DALAM MAHKAMAH PERSEKUTUAN MALAYSIA

(BIDANG KUASA RAYUAN)

RAYUAN JENAYAH NO. 05-46-2007 (W)

ANTARA

PENDAKWA RAYA … PERAYU

DAN

KOK WAH KUAN … RESPONDEN

KORAM: AHMAD FAIRUZ SHEIKH ADBUL HALIM, CJ
ABDUL HAMID MOHAMAD, PCA
ALAUDDIN MOHD SHERIFF, CJ (M)
RICHARD MALANJUM, CJ (S&S)
ZAKI TUN AZMI, FCJ

JUDGMENT OF RICHARD MALANJUM, CJ (S&S)

1. This is an appeal by the Public Prosecutor against the decision of the Court of Appeal which upheld the conviction of the Respondent but set aside the sentence imposed and released him from custody on the ground that section 97 (2) of the Child Act 2001 (Act 611) was unconstitutional.

2. I need not summarize the reasons given by the Court of Appeal since it has already been admirably done in the Judgment of the learned President of the Court of Appeal.

3. Section 97 of the Child Act reads:

“(1) A sentence of death shall not be pronounced or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was a child.

(2) In lieu of a sentence of death, the Court shall order a person convicted of an offence to be detained in a prison during the pleasure of-

(a) the Yang di-Pertuan Agong if the offence was committed in the Federal Territory of Kuala Lumpur or the Federal Territory of Labuan; or

(b) the Ruler or the Yang di-Pertua Negeri, if the offence was committed in the State.

(3) If the Court makes an order under subsection (2), that person shall, notwithstanding anything in this Act-

(a) be liable to be detained in such prison and under such conditions as the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri may direct; and

(b) while so detained, be deemed to be in lawful custody.

(4) If a person is ordered to be detained at a prison under subsection (2), the Board of Visiting Justices for that prison –

(a) shall review that person's case at least once a year; and

(b) may recommend to the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri on the early release or further detention of that person, and the Yang di-Pertuan Agong or the Ruler or the Yang di-

Pertua Negeri may thereupon order him to be released or further detained, as the case may be."

4. On plain reading of subsection (2) of section 97 it is clear that it empowers the Court, after convicting a person who was a child at the time of commission of an offence punishable with death, to make an alternative order instead of imposing a sentence of death. In my view the alternative power to make such an order as provided for by the subsection is no less than the power of the Court to impose a sentence or punishment on a child convict albeit in a different form, namely, to the care of the Yang di-Pertuan Agong or to the Ruler or to the Yang di-Pertua Negeri depending on where the offence was committed.

5. Hence, with respect I do not think there is anything unconstitutional in the scheme since it is still the Court that makes the order consequential to its conviction order. In my view when the Court makes the order it is carrying out the process of sentencing which is generally understood to mean a process whereby punishment in accordance with established judicial principles is meted out by the Court after a conviction order has been made following a full trial or a guilty plea. (See:

Public Prosecutor v Jafa bin Daud [1981] 1 MLJ 315; ***Standard Chartered Bank and others v. Directorate of Enforcement and others 2005 AIR SC 2622***). Incidentally section 183 of the Criminal Procedure Code provides: '*If the accused is convicted, the Court shall pass sentence according to law*'.

6. It might have been a different conclusion if the subsection leaves it entirely to the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri as the case may be to deal with a child convict after being convicted by the Court.

7. For the above reason I do not think it is thus necessary for me to deal with those constitutional points highlighted by the Court of Appeal in coming to its decision.

8. At any rate I am unable to accede to the proposition that with the amendment of Article 121 (1) of the Federal Constitution (the amendment) the Courts in Malaysia can only function in accordance with what have been assigned to them by federal laws. Accepting such proposition is contrary to the democratic system of government wherein the Courts form the third branch

of the government and they function to ensure that there is 'check and balance' in the system including the crucial duty to dispense justice according to law for those who come before them.

9. The amendment which states that "*the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law*" should by no means be read to mean that the doctrines of separation of powers and independence of the Judiciary are now no more the basic features of our Federal Constitution. I do not think that as a result of the amendment our Courts have now become servile agents of a federal Act of Parliament and that the Courts are now only to perform mechanically any command or bidding of a federal law.

10. It must be remembered that the Courts, especially the Superior Courts of this country, are a separate and independent pillar of the Federal Constitution and not mere agents of the federal Legislature. In the performance of their function they perform a myriad of roles and interpret and enforce a myriad of laws. Article 121(1) is not, and cannot be, the whole and sole

repository of the judicial role in this country for the following reasons:

(i) The amendment seeks to limit the jurisdiction and powers of the High Courts and inferior courts to whatever "*may be conferred by or under federal law*". The words "*federal law*" are defined in Article 160(2) as follows:

> "*Federal law means –*
>
> *(a) any existing law relating to a matter with respect to which Parliament has power to make law, being a law continued in operation under Part XIII; and*
>
> *(b) any Act of Parliament*;"

(ii) The Courts cannot obviously be confined to "*federal law*". Their role is to be servants of the law as a whole. Law as a whole in this country is defined in Article 160(2) to include "*written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof*". Further, "*written law*" is defined in

Article 160(2) to include "*this Constitution and the Constitution of any State*". It is obvious, therefore, despite the amendment, the Courts have to remain involved in the interpretation and enforcement of all laws that operate in this country, including the Federal Constitution, State Constitutions and any other source of law recognized by our legal system. The jurisdiction and powers of the Courts cannot be confined to federal law.

