

**DALAM MAHKAMAH RAYUAN MALAYSIA**  
**(BIDANGKUASA RAYUAN)**  
**RAYUAN SIVIL NO: P-01-61-1999**

ANTARA

SAUL HAMID B. PAKIR MOHAMAD

... PERAYU

DAN

1. INSPEKTOR ABDUL FATAH B. ABDUL RAHMAN ... RESPONDEN-

2. KERAJAAN MALAYSIA

RESPONDEN

(Dalam perkara mengenai Mahkamah Tinggi Malaya di Pulau Pinang  
Guaman Sivil No. 22-106-1990

Antara

Saul Hamid B. Pakir Mohamad

... Plaintiff

Dan

1. Inspektor Abdul Fatah B. Abdul Rahman

... Defendan-

2. Kerajaan Malaysia

Defendan)

Coram:

Abdul Aziz bin Mohamad, J.C.A. [Now F.C.J.]

Mohd. Ghazali Bin Mohd. Yusoff, J.C.A.

Zulkefli bin Ahmad Makinudin, J.C.A.

**JUDGMENT OF ZULKEFLI BIN AHMAD MAKINUDIN**Introduction

This is an appeal by the plaintiff against the decision of the High Court at Penang in dismissing the plaintiff's claim against the defendants. In the suit filed the plaintiff seeks to recover damages for wrongful arrest, wrongful detention and malicious prosecution. The grounds of the plaintiff's claim against the defendants are based on abuse of power, negligence and/or breach of statutory duty.

## Background Facts of the Case

The relevant background facts of the case are as follows:

The plaintiff was at the material time, a technician attached to the Botanical Gardens, Penang. The first defendant was at the material time, a Police Inspector serving as an investigating officer at the Pulau Tikus Police Station, Penang and an employee of the second defendant, the Government of Malaysia.

On 21.3.1987, two police reports were lodged at Pulau Tikus Police Station. The first police report namely Report No. 641/87, was lodged by one Sukah Singh, then 13 years old, a schoolboy. Sukah Singh alleged that at about 10.00 a.m. on 21.3.1987 whilst he was selling peanuts at the Botanical Gardens, Penang [“the said Gardens”], a man whom he knew as “Hamid” [the plaintiff], who was then riding a bicycle, suddenly knocked into him from the rear, causing him to fall. According to Sukah Singh, the plaintiff then assaulted him and directed him to empty his pockets. He

obeyed. Sukah Singh said the plaintiff then grabbed his monies amounting to RM14.00 in all.

The second police report, namely Report No. 642/87, was lodged by the plaintiff, then aged 33. In this report the plaintiff alleged that at about 10.30 a.m. on 21.3.1987 whilst on his way to his office, the plaintiff was blocked by a Sikh boy named Sukah Singh and an Indian boy. They refused to let him go to work. The Sikh boy threatened him and told him "*he cannot work here*". The plaintiff pedalled on nevertheless, to work. At about 12.40 p.m. the same day, the plaintiff on his way back home cycled towards the main gate of the said Gardens. The Sikh boy then, together with his two brothers suddenly appeared and shut the gates towards which the plaintiff was travelling. The plaintiff was not able to avoid the gate. He crashed into the gate and he fell. He was injured. His bicycle was damaged. Whilst on the ground, the plaintiff alleged the Sikh boy together with his two brothers attacked the plaintiff. They kicked him. When the plaintiff later

got up and pushed his bicycle away, one of them showed the plaintiff a knife and told him, “*nanti awak jaga awak tidak boleh datang ke kerja di Pejabat Kebun Bunga, Pulau Pinang.*”

The first defendant, when confronted with the two reports choose to believe Sukah Singh’s version over that of the plaintiff. And so, he arrested and detained the plaintiff on 21.3.1987 for investigations. Sukah Singh was released after a statement was recorded from him on the 21.3.1987 itself.

The plaintiff was detained for a period of nine days. The plaintiff dissatisfied with his detention sought compensation from the defendants for the said arrest and detention. The plaintiff contended in the court below that the first defendant had acted wrongfully and unlawfully and had abused the powers of his office by arresting and placing him under detention for nine days. The learned trial judge rejected his contention and ruled that the police had not acted arbitrarily and had not abused their statutory power

of arrest by arresting the plaintiff on 21.3.1987. The learned trial judge held the view that the first defendant was right in taking all of the relevant factors in deciding whether there was a reasonable suspicion of the plaintiff being concerned in the two offences of robbery and voluntarily causing hurt contrary to sections 392 and 323 of the Penal Code.

