

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

RAYUAN JENAYAH NO. 05-69-2008(B)

ANTARA

LIM WEN JENG

... PERAYU

DAN

**1.TIMBALAN MENTERI KESELAMATAN
DALAM NEGERI, MALAYSIA**

2.KETUA POLIS NEGARA

**3.PENGUASA KANAN, PUSAT PEMULIHAN
AKHLAK, SIMPANG RENGAM, JOHOR**

**... RESPONDEN-
RESPONDEN**

**(Dalam Perkara Permohonan Jenayah Selangor
No. 44-237 Tahun 2007)**

KORAM

**ZAKI BIN TUN AZMI, KHN
NIK HASHIM BIN NIK AB. RAHMAN, HMP
ABDUL AZIZ BIN MOHAMAD, HMP**

17 November 2008

Judgment of Nik Hashim bin Nik Ab. Rahman, FCJ

1. The appellant was detained for a period of 18 months with effect from 18 September 2007 pursuant to a Detention Order dated on the same date issued under section 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (the Ordinance). His application for a writ of habeas corpus for his release was refused by the Shah Alam High Court on 13 June 2008. Hence his appeal to this Court.

2. The appellant had averred in his affidavit in support of the application at p20 para 30 of the record that during the hearing before the Advisory Board (the Board) he had made an application for an adjournment as the two witnesses requested by him were not present. In reply to the said averment the Secretary of the Board in her affidavit at p127 para 8 of the record averred that the hearing of the appellant's representations was adjourned twice on 23 October 2007 and 13 November 2007 at the request of the appellant on the ground that his counsel Encik Suresh was unable to attend the hearing. The Secretary further averred that the appellant's counsel had sent a letter dated 27 November 2007 requesting the Board to exercise its power under section 9 of the Ordinance to summon the attendance of two witnesses requested by the appellant namely, Fong Mun Cheong who was under restricted residence in Kuala Terengganu and the Investigation Officer of the case (see p150 of the record). The next hearing date was 29 November 2007.

3. On 28 November 2007 the Board replied the appellant's letter whereupon the Board approved his request to call the two witnesses.

4. It is worthy of note that though the Board did not invoke its powers under section 9 of the Ordinance, it nevertheless carbon copied its letter to the Ibu Pejabat Polis Daerah Kuala Terengganu where the witness Fong Mun Cheong was residing under restricted residence and to the Ketua Penolong Pengarah Jabatan Siasatan Jenayah D7, Bukit Aman Kuala Lumpur where the Investigation Officer was attached. The reason for not invoking section 9 of the Act as averred by the Secretary was because of the short notice of 2 days and the failure of the appellant to avail himself of the benefit of the two earlier adjournments to obtain the witnesses as requested by him.

5. In dismissing the appellant's application on the ground that the appellant had failed to establish non-compliance of the procedure on the part of the Board, the learned High Court judge (Syed Ahmad Helmy J) said :

“Upon evaluating the affidavit evidence filed herein, namely enclosures 3 and 19 affirmed by the applicant and the opposing affidavits of the Secretary of the Advisory Board in enclosures 13 and 20, I am of the considered view that section 9 of the Ordinance is an empowering section which confers powers on the Advisory Board to summon witnesses and compel the production of documents. It is the prerogative of the Board to exercise such powers and it cannot be compelled to exercise such power as contended and urged by the applicant in the instant case as the Board was acting within its

prerogative by not issuing summonses for the attendance of the 2 witnesses requested by the applicant. The non-invocation of its power under section 9 does not in any way prejudice the applicant more so in the light of the Board's approval for the applicant to call the 2 witnesses, which the applicant can do by writing to the Chief Police Officer of Terengganu and/or to the Minister of Home Affairs for the production of the two witnesses. Interestingly there is no evidence of any attempt made by the applicant to secure their attendance."

6. Before us, learned counsel for the appellant contended essentially on two grounds :

- (i) Section 9 is a mandatory procedural requirement that must be exercised by the Board when requested by the appellant to do so. Failure to do so would amount to a breach of mandatory procedural requirement by the Board.
- (ii) The right of the appellant for representations is being guaranteed under Article 151(1)(a) of the Federal Constitution (the Constitution). The failure of the Board to invoke section 9 on summoning the witnesses required by the appellant after application had been made shall invalidate his Detention Order because his right for representations had been prejudiced.

The case of **Puvaneswaran Murugiah v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor (1991) 3 CLJ (Rep) 649** was cited in support.

7. The thrust of the appellant's contention in this case is that the failure of the Board to invoke section 9 contravenes his constitutional right under Article 151(1)(a) of the Constitution thereby prejudicing his right for representations before the Board.
8. To put the matter in perspective, it will be useful to reproduce section 9 of the Ordinance and Article 151(1)(a) of the Constitution. Section 9 reads as follows :

“Power to summon witnesses

Every Advisory Board shall, for the purposes of this Ordinance, but subject to the provision of section 11, have all the powers of a Court for the summoning and examination of witnesses, the administration of oaths or affirmations, and for compelling the production of documents.”

