dikenakan dalam s. 4(1) Akta jatuh tepat dalam lingkungan atau parameter per. 10(2)(a) Persekutuan Perlembagaan. Sekatan yang dikenakan tidak bertentangan dengan per. 10(2)(a). Akta oleh itu adalah secara berperlembagaan digubal oleh Parlimen dan kekal sebagai undang-undang yang sah dan dikuatkuasakan.

(2) Mahkamah undang-undang terikat untuk mentafsir undang-undang seperti sedia ada dan untuk memberikan kesan kepada peruntukan-peruntukannya. Dalam kes-kes di mana terdapat peruntukan yang tidak berguna, adalah menjadi tanggungjawab badan perundangan untuk membuat beberapa pindaan. Seksyen 3(2) Akta adalah sah dan dalam semangat dan tujuan untuk menggubal Akta oleh Parlimen, iaitu untuk membendung apa-apa perbuatan, perkataan atau penerbitan yang cenderung kepada hasutan seperti ditakrifkan dalam s. 3(1) perenggan (a) hingga (f) Akta.

(3) Apabila melihat kepada ungkapan-ungkapan yang dipersoalkan secara keseluruhan, ia bertujuan untuk membawa kepada kebencian atau penghinaan atau untuk membangkitkan perasaan tidak setia terhadap DYMM Sultan Perak, untuk membangkitkan ketidakpuasan hati atau penderhakaan di kalangan rakyat Baginda dan untuk menyoal apa-apa perkara, hak, status, kedudukan, keistimewaan, kedaulatan atau prerogatif yang terbentuk atau dilindungi oleh peruntukan-peruntukan Bahagian III Persekutuan Perlembagaan Pemerintah Perak. Niat tidak relevan. Kebenaran atau kepalsuan kata-kata tidak material mahupun kesannya. Oleh itu, tiada salah laksana keadilan yang substansial berlaku dalam kes ini. Sabitan adalah selamat.

Oleh Tengku Maimun Tuan Mat HMR (menentang):

(1) Isu modifikasi Akta Hasutan sebagai undang-undang sedia ada telah diputuskan oleh Mahkamah Persekutuan. Ia bukan untuk mahkamah ini "melawat semula" isu pada premis bahawa Mahkamah Persekutuan telah gagal mempertimbangkan isu dalam konteks *Tan Eng Hong*. Isu perkadaran atau sama ada s. 3(3) Akta Hasutan mengenakan larangan sepenuhnya atau sekatan berkadar telah diputuskan dalam kes *PP v. Azmi*

Sharom, di mana ia telah dengan jelasnya menyatakan bahawa s. 3(2) memperuntukkan pengecualian , s. 4(1) Akta Hasutan bukanlah larangan keseluruhan. Tambahan, berpandukan kes Mahkamah Persekutuan *Fan Yew Teng v. PP*, isu pertuduhan defektif tidak mempunyai merit.

(2) Perayu telah memberikan keterangan bersumpah dan telah diperiksa balas. Perayu menyatakan bahawa alasan sebenar dia telah mengadakan sidang akhbar adalah untuk kepentingan umum. Ia bertujuan untuk memperjelaskan kepada pihak umum krisis politik yang sedang berlaku di Perak dan dia telah memberikan pendapat undang-undang. Perayu juga menyatakan bahawa Sultan Perak tidak boleh dipersoalkan berkenaan prerogatifnya dan perayu juga tidak mempersoalkan kuasa dan prerogatif Sultan Perak tetapi dia hanya mempersoalkan cara DYMM Sultan Perak mengguna pakai prerogatif dan cara menyelesaikan krisis, yang dari pandangan perayu adalah salah. Dan sama ada pandangan perayu adalah betul atau salah, itu adalah pendapatnya.

(3) Pastinya pembelaan yang diberikan secara bersumpah harus dianalisis dan dinilai oleh Mahkamah Tinggi. Walau bagaimanapun, tiada penilaian dilakukan berkenaan versi dan keterangan pembelaan. Kegagalan Hakim Mahkamah Tinggi mempertimbangkan keseluruhan kes terhadap perayu termasuk bukan hanya kes untuk pendakwaan tetapi juga kes untuk pembelaan adalah satu salah arahan undang-undang. Autoriti penuh dengan kegagalan hakim bicara mempertimbangkan pembelaan yang membawa kepada salah laksana keadilan yang memadai untuk mengetepikan sabitan.

(4) Pembelaan perayu bahawa dia menyatakan pendapatnya berkenaan krisis politik di Negeri Perak dan bahawa tindakan DYMM Sultan Perak adalah pramatang, terangkum di bawah s. 3(2)(a) Akta Hasutan, iaitu perayu hendak menunjukkan bahawa Pemimpin telah terkhilaf dalam langkah-langkah beliau. Salah laksana keadilan telah berlaku kepada perayu disebabkan salah arahan hakim bicara oleh itu sabitan adalah tidak selamat.

Case(s) referred to:

Ahmad Najib Aris v. PP [2009] 2 CLJ 800 FC ***(refd)***
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Assa Singh v. Menteri Besar, Johore [1968] 1 LNS 9 FC ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Bato Bagi & Ors. v. Kerajaan Negeri Sarawak & Another Appeal [2011] 8 CLJ 766 FC ***(refd)***
Chai Tee Keiong v. PP [2013] 1 LNS 975 CA ***(refd)***
Chang Lee Swee v. PP [1984] 1 LNS 134 HC ***(refd)***
Er Ah Kiat v. PP [1965] 1 LNS 37 FC ***(refd)***
Fan Yew Teng v. PP [1975] 1 LNS 38 FC ***(refd)***
Jamaluddin Mohd Radzi & Ors v. Sivakumar Varatharaju Naidu; Suruhanjaya Pilihan Raya (Intervener) [2009] 4 CLJ 347 FC ***(refd)***

Mat Shuhaimi Shafiei v. PP [2014] 5 CLJ 22 CA ***(refd)***
Melan Abdullah & Anor v. PP [1971] 1 LNS 77 HC ***(refd)***
Mohamed Din v. PP [1984] 1 LNS 171 ***(refd)***
Mohamed Shariff v. PP [1964] 1 LNS 114 HC ***(refd)***
Mohd Johi Said & Anor v. PP [2005] 1 CLJ 389 CA ***(refd)***
Mohd Nazri Omar & Ors v. PP [2014] 1 LNS 576 CA ***(refd)***
Mraz v. The Queen (1955) 93 CLR 493 ***(refd)***
Nguyen Quoc Viet v. PP [2016] 1 CLJ 365 CA ***(refd)***
Nyambirai v. National Social Security Authority [1996] 1 LRC 64 ***(refd)***
PP v. Azmi Sharom [2015] 8 CLJ 921 FC ***(refd)***
PP lwn. Karpal Singh Ram Singh [2012] 5 CLJ 580 CA ***(refd)***
PP v. Kok Wah Kuan [2007] 6 CLJ 341 FC ***(refd)***
PP v. Mark Koding [1982] 1 LNS 96 HC ***(refd)***
PP v. Sihabduin Hj Salleh & Anor [1981] CLJ 39; [1981] CLJ (Rep) 82 FC ***(refd)***
PP v. Su Liang Yu [1976] 1 LNS 113 HC ***(refd)***
Prasit Punyang v. PP [2014] 7 CLJ 392 CA ***(refd)***
Re Tan Boon Liat @ Allen & Anor Et Al; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri & Ors And Chuah Han Mow v. Menteri Hal Ehwal Dalam Negeri & Ors And Subramaniam v. Menteri Hal Ehwal Dalam Negeri & Ors [1977] 1 LNS 110 FC ***(refd)***
Rozmi Yusof v. PP [2013] 4 CLJ 384 CA ***(refd)***
Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 FC ***(refd)***
Songsil Udtoom & Ors v. PP [2016] 1 CLJ 39 CA ***(refd)***
Surinder Singh Kanda v. The Government of the Federation of Malaya [1960] 1 LNS 132 HC ***(refd)***
Tan Eng Hong v. Attorney-General [2012] 4 SLR 476 ***(refd)***
Teh Cheng Poh v. PP [1978] 1 LNS 202 PC ***(refd)***
Tunde Apatira & Ors v. PP [2001] 1 CLJ 381 FC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 60(1)
Criminal Procedure Code, ss. 152(4), 182A(1)
Federal Constitution, arts. 10(2)(a), 145(3), 162(6), 181(1)
Sedition Act 1948, ss. 3(1)(a), (d), (f), (2)(a), 3(3), 4(1)(b)

Constitution of the Republic of Singapore [Sing], arts. 4, 9, 12, 14
Criminal Appeal Act 1912 [Aus], s. 6(1)
Penal Code (Cap 224) [Sing] s. 377A
Rules of Court (Cap 322) [Sing], O. 18 r. 19

For the appellant - Gobind Singh Deo, Ramkarpal Singh, Aliff Bolkin, Malik Imtiaz, Mohd Haijan Omar, S Prakash, Ravin Jay, R. Rishi & RSN Rayer; M/s Karpal Singh & Co
For the respondent - Awang Armadajaya Awang Mahmud & Hamdan Hamzah; DPPs

[Editor's note: For the High Court judgment, please see PP lwn. Karpal Singh Ram Singh [2009] 9 CLJ 688 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Mohtarudin Baki JCA:

[1] In this case, the appellant was initially acquitted by the High Court for a charge under s. 4(1)(b) of the Sedition Act 1948 at the end of the prosecution's case. Aggrieved by the said decision, the prosecution appealed to this court. The appeal by the prosecution was allowed and the appellant was ordered to enter upon his defence at the High Court before the same trial judge. The grounds of judgment of this court was reported (see *PP lwn. Karpal Singh Ram Singh* [2012] 5 CLJ 580; [2012] 4 MLJ 443). Having heard the defence put forth by the appellant, the High Court Judge ruled that he had failed in casting a reasonable doubt on the prosecution's case. The appellant was then convicted and fined RM4,000 in default, four months imprisonment. Hence this appeal.

[2] In the High Court, the charge against the appellant reads as follows:

> Bahawa kamu pada 6 Februari 2009 jam antara 12.00 tengahari dan 12.30 petang di Tetuan Karpal Singh & Co yang beralamat No.67, Jalan Pudu Lama, dalam Daerah Dang Wangi, Wilayah Persekutuan Kuala Lumpur dalam satu sidang akhbar telah menyebut kata-kata menghasut (transkrip ucapan dilampirkan sebagai LAMPIRAN 'A' kepada pertuduhan ini dan kata-kata menghasut digariskan); dan oleh yang demikian, kamu telah melakukan satu kesalahan di bawah seksyen 4(1)(b) Akta Hasutan 1948 (Akta 15) dan boleh dihukum di bawah seksyen 4(1) Akta yang sama.

[3] The appellant had committed the alleged offence as above in a press conference held by him due to the removal of the then Perak Menteri Besar, Datuk Seri Haji Nizar bin Jamaluddin by His Royal Highness (HRH) the Sultan of Perak. For easy reference, Lampiran "A" reads:

> **Transkrip Video Kenyataan Akhbar Oleh YB Karpal Singh Di Pejabat Peguam Karpal Singh No. 67, Jalan Pudu Lama, 50200 Kuala Lumpur Pada 6.2.2009 @ 12.00 Tengahari**
>
> I think I baca statement, yang ada depan saya sekarang ini,
>
> The removal of Perak Menteri Besar, Datuk Seri Haji Nizar bin Jamaluddin, by the Sultan of Perak purportedly pursuant to Article 16(6) of the Constitution of the State of Perak which is stated here in brackets, is clearly *ultra* (*sic*) *vires* the provisions of this article.
>
> In law, the decision of the Sultan of Perak can be questioned in a court of law. As far back as the 12th of May 1977, a strong five men bench of the Federal Court ruled that the decision of the Yang Dipertuan Agong to confirm three detention orders under the emergency (Public Order and prevention on crime) Ordinance 1969 was amenable to judicial review if it was *ultra vires* the provisions of the Federal Constitution. The Federal Court unanimously ruled, although the orders of the detention had been confirmed by the King, that decision was *ultra vires* Article 1(5)(1)(b) of the Federal Constitution as that confirmation was made outside and beyond the period of three months stipulated in that article.

With that ruling of the Federal Court which has stood the test of time for 32 years beyond a pale of doubt, the Sultan of Perak has contravened Article 16(6) of the Constitutions of the State of Perak.

The Pakatan Rakyat State Government had the mantle of legitimacy it still has. In my view the election commission had through its chairman, Tan Sri Abdul Aziz Mohd Yusof publicly ruled that there was a doubt over the vacancy of the seats of PKR Changkat Jering assemblyman, Mohd Osman Mohd Jailu, and PKR Behrang assemblyman Jamaludin Mohd Razi after the letters submitted by Perak assembly speaker V. Sivakumar in relation to their letters of resignation were conducted or rather contradicted by denials from both these assemblymen. This triggered the provisions of Article 33(1) which states [if any question arises whether a member of the Legislative assembly has a been disqualified for membership, the decision of the assembly shall be taken and shall be final.]

Therefore for the assembly to decide on the status of these 3, of these assemblymen and not the Sultan of Perak who determine that they remain independent despite having submitted undated letters of resignation to the Perak Assembly speaker and therefore with their presence at the Istana and their pledge of allegiance to the Barisan Nasional together with DAP Jelapang assemblywoman, Hee Yit Foong, the Pakatan Rakyat Government could no longer hold onto office.

In my view, until such time, the Assembly has invoked the provisions of Article 33(1) both Mohd Osman Mohd Jailu and Jamaludin Mohd Razi remained PKR assemblymen together with Jelapang assemblywoman Hee Yit Foong, remaining with the DAP until her resignation letter was subjected to determination by the Assembly pursuant to Article 33(1) thereby causing the Pakatan Rakyat to have 31members in the assembly of 60 members. It cannot therefore be said that the Sultan of Perak acted *intra vires* in fact acted *ultra vires* Article 16(6) when he determined that Menteri Besar, Nizar Jamaludin had ceased to command the confidence of the majority of the members of the legislative assembly and was therefore required to tender resignation of the executive council over which he presided including his own resignation.