### Decision on Appeal

For the plaintiff it was submitted before us that there are serious errors of law in the findings made by the learned trial judge in dismissing the plaintiff's claim. Learned Counsel for the plaintiff focused his argument on two main points as follows:

Firstly, it is the contention of the plaintiff that the first defendant had no power at that time to arrest the plaintiff for an offence under section 323 of the Penal Code which is a non-seizable offence.

Secondly, it is the contention of the plaintiff that the first defendant had no grounds which could raise reasonable suspicion on his part which justified him in the exercise of his discretion to arrest the plaintiff for both offences as alleged.

On the first point raised by the plaintiff, it was submitted that an offence under section 323 of the Penal Code is a non-seizable offence. In such a case the police shall not arrest the alleged offender without a warrant. Under section 2 of the Criminal Procedure Code [“CPC”], a “ non-seizable offence” means an offence for which a police officer may not ordinarily arrest without a warrant according to the third column of the First Schedule. It was further argued that under section 108 of the CPC, whenever an information relating to the commission of an offence relates to the commission of a non-seizable offence the informant shall be referred to a Magistrate. Section 108(2) of the CPC expressly states that no police officer shall in a non-seizable case exercise any of the special powers in relation to police investigations given

by chapter XIII of the CPC without the order of the Public Prosecutor. Chapter XIII of the CPC includes the provisions of sections 112 to 117 of the CPC.

Learned Counsel for the plaintiff contended that contrary to the above mentioned express provisions of the CPC, the first defendant had arrested the plaintiff without a warrant and had wrongfully detained and remanded him for a period of nine days for investigation of an offence under section 323 of the Penal Code which is clearly a non-seizable offence. It was also contended for the plaintiff that the learned trial judge had erred in law when she ruled that the arrest of the plaintiff for both offences of robbery and voluntarily causing hurt under sections 392 and 323 of the Penal Code was not unlawful. It is the plaintiff's case that the arrest and detention of the plaintiff for nine days for the purpose of investigating both offences is completely unlawful and must be so declared.

On the first point raised by the plaintiff it must be noted at the outset the offence under investigation by the first defendant in this case is not only the offence under section 323 of the Penal Code, but also an offence under section 392 of the Penal Code, which is a seizable offence. The first defendant [DW4] in his evidence had stated as follows:

*“Saya seterusnya telah tangkap plaintiff kerana disyaki telah melakukan samun dan mengakibatkan cedera ke atas DW1 [‘Sukah Singh’].”*

**[See page 110 of the Appeal Record].**

I am of the view since the plaintiff had been investigated on suspicion of committing the offence of robbery under section 392 of the Penal Code and being a seizable offence, the first defendant was therefore justified in the circumstances of the case to have arrested the plaintiff without a warrant. It is untenable for the plaintiff to contend just because the plaintiff had also been

investigated at the same time for an offence of voluntarily causing hurt under section 323 of the Penal Code, being a non-seizable offence that a warrant is needed to effect the arrest on the plaintiff. Both the said police reports were lodged by the plaintiff and Sukah Singh on the same day on 21.3.1987 and the two offences under sections 392 and 323 of the Penal Code were found to have been committed in the same transaction. In my view there need be only one arrest effected by the first defendant on the plaintiff and for this the first defendant had lawfully exercised his power by arresting the plaintiff with a view to investigation for an offence under section 392 of the Penal Code. I do not think the first defendant needed a warrant with a view to effecting another arrest on the plaintiff for investigation of an alleged offence under section 323 of the Penal Code when the plaintiff had already been lawfully arrested and detained for committing the alleged offence of robbery under section 392 of the Penal Code. Furthermore it has to be stated here there is an Explanatory Note No. (2) to the First Schedule of the CPC which states that the entries in the Third

Column of the said Schedule are not intended in any way to restrict the powers of arrest without warrant which may be lawfully exercised by Police Officers.

It is also to be noted that the first defendant [DW4] as the investigating officer of the case had referred the result of his investigation to the Deputy Public Prosecutor [“DPP”] for further directions. On this point DW4 had this to say:

*“Saya merujuk kertas siasatan kepada Timbalan Pendakwa Raya. Saya berjumpa dengan Timbalan Pendakwa Raya. Timbalan Pendakwa Raya telah mengarahkan plaintif dituduh di bawah seksyen 392 dan 323 Kanun Keseksaan.”*

**[See page 116 of the Appeal Record].**

I am of the view if section 108(2) of CPC requires reference to the DPP for an investigation of an offence under section 323 of the Penal Code, the DPP had in fact taken cognizance when the DPP instructed the police in this case to charge the plaintiff for offences under sections 323 and 392 of the Penal Code. The investigation therefore is not contrary to section 108 of the CPC. In fact the total nine days remand order that was first granted by the Registrar of the Sessions Court and subsequently by the President of the Sessions Court in this case was for the purposes of investigation for both offences under sections 392 and 323 of the Penal Code and not section 392 of Penal Code alone. For this reason it is my judgment that the first defendant cannot be held responsible for wrongful arrest and false imprisonment.

