

**DALAM MAHKAMAH PERSEKUTUAN MALAYSIA, DI PUTRAJAYA
(BIDANG KUASA RAYUAN)**

RAYUAN JENAYAH NO. 05-130 & 143-2008 (B)

ANTARA

MENTERI HAL EHWAL DALAM NEGERI ... PERAYU

DAN

RAJA PETRA BIN RAJA KAMARUDIN ... RESPONDEN

**(RAYUAN DARIPADA MAHKAMAH TINGGI SHAH ALAM
PERMOHONAN JENAYAH SELANGOR NO. 44-217 TAHUN 2008)**

**The respondent's application to recuse Augustine Paul
FCJ from hearing the criminal appeals No. 05-130-2008 (B)
and No. 05-143-2008 (B)**

KORAM

**NIK HASHIM BIN NIK AB. RAHMAN, HMP
AUGUSTINE PAUL, HMP
ZULKEFLI BIN AHMAD MAKINUDIN, HMP**

09 April 2009

The respondent's application to recuse Augustine Paul FCJ from hearing the criminal appeals No. 05-130-2008 (B) and No. 05-143-2008 (B)

JUDGMENT OF THE COURT

1. A three-member panel consisting of Nik Hashim, Augustine Paul and Zulkefli FCJJ, was empanelled by the learned Chief Justice to hear the Federal Court Criminal Appeals No. 05-130-2008 (B) (the 1st appeal) and No. 05-143-2008 (B) (the 2nd appeal) on 11 February 2009 at Putrajaya. The 1st appeal is the appellant's appeal against the High Court's decision allowing the respondent's application for a writ of habeas corpus for his release on 7th November 2008 whereas the 2nd appeal is the respondent's cross-appeal specifically against the High Court's decision in holding that section 8 of the Internal Security Act 1960 did not contravene the Federal Constitution.
2. When both the appeals were called up for hearing on 11 February 2009, learned counsel for the respondent, Encik Malik Imtiaz Sarwar applied to recuse my learned brother Augustine Paul FCJ from hearing the appeals on the grounds that the respondent had been critical of the learned judge in his website in 2001 and that there might be a real danger of bias on the part of the learned judge if he sat on the panel to hear the appeals. He also said that as a High Court judge, Justice Augustine Paul had dismissed the respondent's habeas corpus application in 2001 and that the Federal Court had allowed his appeal against the order made. Learned counsel then applied

for a short adjournment of the hearing to enable him to submit a formal application and to file documents in support of the application.

3. The learned Senior Deputy Public Prosecutor, Tun Abd. Majid, objected to the application for the adjournment and argued that the question of bias did not arise in this case and urged the Court to dismiss the recusal application.
4. Having heard the parties, we at first dismissed the application for the adjournment, but upon reconsideration while still on the bench, we allowed the application for time for the learned counsel for the respondent to file a formal application by the next day i.e. 12th February 2009 and we set Monday 17 February 2009 at 9.30 a.m. as the date and time for the continuation of the hearing of the recusal application. The application could not be set down for continued hearing on the 12th and 13th February 2009 (Thursday and Friday respectively) as on those two dates the presiding judge Nik Hashim FCJ had to be in Kota Kinabalu together with the learned President of the Court of Appeal and the learned Chief Judge of Malaya to hear two election petition appeals No. 01(F)-19-2008 and No. 01(F)-20-2008.
5. The respondent's formal application which was filed was marked as encl.17(a). At the outset of the continued hearing on 17th February 2009, my learned brother Augustine Paul FCJ informed the Court that he wished to recuse himself from the recusal proceeding as he considered that the nature of the

application would not make his presence on the bench appropriate and his absence on the bench would be in line with the principle that justice must not only be done but also must be seen to be done. With the agreement of my learned brother Zulkefli FCJ, I then allowed my learned brother Augustine Paul FCJ to leave the bench leaving the two of us to continue with the hearing of the application.

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

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

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

“Continuation of proceedings notwithstanding absence of Judge

78.(1) If, **in the course of any proceeding**, or, in the case of a reserved judgment, at any time before delivery

of the judgment, **any Judge of the Court hearing the proceeding is unable, through illness or any other cause, to attend the proceeding** or otherwise exercise his functions as a Judge of that Court, **the hearing of the proceeding shall continue** before, and judgment or reserved judgment, as the case may be, **shall be given by, the remaining Judges of the Court, not being less than two**, and the Court shall, for the purposes of the proceeding, be deemed to be duly constituted notwithstanding the absence or inability to act of the Judge as aforesaid.