Clearly the Sultan of Perak cannot invoke his powers under Article 16(1) which states [His Royal Highness shall appoint an Executive Council to appoint a Barisan Nasional Executive Council with a new Menteri Besar and a new Government. The Government of a Menteri Besar Dato' Haji Nizar bin Jamaludin still had constitutional (*sic*) supremacy and legitimacy. The actions of the Sultan of Perak are clearly, premature.

I call upon the Sultan to cease and desist from appointing a new Barisan Nasional Menteri Besar and executive council later this afternoon. This in no way should be construe as a threat to the Sultan but on the other hand a firm reminder to him that he is required to act within the parameters and confines of the sacred constitutional document that is the constitution of the State of Perak which is the supreme law of that state

The following words of Raja Muda of Perak, Raja Dr. Nazrin Shah, during the pledge of loyalty at the special investiture in conjunction with the silver jubilee celebration of Sultan Azlan Shah as the 34th Sultan of Perak at Istana Iskandariah on 3rd February 2009 bear repetition. Quote, "The rule, as the head of state and country, needs to be neutral, non-partisan, and free of having personel interest to ensure justice for the people".

Raja Nazrin also said that the power entrusted by Allah should be discharged with responsibility because he (the Ruler) would be judged in the hereafter. As such he said power must be exercised to implement goo practices adding that the ruler's nobility and honour, position, and sovereignty do not come automatically.

It is my view that the Pakatan Rakyat Government headed by Nizar Jamaludin should be allowed without any hindrance for any quarter to invoke the provisions of Article 33(1). It is after this exercise that the intervention on the Sultan of Perak could become if at all necessary.

If the Sultan persists in appointing a Barisan Nasional Executive Council and Menteri Besar, later at 3pm today, the Pakatan Rakyat will have no alternative but to seek a judicial pronouncement in the interest of the rakyat in Perak. The judicial proceedings will inevitably include the purported new State Government. This will, in turn, cause unnecessary apprehension, anxiety an concern which should be averted at all costs.

Questions And Answers

Well that is my statement. Are there any question?

(… inaudible …)

Beyond the powers conferred on him under the Constitution of the State of Perak. That he had no right, that he had no right to dismiss the Government rather the State Government of MB Nizar Jamaludin. The lawful Government is still the Government, the Pakatan Rakyat Government.

(Question from reporter … YB, can you … (unclear) …)

In fact, I've stated very clearly that we will sue the Sultan together with the new State Government as defendants if they persist. If they don't, this afternoon, if what I said is right, and the Sultan is prepared to accept that, then things are perfectly in order. The old Government would still be in power.

In fact, over Article 83 or rather 63 of the Constitution of the State of Perak. We give copies of it. I'll read what is that. What the Sultan of Perak can do is this under Article 64 and that states, His Royal Highness may refer to the Federal Court for tis decision or rather its opinion any question as to the effect of any provisions of this constitution which has a reason or appears to his Royal Highness likely to arise and the Federal Court shall pronounce in open court to his opinion on any question so

A referred to it. In other words, under Article 64 the Sultan can now refer this question and question would be whether these 3 assemblymen are still members of the assembly as.

Because if that is so, and I say that is so until such time as the State of Assembly decides under Article 33(1) as to whether they are still qualified to sit in the assembly they remain members of the Pakatan Rakyat. Pakatan Rakyat assembly, assemblymen.

(Question from reporter … YB it's look like the Barisan Nasional new … (unclear) … tomorrow …)

Well tomorrow is a holiday, the suit will be filed on Tuesday because Monday is also a holiday. In fact I call upon the Sultan to carefully consider what he has in fact done. The Sultan has no right to call the 32 members, or assemblymen rather, to the Istana and questioned them one by one as to where their allegiance lay, because that is not within the confines of a what the Sultan could do. That is the a job of the assembly to decide under Article 33(1). The Sultan cannot usurp the powers of the State Assembly.

In fact, I have cited two cases there, in fact the first case if you all can have a look at it. This is the decision of the 5 member bench of the Federal Court way back in a 1977 May 12. If you look at it, this is what was decided by the Court. Now in this case what has happened was 3 detention orders were confirmed by the Yang Di-Pertuan Agong. But that confirmation was outside the 3 month period provided for under Article 151(B) of the Federal Constitution, and this is what the Federal Court a held, it's at page 5. It's marked paragraph 3. Although the note, although the orders of detention in these cases had been confirmed by the King, that decision was *ultra vires* and could be corrected by the Court. So we are saying here what the Sultan Perak has done is *ultra vires* the Constitution of the State of Perak and the Court has jurisdiction to a set that right. It's as simple as that. A very simple constitutional issue.

(Question from reporter … Sorry YB, could you explain *ultra vires* in layman terms?

Ultra vires a means a is acting beyond, you don't have the power to act beyond what the, the, the a you know a Constitution provides. Which is only the assembly can decide on whether assemblymen in view of these letters. Even … election Commission said there's a doubt as to whether the letters were valid. And Article 33 vary a clearly states if any question arises with regard to whether an assemblyman's qualified or not, the decision shall be taken by the assembly. In fact, the a, the a present State Government, the Government which has in fact been dismissed by the Sultan, can convene a meeting even today and I tender Article 33(1) and determine whether those letters are valid and even assuming the assembly decides that these 3 are in fact no more a lawfully elected assemblymen then there's a deadlock. It would mean 28:28. 28 for the Barisan and 28 for the Pakatan Rakyat which means there's a deadlock, which means

then the Sultan of Perak should order a snap election in the State of Perak. He should dissolve the assembly, but he cannot act in the manner he has done.

(Question from reporter … Do you think Malaysia is facing a perhaps constitutional crisis?

Well, it's not Malaysia, the State of Perak is. But this could extend to other states, and we wouldn't want that kind of position. As I said, there's a way out, way out. The Sultan can act under Article 64, refer this question to the Federal Court *vis-a-vis* the facts and circumstances of this case. Whether he could act under Article 16(6) to dismiss the Government of a Nizar Jamaludin. As I keep saying our view is that the Government of Nizar Jamaludin, the Pakatan State Government still is the valid and lawful one.

I've tried to make it as clear as I can in the statement I have made. I'm backing up whatever I'm saying by cases, a by the Federal Court and the second case. If I could t..t..t.. take it to you the case of *Fan Yew Teng*, this was way back in 1975

… If I remember correctly, ya, March 12, 1975 … I did this case, in fact. What had happened was the same a constitutional provision came into a, a question, at page 15. Article 53 of the a Federal Constitution states if any question arises whether member of the House in Parliament has become disqualified the decision of the House shall be taken and shall be final. Exactly the same as Article 33(1) and the Court held that a there Fan Yew Teng did not stand disqualified this by way of conviction. In fact a by-election was called after he was convicted by the High Court. He got an injunction to stop the by election. The Court granted it because it was for the Parliament to decide whether it's a result of the conviction he had become disqualified.

(Question from reporter … YB, so you said that, since now the three have a submitted their resignation to the assembly, so the assembly should have the final say to tell them as they have a mean they are not valid member of the assembly, so by-election should be held or snap … (unclear) …

Oh .. oh … a snap election. The Sultan has got no right to intervene. He can't, under these circumstances I must say. He has certain rights but those rights do not arise under the a present state of affairs in the State of Perak.

(Question from reporter … Do you think the resignation letter is still valid because the date was fill … (unclear) …

Does not matter, let the assembly decide, let the assembly decide. The Sultan cannot decide. He has no power. We are going by the constitution. Sultan is bound by the constitution of the State of Perak. He's not immune from being taken to the Court. But I'll make it very clear. I got

That, that in fact, it' s unlawful,. That, that whoever has stopped him from excluding his duties is committing an offense under the penal code – obstruction of a public servant in the execution of his duty. I hope whoever is doing it realises what is being done. In fact, a letter has been sent out by the state Secretary to the Menteri Besar and all the actual members of the Pakatan Rakyat Government that they are required to go to the office and collect their personel effects and no other documents. (Cough) You can't shut out a Menteri Besar who has been lawfully elected from entering his own office. It's an abuse of power on the part of whoever did it. And I hope he's prepared for the consequences, and we must make it very clear that the Pakatan Rakyat is very serious about what is going on in the state of Perak. We don't want it to spread elsewhere.

(Question from reporter … What happened will happened to them also … (unclear …)

Well I'm they are not worried. I don't think anything will happened elsewhere, but the, the fact remains. We don't want a precedent like this. You can't grab power. You must get the power from the people in a constitutional manner. And I'm surprised that the Deputy Prime Minister is in fact a heading the charge in Perak including the Prime Minister himself. What is being done is very high-ended. Unbecoming of a Prime Minister and his Deputy. They got no business in fact to be even there. It's better for the state assemblymen in UMNO that they should take it up with the Sultan. Why, why should the a Sultan even give an audience to the Prime Minister and Deputy Prime Minister. They had no business to be there.

Ada apa-apa soalan lain?

(Question from reporter … is Pakatan going to a launch a huge rally to show the protest … (unclear) …)

Oh. That's a separate matter. My task is a you know to sort of take it from a legal side. They want the law to prevail and we want the constitutional provision to prevail. It's all wrong to take power on the strengths of crossovers, crossovers a people who are guilty of treachery to the rakyat. In fact, crossing over should be a made a criminal offence. It's cheating the public. It's a very very serious matter to a cheat out of having been elected on a, on a PKR ticket to crossover or for that matter on DAP ticket to crossover. You got no business to do that. You are not elected on the Barisan Nasional ticket. You go back to the people.

(Question from reporter … YB, does your statement applies to both ruling an opposition party … (unclear) …)

Yes, my statement applies to both. In fact I say Anwar Ibrahim was wrong in having started a campaign to a take power on the strengths of crossovers. What he did was not right. What has to be said will be said. You can't take power, or grab power on the strengths of crossovers.

Likewise, Najib is wrong, so why not, why not amend the Federal Constitution. I've been saying that all the time. At the moment the Federal Court has decided and this was a case coming from Kelantan. Kelantan had an anti-hopping law enacted in 1991, the Federal Court declared that the anti-hopping law was unconstitutional on the ground that it contravened. Article 10 of the Federal Constitution which says you have a right to form associations. The right to associated (*sic*) include the right to disassociate, that's what the Federal Court said.

The Federal Court has made a decision. The only way to get around the decision is to amend the Federal Constitution … to outlaw party hopping. I think the people, the country are disgusted with party hopping. And every effort should be made by the elected residents of the people. To amend not only the Federal Constitution, but all states constitution to include a anti-hopping law. In fact, anti-hopping law should be made a criminal offence. Whoever does that should be put in prison. Barisan Nasional Government does not have a two-third (*sic*) majority in Parliament at the moment to amend the Federal Constitution. I say now that the DAP will prepare, is prepared rather to give them not 9, they need 9 seats to make up two-third majority. We'll give them 28. I'll persuade Anwar Ibrahim and PAS to also support that amendment. At the moment PAS and PKR support party hopping, which is wrong. The DAP does not. Our stand has always been from the time the DAP was a in fact a set up way back in 1966 and it was formed until now our stand is very clear. You cannot cheat the Rakyat. Party hopping is something abhorrent, unacceptable, and indefensible.

Any other question?

Dan dari segi Perlembagaan Negeri Perak, adalah terus terang apa yang ada di mengisytiharkan oleh Sultan Perak iaitu a Kerajaan Negeri Pakatan Rakyat tidak sah tentang dengan peruntukan Perkara 16(6) Perlembagaan a Perak. Apa yang dibuat tidak a boleh dimempertahankan. Adakah tiga ahli Dewan Undangan Negeri Perak apabila menandatangani satu surat letak jawatan, a letak jawatan, adakah itu sah, adalah untuk a Dewan Undangan Negeri Perak membuat keputusan. Tidak ada pihak lain yang ada kuasa untuk a buat demikian, termasuk Sultan Perak.

Apa yang saya menyatakan tadi ada satu a langkah yang lain yang boleh digunakan iaitu rombakan Perkara 64 Perlembagaan Negeri Perak iaitu Sultan Perak ada kuasa untuk a rujuk satu soalan, soalan mengenai peruntukan dalam a Perlembagaan Negeri Perak dari segi apa yang ada keadaan di negeri itu untuk menentukan sapa ada kuasa. Kuasa dalam tangan Dewan Undangan Negeri untuk mengisytiharkan adakah tiga DUN a ADUN ini, ADUN yang tidak letak jawatan atau sudah letak jawatan. Bukan Sultan Perak untuk memanggil 32 ADUN ke Istana dan menyoal dia.

Adakah dia masih ahli Dewan Undangan Negeri bagi a Keadilan atau DAP. Itu bukan kuasa Sultan Perak, itu kuasa Negeri, Kerajaan Negeri yang sah. Kerajaan Negeri yang akan di a mengisytiharkan a pada 3 petang ini, tidak sah. Jika itu dibuat, kami akan rujuk perkara ini ke

A Mahkamah Tinggi di Ipoh pada hari Selasa depan satu kes akan difailkan. Dalam kes itu, Sultan Perak akan jadi penentang yang a atau a responden, defendan akan dinamakan sebagai defendan yang pertama dan Kerajaan Negeri baru yang akan dia mengisytiharkan pada pukul 3 setengah petang ini, sebagai defendan yang kedua. Dan Plaintif adalah Datuk Seri a Nizar Jamaludin. Dia akan memfailkan kes itu sebagai Menteri Besar yang sah
B untuk dapat satu a pengisytiharan daripada Mahkamah untuk a memputuskan dia adalah Menteri Besar yang sah dan bukan a Menteri Besar dan exco yang akan di um …bersumpah pada 3 setengah petang ini. Itu adalah dengan ringkas apa yang saya menyatakan dalam bahasa Inggeris tadi. Adakah apa-apa soalan?