On the second point raised by the plaintiff it relates more to the factual aspect of the case as to whether or not the first defendant had the reasonable suspicion enough to justify the exercise of discretion to arrest the plaintiff. Section 23(i)(a) of the

CPC speaks about “reasonable suspicion” before an arrest can be made. In the Privy Council case of **Shaaban & Ors. v. Chong Fook Kam [1969] 2 MLJ 219**, Lord Devlin held that the test to be applied in the exercise of the power under section 23(i)(a) of the CPC is the reasonable suspicion test, and not the prima facie proof test. The learned trial judge had rightly adopted the correct test having referred to the principle as set out in **Shaaban**’s case and in her judgment she had quoted the relevant passage of the said case as follows:

*“Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: ‘I suspect but I cannot prove’. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end. When such proof has been obtained the police case is complete; it is ready for trial and passes on to its next stage. It is indeed desirable as a general rule that an arrest should*

*not be made until the case is completed. But if arrest before that is forbidden, it could seriously hamper the police. To give power to arrest on reasonable suspicion does not mean that it is always or even ordinarily to be exercised. It means that there is an executive discretion.*

*In the exercise of it many factors have to be considered besides the strength of the case. The possibility of escape, the prevention of further crime and the obstruction of police enquiries are examples of those factors with which all judges who have had to grant or refuse bail are familiar.*

*There is no serious danger in a large measure of executive discretion in the first instance because in countries where common law principles apply the discretion is subject indirectly to judicial control. There is first the power to grant bail. There is secondly the fact that in such countries there is available only a*

*limited period between the time of arrest and the institution of proceedings; and if a police institutes proceedings without prima facie proof, he will run the risk for malicious prosecution. The ordinary effect of this is that a police officer either has something substantially more than reasonable suspicion before he arrests or that, if he has not, he has to act promptly to verify it. In Malaysia the period available is strictly controlled by the Code. Under section 28 the suspect must be taken before a magistrate at the latest within 24 hours. If the investigation cannot be completed within 24 hours and there are grounds for believing that the accusation or information is well founded, under section 117 the magistrate may order the detention of the accused for a further period not exceeding 15 days in the whole. By allowing 15 days after arrest for investigation, the Code shows clearly that it does not*

*contemplate prima facie proof as a prerequisite for arrest.*

.....

*There is another distinction between reasonable suspicion and prima facie proof. Prima facie proof consists of admissible evidence. Suspicion can take account matters that could not be put in evidence at all.”*

**[See pages 22-23 of the Appeal Record].**

I am of the view the first defendant had acted reasonably in his decision before arresting the plaintiff at about 3.15 p.m. on 21.3.1987. At the time of arrest the “reasonable suspicion” was that the first defendant believed the report of Sukah Singh [DW1] in his report No. 641/87 as being true and not the report No. 642/87 lodged by the plaintiff. The first defendant in his evidence before the trial judge had given an account as to what he did in respect of the said two police reports. The first defendant stated

that he had conducted a preliminary investigation by interviewing the plaintiff and Sukah Singh. He directed Sergeant Major Zainol [DW3] to record the statement of Sukah Singh. He took into consideration the plaintiff's body size, and said that through his experience as a police officer Sukah Singh cannot be the aggressor. The plaintiff alleged that he was assaulted but the first defendant observed there were no marks of injuries at all sustained by the plaintiff. The first defendant further consulted his superior, Superintendent Leong Ho Chiew and they were both satisfied that the report by Sukah Singh was reasonable. **[See pages 107-110 of the Appeal Record]**.

Learned Counsel for the plaintiff in his submission before us took up as an issue that the learned trial judge was wrong in law when she expressly held that the failure on the part of Counsel for the plaintiff to cross-examine Sukah Singh [DW1] as to the accuracy of the contents of the police reports amounted to acceptance on the part of the plaintiff of the complaint made

against him by DW1. Learned Counsel for the plaintiff further contended that whether the reports are true or not would have no bearing on the plaintiff's case. It is really what the first defendant did preliminary to satisfy himself for the need to arrest at the material time which is important. Against this contention of the plaintiff I wish to state here that the principle of law on this point is well established as referred to in the case of **Aik Ming (M) Sdn. Bhd. & Ors. v. Chang Ching Chuen and another appeal [1995] 2 MLJ 770** wherein Gopal Sri Ram, JCA in delivering the Judgement of the Court of Appeal and in applying the rule as laid down in **Browne v. Dunn [1893] 6 R 67** at page 794 had this to say:

*“It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from*

*doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal cases. It applies with equal force in the trial of civil cases as well.”*

With regard to the above proposition of law learned Counsel for the plaintiff however submitted that in relation to the present case emphasis should be placed on the words ‘party’s case’ and according to him it is different in respect of claim for unlawful arrest and detention. He was of the view what is of essence is to consider whether the police had good reasons at the time of arrest to effect such arrest. With respect I find such a contention is without merit. There is no difference. The law applies across the board, otherwise different set of rule of evidence have to be applied for different causes of action.