(iii) Moreover, the Federal Constitution is superior to federal law. The amendment cannot be said to have taken away the powers of the Courts to examine issues of constitutionality. In my view it is not legally possible in a country with a supreme Constitution and with provision for judicial review to prevent the Courts from examining constitutional questions. Along with Articles 4(1), 162(6), 128(1) and 128(2), there is the judicial oath in the Sixth Schedule "*to preserve, protect and defend (the) Constitution*".

(iv) With respect I do not think the amendment should be read to destroy the Courts' common law powers. In

Article 160(2) the term "*law*" includes "*common law*". This means that, despite the amendment, the common law powers of the Courts are intact. (See: ***Ngan Tuck Seng v Ngan Yin Hoi [1999] 5 MLJ 509***). The inherent powers are a separate and distinct source of jurisdiction. They are independent of any enabling statute passed by the Legislature. On Malaysia Day when the High Courts came into existence by virtue of Article 121, "*they came invested with a reserve fund of powers necessary to fulfill their function as Superior Courts of Malaysia*". Similar sentiments were expressed in ***R Rama Chandran v The Industrial Court [1997] 1 MLJ 145***.

(v) The amendment in my view cannot prevent the Courts from interpreting the law creatively. It is now universally recognized that the role of a judge is not simply to discover what is already existing. The formal law is so full of ambiguities, gaps and conflicts that often a judge has to reach out beyond formal rules to seek a solution to the problem at hand. In a novel situation a judge has to reach out where the light of '*judicial precedent fades and flicker and extract from there some raw materials with which to*

fashion a signpost to guide the law'. When rules run out, as they often do, a judge has to rely on principles, doctrines and standards to assist in the decision. When the declared law leads to unjust result or raises issues of public policy or public interest, judges would try to find ways of adding moral colours or public policy so as to complete the picture and do what is just in the circumstances.

(vi) Statutes enacted in one age have to be applied in a time frame of problems of another age. A present time-frame interpretation to a past time framed statute invariably involves a judge having to consider the circumstances of the past to the present. He has to cause the statute to 'leapfrog' decades or centuries in order to apply it to the necessities of the times.

(vii) Further, in interpreting constitutional provisions, a judge cannot afford to be too literal. He is justified in giving effect to what is implicit in the basic law and to crystallize what is inherent. His task is creative and not passive. This is necessary to enable the constitutional provisions

to be the guardian of people's rights and the source of their freedom. (See: ***Dewan Undangan Negeri Kelantan & Anor. v Nordin bin Salleh & Anor [1992] 1 MLJ 697***; ***Mamat bin Daud & Ors v Government of Malaysia & Anor [1988] 1 MLJ 119***).

(viii) Though there is much truth in the traditionalist assertion that the primary function of the Courts is to faithfully interpret and apply laws framed by the elected Legislatures, there are, nevertheless, a host of circumstances in which the role of a judge is not just to deliver what is already there. The role is constitutive and creative and goes far beyond a mechanical interpretation of pre-existing law. It extends to direct or indirect law making in the following ways:

1. Formulating original precedents

Life is larger than the law and there is no dearth of novel situations for which there is no enacted rule on point. In such situations a judge relies on the customs and traditions of the land and on standards, doctrines and principles of justice that

are embedded in the life of the community to lay down an "original precedent" to assist the Court. Admittedly, this fashioning of a new precedent is an infrequent occurrence but its impact on legal growth is considerable;

2. ***Overruling earlier precedents***

Judicial creativity is fully in play when a previous precedent is overruled and thereby denied the authority of law. The overruling may be retrospective or prospective. In either case a new principle is contributed to the legal system and a new direction is forged;

3. ***Constitutional review***

Under Articles 4(1) and 128 of the Federal Constitution, the Superior Courts of this country have the power to review the validity of legislative and executive actions by reference to norms of the basic law. If a legislative measure is found by the Court to be unconstitutional, the Court has a number of choices. It may condemn the entire

statute as illegal or it may apply the doctrine of severability and invalidate only the sections that are unconstitutional and leave the rest of the statute intact. The Court may declare the statute null and void ab-initio or only from the date of the ruling. For instance in ***Dato Yap Peng v PP [1987] 2 MLJ 31*** the Supreme Court invalidated section 418A of the Criminal Procedure Code prospectively.

Questions of constitutionality are fraught with political and policy considerations and decisions thereon can influence the course of legal and political development. For example in ***Faridah Begum v Sultan Haji Ahmad Shah [1996] 1 MLJ 617*** the majority held that the 1993 constitutional amendment removing the immunities of the Sultans cannot apply to suits brought by foreigners.

Article 162(6) of the Federal Constitution allows judges to modify pre-Merdeka laws in order to make such laws conform to the Constitution. Modification is without doubt a legislative task.

