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 ABDUL HALIM, CJ**
ABDUL HAMID MOHAMAD, PCA
ALAUDDIN MOHD SHERIFF, CJ (M)
RICHARD MALANJUM, CJ (S&S)
ZAKI TUN AZMI, FCJ

JUDGMENT OF ABDUL HAMID MOHAMAD, PCA

The Respondent who was 12 years and 9 months old at the time of the commission of the offence was charged in the High Court for the offence of murder punishable under section 302 of the Penal Code. He was convicted and ordered to be detained during the pleasure of the Yang di-Pertuan Agong pursuant to section 97(2) of the Child Act 2001 (Act 611) ("the Child Act"). He appealed to the Court of Appeal. The Court of Appeal upheld the conviction but set aside the sentence imposed on him and released him from custody

on the sole ground that section 97(2) of the Child Act was unconstitutional. The Public Prosecutor appealed to this court.

On what ground did the Court of Appeal hold section 97(2) of the Child Act to be unconstitutional?

From the judgment of the Court of Appeal, it can be seen that that court had arrived at that conclusion on the following premises:

(i) The doctrine of separation of powers is an integral part of the Constitution;

(ii) Judicial power of the Federation vests in the courts;

(iii) By section 97(2) of the Child Act, Parliament had consigned the power to determine the measure of the sentence that was to be served to the Yang di-Pertuan Agong in the case of an offence committed in the Federal Territories, or to the Ruler or the Yang di-Pertua Negeri, if the offence is committed in the State.

(iv) By virtue of Article 39 of the Constitution, the executive authority of the Federation vests in the Yang di-Pertuan Agong who, in accordance with Article 40 of the Constitution, must act in accordance with the advice given by the Cabinet or particular minister of the Cabinet.

(v) Therefore, section 97(2) of the Child Act contravenes the doctrine of separation of powers housed in the Constitution by consigning to the Executive the judicial power to determine the measure of the sentence to be served by the appellant.

Before going any further I will first reproduce the relevant provisions of the Constitution and the Child Act. Article 121 of the Constitution provides:

> "121. (1) There shall be two High Courts of co-ordinate jurisdiction and status, namely –
>
> (a) one in the States of Malaya …… and;
>
> (b) one in the States of Sabah and Sarawak ……… and the High Courts … shall have such jurisdiction and powers as may be

conferred by or under federal law.” (emphasis added)

Article 4(1) of the Constitution provides:

“4.(1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.”

Section 97 of the Child Act provides:

“97. (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 of 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."

The Court of Appeal posed two questions for it to answer. They are, first, whether the doctrine of separation of powers is an integral part of the Constitution and, secondly, whether Section 97 of the Child Act "in pith and substance violates the doctrine." The Court, answered the two questions in the affirmative. On the first question, the court held that the amendment to Article 121 of the Constitution by Act A 704 did not have the effect of divesting the courts of the judicial power of the Federation. The court gave two reasons:

> "First, the amending Act did nothing to vest the judicial power in some arm of the Federation other than the courts. Neither did it provide for the sharing of the judicial power with the Executive or Parliament or both those arms of government.
>
> Second, the marginal note to art. 121 was not amended. This clearly expresses the intention of Parliament not to divest ordinary courts of judicial power of the Federation and to transfer it to or share it

> with either the Executive or the Legislature."

Let us take a close look at the provision of Article 121 of the Constitution before and after the amendment.

Prior to the amendment, Article 121(1) of the Constitution reads: "… the judicial power of the Federation shall be vested in the two High Courts ……… and the High Courts ………… shall have such jurisdiction and powers as may be conferred by or under federal law."

There was thus a definitive declaration that the judicial power of the Federation shall be vested in the two High Courts. So, if a question is asked "Was the judicial power of the Federation vested in the two High Courts?" The answer has to be "yes" because that was what the Constitution provided. Whatever the words "judicial power" mean is a matter of interpretation. Having made the declaration in general terms, the provision went of to say "and the High Courts ……… shall have jurisdiction and powers as may be conferred by or under federal law." In other words, if we want to know what are the specific jurisdiction and powers of the two High Courts, we will have to look at the federal law.

After the amendment, there is no longer a specific provision declaring that the judicial power of the Federation shall be vested in the two High Courts. What it means is that there is no longer a declaration that "judicial power of the Federation" as the term was understood prior to the amendment vests in the two High Courts. If we want to know the jurisdiction and powers of the two High Courts we will have to look at the federal law. If we want to call those powers "judicial powers", we are perfectly entitled to. But, to what extent such "judicial powers" are vested in the two High Courts depend on what federal law provides, not on the interpretation the term "judicial power" as prior to the amendment. That is the difference and that is the effect of the amendment. Thus, to say that the amendment has no effect does not make sense. There must be. The only question is to what extent?