C (Question from reporter … You sebagai lawyer on behalf … (unclear) …)

Yes…yes, yes, saya lawyer bagi … Bukan saya sahaja, saya dengan Gobind Singh Deo, Ram Karpal Singh, Sanggit Kaur, Deo dan peguam-peguam lain dalam parti bukan DAP sahaja, tetapi Keadilan dan PAS

(Question from reporter … Kira-kira jumlah berapa lawyer yang akan file-
D in next week?)

a Itu tidak ditentukan, menentukan, di saat ini.

(Question from reporter … YB, sekarang Sultan Perak desak letak jawatan … Datuk Seri … (unclear) …)

E Tidak ada kuasa apa yang saya menyatakan tadi. Ini tentang, tentang, dan a …

(reporter: (cont) … keluar daripada Perak State …)

Tidak boleh. Sultan tidak ada kuasa untuk a apa ni buang negeri. Saya ingat sesuatu warganegara dalam a Malaysia. Tidak ada, tidak ada kuasa
F untuk buat demikian.

One way, or another by Court of Law a by, by the State Assembly, and after that by the Court of Law. So what the Sultan is doing is premature, as I said, because, the Pakatan State Government is still in the majority.

G AFZAN SAKINA SULAIMAN, AISHAH AHMAD AZAM

The Prosecution's Case

[4] As mentioned earlier, on appeal against the acquittal of the appellant, this court ruled that the prosecution had succeeded in establishing a *prima facie* case and thus, the appellant was called upon to enter his defence. Briefly,
H this court (the first Court of Appeal) found that the appellant did indeed utter the seditious words in a frequent manner throughout his press statement as *per* the transcript produced above. The content of the press statement's transcript was thoroughly analysed, whereby Ahmad bin Haji Maarop JCA (as he then was) held that:

I [101] … Setelah menimbangkan dengan teliti perkataan-perkataan responden seperti dalam P3 ayat demi ayat dan menimbangkan perkataan-perkataan tersebut secara keseluruhannya serta konteks dalam mana

perkataan-perkataan tersebut disebut, dan setelah memberi latitude sebanyak yang wajar kepada responden untuk memberikan komen politik dan pandangan undang-undang sebagai ahli Parlimen dan peguam kanan yang terkemuka, tiada keraguan di fikiran kami bahawa berdasarkan kepada undang-undang yang berkuat kuasa dan keterangan yang dikemukakan di Mahkamah di peringkat ini, responden telah melepasi garis yang memisahkan pernyataan perkataan-perkataan yang dibenarkan oleh undang-undang dengan pernyataan perkataan-perkataan menghasut. Tiada keraguan di fikiran kami bahawa perkataan-perkataan responden itu bukan perkataan-perkataan yang mempunyai kecenderungan untuk menunjukkan bahawa DYMM Sultan Perak telah terkeliru atau tersilap. Oleh itu di peringkat ini pembelaan di bawah s. 3(2)(a) Akta 15 adalah tidak terpakai. Kami berpuas hati bahawa perkataan-perkataan responden mempunyai kecenderungan:

(a) Bagi mendatangkan kebencian dan penghinaan atau membangkitkan perasaan tidak setia terhadap DYMM Sultan Perak seperti diperuntukkan di bawah s. 3(1)(d) Akta 15.

(b) Bagi menimbulkan perasaan tidak puas hati atau tidak setia di kalangan rakyat DYMM Sultan Perak seperti diperuntukkan di bawah s. 3(1)(d) Akta 15.

[102] Selanjutnya, tiada keraguan di fikiran kami bahawa perkataan-perkataan responden itu mempunyai kecenderungan yang diperuntukkan di bawah s. 3(1)(f) Akta 15, iaitu kecenderungan bagi mempersoalkan kuasa prerogative DYMM Sultan Perak yang ditetapkan atau dilindungi di bawah perkara 181(1) Perlembagaan Persekutuan.

The Defence

[5] At the High Court, the appellant had two issues in his defence. The first issue was that the appellant was not questioning the prerogative power of HRH the Sultan in dissolving the State Assembly, but just the manner the prerogative was exercised. The appellant felt that the exercise of the powers by HRH the Sultan was premature. The appellant as a lawyer was just giving his legal opinion and as a Member of Parliament he just did his duty to explain to the public on the political crisis in the State of Perak. He also denied giving a warning or threat to the HRH the Sultan.

[6] The second issue was that the charge against the appellant under Sedition Act 1948 was unconstitutional and there was a selective prosecution by the Attorney General.

Findings Of The High Court At The End Of The Defence Case

[7] The appellant had relied on cases of *Re Tan Boon Liat @ Allen & Anor Et Al; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri & Ors And Chuah Han Mow v. Menteri Hal Ehwal Dalam Negeri & Ors And Subramaniam v. Menteri Hal Ehwal Dalam Negeri & Ors* [1978] 1 LNS 202; [1979] 1 MLJ 50 to establish a point that a HRH Sultan can be sued in court. However, the prosecution

A argues that these cases are distinguishable based on their respective facts. The High Court Judge agreed with the prosecution that these cases are irrelevant to support the appellant's contention.

[8] On the second issue, the High Court Judge ruled that there is no option for the court to decide on the prerogative powers of the prosecutor in B prosecuting someone as enshrined under art. 145(3) of the Federal Constitution.

[9] Subsequently the High Court decided that the appellant had failed to cast a reasonable doubt on the prosecution's case. The words that he uttered in his statement had seditious tendency to bring into hatred or contempt or C to excite disaffection against a Ruler and a Government as provided under s. 3(1)(a), had tendency to raise discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or of the Ruler of any State or amongst the inhabitants of Malaysia or of any State as provided under s. 3(1)(d) and finally as provided under s. 3(1)(f), had seditious tendency to question any D matter, right, status, position, privilege, sovereignty or prerogative established or protected by the art. 181(1) of the Federal Constitution. Thus, the appellant was convicted and fined RM4,000 in default four months of imprisonment.

E The Appeal

[10] The appellant was represented by his wife, Madam Gurmit Kaur a/p Sohan Singh as he had passed away on 17 April 2014.

[11] The issues canvassed by learned counsel for the appellant were as follows:

F

(a) The Sedition Act is unconstitutional as it is contrary to art. 10(2) of the Federal Constitution and it prohibits freedom of expression and speech on the matters provided in s. 4 read with s. 3 of the Sedition Act.

(b) The charge against the appellant was defective.

G

(c) The High Court Judge failed to make a finding whether or not the appellant had succeeded in establishing his defence under s. 3(2)(a) of the Sedition Act, thus he was denied a fair trial as his defence was not evaluated properly.

H **[12]** The appellant's counsel submitted that the Sedition Act is a pre-merdeka law and still existing in which it could not be modified under cl. 6 of art. 162 of the Federal Constitution. The counsel relied upon the cases of *Surinder Singh Kanda v. The Government of the Federation of Malaya* [1960] 1 LNS 132; [1962] 28 MLJ 169; *Assa Singh v. Menteri Besar, Johore* [1968] 1 LNS 9; [1969] 2 MLJ 30 and *Tan Eng Hong v. Attorney-General* I [2012] 4 SLR 476 and submitted that if an existing law cannot be modified to make it in accordance with the provisions of the Federal Constitution, that

law cannot be applied by any court under art. 162. Learned counsel also submitted that s. 3(3) of the Sedition Act totally prohibits any views or discussions pertaining matters that may have a 'seditious tendency' as can be seen in s. 3(1) of the Act. According to counsel, this prohibits freedom of speech and expression. Counsel relied on *PP v. Azmi Sharom* [2015] 8 CLJ 921 and contended that although the Federal Court was correct on the proportionality test, it has overlooked s. 3(3) of the Sedition Act when it was ruled that s. 4(1) is not a total prohibition because of the exceptions provided under s. 3(2) of the Act.

[13] Notwithstanding the first issue, it was also argued in the alternative that the charge against the appellant was defective because it did not state exactly under which limb of s. 3 of the Sedition Act was relied upon by the prosecution to establish a case against the appellant. Further the appellant's counsel also claimed that the defence was not evaluated independently and the High Court Judge did not make a finding whether the appellant's defence fall under s. 3(2) of the Sedition Act. Thus the appellant was denied a fair trial.

My Finding

[14] The constitutional issues raised by learned counsel had been ventilated and settled by the Federal Court in various decided cases in an extensive manner. I find no reason to go against the principles established in the case of *Azmi Sharom (supra)* with regards of modification of the Sedition Act in accordance with the Federal Constitution and on proportionality test whether s. 3(3) of the Sedition Act imposes a total prohibition or proportionate restriction. I found the appellant's submission on these grounds had no compelling merits for us to interfere.

[15] For the issue of defective charge, I took guidance from the case of *Fan Yew Teng v. PP* [1975] 1 LNS 38; [1975] 2 MLJ 235 on a similar subject where the Federal Court observed that in a prosecution under s. 4(1)(b) of the Sedition Act, the Public Prosecutor is not bound to specify in the charge on which of the six tendencies set out in s. 3(1) he relies and it is open to him during the course of the trial to pick and choose. Thus, in my opinion this issue bereft of any merit.

[16] The appellant's counsel also argued that the appellant had no intentions *(mens rea)* in committing the said offence and it is within the ambit of s. 3(2)(a) of the Act. Although the learned High Court Judge (HCJ) did not consider or rather failed to direct his mind in evaluating the appellant's defence especially with regard to the fourth and fifth grounds of appeal, I am of the view that this court at the appellate level is duty bound to consider whether the conviction against the appellant is safe or not. This issue was canvassed in *Mohd Johi Said & Anor v. PP* [2005] 1 CLJ 389, wherein Gopal Sri Ram JCA said:

A

> Unlike civil appeals, where the appellant carries the burden of showing that the judge at first instance went wrong, in a criminal case the duty of the court is to consider whether the conviction is right. **The correct approach is therefore not whether the decision is wrong but whether the conviction is safe**. (emphasis added)

B

> Note: See also section 60 Court of Judicature Act 1964.

[17] Guided by the principle above, it is my humble opinion that the conviction is safe. This is a serious offence involving sovereignty of a Ruler and his prerogative powers. It was not denied that the learned HCJ did not make a finding on whether the appellant had made out a defence under s. 3(2) C of the Sedition Act (the Act). Section 3(2) of the Act provides exceptions where if an accused person can show that his statement falls under paras. (a), (b), or (c) of s. 3(2) of the Act, he will succeed in his defence regardless of the fact that the prosecution has proven an offence under s. 3(3) of the Act. The relevant paragraph in this case was s. 3(2)(a) of the Act which provides:

D

> (2) Notwithstanding anything in subsection (1) an act, speech, words, publication or other thing shall not be deemed to be seditious by reason only that it has a tendency:
>
> (a) to show that any Ruler has been misled or mistaken in any of his measures;

E

[18] Question arises as to where to draw the line in making a statement that is deemed to show that the Ruler has been misled or mistaken in exercising his prerogative power within the limit as provided by the Act without any seditious tendency. In the present case, it was quiet obvious that the appellant had crossed his limits when he uttered phrases such as:

F

(i) "firm reminder to him",

(ii) "he had no right to dismiss the government rather the State Government of MB Nizar Jamaludin",

(iii) "I've stated very clearly that we will sue the Sultan together with G the new State Government as defendants if they persist",

(iv) "He is not immune from being taken to the court".

It is apparent that the appellant clearly had *mens rea* in making such statements which has seditious tendency within the ambit of s. 3(1)(a), (d) and also (f) of the Act.

H

[19] *Mens rea* could only be inferred from the circumstances of the case. There are numerous of authorities to the effect. However, I would like to refer the case of *Mat Shuhaimi Shafiei v. PP* [2014] 5 CLJ 22, Abdul Malik Ishak JCA (as he then was) had this to say:

I

> … Under the said Act, intention is irrelevant. As long as the speech or publication had a seditious tendency, an offence is committed. It is akin to an offence of strict liability. We reiterate the principles established by

Public Prosecutor v. Ooi Kee Saik & Ors (supra) to the effect that the truth or falsity of the words uttered is immaterial and it is not a defence to a charge for sedition. And whether the words complained of could have the effect of producing or did in fact produce any of the consequences listed in s. 3(1)(a) to (f) of the Sedition Act is immaterial.

[20] It was never denied that the appellant had acted in his capacity as a Member of Parliament and had given a legal opinion based on his knowledge that he had in legal field. However, it is noteworthy that in making any statement especially in a press conference against the Ruler and his prerogative powers, one has a responsibility to be absolutely sure that it has no seditious tendency as laid out by s. 3(1) of the Act. The appellant's continuous and repeated averments that the Ruler has no power and that he is not immune from being taken to court were only show that he had crossed the line between uttering words that are legally permitted and the ones that have seditious tendency. It is unreasonable for appellant who was from legal background, especially with vast knowledge in constitutional law to have come up with such statements. At this juncture, I find it convenient and adequate to just adapt the same view as was discussed in a great length by Ahmad Haji Maarop, the then JCA in ordering the appellant to enter his defence at the end of prosecution's case in his grounds of judgment (see *PP lwn. Karpal Singh Ram Singh* [2012] 5 CLJ 580; [2012] 4 MLJ 443).