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

(emphasis added)

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

“.... the imposition of a limitation on the scope of a general expression by the application of the *ejusdem generis* principle presupposes the identification of a like group of matters. **If no genus is established, the rule cannot be applied.** In *R v Regos and Morgan* (1947) 74 CLR 613 Latham CJ at 624 said that the specific things enumerated must ‘possess some common and dominant feature’. An example of this approach is provided by

Stewart v Lizars (1965) VR 210. There is a definition of 'litter' as meaning 'bottles, tins, cartons, packages, paper, glass, food or other refuse or rubbish' was held not to attract the *ejusdem generis* principle because no single relevant genus could be spelled out of the items specifically mentioned. Hence motor car sump oil could fall within the definition.

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

(emphasis added)

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

10. Secondly, what must be considered is whether the recusal of my learned brother Augustine Paul FCJ was “.... in the course of any proceeding” as required by the section. The words refer to a proceeding which has already commenced.
11. In this case the hearing of the proceeding had already commenced when my learned brother Augustine Paul FCJ recused himself. It had been fixed for continued hearing. Prior to that he had participated in the proceeding. He took part in the decision made on the 11th February 2009 to allow the adjournment to enable the respondent to file a written application for his recusal on the 12th February 2009. That decision was the exercise of a discretionary power agreed to by all three of us. It need not necessarily find favour with another judge if appointed to take the place of my learned brother Augustine Paul FCJ. The requirements of section 78(1) of the Act have therefore been satisfied to enable the remaining two judges to continue with the proceeding.
12. It is true that section 74(1) of the Act provides that every proceeding in the Federal Court shall be heard and disposed of by three Judges or such greater uneven number of Judges as the Chief Justice may in any particular case determine, but by its term, the section is a general provision which is subject to other provisions under Part IV of the Act that includes section 78. Thus, for the purposes of the recusal proceeding, the Court, consisting of the remaining two judges : Nik Hashim and

Zulkefli FCJJ, was duly constituted notwithstanding the absence of my learned brother Augustine Paul FCJ.

13. It is now necessary to deal with the merits of the recusal application. On the question of judicial bias, the law in this area is settled. The test is premised on the “real danger of bias” as propounded in **R v Gough (1993) AC 646** which was approved and applied by the Federal Court in numerous cases such as **Majlis Perbandaran Pulau Pinang v Syarikat Berkerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan (1999) 3 MLJ 1**; **Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara (2002) 1 MLJ 321**; **Dato’ Tan Heng Chiew v Tan Kim Hor (2006) 2 MLJ 293** and recently in **Metramac Corp. Sdn Bhd v Fawziah Holdings Sdn Bhd (2007) 5 MLJ 501**. In this case, the Court was urged to recuse my learned brother Augustine Paul FCJ from being one of the panel members to hear the appeals on the grounds that the respondent had been critical of the learned judge in his website and that there might be a real danger of bias on the part of the learned judge if he sat on the panel to hear the appeals. Be it noted that it is the respondent who was critical of my learned brother Augustine Paul FCJ in his website in 2001. And there was no response by the learned judge against the criticism. Furthermore, the respondent was never cited for contempt for the criticism. With regard to the objection raised by learned counsel about my learned brother Augustine Paul FCJ having dismissed the previous application for habeas corpus by the respondent, it is our view that a judge is not precluded from

hearing a case against a person when he had in the past heard another case against the person if the facts in the cases are different. It must also be observed that in the previous habeas corpus application by the respondent, my learned brother Augustine Paul FCJ did not go into the facts of the case as it was agreed by the parties in that case that the decision in one case that was being heard shall be binding on the respondent's application (see **Mohamad Ezam Mohd Nor & Ors v Inspector General of Police (2001) 2 MLJ 481**). So, how on earth might there be a real danger of bias on the part of my learned brother Augustine Paul FCJ to sit on the panel to hear the appeals? On the facts submitted by the learned counsel, we found the grounds of the application far-fetched and ludicrous.

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

09 April 2009

(Dato' Bentara Istana Dato' Nik Hashim bin Nik Ab. Rahman)
Judge
Federal Court,
Malaysia

Counsel:

For the appellant : Tun Abd. Majid bin Tun Hamzah,
Senior Deputy Public Prosecutor
Abd. Wahab bin Mohamed, Najib bin
Zakaria

Public Prosecutor : Senior Federal Counsel

For the respondent : Malik Imtiaz Sarwar, Azhar Azizan
Harun, J. Chandra, Amarjit Singh,
Ashok Kandiah, Sreekant Pillai,
Neoh Hor Kee.

Solicitors : Mathews Hun Kandiah