Article 151 provides :

“Restrictions on preventive detention

(1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention-

(a) the authority on whose order any person is detained under that law or ordinance shall, as soon as may be, inform him on the grounds for his detention and, subject to Clause (3), the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as may be;

(b)

(2)

(3) This Article does not require any authority to disclose facts whose disclosure would in its opinion be against the national interest.”

9. On the appellant’s right for representations before the Board, the learned Senior Federal Counsel for the respondent drew our attention to the case of **A.K. Roy v Union of India A.I.R. 1982 SC 710** where the Indian Supreme Court said at p751 para 105 :

“.... The detenu may therefore offer oral and documentary evidence before the Advisory Board in order to rebut the allegations which were made against him. We would only like to add that if the detenu desires to examine any witnesses, he shall have to keep them present at the appointed time and no obligation can be cast on the Advisory Board to summon them. The Advisory Board, like any tribunal, is free to regulate its own procedure within the constraints of the Constitution and the statute. It would be open to it, in the exercise of that power to limit the time within which the detenu must complete his evidence. We consider it necessary to make this observation particularly in view of the fact that the Advisory Board is under an obligation under section 11(1) of the Act to submit its report to the appropriate Government within seven weeks from the date of detention of the person concerned. The proceedings before the Advisory Board have therefore to be completed with the utmost expedition.”

10. In my opinion, the above principle is equally applicable to our case.

11. In the present case, section 9 of the Ordinance is quite clear in its provision. I agree with the learned judge that the section is an empowering provision which, subject to disclosure under section 11 of facts or production of documents which are against the national interest to disclose or produce (see also Article 151(3) of the Constitution), confers powers on the Board to summon witnesses and compel the production of documents. By its terms, section 9, (unlike rule 3(2) of the Public Order and Prevention of Crime (Procedure) Rules 1972 which requires service of certain number of copies of Form 1 as ruled in **Puvaneswaran**, supra, as a mandatory requirement), is not a mandatory procedural requirement that the Board can be compelled to exercise the power of summoning the witnesses as required by the appellant. If the appellant wishes to examine any witnesses he should make them available at the hearing and no obligation can be cast on the Board to summon them.
12. The Board, like any other tribunal, is free to regulate its own procedure within the constraints of the Constitution and the statute. It would be open to it, in the exercise of that power to limit the time within which the appellant must complete his evidence for the Board is under an obligation under section 6(1) of the Ordinance to submit its report to the Yang diPertuan Agong within 3 months from the date of receipt of the appellant's representations by the Board. The proceedings before the Board have to be completed expeditiously. Thus, the reason of too short a notice given by the Secretary for not invoking section 9 to summon the two witnesses by the Board as requested by the appellant cannot be said to be unjustified.

13. Moreover, the appellant had failed to state specifically as to what evidence the two witnesses would testify before the Board. The appellant in his affidavit at p20 para 30 merely averred that the two witnesses were material and without their evidence he would not be able to show his innocence (“Pihak kami telah memaklumkan bahawa mereka adalah saksi yang amat material dan tanpa mereka, saya tidak dapat menunjukkan ketidakbersalahan saya”). It is to be noted that the hearing of the representations fixed on 23 October 2007 and 13 November 2007 before the Board was adjourned at the request of the appellant. It appears therefore that the appellant was not serious enough in his effort to present his representations soonest possible before the Board. With such material before the Board, it would not be unreasonable for the Board to reject his request for a further adjournment of the hearing that had been fixed on 29 November 2007. Ample opportunity had been given to the appellant to secure the attendance of two witnesses but he had failed to avail himself of the opportunity. And therefore, because of his failure, his right to an opportunity of making representations before the Board as provided for under Article 151(1)(a) of the Constitution cannot be argued to have been prejudiced.
14. In my view, there is no non-compliance of the procedural requirement in this case. The rejection of the appellant’s request for the third adjournment of the hearing and the refusal of the Board to invoke section 9 to summon the two witnesses were made lawfully. Consequently, I find no reason for interference with the impugned order and dismiss the appeal.

15. My learned brother Zaki Tun Azmi, Chief Justice concurred with me in this judgment while my learned brother Abdul Aziz Mohamad, FCJ dissented in his separate judgment.

17 November 2008

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

Counsel:

For the appellant	:	Suresh Thanabalasingam, Alvinthiren, P. Visnuvarman
Solicitors	:	Kuldip & Company
For the respondents	:	Abd. Wahab bin Mohamed
Public Prosecutor	:	Senior Federal Counsel