It is my judgment that the learned trial judge was right in deciding that the failure of the plaintiff's Counsel to put his case or challenge the evidence of Sukah Singh [DW1] and his friend, Kandhiah [DW2] who were both at the scene of the incident is fatal to the plaintiff's case. In my view when the learned trial judge accepted the truth of DW1's and DW2's evidence because the plaintiff failed to contradict their evidence during cross-examination, then the first defendant cannot be said to be wrong in accepting DW1's report as reasonable.

For the plaintiff, it was argued that he had in fact put his case and challenged the defendants' version of the case when the first defendant [DW4] was cross-examined in detail in respect of the conduct of his investigation. However, DW4 is not the material witness. He is only carrying out the investigation over the report by DW1. The material for investigation is the police report by DW1, which DW4 relied on and he had found it to be true. DW1 and DW2 are in fact the material witnesses who had said the

plaintiff assaulted and robbed DW1. The plaintiff's version of the incident on 21.3.1987 was never put to DW1 and DW2. In the circumstances of the case the learned trial judge was correct in accepting DW1's version. It therefore follows that the decision to arrest the plaintiff was lawful and with reasonable cause. It was entirely upon the first defendant's discretion to arrest the plaintiff. What is reasonable to the first defendant is for him to determine.

I shall now deal with other ancillary points raised by the plaintiff in this appeal. It was contended for the plaintiff that a police officer need not arrest a person if investigation can proceed without his arrest and detention. It was submitted that in this case there is not an iota of evidence led by the defendants as to why investigation cannot be carried out without the first defendant arresting and detaining the plaintiff. On this point I do not think the defendant has a burden to lead such evidence if it can be shown that the decision by the first defendant to arrest the plaintiff was lawful and with reasonable cause. Whether the first defendant did

not do this or did not do that is immaterial. What is important is whether the arrest is reasonable and not the manner of investigation.

Learned Counsel for the plaintiff in his submission before us made an attempt to show that the learned trial judge failed to appreciate the true extent of the provision of section 23 of the CPC. He contended that section 23 of CPC says a police officer “may arrest”. It does not say “must arrest”. In my view the word “may” connotes a discretion and here in this case is the discretion of the first defendant as whether to arrest the plaintiff or not. The first defendant had arrested the plaintiff because he believed DW1’s police report as reasonable. He had reasonable suspicion that the plaintiff commits the offences and arrested him. Whether he has reasonable cause is a question fact for the learned trial judge to determine and in this case the learned trial judge had made a finding of fact that the arrest of the plaintiff was lawful in the circumstances of the case. The Police Report No. 641/87 by DW1

is the basis of the investigation by the first defendant and as had been held in Shaaban's case (supra) suspicion can take into consideration matters that could not be put in evidence at all.

For the plaintiff it was also submitted that the first defendant as the investigating officer had failed to look at the plaintiff's bicycle which would have indicated damage consistent with the plaintiff's story. In his evidence the plaintiff had said the first defendant asked his younger brother [PW2] to go back to his house and bring the bicycle to the first defendant for him to investigate. On this issue I find that learned Counsel for the plaintiff never put the question to the first defendant whether the bicycle was brought by PW2 to him and whether he had investigated in respect of the bicycle. No evidence was led in this respect by the plaintiff and it would be too late in the day for the plaintiff to raise the issue now. The principle of law on this point as laid down in the case of Browne v. Dunn (supra) would equally apply here.

## Conclusion

For the reasons already stated I would dismiss the plaintiff's appeal with costs and order the deposit to be paid to the defendants on account of taxed costs.

My learned brother Mohd. Ghazali bin Mohd. Yusoff, JCA has seen this judgment in draft and has conveyed his agreement thereto.

(DATO' ZULKEFLI BIN AHMAD MAKINUDIN)  
Judge  
Court of Appeal

Dated: 20<sup>th</sup> July 2007.

### **Counsel for the Appellant:**

Mr. Gobind Singh Deo

### **Solicitors for the Appellant:**

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### **Counsel for the Respondents:**

Encik Kamaludin bin Md. Said, Senior Federal Counsel  
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