[21] Further the appellant had also given an *ultimatum* in his statement when he said as below:

If the Sultan persists in appointing a Barisan Nasional Executive Council and Menteri Besar, later at 3pm today, the pakatan Rakyat will have no alternative but to seek a judicial pronouncement in the interest of the rakyat in Perak. The judicial proceedings will inevitably include the purported new state government. **This will, in turn, cause unnecessary apprehension, anxiety and concern which should be averted at all costs**. (emphasis added)

[22] The above statement, in my opinion is very disrespectful to be made against any Ruler of a State and suffice to constitute an offence under s. 4(1) of the Act. I find that the statements by the appellant do not fall under s. 3(2)(a) as they were far-fetched from only showing that the Ruler has been misled or mistaken in dissolving the State Assembly and to appoint the new Menteri Besar. Thus, the appellant's counsel argument, that the learned HCJ failure to make a finding whether the appellant had made out a defence under s. 3(2) of the Act does not entitle him to be exonerated from the offence. The non-direction does not tantamount to a serious misdirection. Therefore, the conviction against the appellant is safe for the reasons aforesaid, the appeal is dismissed. Conviction by the learned HCJ affirmed. My learned brother Kamardin bin Hashim has read my draft judgment and agreed with me.

Tengku Maimun Tuan Mat JCA:

[23] These two (2) appeals were filed by the appellant, Mr Karpal Singh a/l Ram Singh against conviction and sentence handed down by the High Court under s. 4(1)(b) of the Sedition Act 1948.

The Background

[24] In the High Court, the appellant was charged for the following offence:

> Bahawa kamu pada 6 Februari 2009 jam antara 12.00 tengahari dan 12.30 petang di Tetuan Karpal Singh & Co yang beralamat No. 67, Jalan Pudu Lama, dalam Daerah Dang Wangi, Wilayah Persekutuan Kuala Lumpur dalam satu sidang akhbar telah menyebut kata-kata menghasut (transkrip ucapan dilampirkan sebagai LAMPIRAN 'A' kepada pertuduhan ini dan kata-kata menghasut digariskan); dan oleh yang demikian, kamu telah melakukan satu kesalahan di bawah seksyen 4(1)(b) Akta Hasutan 1948 (Akta 15) dan boleh dihukum di bawah seksyen 4(1) Akta yang sama.
>
> **Hukuman**
>
> Kamu boleh, bagi kesalahan kali pertama, didenda tidak melebihi lima ribu ringgit atau dipenjara selama tempoh tidak melebihi tiga tahun atau kedua-duanya, dan bagi kesalahan yang kemudian boleh dipenjara selama tempoh tidak melebihi lima tahun.

[25] The words that form the subject matter of the charge against the appellant were uttered by the appellant at a press conference called by him in respect of the political crisis in the State of Perak which led to the removal of the then Menteri Besar, Datuk Seri Haji Nizar bin Jamaluddin by HRH the Sultan of Perak.

[26] For ease of reference, I reproduce below Lampiran 'A' which reads:

> **Transkrip Video Kenyataan Akhbar Oleh YB Karpal Singh Di Pejabat Peguam Karpal Singh No. 67, Jalan Pudu Lama, 50200 Kuala Lumpur Pada 6.2.2009 @ 12.00 Tengahari**
>
> I think I baca statement, yang ada depan saya sekarang ini,
>
> The removal of Perak Menteri Besar, Datuk Seri Haji Nizar bin Jamaluddin, by the Sultan of Perak purportedly pursuant to Article 16(6) of the Constitution of the State of Perak which is stated here in brackets, is clearly *ultra* (*sic*) *vires* the provisions of this article.
>
> In law, the decision of the Sultan of Perak can be questioned in a court of law. As far back as the 12th of May 1977, a strong five men bench of the Federal Court ruled that the decision of the Yang Dipertuan Agong to confirm three detention orders under the emergency (Public Order and prevention on crime) Ordinance 1969 was amenable to judicial review if it was *ultra vires* the provisions of the federal constitution. The federal court unanimously ruled, although the orders of the detention had been

confirmed by the King, that decision was *ultra vires* Article 1(5)(1)(b) of the Federal Constitution as that confirmation was made outside and beyond the period of three months stipulated in that article.

With that ruling of the federal court which has stood the test of time for 32 years beyond a pale of doubt, the Sultan of Perak has contravened Article 16(6) of the Constitutions of the State of Perak.

The Pakatan Rakyat State Government had the mantle of legitimacy it still has. In my view the election commission had through its chairman, Tan Sri Abdul Aziz Mohd Yusof publicly ruled that there was a doubt over the vacancy of the seats of PKR Changkat Jering assemblyman, Mohd Osman Mohd Jailu, and PKR Behrang assemblyman Jamaludin Mohd Razi after the letters submitted by Perak assembly speaker V. Sivakumar in relation to their letters of resignation were conducted or rather contradicted by denials from both these assemblymen. This triggered the provisions of Article 33(1) which states [if any question arises whether a member of the Legislative assembly has a been disqualified for membership, the decision of the assembly shall be taken and shall be final.]

Therefore for the assembly to decide on the status of these 3, of these assemblymen and not the Sultan of Perak who determine that they remain independent despite having submitted undated letters of resignation to the Perak Assembly speaker and therefore with their presence at the Istana and their pledge of allegiance to the Barisan Nasional together with DAP Jelapang assemblywoman, Hee Yit Foon, the Pakatan Rakyat government could no longer hold on to office.

In my view, until such time, the Assembly has invoked the provisions of Article 33(1) both Mohd Osman Mohd Jailu and Jamaludin Mohd Razi remained PKR assemblymen together with Jelapang assemblywoman Hee Yit Foong, remaining with the DAP until her resignation letter was subjected to determination by the Assembly pursuant to Article 33(1) thereby causing the Pakatan Rakyat to have 31 members in the assembly of 60 members. It cannot therefore be said that the Sultan of Perak acted *intra vires* in fact acted *ultra vires* Article 16(6) when he determined that Menteri Besar, Nizar Jamaludin had ceased to command the confidence of the majority of the members of the legislative assembly and was therefore required to tender resignation of the executive council over which he presided including his own resignation.

Clearly the Sultan of Perak cannot invoke his powers under Article 16(1) which states [His Royal Highness shall appoint an Executive Council] to appoint a Barisan Nasional Executive Council with a new Menteri Besar and a new government. The Government of a Menteri Besar Dato' Haji Nizar bin Jamaludin still had constitunional (*sic*) supremacy and legitimacy. The actions of the Sultan of Perak are clearly, premature.

I call upon the Sultan to cease and desist from appointing a new Barisan Nasional Menteri Besar and executive council later this afternoon. This in no way should be construe as a threat to the Sultan but on the other

hand a firm reminder to him that he is required to act within the parameters and confines of the sacred constitutional document that is the constitution of the State of Perak which is the supreme law of that state.

The following words of Raja Muda of Perak, Raja Dr. Nazrin Shah, during the pledge of loyalty at the special investiture in conjunction with the silver jubilee celebration of Sultan Azlan Shah as the 34th Sultan of Perak at Istana Iskandariah on 3rd February 2009 bear repetition. Quote, "The ruler, as the head of state and country, needs to be neutral, non-partisan, and free of having personal interest to ensure justice for the people".

Raja Nazrin also said that the power entrusted by Allah should be discharged with responsibility because he (the Ruler) would be judged in the hereafter. As such he said power must be exercised to implement good practices adding that the Ruler's nobility and honour, position, and sovereignty do not come automatically.

It is my view that the Pakatan Rakyat Government headed by Nizar Jamaludin should be allowed without any hindrance for any quarter to invoke the provisions of Article 33(1). It is after this exercise that the intervention of the Sultan of Perak could become if at all necessary.

If the Sultan persists in appointing a Barisan Nasional Executive Council and Menteri Besar, later at 3 pm today, the Pakatan Rakyat will have no alternative but to seek a judicial pronouncement in the interest of the rakyat in Perak. The judicial proceedings will inevitably include the purported new state government. This will, in turn, cause unnecessary apprehension, anxiety and concern which should be averted at all costs.

QUESTIONS AND ANSWERS

Well that is my statement. Are there any question?

(... inaudible ...)

Beyond the powers conferred on him under the Constitution of the State of Perak. That he had no right, that he had no right to dismiss the government rather the State Government of MB Nizar Jamaludin. The lawful Government is still the Government, the Pakatan Rakyat government.

(Question from reporter .... YB, can you ... (unclear) ...)

In fact, I've stated very clearly that we will sue the Sultan together with the new State Government as defendants if they persist. If they don't, this afternoon, if what I said is right, and the Sultan is prepared to accept that, then things are perfectly in order. The old government would still be in power.

In fact, over Article 83 or rather 63 of the Constitution of the State of Perak. We give copies of it. I'll read what is that. What the Sultan of Perak can do is this under Article 64 and that states, His Royal Highness may refer to the Federal Court for its decision or rather its opinion any

question as to the effect of any provisions of this constitution which has a reason or appears to his Royal Highness likely to arise and the Federal Court shall pronounce in open court to his opinion on any question so referred to it. In other words, under Article 64 the Sultan can now refer this question and question would be whether these 3 assemblymen are still members of the assembly as

Because if that is so, and I say that is so until such time as the State of Assembly decides under Article 33(1) as to whether they are still qualified to sit in the assembly they remain members of the Pakatan Rakyat. Pakatan Rakyat assembly, assemblymen.

(Question from reporter ... YB it's look like the Barisan Nasional new ... (unclear) ... tomorrow ...)

Well tomorrow is a holiday, the suit will be filed on Tuesday because Monday is also a holiday. In fact I call upon the Sultan to carefully consider what he has in fact done. The Sultan has no right to call the 32 members, or assemblymen rather, to the Istana and questioned them one by one as to where their allegiance lay, because that is not within the confines of a what the Sultan could do. That is the a job of the assembly to decide under Article 33(1). The Sultan cannot usurp the powers of the State Assembly.

In fact, I have cited two cases there, in fact the first case if you all can have a look at it. This is the decision of the 5 member bench of the Federal Court way back in a 1977 May 12. If you look at it, this is what was decided by the Court. Now in this case what has happened was 3 detention orders were confirmed by the Yang DiPertuan Agong. But that confirmation was outside the 3 month period provided for under Article 151(B) of the Federal Constitution, and this is what the Federal Court a held, its at page 5. It's marked paragraph 3. Although the note, although the orders of detention in these cases had been confirmed by the King, that decision was *ultra vires* and could be corrected by the court. So we are saying here what the Sultan Perak has done is *ultra vires* the Constitution of the State of Perak and the Court has jurisdiction to a set that right. It's as simple as that. A very simple constitutional issue.

(Question from reporter ... Sorry YB, could you explain *ultra vires* in layman terms?

Ultra vires a means a is acting beyond, you don't have the power to act beyond what the, the, the, a you know a Constitution provides. Which is only the assembly can decide on whether assemblymen in view of these letters. Even ... Election Commission said there's a doubt as to whether the letters were valid. And Article 33 very a clearly states if any question arises with regard to whether an assemblyman's qualified or not, the decision shall be taken by the assembly. In fact, the a, the a present State Government, the Government which has in fact been dismissed by the Sultan, can convene a meeting even today and I tender Article 33(1) and determine whether those letters are valid and even assuming the assembly decides that these 3 are in fact no more a lawfully elected assemblymen

then there's a deadlock. It would mean 28:28. 28 for the Barisan and 28 for the Pakatan Rakyat which means there's a deadlock, which means then the Sultan of Perak should order a snap election in the State of Perak. He should dissolve the assembly, but he cannot act in the manner he has done.

(Question from reporter ... Do you think Malaysia is facing a perhaps constitutional crisis?

Well, its not Malaysia, the State of Perak is. But this could extend to other states, and we wouldn't want that kind of position. As I said, there's a way out, way out. The Sultan can act under Article 64, refer this question to the Federal Court *vis-a-vis* the facts and circumstances of this case. Whether he could act under Article 16(6) to dismiss the government of a Nizar Jamaludin. As I keep saying our view is that the Government of Nizar Jamaludin, the Pakatan State Government still is the valid and lawful one.

I've tried to make it as clear as I can in the statement I have made. I'm backing up whatever I'm saying by cases, a by the Federal Court and the second case. If I could t..t..t.. take it to you the case of *Fan Yew Teng*, this was way back in 1975.. if I remember correctly, ya, March 12, 1975.. I did this case, in fact. What had happened was the same a constitutional provision came into a, a question, at page 15. Article 53 of the a Federal Constitution states if any question arises whether member of the House in Parliament has become disqualified the decision of the House shall be taken and shall be final. Exactly the same as Article 33(1) and the court held that a there Fan Yew Teng did not stand disqualified this by way of conviction. In fact a by-election was called after he was convicted by the High Court. He got an injunction to stop the by-election. The court granted it because it was for the Parliament to decide whether it's a result of the conviction he had become disqualified.

(Question from reporter ... YB, so you said that, since now the three have a submitted their resignation to the assembly, so the assembly should have the final say to tell them as they have a mean they are not a valid member of the assembly, so by-election should be held or snap ... (unclear) ...

Oh .. oh... a snap election. The Sultan has got no right to invervene. He can't, under these circumstances I must say. He has certain rights but those rights do not arise under the a present state of affairs in the state of Perak.

(Question from reporter ... Do you think the resignation letter is still valid because the date was fill ... (unclear) ...

Does not matter, let the assembly decide, let the assembly decide. The Sultan cannot decide. He has no power. We are going by the constitution. Sultan is bound by the constitution of the state of Perak. He's not immune from being taken to the court. But I'll make it very clear. I got

That, that in fact, it's unlawful,. That, that whoever has stopped him from excluding his duties is committing an offense under the penal code – obstruction of a public servant in the execution of his duty. I hope whoever is doing it realises what is being done. In fact, a letter has been sent out by the State Secretary to the Menteri Besar and all the actual members of the Pakatan Rakyat Government that they are required to go to the office and collect their personal effects and no other documents. (Cough) You can't shut out a Menteri Besar who has been lawfully elected from entering his own office. It's an abuse of power on the part of whoever did it. And I hope he's prepared for the consequences, and we must make it very clear that the Pakatan Rakyat is very serious about what is going on in the state of Perak. We don't want it to spread elsewhere.