In Public Prosecutor v Dato' Yap Peng (1987) 2 MLJ 311, section 418A a of the Criminal Procedure Code came into question as it was argued that it infringed Article 121(1) and 5(1) of the Federal Constitution. Zakaria Yatim J (as he then was) held that section 418A of the Criminal Procedure was unconstitutional as it was inconsistent with Article 121(1) of the Constitution. Appeal to the Supreme Court was dismissed by a majority of 3:2. That case was decided, not on the ground that it was inconsistent with the

doctrine of separation of powers. It was decided on the ground that it was inconsistent with the term "judicial power" of the court then provided by Article 121(1) of the Constitution. In other words section 418A was inconsistent with the specific provision of the Constitution that provides "… … the judicial power of the Federation shall be vested in two High Courts……." The inconsistency then attracts Article 4(1) of the Constitution which declares such a law, to the extent of the inconsistency, be void.

What about the instant appeal? In the instant appeal, even the Court of Appeal's judgment does not, indeed cannot, show which provision of the Constitution section 97 is inconsistent with. Instead the court held that that section violated the doctrine of the separation of powers, which, in its view was an integral part of the Constitution.

What is this doctrine of separation of powers? Separation of powers is a term coined by French political enlightenment thinker Baron de Montesquieu. It is a political doctrine under which the legislative, executive and judicial branches of government are kept distinct, to prevent abuse of power. The principle traces its origins as far back as Aristotle's time. During the Age of Enlightenment, several philosophers, such as John Locke and James

Harrington, advocated the principle in their writings, whereas others such as Thomas Hobbes strongly opposed it. Montesquieu was one of the foremost supporters of the doctrine. His writings considerably influenced the opinions of the framers of Constitution of the United States. There, it is widely known as "checks and balances". Under the Westminster System this separation does not fully exist. The three branches exist but Ministers, for example, are both executives and legislators. Until recently, the Lord Chancellor was a member of all the three branches – see generally ECS Wade and A W Bradley: Constitutional and Administrative Law 10th Edition; Wikipedia (Encyclopedia).

In P. Ramanatha Aiyar's Advance Law Lexicon, Volume 4, we find the following passage:

> "It is extraordinarily difficult to define precisely each particular power." – GEORGE WHITECROSS PATON, A Textbook of Jurisprudence 330 (G.W. PATON & DAVID P. DERHAM eds., 4th ed. 1972).

> "A political system that separates executive, legislative, and judicial powers of government into separate branches. Some systems combine two, or even all three, powers into single

> institutions. In the United States, many administrative agencies actually exercise at least first level judicial powers, and many administrative agencies also exercise what amount to legislative powers in promulgating detailed legal regulations: In other systems, the absence of a separation of powers, particularly between the executive and the legislative, is more explicit.. as in the Westminster-style parliamentary system."

Malaysia, like the United States has a written Constitution that spells out the functions of the three branches. At the same time it follows the Westminster model and has its own peculiarities. The Yang di-Pertuan Agong is the Supreme Head of the Federation (Article 32(1)). The executive authority of the Federation is vested in the Yang di-Pertuan Agong (Article 39). He is the Supreme Commander of the armed forces of the Federation (Artcile 41). Parliament consists of the Yang di-Pertuan Agong, the Dewan Negara and Dewan Rakyat (Article 44). While members of the Dewan Rakyat are directly elected, members of the Dewan Negara may be elected by the Legislative Assembly of the States or appointed by the Yang di-Pertuan Agong (Article 45(1) and Seventh Schedule). Judges, including the Chief Justice are appointed by the Yang di-Pertuan Agong. Even the

principal registry of the High Court of Sabah and Sarawak is determined by the Yang di-Pertuan Agong (Article 121(1)(b)). On top of all that, the Yang di-Pertuan Agong, unlike the British Monarch, is elected by the Conference of Rulers for a fixed period of five years. And so on.

In other words we have our own model. Our Constitution does have the features of the separation of powers and at the same time, it contains features which do not strictly comply with the doctrine. To what extent the doctrine applies depends on the provisions of the Constitution. A provision of the Constitution cannot be struck out on the ground that it contravenes the doctrine. Similarly no provision of the law may be struck out as unconstitutional if it is not inconsistent with the Constitution, even though it may be inconsistent with the doctrine. The doctrine is not a provision of the Malaysian Constitution even though no doubt, it had influenced the framers of the Malaysian Constitution, just like democracy. The Constitution provides for elections, which is a democratic process. That does not make democracy a provision of the Constitution in that where any law is undemocratic it is inconsistent with the Constitution and therefore void.