4. Statutory interpretation

In interpreting pre-existing law a judge is not performing a mere robotic function. The interpretive task is, by its very nature, so creative that it is indistinguishable from law-making. "*The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.*" (per the American jurist Oliver Wendell Holmes). This is specially so in constitutional law. Even if it is accepted that a judge is bound by the intention of the Legislature, it must be noted that such an intention is not always clearly defined. The formal law is so full of ambiguities, gaps and conflicts that often a judge has to reach out beyond the statute to seek a solution to the problem at hand. (See: ***Chiu Wing Wa & Ors v Ong Beng Cheng [1994] 1 MLJ 89***). A judge may scrutinise preambles, headings and extraneous materials like explanatory statements that accompany Bills and parliamentary debates to help unravel the meaning of statutory formulae. A judge may lean on the interpretation clauses of a statute or on the Interpretation Act

1948/1967 to decipher the intention of the Legislature. Or he may fall back on a wealth of rules of statutory construction to aid his task. So numerous and varied are these rules that judicial discretion to rely on one rule or another cannot be predicted. Sometimes a judge's attention is drawn to foreign legislation and related precedents. He may declare the overseas statute to be in *pari materia* with local legislation and, therefore, relevant to the case. Alternatively, he may pronounce the local law to be *sui generis* and therefore to be viewed in the local context without aid of foreign decisions.

When the enacted law leads to undesirable or unjust results, a judge may be persuaded to add moral or public policy shades to the issue in order to do justice.

One could also note, for instance, the "*public interest*" interpretation of Article 5(3) of the Federal Constitution in ***Ooi Ah Phua [1975] 2 MLJ 198*** in

which the Court held that the constitutional right to legal representation can be postponed pending police investigation. In ***Teoh Eng Huat v Kadhi Pasir Mas [1990] 2 MLJ 300*** the "*wider interest of the nation*" prevailed over a minor's right to religion guaranteed by Article 11. In ***Hajjah Halimatussaadiah v Public Services Commission [1992] 1 MLJ 513*** the Court subjected a public servant's claim of a religious right to wear purdah at the workplace to the need to maintain "*discipline in the service*".

A judge is not required to view a statute in isolation. He is free to view the entire spectrum of the law in its entirety; to read one statute in the light of related statutes and relevant precedents; to understand law in the background of a wealth of presumptions, principles, doctrines and standards that operate in a democratic society. (See: ***Kesultanan Pahang v Sathask Realty Sdn. Bhd. [1998] 2 MLJ 513***). He is justified in giving effect to what is implicit in the legal system and to crystallize what is inherent.

Such a holistic approach to legal practice is justified because "law" in Article 160(2) is defined broadly to include written law, common law and custom and usage having the force of law.

5. *Operation of doctrine of binding precedent*

The doctrine of binding judicial precedent exists to promote the principle of justice that like cases should be decided alike. It also seeks to ensure certainty, stability and predictability in the judicial process. There can be no denying that the existence of this doctrine imposes some rigidity in the law and limits judicial choices. But one must not ignore the fact that some flexibility and maneuverability still exist.

Though a superior court is generally reluctant to disregard its own precedents, it does have the power "*to refuse to follow*" its earlier decisions or to cite them with disapproval. Our Federal Court has, on some occasions, overruled itself. High Court judges occasionally refuse to follow other High

Court decisions. An inferior court can maneuver around a binding decision through a host of indirect techniques.

6. ***Application of doctrine of ultra vires***

Whether an agency has acted ultra vires is a complex question of law that permits judicial creativity.

Some statutes declare that discretion is absolute or that a decision is final and conclusive. Some statutory powers are conferred in broad and subjective terms. To statutory formulae of this sort, contrasting judicial responses are possible. The Court may interpret them literally and give judicial sanction to absolute powers.

Alternatively the Court may read into the enabling law implied limits and constitutional presumptions of a rule of law society. This will restrict the scope of otherwise unlimited powers. (See: ***R v Lord Chancellor, Ex p Witham [1998] QB 575***).

Subjective powers may be viewed objectively. Purposive interpretation may be preferred over literal interpretation. (See: ***Public Prosecutor v Sihabduin bin Haji Salleh & Anor [1980] 2 MLJ 273***).

When procedural violations are alleged, a decisive but discretionary issue is whether the procedure was mandatory or directory. Violation of a mandatory procedure results in nullity. Violation of a directory requirement is curable.

7. Import of rules of natural justice

Rules of natural justice are non-statutory standards of procedural fairness. They are not nicely cut up and dried and vary from situation to situation. Judges have wide discretion in determining when they apply and to what extent.

11. Hence, it is reasonable to emphasize that the amendment should not be construed or viewed as having emasculated the

Courts in this country to mere automaton and servile agents of a federal Act of Parliament.

12. Anyway, reverting to this appeal, for the reason I have given earlier on I would therefore allow it and restore the order made by the High Court.

Signed.
(TAN SRI RICHARD MALANJUM)
Chief Judge, Sabah and Sarawak

Date: 23rd October, 2007

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