(Question from reporter ... What happened will happened to them also ... (unclear...)

Well I'm they are not worried. I don't think anything will happened elsewhere, but the, the fact remains. We don't want a precedent like this. You can't grab power. You must get the power from the people in a constitutional manner. And I'm surprised that the Deputy Prime Minister is in fact a heading the charge in Perak including the Prime Minister himself. What is being done is very high-ended. Unbecoming of a Prime Minister and his Deputy. They got no business in fact to be even there. It's better for the state assemblymen in UMNO that they should take it up with the Sultan. Why, why should the a Sultan even give a audience to the Prime Minister and Deputy Prime Minister. They had no business to be there.

Ada apa-apa soalan lain?

(Question from reporter ... is Pakatan going to a launch a huge rally to show the protest ... (unclear) ...)

Oh. That's a separate matter. My task is a you know to sort of take it from a legal side. They want the law to prevail and we want the constitutional provision to prevail. It's all wrong to take power on the strengths of crossovers, crossovers a people who are guilty of treachery to the rakyat. In fact, crossing over should be a made a criminal offence. It's cheating the public. It's a very very serious matter to a cheat out of having been elected on a, on a PKR ticket to crossover or for that matter on DAP ticket to crossover. You got no business to do that. You are not elected on the Barisan Nasional ticket. You go back to the people.

(Question from reporter ... YB, does your statement applies to both ruling an opposition party ... (unclear) ...)

Yes, my statement applies to both. In fact I say Anwar Ibrahim was wrong in having started a campaign to a take power on the strengths of crossovers. What he did was not right. What has to be said will be said. You can't take power, or grab power on the strengths of crossovers.

Likewise, Najib is wrong, so why not, why not amend the Federal Constitution. I've been saying that all the time. At the moment the federal court has decided and this was a case coming from Kelantan. Kelantan had an anti-hopping law enacted in 1991, the Federal Court declared that the anti-hopping law was unconstitutional on the ground that it contravened.

Article 10 of the Federal Constitution which says you have a right to form associations. The right to associated (*sic*) include the right to disassociate, that's what the Federal Court said.

The Federal Court has made a decision. The only way to get around the decision is to amend the Federal Constitution ... to outlaw party hopping. I think the people, the country are disgusted with party hopping. And every effort should be made by the elected residents of the people. To amend not only the Federal Constitution, but all states constitution to include a anti-hopping law. In fact, anti-hopping law should be made a criminal offence. Whoever does that should be put in prison. Barisan Nasional Government does not have a two-third (*sic*) majority in Parliament at the moment to amend the Federal Constitution. I say now that the DAP will prepare, is prepared rather to give them not 9, they need 9 seats to make up two-third majority. We'll give them 28. I'll persuade Anwar Ibrahim and PAS to also support that amendment. At the moment PAS and PKR support party hopping, which is wrong. The DAP does not. Our stand has always been from the time the DAP was a in fact a set up way back in 1966 and it was formed until now our stand is very clear. You cannot cheat the Rakyat. Party hopping is something abhorent, unacceptable, and indefensible.

Any other question?

Dan dari segi Perlembagaan negeri Perak, adalah terus terang apa yang ada dimengisytiharkan oleh Sultan Perak iaitu a Kerajaan Negeri Pakatan Rakyat tidak sah tentang dengan peruntukan Perkara 16(6) Perlembagaan a Perak. Apa yang dibuat tidak a boleh dimempertahankan. Adakah tiga ahli Dewan Undangan Negeri Perak apabila menandatangan satu surat letak jawatan, a letak jawatan, adakah itu sah, adalah untuk a Dewan Undangan Negeri Perak membuat keputusan. Tidak ada pihak lain yang ada kuasa untuk a buat demikian, termasuk Sultan Perak.

Apa yang saya menyatakan tadi ada satu a langkah yang lain yang boleh digunakan iaitu rombakan Perkara 64 Perlembagaan Negeri Perak iaitu Sultan Perak ada kuasa untuk a rujuk satu soalan, soalan mengenai peruntukan dalam a Perlembagaan Negeri Perak dari segi apa yang ada keadaan di negeri itu untuk menentukan sapa ada kuasa. Kuasa dalam tangan Dewan Undangan Negeri untuk mengisytiharkan adakah tiga DUN a ADUN ini, ADUN yang tidak letak jawatan atau sudah letak jawatan. Bukan Sultan Perak untuk memanggil 32 ADUN ke Istana dan menyoal dia.

Adakah dia masih ahli Dewan Undangan Negeri bagi a Keadilan atau DAP. Itu bukan kuasa Sultan Perak, itu kuasa negeri, Kerajaan Negeri yang sah. Kerajaan Negeri yang akan di a mengisytiharkan a pada 3 petang ini, tidak sah. Jika itu dibuat, kami akan rujuk perkara ini ke Mahkamah Tinggi di Ipoh pada hari Selasa depan satu kes akan difailkan. Dalam Kes itu, Sultan Perak akan jadi penentang yang a atau a responden, defendan akan dinamakan sebagai defendan yang pertama dan Kerajaan Negeri baru yang akan di a mengisytiharkan pada pukul 3 setengah petang ini, sebagai defendan yang kedua. Dan Plaintif adalah Datuk Seri a Nizar Jamaludin. Dia akan memfailkan kes itu sebagai Menteri Besar yang sah untuk dapat satu a pengisytiharan daripada mahkamah untuk a memputuskan dia adalah Menteri Besar yang sah dan bukan a Menteri Besar dan exco yang akan di um ... bersumpah pada 3 setengah petang ini. Itu adalah dengan ringkas apa yang saya menyatakan dalam bahasa Inggeris tadi. Adakah apa-apa soalan?

(Question from reporter... You sebagai lawyer on behalf ... (unclear)...)

Yes...yes, yes, saya lawyer bagi... Bukan saya sahaja, saya dengan Gobind Singh Deo, Ram Karpal Singh, Sanggit Kaur, Deo dan peguam-peguam lain dalam parti bukan DAP sahaja, tetapi Keadilan dan PAS

(Question from reporter... Kira-kira jumlah berapa lawyer yang akan file-in next week?

a Itu tidak ditentukan, menentukan, di saat ini.

(Question from reporter ...YB, sekarang Sultan Perak desak letak jawatan ... Datuk Seri ...(unclear)...)

Tidak ada kuasa apa yang saya menyatakan tadi. Ini tentang, tentang, dan a ...

(reporter: (cont) ... keluar daripada Perak State ...)

Tidak boleh. Sultan tidak ada kuasa untuk a apa ni buang negeri. Saya ingat sesuatu warganegara dalam a Malaysia. Tidak ada, tidak ada kuasa untuk buat demikian.

One way, or another by court of law a by, by the State Assembly, and after that by the Court of Law. So what the Sultan is doing is premature, as I said, because, the Pakatan State Government is still in the majority.

AFZAN SAKINA SULAIMAN, AISHAH AHMAD AZAM

[27] The relevant provisions of the Sedition Act 1948 read:

3. **Seditious tendency.**

(1) A "seditious tendency" is a tendency:

(a) to bring into hatred or contempt or to excite disaffection against any Ruler or against any Government;

A (b) to excite the subjects of any Ruler or the inhabitants of any territory governed by any Government to attempt to procure in the territory of the Ruler or governed by the Government, the alteration, otherwise than by lawful means, of any matter as by law established;

B (c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any State;

(d) to raise discontent or disaffection amongst the subjects of the Yang di-Pertuan Agong or of the Ruler of any State or amongst the inhabitants of Malaysia or of any State;

C (e) to promote feelings of ill-will and hostility between different races or classes of the population of Malaysia; or

(f) to question any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III of the Federal Constitution or Article 152, 153 or 181 of the Federal Constitution.

D

(2) Notwithstanding anything in subsection (1) an act, speech, words, publication or other thing shall not be deemed to be seditious by reason only that it has a tendency:

(a) to show that any Ruler has been misled or mistaken in any of

E his measures;

(b) to point out errors or defects in any Government or constitution as by law established (except in respect of any matter, right, status, position, privilege, sovereignty or prerogative referred to in subsection (1)(f) otherwise than in relation to the implementation of any provision relating thereto) or in

F legislation or in the administration of justice with a view to the remedying of the errors or defects;

(c) except in respect of any matter, right, status, position, privilege, sovereignty or prerogative referred to in subsection (1)(f):

G (i) to persuade the subjects of any Ruler or the inhabitants of any territory governed by any Government to attempt to procure by lawful means the alteration of any matter in the territory of such Government as by law established; or

(ii) to point out, with a view to their removal, any matters

H producing or having a tendency to produce feelings of ill will and enmity between different races or classes of the population of the Federation, if the act, speech, words, publication or other thing has not otherwise in fact a seditious tendency.

(3) For the purpose of proving the commission of any offence against

I this Act the intention of the person charged at the time he did or attempted to do or made any preparation to do or conspired with

any person to do any act or uttered any seditious words or printed, published, sold, offered for sale, distributed, reproduced or imported any publication or did any other thing shall be deemed to be irrelevant if in fact the act had, or would, if done, have had, or the words, publication or thing had a seditious tendency.

4. **Offences**

(1) Any person who –

(a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act which has or which would, if done, have a seditious tendency;

(b) utters any seditious words;

(b) prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication; or

(d) imports any seditious publication,

shall be guilty of an offence and shall, on conviction, be liable for a first offence to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both, and, for a subsequent offence, to imprisonment for a term not exceeding five years; and any seditious publication found in the possession of the person or used in evidence at his trial shall be forfeited and may be destroyed or otherwise disposed of as the court directs.

The Prosecution's Case

[28] I do not propose to set out the evidence of the prosecution witnesses. Suffice to state that at the end of the prosecution's case, having heard the witnesses, the High Court ruled that the prosecution had failed to make out a *prima facie* case against the appellant. The appellant was thus acquitted and discharged without defence being called.

[29] Aggrieved by the decision of the High Court, the prosecution appealed to this court. The appeal was allowed and the appellant was ordered to enter his defence before the same High Court Judge. This court had given its grounds of judgment as to why it found that a *prima facie* case had been proved by the prosecution (see *PP lwn. Karpal Singh Ram Singh* [2012] 5 CLJ 580; [2012] 4 MLJ 443).

[30] In essence, having gone through and analysed each and every paragraph of the transcript of the press statement Lampiran A, this court found that not once did the appellant utter the words that clearly carried the meaning that HRH the Sultan of Perak did not respect or did not comply with the law but that the appellant continuously uttered such words and had given a stern reminder to HRH to cease his act of appointing the Menteri Besar and the new State Assembly. This court concluded that:

A [101] … Setelah menimbangkan dengan teliti perkataan-perkataan responden seperti dalam P3 ayat demi ayat dan menimbangkan perkataan-perkataan tersebut secara keseluruhannya serta konteks dalam mana perkataan-perkataan tersebut disebut, dan setelah memberi latitude sebanyak yang wajar kepada responden untuk memberikan komen politik dan pandangan undang-undang sebagai ahli Parlimen dan peguam kanan
B yang terkemuka, tiada keraguan difikiran kami bahawa berdasarkan kepada undang-undang yang berkuatkuasa kini dan keterangan yang dikemukakan di Mahkamah di peringkat ini, responden telah melepasi garis yang memisahkan pernyataan perkataan-perkataan yang dibenarkan oleh undang-undang dengan pernyataan perkataan-perkataan menghasut.
C Tiada keraguan di fikiran kami bahawa perkataan-perkataan responden itu bukan perkataan-perkataan yang mempunyai kecenderungan untuk menunjukkan bahawa DYMM Sultan Perak telah terkeliru atau tersilap. Oleh itu di peringkat ini pembelaan di bawah s. 3(2)(a) Akta 15 adalah tidak terpakai. Kami berpuas hati bahawa perkataan-perkataan responden mempunyai kecenderungan:

D (a) bagi mendatangkan kebencian dan penghinaan atau membangkitkan perasaan tidak setia terhadap DYMM Sultan Perak seperti diperuntukkan di bawah s. 3(1)(a) Akta 15; dan

(b) bagi menimbulkan perasaan tidak puas hati atau tidak setia di kalangan rakyat DYMM Sultan Perak seperti diperuntukkan di
E bawah s. 3(1)(d) Akta 15.

[102] Selanjutnya, tiada keraguan di fikiran kami bahawa perkataan-perkataan responden itu mempunyai kecenderungan yang diperuntukkan di bawah s. 3(1)(f) Akta 15, iaitu kecenderungan bagi mempersoalkan kuasa prerogatif DYMM Sultan Perak yang ditetapkan atau dilindungi di
F bawah perkara 181(1) Perlembagaan Persekutuan.

The Defence

[31] The defence can be categorised into two broad aspects. Firstly, that what was stated in the press statement and Lampiran A did not and cannot come within the meaning of the s. 3(1)(f) of the Sedition Act as the appellant
G was not questioning the prerogative of HRH the Sultan but the manner the prerogative was exercised. The second aspect of the defence was that the charge against the appellant was unconstitutional as there was selective prosecution by the Attorney General.

H **[32]** As regards the first aspect of the defence, the evidence of the appellant given under oath may be summarised as follows. The press conference was called to explain to the public the political crisis in the State of Perak. The appellant was giving his legal opinion backed with authorities. The appellant acknowledged that HRH the Sultan of Perak has the powers under the Constitution of the State of Perak to dissolve the State Assembly and to
I appoint the Menteri Besar but it was the appellant's view that the exercise of the powers by HRH the Sultan at that point of time was premature.

[33] The appellant stated that he was acting in his capacity as a Member of Parliament and that he had given a legal opinion for the benefit of the public. The appellant emphasised that he may be wrong in his opinion but that his view was premised on art. 33 of the Constitution of the State of Perak where the appellant stated that it was for the State Assembly to first decide on the validity or otherwise of the resignation of the three assemblymen before HRH the Sultan of Perak could decide on the removal and replacement of Dato' Seri Mohamed Nizar as the Menteri Besar. On the words 'firm reminder' given to HRH the Sultan, the appellant denied that he was giving a warning to, or that he was threatening HRH the Sultan of Perak.

[34] On the words uttered that "... we will sue the Sultan together with the new State Government as defendants if they persist", the appellant stated that the basis for him saying so was the establishment of the special court which had enabled the Rulers to be sued in that court.

[35] As for the second aspect of the defence, the appellant testified on the fact that the former Prime Minister, Tun Mahathir Mohamed had made seditious statements during the 1993 constitutional crisis but Tun Mahathir was not prosecuted. Evidence was also led on the police reports lodged against certain individuals making seditious statements, which were not investigated by the authorities.

The Findings Of The High Court At The End Of The Defence Case

[36] On the first aspect of the defence, the High Court found that the cases of *Re Tan Boon Liat @ Allen & Anor Et Al; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri & Ors And Chuah Han Mow v. Menteri Hal Ehwal Dalam Negeri & Ors And Subramaniam v. Menteri Hal Ehwal Dalam Negeri & Ors* [1977] 1 LNS 110; [1977] 2 MLJ 108 and *Teh Cheng Poh v. PP* [1978] 1 LNS 202; [1979] 1 MLJ 50 which were relied upon by the appellant to form his views that HRH the Sultan of Perak may be sued was distinguishable on the facts. The High Court agreed with the prosecution that the two cases had nothing to do with the situation in the State of Perak and that the cases do not support the appellant's views.

[37] On the issue of selective prosecution, quoting art. 145(3) of the Federal Constitution and various case laws which I find no necessity to repeat, the High Court found no reason and power to rule that the appellant ought not to have been charged on the ground that there had been selective and *mala fide* prosecution against the appellant by the Attorney General.

[38] Having dealt with the two aspects of the defence, the High Court concluded as follows (pp. 112-113 of appeal record vol. 7):

> [36] Mahkamah setelah meneliti penghakiman Mahkamah Rayuan Malaysia secara keseluruhannya dan pembuktian di dalam kes pihak pendakwaan dan meneliti pembelaan tertuduh memutuskan tertuduh gagal menimbulkan sebarang keraguan munasabah ke atas kes pihak

pendakwaan. Bahawa pihak pendakwaan tanpa sebarang keraguan yang munasabah telah berjaya membuktikan bahawa Kenyataan Akhbar oleh tertuduh di P3 dan Lampiran A mempunyai kecenderungan menghasut bagi mendatangkan kebencian atau penghinaan atau membangkitkan perasaan tidak setia terhadap DYMM Sultan Perak seperti yang diperuntukkan di bawah s. 3(1)(a) dan kecenderungan menghasut bagi menimbulkan perasaan tidak puas hati atau tidak setia di kalangan rakyat DYMM Sultan Perak seperti yang diperuntukkan di bawah s. 3(1)(d) dan kecenderungan menghasut yang diperuntukkan di bawah s. 3(1)(f), iaitu kecenderungan bagi mempersoalkan kuasa prerogatif DYMM Sultan Perak yang ditetapkan atau dilindungi di bawah Perkara 181(1) Perlembagaan Persekutuan. Oleh itu pembelaan di bawah s. 3(2)(a) dan pembelaan yang dinyatakan di atas tadi tidak terpakai dan gagal menimbulkan sebarang keraguan munasabah dan Mahkamah ini berpuas hati bahawa perkataaa-perkataan responden (sic) mempunyai kecenderungan menghasut di bawah sub-para (a), (d) dan (f).

[39] The appellant was thus convicted and having heard the parties on sentence, the High Court imposed a fine of RM4,000 in default four months imprisonment, hence the appeal.

The Appeal

[40] Following the demise of the appellant on 17 April 2014, Madam Gurmit Kaur a/p Sohan Singh had been substituted as the appellant *vide* an order of this court dated 10 November 2014.

[41] The grounds of appeal as canvassed by learned counsel for the appellant were as follows:

(i) that the Sedition Act is unconstitutional as it is contrary to art. 10(2) and is incapable of being modified under art. 162(6) of the Federal Constitution;

(ii) that the Sedition Act is unconstitutional as it did not meet the reasonableness and proportionality tests as it prohibits freedom of expression and speech upon those matters set out in s. 4 read with s. 3 of the Sedition Act;

(iii) that the charge against the appellant was defective;

(iv) that the High Court Judge failed to make a finding whether or not the appellant had made out a defence under s. 3(2)(a) of the Sedition Act; and

(v) that the appellant was deprived of a fair trial in which his defence was not evaluated independently.

The Constitutionality Of The Sedition Act 1948

[42] Learned counsel had submitted that the conviction of the appellant under s. 4(1)(b) of the Sedition Act was unconstitutional and could not be sustained for the reason that the Sedition Act which is a pre-merdeka law and is an existing law could not be modified under cl. 6 of art. 162 of the Federal Constitution which reads:

> (6) Any court or tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day under this Article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution.

[43] It was the submission of learned counsel that the Sedition Act is not capable of modification in a manner which would bring it into accord with the Federal Constitution. This submission was premised on cl. (2)(a) of art. 10 of the Federal Constitution which provides for the imposition of restrictions to the right to speech and expression guaranteed in cl. (1)(a) of art. 10.

[44] Clause (2)(a) reads:

> (2) Parliament may by law impose:
>
> (a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence;

[45] In light of the above provision, learned counsel argued that only Parliament (which consist of Yang di-Pertuan Agong, the Dewan Negara and the Dewan Rakyat) has the power to impose restrictions on freedom of speech and expression and that too only for the matters within the areas contemplated under cl. (2)(a) therein.

[46] Thus it is for the Dewan Rakyat and not for the court to decide as to what restrictions are necessary and since the Sedition Act was not debated nor considered by the Dewan Rakyat or Dewan Negara, no amount of modification by a court of law can bring it into accord with what is required by art. 10(2). Citing *Surinder Singh Kanda v. The Government of Federation of Malaya* [1960] 1 LNS 132; [1962] 28 MLJ 169; *Assa Singh v. Menteri Besar, Johore* [1968] 1 LNS 9; [1969] 2 MLJ 30 and *Tan Eng Hong v. Attorney-General* [2012] 4 SLR 476, learned counsel contended that where an existing law cannot be modified so as to bring it into accord with the provisions of the Federal Constitution, that law cannot be applied by any court under art. 162.

[47] Particular emphasis was placed by learned counsel on the case of *Tan Eng Hong (supra)*, where the Court of Appeal of Singapore had to determine an application brought by an accused person for a declaration that s. 377A of the Penal Code of the Republic of Singapore was inconsistent with arts. 9, 12 and 14 of the Constitution of Singapore and was therefore void by virtue of art. 4 of the said Constitution.

[48] Although the Singapore Court of Appeal in *Tan Eng Hong (supra)*, did not deal with the substantive issue of the constitutionality of s. 377A of the Penal Code of Singapore but only dealt with the preliminary issue of whether the application was correctly struck out under O. 18 r. 19 of the Rules, the Singapore Court of Appeal considered the line of Malaysian cases, namely *Jamaluddin Mohd Radzi & Ors v. Sivakumar Varatharaju Naidu; Suruhanjaya Pilihan Raya (Intervener)* [2009] 4 CLJ 347; [2009] 4 MLJ 593; *Surinder Singh (supra)* and *Assa Singh (supra)* which have interpreted arts. 4 and 162 of the Federal Constitution.

[49] In *Tan Eng Hong (supra)*, V K Rajah JA said:

> 55 In our view, apart from *Jamaluddin*, the Malaysian cases cannot be taken as support for the AG's contention that existing laws can never be voided under Art. 4. As we explained in the preceding paragraph, it appears that *Jamaluddin* is itself out of kilter with the approach adopted in earlier cases such as *Surinder Singh* and *Assa Singh* ... We align ourselves with the latter two cases, and find that while those two cases hold that modification of unconstitutional existing laws must be carried out, this is *only in so far as modification is possible. Surinder Singh and Assa Singh* leave open the position which the courts should take where modification is impossible, *viz*, whether the courts can then void the unconstitutional existing law under Art. 4. It is this question that we must now turn to, looking at the Constitution of Singapore. Before we do so, we note that our views correspond with those of the authors of the Report of the Federation of Malaya Constitutional Commission (11 February 1957) (Chairman: Lord Reid) ("the Reid Report") and also with those of leading constitutional experts who have studied the Constitution of Malaysia. The Reid Report at para 161 recommended the inclusion of fundamental rights in the Constitution of Malaysia as only a Constitution, as the supreme law, was able to guarantee fundamental rights:
>
> > The guarantee afforded by the Constitution [of Malaysia] *is the supremacy of the law* and the power and duty of the Courts to enforce these rights and to annul any attempt to subvert any of them whether by legislative or administrative action or otherwise (emphasis added)
>
> 56 The same point was noted by Datuk Ahmad Ibrahim (see "Interpreting the Constitution: Some General Principles" in *The Constitution of Malaysia, Further Perspectives and Developments: Essays in honour of Tun Mohamed Suffian*

(F A Trindade & H P Lee eds) (Oxford University Press, 1986) at p 19), who commented that the Reid Report took the view that the fundamental rights must be guaranteed by the Constitution of Malaysia as the guarantee afforded by that Constitution was the supremacy of the law. In the commentary on Art 162 of the Constitution of Malaysia in Dato K C Vohrah, Philip T N Koh & Peter S W Ling, *Sheridan & Groves: The Constitution of Malaysia* (Malayan Law Journal, 5th Ed, 2004), Surinder Singh is cited (at p 708) for the proposition that "inconsistent existing laws must give way to the Constitution [of Malaysia] even where an Article or the Constitution [of Malaysia] was expressed to be 'subject to existing laws'". R H Hickling, Malaysian Public Law (Pelanduk Publications, 1997) at p 50 also refers to Surinder Singh as upholding the supremacy of the Constitution of Malaysia. The strongest statement of support for our view comes from Harry E Groves, *The Constitution of Malaysia* (Malaysia Publications, 1964) who wrote that the Constitution of Malaysia continued existing laws "provided such laws were not inconsistent with [that] Constitution" (at p 36), and that existing laws which were inconsistent with the Constitution of Malaysia and which "[had] not been modified in one of the available ways must be held void (emphasis added) (at p 37, citing *Surinder Singh*).

[50] Learned counsel highlighted that although the issue of modification of the Sedition Act has been decided by the Federal Court in *PP v. Azmi Sharom* [2015] 8 CLJ 921, the Federal Court did not consider the issue in the context of *Tan Eng Hong (supra)*.

[51] Learned counsel had also argued on the constitutionality of the Sedition Act from the angle of proportionality test. The crux of the submission was that s. 3(3) of the Sedition Act totally prohibits any discussion of the matters deemed to have a "seditious tendency" as set out in s. 3(1) of the Act. This, contended learned counsel, is in violation of art. 10(2) since under art. 10(2), Parliament may by law impose restrictions (and not a prohibition) in respect of freedom of speech and expression.

[52] The Federal Court in *Azmi Sharom (supra)* had referred to and followed *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507 on proportionality test. *Sivarasa Rasiah* (*supra*) in turn had considered the statement of Gubbay CJ in the case of *Nyambirai v. National Social Security Authority* [1996] 1 LRC 64, the leading authority on the matter. This is what the Federal Court ruled in *Azmi Sharom (supra)*:

[43] In this regard, we agree with the learned judge in *Sivarasa Rasiah*, that the restriction that may be imposed by the Legislature under art. 10(2) is not without limit. This means to say that the law promulgated under art. 10(2) must pass the proportionality test in order to be valid. This, in our view is in line with the test laid down in *Pung Chen Choon* discussed earlier. Having said that, we will now consider whether s. 4(1) of the Act would pass the proportionality test. One thing is clear, this section is directed to any act, word or publication having a "seditious tendency" as

A defined in s. 3(1) paras (a) to (f) of the Act. This in our view is consistent with art. 10(2)(a) and art. 10(4) of the Constitution, as it cannot be said that the restrictions imposed by s. 4(1) are too remote or not sufficiently connected to the subjects/objects enumerated in art. 10(2)(a). Furthermore, this is not a total prohibition as it is subject to a number of exceptions as provided in s. 3(2) of the Act. As legislated, it is not B seditious to show that any Ruler has been misled or mistaken in any of his measures, or to point out errors or defects in any Government or Constitution as by law established. Upon close analysis, we agree with the plaintiff's submission that the restrictions imposed in s. 4(1) fall squarely within the ambit or parameter of art. 10(2)(a) of the Constitution.

C **[53]** Whilst learned counsel submitted that the Federal Court was correct in respect of the proportionality test, it was contended that the Federal Court overlooked s. 3(3) of the Sedition Act when it said that s. 4(1) is not a total prohibition as it is subject to a number of exceptions as provided in s. 3(2) of the Act. Learned counsel's argument was that the exceptions in s. 3(2) D have been rendered nugatory by s. 3(3) of the Sedition Act.

[54] In this regard learned counsel cited *Melan bin Abdullah & Anor v. PP* [1971] 1 LNS 77; [1971] 2 MLJ 280 where Ong CJ (Malaya) said:

> Sub-section (2) of section 3, in my view, is now nugatory to all intents and purposes. It starts to qualify or limit the broad application of E sub-section (1) by saying that an act or publication "shall not be deemed to be seditious by reason only that it has a tendency to be critical of authority, but ends contrariwise with the qualification: "if the act, speech, words, publication or other thing has not otherwise in fact a seditious tendency. In short, it simply lays down that the test to be applied is F whether or not the act impugned has in fact a seditious tendency. Sub-section (3) of section 3 in the same strain goes on to emphasise that intention is irrelevant if in fact the act had a seditious tendency.
>
> The 1970 amendment to sub-section (2) piled exception upon exception, while expressly saving from condemnation such criticisms as may be made "in relation to implementation" of the relevant articles in the G Constitution. But any effect it may intended to have on sub-section (1) is rendered wholly nugatory by paragraph (c) of subsection (2), since the new paragraph (f) is all-powerful. How the provisions of sub-section (2) can possibly affect the simple test laid down is beyond my comprehension. The law, therefore, as I construe it, is that the doing or making of any act or publication having in fact a seditious tendency renders the person H responsible liable to prosecution under section 4(1)(c) of the Sedition Act. The most significant effect of the 1970 amendment lies in paragraph (f) of sub-section (1), whereby the definition of a "seditious tendency" includes questioning any of the provisions and articles in the Federal Constitution therein specified. The ban on such questions is made absolute by paragraph (c) of sub-section (2).

I

[55] It was further the submission of learned counsel that s. 3(3) of the Sedition Act prohibits totally any discussion of the matters deemed to have a "seditious tendency" as set out in s. 3(1). This, argued learned counsel, is in violation of art. 10(2) of the Federal Constitution which states that Parliament may by law impose restrictions, not prohibition.

Decision

[56] The constitutional issue canvassed by learned counsel is not for this court to decide. It is within the domain of the Federal Court and the issues had in fact been settled by the Federal Court. In the case of *Azmi Sharom (supra)*, the Federal Court considered the following two questions referred by the High Court, by way of a special case:

(i) whether s. 4(1) of the Sedition Act contravened art. 10(2) of the Federal Constitution and therefore void under art. 4(1); and

(ii) whether the Sedition Act is valid and enforceable under the Federal Constitution.

[57] The Federal Court answered the first question in the negative and the second question in the positive. In delivering the judgment of the Federal Court, Arifin Zakaria CJ said:

> [24] To say that the Act does not come within the ambit of art. 10(2) of the Constitution as it was not made by Parliament would give it a highly restrictive and rigid interpretation to the phrase "Parliament may by law" as appearing in the said article. We are of the view that the framers of the Constitution in drafting art. 162 would have in their contemplation the provision of art. 10(2), and had they indeed intended that the phrase "the existing laws" in art. 162 is not to include the Act they could have done so in no uncertain terms.
>
> [25] On the contrary, we are of the view that the intention of the framers of the Constitution is to provide for the continuance of all existing laws including the Act, subject to any modifications as may be made so as to bring it into accord with the Constitution. The existing law is only rendered void or invalid if it could not be brought into accord with the Constitution. This is to be contrasted with the treatment of post Merdeka Day legislation which by virtue of art. 4(1) is rendered null and void to the extent of its inconsistency with the Constitution.

[58] The Federal Court went on to consider the Report of the Working Committee of Constitutional Proposals in 1946 and concluded that:

> [27] ... it is thus the intention of the framers of the Constitution to ensure that the existing law will continue to be valid and enforceable upon the coming into operation of the Constitution on Merdeka Day. It follows therefore that the Act being the "existing law" at the material date should continue to be valid and enforceable post Merdeka Day.

[59] As mentioned in para. [28] above, learned counsel submitted that the Federal Court in *Azmi Sharom (supra)* did not look at the issue of modification in the context of Singapore case of *Tan Eng Hong (supra)*.

[60] With respect, I am of the view that regardless of how the Federal Court looked at it, the issue of modification of the Sedition Act as an existing law has been decided by the Federal Court. It is not for this court to "revisit" the issue on the premise that the Federal Court had failed to consider the issue in the context of *Tan Eng Hong (supra)*.

[61] The issue on proportionality or whether s. 3(3) of the Sedition Act imposes a total prohibition or proportionate restriction had similarly been decided in *Azmi Sharom* (*supra*). The learned CJ had clearly stated that as s. 3(2) provides for exceptions, s. 4(1) of the Sedition Act is not a total prohibition. Learned DPP had also submitted that there is a statutory defence as provided under s. 3(2) of the Sedition Act and that if an accused person succeeded in showing that he falls under para. (a), (b) or (c) of s. 3(2), then he will succeed in his defence notwithstanding that the prosecution has proved s. 3(3).

[62] I therefore decline to make any finding on the first two issues raised by the appellant.

The Charge

[63] It was submitted by learned counsel in the alternative that the charge against the appellant was defective in that it did not state with precision which limb of s. 3 of the Sedition Act did the prosecution rely on to make out a case of sedition against the appellant. Section 152 of the Criminal Procedure Code was cited in support of the submission, in particular sub-s. (4) which reads:

> (4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

Decision

[64] The issue of defective charge was canvassed in *Fan Yew Teng v. PP* [1975] 1 LNS 38; [1975] 2 MLJ 235. This issue was dismissed by the Federal Court wherein Lee Hun Hoe CJ (Borneo) said:

> The fourth ground of appeal is that the appellant was given insufficient particulars of the offence alleged against him and, therefore, the charge was bad in law. Mr. Karpal Singh argued that as section 3(1) of the Sedition Act specifies six different kinds of seditious tendencies, the prosecution should have specified in what way the publication complained of was seditious, and that failure of the prosecution to do so embarrassed the appellant and rendered the charge bad in law. He referred to a specimen charge at page 317 of *Ratanlal's Law of Crimes*, 22nd edition, under section 124A of the Indian Penal Code. He also cited *Lim Beh v. Opium Farmer, Public Prosecutor v. Lee Pak* and *Pek Tin Shu v. Public Prosecutor*.

> With all due respect, we do not think that there is any merit in this argument. The forms of charges set out in *Ratanlal's Law of Crimes* merely serves as a general guide and bear no relation to any particular set of facts. The offence of murder is committed only if there was present intention or knowledge of the kinds mentioned in section 299 and 300 of the Penal Code, and yet when a person is charged with murder, it is unnecessary for the prosecution to specify in the charge the particular intention or knowledge set out in the two sections on which it relies, and indeed it can shift its ground during the course of the prosecution. In our judgment, in a prosecution under section 4(1)(c) of the Sedition Act, it is equally unnecessary for the Public Prosecutor to specify in the charge on which of the six tendencies set out in section 3(1) he relies and that it is open to him during the course of the trial to pick and choose.

[65] Guided by the above decision of the Federal Court, I similarly dismissed the issue of defective charge as being devoid of any merit.

Evaluation Of The Defence

[66] The fourth and the fifth grounds of appeal relate to the defence. To recapitulate, the defence of the appellant was premised on s. 3(2)(a) of the Sedition Act. The High Court Judge was alive of this defence when His Lordship said:

> 15. Tertuduh juga menyatakan bahawa beliau bertujuan untuk menunjukkan hanya kekhilafan di pihak Sultan sahaja akan cara "manner" Baginda bertindak. Tertuduh menghujahkan adalah bukan suatu kesalahan di pihak dirinya sebagai peguam pengalamannya luas dalam isu-isu perlembagaan dan melalui P3 dan Lampiran A dengan berlandaskan Perlembagaan Negeri dan nas-nas kes yang diputuskan sendiri oleh Mahkamah di Malaysia menyatakan akan pendapat beliau.

[67] The complaint of learned counsel was that the High Court had failed to evaluate the defence independently and had also failed to make his finding on whether the appellant had made out a defence under s. 3(2) of the Sedition Act. The failure, according to learned counsel, resulted in the appellant not having a fair trial.

Decision

[68] It is trite that at the conclusion of the trial, the High Court Judge is duty bound to consider all the evidence as mandated under s. 182A(1) of the Criminal Procedure Code. I endorse the judgment of this court in *Prasit Punyang v. PP* [2014] 7 CLJ 392 where Azahar Mohamed JCA (now FCJ) said:

> [8] ... In accordance with the provisions of s. 182A(1) of the Criminal Procedure Code , it is the duty-bound of learned JC, at the conclusion of the trial, to consider all the evidence adduced before him and shall decide whether the prosecution has proved its case beyond reasonable doubt. The legislature has advisedly used the term "all the evidence". The

A emphasis must be on the word "all". ... The aim of this provision is obviously to make certain that an accused person gets a fair trial. In the recent case of *Ahmad Mukamal Abdul Wahab & Ors v. PP* [2013] 4 CLJ 949, Hamid Sultan Abu Backer, JCA in delivering the judgment of this court has explained that the trial court has a duty and obligation to fairly and justly weigh the defence version and evidence (including the cautioned B statement of the accused) or for that matter a story by the accused to reach a just result.

[69] I have perused the grounds of judgment of the High Court at the end of the defence case. I find merit in the submission of learned counsel that the High Court had failed to look at and to evaluate the defence of the appellant C independently and had failed to make a finding whether the appellant was successful in his defence. What is apparent from the judgment of the High Court is that, in finding that the prosecution had proved its case against the appellant beyond reasonable doubt, the High Court quoted and relied on paras. 42-44, 67 and 89 of the grounds of judgment of this court in calling D for the defence (see pp. 99-103 appeal record: vol. 7). Apart from quoting the findings of this court as adverted to above, I find no evaluation by the learned High Court Judge of the defence.

[70] Clearly, the learned High Court Judge had overlooked the fact that in calling for the defence, this court only decided the case at the stage of the E prosecution's case. This was made clear by Ahmad Maarof JCA (now FCJ) when His Lordship stated "berdasarkan kepada ... keterangan yang dikemukakan di peringkat ini ..." and "di peringkat ini pembelaan di bawah 3(2)(a) Akta 15 adalah tidak terpakai." The emphasis was on "diperingkat ini" ie, at the prosecution's case. The defence remains to be evaluated and F considered by the High Court where a decision on whether the prosecution had proved its case beyond reasonable doubt had to be made by the High Court having regard to the whole case.

[71] In *Balachandran v. PP* [2005] 1 CLJ 85; [2005] 2 MLJ 301, the Federal Court had stated:

G

> Proof beyond reasonable doubt involves two aspects. While one is the legal burden on the prosecution to prove its case beyond reasonable doubt, the other is the evidential burden on the accused to raise a reasonable doubt. Both these burdens can only be fully discharged at the end of the whole case when the defence has closed its case. Therefore H a case can be said to have been proved beyond reasonable doubt only at the conclusion of the trial upon the consideration of all the evidence adduced as provided by s. 182A(1) of the Criminal Procedure Code. That would normally be the position where the accused has given evidence. However, where the accused remains silent there will be no necessity to re-evaluate the evidence in order to determine whether there is a I reasonable doubt in the absence of any further evidence for such consideration. The *prima facie* evidence which was capable of supporting a conviction beyond reasonable doubt will constitute proof beyond reasonable doubt.

[72] The appellant had given evidence under oath and he was cross-examined. He stated that the real reason why he held the press conference was for public interest. It was meant to explain to the public the political crisis in the State of Perak and that he was giving his legal opinion. The appellant further stated that the Sultan of Perak could not be questioned on HRH's prerogative and that he did not question the power or prerogative of the Sultan of Perak but that he was questioning the manner HRH the Sultan of Perak applied the prerogative and resolved the crisis, which in the appellant's view, was wrong. And whether his view was right or wrong, that was his opinion.

[73] Surely the defence given on oath deserved to be analysed and evaluated by the High Court. However, there was simply no evaluation of the defence version and evidence. The High Court had merely relied on the judgment of this court at the end of the prosecution's case. By doing so, the High Court had impliedly rejected the defence premised on the judgment of this court in calling upon the appellant to enter his defence. This approach, with respect, is erroneous.

[74] The failure of the High Court Judge to consider the entire case against the appellant which included not only the case for the prosecution but also the case for the defence, is a misdirection in law. Authorities are replete that the failure of a trial judge to consider the defence amounts to miscarriage of justice which is sufficient on its own to have the conviction set aside (see *Mohamed Shariff v. PP* [1964] 1 LNS 114; [1964] MLJ 64; *Er Ah Kiat v. PP* [1965] 1 LNS 37; [1965] 2 MLJ 239; *Mohamed Din v. PP* [1984] 1 LNS 171; [1985] 2 MLJ 251; *Alcontara a/l Ambross Anthony v. PP* [1996] 1 CLJ 705; [1996] 1 MLJ 209; *Rozmi bin Yusof v. PP* [2013] 4 CLJ 384; [2013] 5 MLJ 66; see also *Chang Lee Swee v. PP* [1984] 1 LNS 134; [1985] 1 MLJ 75; *Chai Tee Keiong v. PP* [2013] 1 LNS 975; [2014] 2 MLJ 246; *Mohd Nazri bin Omar & Ors v. PP* [2014] 1 LNS 576; [2014] 5 MLJ 644; *Nguyen Quoc Viet v. PP* [2016] 1 CLJ 365; [2016] 1 AMR 453; *Songsil Udtoom & Ors v. PP* [2016] 1 CLJ 39; [2016] 1 MLJ 41).

[75] I am mindful of the powers that this court has to review and reevaluate all the evidence adduced (see *Ahmad Najib Aris v. PP* [2009] 2 CLJ 800; [2009] 2 MLJ 613) and that there is an exception to the general principle of law that where there is a misdirection, an appellate court will quash a conviction (see *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381; [2001] 1 MLJ 259). However, on the facts and circumstances of this case, I do not think that it falls under the exception to the general rule. In my view, the miscarriage of justice occasioned to the appellant due to the misdirection of the learned trial judge had rendered the conviction unsafe.

[76] I echo the following words of Fullagar J in *Mraz v. The Queen* (1955) 93 CLR 493 at p. 514 in addressing s. 6(1) of the New South Wales Criminal Appeal Act 1912, which is *pari materia* with s. 60(1) of our Courts of Judicature Act 1964, as quoted in the judgment of the Federal Court in *Tunde Apatira (supra)*:

> It is very established that the proviso to s. 6(1) does not mean that a convicted person, on an appeal under the act, must show that he ought not to have been convicted of anything. It ought to be read and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects and the appellant may have thereby lost a chance which was fairly open to him of being acquitted, there is in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried.

[77] Be that as it may, I have taken the liberty to peruse the evidence of the appellant at pp. 30-70 of appeal record vol. 7, the gist as set out in paras. 10-12 and 50 above, which I do not propose to repeat. Having tested the defence against the prosecution's case and looking at the underlined words in Lampiran A; looking at Lampiran A as a whole where the words "my view" appeared several times and looking at the context in which the speech in Lampiran A was made, it is my judgment that the defence of the appellant that he was stating his opinion on the political crisis in the State of Perak and that the act of HRH the Sultan of Perak was premature, falls under s. 3(2)(a) of the Sedition Act, namely that the appellant wanted to show that the Ruler has been mistaken in his measures.

[78] To conclude, I allow the appeal. The conviction and sentence of the High Court is set aside. The appellant is acquitted and discharged.

Kamardin Hashim JCA:

[79] This is an appeal by the appellant against conviction and sentence for an offence under s. 4(1)(b) of the Sedition Act 1948 meeted out by the learned High Court Judge at Kuala Lumpur. We heard the appeal, at the end of which, we dismissed by majority, comprising my learned brother Justice Mohtarudin bin Baki and myself. My learned sister Justice Tengku Maimun binti Tuan Mat dissented.

[80] I have had the privilege and advantage of reading and considering the judgments of my learned brother and sister judges in draft. I concurred with my learned brother Justice Mohtarudin bin Baki judgment in dismissing the appellant's appeal. The following is my judgment in support of my learned brother.

[81] The charged framed against the appellant was as follows: A

> Bahawa kamu pada 6 Februari 2009 jam antara 12:00 tengahari dan 12:30 petang di Tetuan Karpal Singh & Co yang beralamat No. 67, Jalan Pudu Lama, dalam Daerah Dang Wangi, Wilayah Persekutuan Kuala Lumpur dalam satu sidang akhbar telah menyebut kata-kata menghasut (transkrip ucapan dilampirkan sebagai LAMPIRAN 'A' kepada pertuduhan ini dan kata-kata menghasut digariskan); dan oleh yang demikian, kamu telah melakukan satu kesalahan di bawah seksyen 4(1)(b) Akta Hasutan 1948 (Akta 15) dan boleh dihukum di bawah seksyen 4(1) Akta yang sama. B

[82] The Lampiran 'A' to the charge can be found in the judgment of my learned sister Justice Tengku Maimun binti Tuan Mat. It is not necessary for me to repeat them. C

[83] The background facts have been laid down by the learned trial judge in his grounds of judgment which can be found at pp. 90-139 of the appeal record vol.1. I do not wish to repeat them as well. At the end of the prosecution case, the learned trial judge found that the prosecution had failed to make out a *prima facie* case. The appellant was thus acquitted and discharged without defence being called. D

[84] The prosecution appealed against the acquittal was allowed by this court whereby the appellant was ordered to enter his defence before the same trial judge. The judgment of this court can be seen in *PP lwn. Karpal Singh Ram Singh* [2012] 5 CLJ 580; [2012] 4 MLJ 443. E

[85] In essence, the appellant's defence was that what was stated in the press statement and Lampiran 'A' did not and cannot come within the meaning of s. 3(1)(a), (d) or (f) of the Act. The other defence raised by the appellant was that, that there was selective prosecution by the Attorney General. F

[86] After discussing the appellant's defence, the learned trial judge found the appellant's explanation to be baseless and without merit. The learned trial judge found that once seditious tendency had been proven, intention is no longer relevant. In the premise, the learned trial judge found the appellant guilty and sentenced him accordingly. G

[87] Before us learned counsel for the appellant canvassed five grounds of appeal in his submissions, as follows:

(i) that the Sedition Act 1948 is unconstitutional as it is contrary to art. 10(2) of the Federal Constitution and is incapable of being modified under art. 162(6); H

(ii) that the Sedition Act 1948 is unconstitutional as it did not meet the reasonableness and proportionality tests; I

(iii) that the charge against the appellant was defective;

(iv) failure of the trial judge to consider the defence under s. 3(2)(a) of the Act amounting to misdirection; and

(v) that the trial judge failed to evaluate appellant's defence independently.

[88] On the issue regarding constitutionality of the impugned Act and likewise on the issue of defective charges, both issues had been discussed at length by my learned sister Justice Tengku Maimun binti Tuan Mat in her judgment. I am in total agreement with Her Ladyship's findings as regard to the two issues. I need only add that there is a presumption of constitutionality that favours the impugned statutory provisions (*PP v. Su Liang Yu* [1976] 1 LNS 113; [1976] 2 MLJ 128). The burden is on the appellant to show otherwise. The arguments put forward by the appellant's counsel failed to discharge the burden. The two issues were devoid of any merit in the appeal. I would hold that the Act is valid and constitutional.

[89] In *PP v. Azmi Sharom* [2015] 8 CLJ 921, the Federal Court had considered the issue on the constitutionality of the Sedition Act 1948 from the angle of reasonable test and the proportionality test by virtue of s. 3(2) of the same Act. In the final analysis, the apex court come to the conclusion that the impugned Act was constitutional and the validity of the Act comes under the saving provisions of art. 162 of the Federal Constitution.

[90] In my considered view that the restrictions imposed by s. 4(1) of the Sedition Act 1948 does not infringe the reasonable test and the proportionality test. Thus, the restrictions imposed in s. 4(1) of the Act fell squarely within the ambit or parameter of art. 10(2)(a) of the Federal Constitution. The restrictions imposed does not run counter to art. 10(2)(a). I hold that the Act is constitutionally enacted by Parliament and remain a valid and enforceable law.

[91] On the issue raised by learned counsel on the effect of s. 3(3) of the Act which amount to total prohibition and in contra with sub-s. (2) of s. 3 thereby against art. 10(2) of the Federal Constitution, my view is that, that we go back to the cardinal rule of interpretation of statute. It is trite that the court of law duty bound to interpret the law as it is and to give effect to its provisions. In cases where there were nugatory provisions, it is the duty of the legislator to make some amendments. As far as we are concerned, s. 3(2) of the Act is valid and in the spirit and purpose of in enacting the Act by Parliament, ie to curb any act, word or publication having a seditious tendency as defined in s. 3(1) paras. (a) to (f) of the Act.

[92] In *PP v. Sihabduin Hj Salleh & Anor* [1981] CLJ 39; [1981] CLJ (Rep) 82; [1980] 2 MLJ 273 the Federal Court on similar related issue had decided as follows: A

> Secondly, the relevant law-maker has power to amend the law at any time to change this principle so as to render it unnecessary for the prosecution to prove a *prima facie* case at the end of its case, so that thereafter the court is obliged to call on the accused to enter on his defence, even if no *prima facie* case has been proved against him. B
>
> Thirdly, if the law-maker so amends the law, to paraphrase the words of Lord Diplock at page 541 in *Duport Steels Ltd. v. Sirs*, the role of the judiciary is confined to ascertaining from the words that the law-maker has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the words is plain and unambiguous it is not for judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral; or to paraphrase the words of Lord Scarman at page 551 in the same case, in the field of statute law the judge must be obedient to the will of the law-maker as expressed in its enactments, the judge has power of choice where differing constructions are possible, but he must choose the construction which in his judgment best meets the legislative purpose of the enactment. Even if the result be unjust but inevitable, he must not deny the statute; unpalatable statute law may not be disregarded or rejected, simply because it is unpalatable; the judge's duty is to interpret and apply it. C D E

[93] As regard to the authority cited by learned counsel of a Singapore case, *Tan Eng Hong v. Attorney-General* [2012] 4 SLR 476, my view is that in interpreting provisions in our Federal Constitution, we should look at the circumstances prevailing in our country. Thus, *Tan Eng Hong (supra)* decision is in the most, persuasive in nature. (*Bato Bagi & Ors. v. Kerajaan Negeri Sarawak & Another Appeal* [2011] 8 CLJ 766 and *PP v. Kok Wah Kuan* [2007] 6 CLJ 341). F

[94] On the issue of defective charge, the same was argued in *Fan Yew Teng v. PP* [1975] 1 LNS 38; [1975] 2 MLJ 235. The issue was dismissed by the Federal Court as devoid of any merit. At p. 237, Lee Hun Hoe CJ (Borneo) said: G

> The fourth ground of appeal is that the appellant was given insufficient particulars of the offence alleged against him and, therefore, the charge was bad in law. Mr. Karpal Singh argued that as section 3(1) of the Sedition Act specifies six different kinds of seditious tendencies, the prosecution should have specified in what way the publication complained of was seditious, and that the failure of the prosecution to do so embarrassed the appellant and rendered the charge bad in law. He referred to a specimen charge at page 317 of *Ratanlal's Law of Crimes*, H I

22nd edition, under section 124A of the Indian Penal Code. He also cited *Lim Beh v. Opium Farmer*, *Public Prosecutor v. Lee Pak* and *Pek Tin Shu v. Public Prosecutor*.

With all due respect, we do not think that there is any merit in this argument. The forms of charges set out in *Ratanlal's Law of Crimes* merely serve as a general guide and bear no relation to any particular set of facts. The offence of murder is committed only if there was present intention or knowledge of the kinds mentioned in sections 299 and 300 of the Penal Code, and yet when a person is charged with murder, it is unnecessary for the prosecution to specify in the charge the particular intention or knowledge set out in the two sections on which it relies, and indeed it can shift its ground during the course of the prosecution. In our judgment, in a prosecution under section 4(1)(c) of the Sedition Act, it is equally unnecessary for the Public Prosecutor to specify in the charge on which of the six tendencies set out in section 3(1) he relies and that it is open to him during the course of the trial to pick and choose.

[95] I would dismissed the issue of defective charge as without any merit. It was never raised during the trial that the appellant had been misled or prejudiced. It was not shown to me that due to the alleged defective charge a miscarriage of justice had occurred in this case as against the appellant.

[96] And now, to the most important issue regarding evaluation of the defence by the trial judge where my learned sister Justice Tengku Maimun Tuan Mat had dissented. The complaint by learned counsel was that the trial judge had failed to evaluate the defence independently and the trial judge also failed to make his finding on whether the appellant had made out a defence under s. 3(2) of the Act with regard to lack of intention on the part of the appellant.

[97] In his judgment, after highlighting the defences raised by the appellant, the learned trial judge concludes as follows:

[36] Mahkamah setelah meneliti Penghakiman Mahkamah Rayuan Malaysia secara keseluruhannya dan pembuktian di dalam kes pendakwaan dan meneliti pembelaan tertuduh memutuskan tertuduh gagal menimbulkan sebarang keraguan munasabah ke atas kes pihak pendakwaan. Bahawa pihak pendakwaan tanpa sebarang keraguan yang munsabah telah berjaya membuktikan bahawa Kenyataan Akhbar oleh tertuduh di P3 dan Lampiran A mempunyai kecenderungan menghasut bagi mendatangkan kebencian atau penghinaan atau membangkitkan perasaan tidak setia terhadap DYMM Sultan Perak seperti yang diperuntukkan di bawah s. 3(1)(a) dan kecenderungan menghasut bagi menimbulkan perasaan tidak puas hati atau tidak setia di kalangan rakyat DYMM Sultan Perak seperti yang diperuntukkan di bawah s. 3(1)(d) dan kecenderungan menghasut yang diperuntukkan di bawah s. 3(1)(f), iaitu, kecenderungan bagi mempersoalkan kuasa prerogatif DYMM Sultan Perak yang ditetapkan atau dilindungi di bawah Perkara 181(1) Perlembagaan Persekutuan. Oleh itu pembelaan di bawah s. 3(2)(a) dan

pembelaan yang dinyatakan di atas tadi adalah tidak terpakai dan gagal menimbulkan sebarang keraguan munasabah dan Mahkamah ini berpuas hati bahawa perkataan-perkataan responden mempunyai kecenderungan menghasut di bawah sub-para (a), (d) dan (f).

[37] Dengan ini Mahkamah mendapati tertuduh telah melakukan suatu kesalahan menghasut seperti mana pertuduhan iaitu satu kesalahan di bawah seksyen 4(1)(b) Akta 15 dan Mahkamah ini telah menjatuhkan hukuman di bawah seksyen 4(1) Akta yang sama ke atas tertuduh.

[98] From what had been written by learned trial judge in his judgment cannot be said that he did not consider defences put up by the appellant. Indeed the two defences put forward by the appellant had been considered *albeit* not independently. It seems that the trial judge make his finding based so much reliance on the judgment of this court at the *prima facie* stage. What the trial judge did was highlighting the defences put up by the appellant earlier in his judgment and come to his conclusion at the later part of his judgment.

[99] The question that arise now is whether the conviction is safe? This can be done by looking at the press statement as found in Lampiran 'A', whether the right of the appellant to free speech had comes within the ambit of s. 3(1)(a), (d) or (f) of the Act, which in this case the trial judge had decided so. I would certainly agree with the learned trial judge that upon reading the impugned speech as a whole it was intended to bring into hatred or contempt or to excite disaffection against HRH the Sultan of Perak, to raised discontent or disaffection amongst the subjects of His Majesty beside to question any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III of the Federal Constitution of the Ruler of Perak. Intention is irrelevant. The truth or falsity of the words mattered is immaterial nor was the after effect of it (*PP v. Mark Koding* [1982] 1 LNS 96; [1983] 1 MLJ 111).

[100] In the upshot, I would dismissed the appeal as there were no substantial miscarriage of justice occurred in this case. The conviction is safe. For reasons stated above, I would affirm the conviction of the High Court.