So, in determining the constitutionality or otherwise of a statute under our Constitution by the court of law, it is the provision of our Constitution that matters, not a political theory by some thinkers. As Raja Azlan Shah F.J. (as His Royal Highness then was) quoting Frankfurter J said in Loh Kooi Choon v. Government of Malaysia (1977) 2MLJ 187 FC said: "The ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it."

His Lordship further said at page 188 to 189:

> "Whatever may be said of other Constitutions, they are ultimately of little assistance to us because our Constitution now stands in its own right and it is in the end the wording of our Constitution itself that is to be interpreted and applied, and this wording "can never be overridden by the extraneous principles of other Constitutions" – see Adegbenro v Atkintola & Anor. Each country frames its constitution according to its genius and for the good of its own society. We look at other Constitution to learn from their experiences, and from a desire to see how their progress and well-being is ensured by their fundamental law."

I agree entirely with those observations.

Now that the pre-amendment words are no longer there, they simply cannot be used to determine the validity of a provision of a statute. The extent of the powers of the courts depends on what is provided in the Constitution. In the case of the two High Courts, they "shall have such jurisdiction and powers as may be conferred by or under federal law." So, we will have to look at the federal law to know the jurisdiction and powers of the courts. (In the case of the Federal Court and the Court of Appeal, part of their jurisdiction is specifically provided in the Constitution itself – see Article 121(1B) and (2) respectively).

So, even if we say that judicial power still vests in the courts, in law, the nature and extent of the power depends on what the Constitution provides, not what some political thinkers think "judicial power" is. Federal law provides that the sentence of death shall not be pronounced or recorded against a person who was a child at the time of the commission of the offence. That is the limit of judicial power of the court imposed by law. It further provides that, instead, the child shall be ordered to be detained in a prison during the pleasure of the Yang di-Pertuan Agong or the Ruler or the Yang Di-Pertua Negeri, depending on where

the offence was committed. That is the sentencing power given by federal Law to the court as provided by the Constitution. Similarly, in some cases, Federal law provides for death sentence, in others, imprisonment and/or fine, some are mandatory and some are discretionary. The Legislature provides the sentences, the court imposes it where appropriate.

Going one step further, even where the court imposes a sentence of imprisonment for a fixed term of more than a month, a prisoner is entitled to be granted a remission of his sentence. The Director General of Prisons may cancel any part of the remission if the prisoner commits an offence under section 50 of the Act. He may restore to the prisoner all or any part of the remission which the prisoner has forfeited during his sentence – section 44 of the Prison Act 1995 (Act 537)("the Prison "Act").

Section 67 of the Prison Act empowers the Minister to publish in the Gazette such regulations, inter alia, providing for the remission of sentences to be allowed to a prisoner. Hence Prisons Regulations 2000 (P.U.(A) 325/2000) is made.

We see here that the Prison Act empowers the Director General of Prisons to cancel and restore the remission which may be argued to amount to meddling

with the fixed term of imprisonment passed by the court. Following the argument of the Court of Appeal, this should be unconstitutional too.

Let us take another example. It is common for a statute to make provision for a Minister in charge of an Act of Parliament to make rules or regulations. The Minister is an Executive. Rules and Regulations and by-laws, having the effects of law, is within the realm of the Legislature to make, not the Executive. Yet, I am unable to find any provision in the Constitution giving power to the Legislature to make law to give the power to make such by-laws to the Executive. So, are the provisions in the Statutes giving Ministers power to make by-laws unconstitutional too on the ground that they contravene the doctrine of separation of powers? All these show the absurdity of applying the doctrine as a provision of the Constitution.

All these examples show that the doctrine is not definite and absolute. The extent of its application varies from country to country, depending on how much it is accepted and in what manner it is provided for by the Constitution of a country. Similarly, judgments from other jurisdictions, while they are useful comparisons, should not be treated as if they are binding on our courts. As such, I do not think it is

necessary to discuss all those cases from other jurisdictions referred to us.

On these grounds I would allow the appeal, set aside the order of the Court of Appeal and reinstate the order of the High Court.

Ahmad Fairuz Sheikh Halim CJ, Alauddin Mohd. Sheriff CJ(M) and Zaki Azmi FCJ have read this judgment and agreed with it.

(DATO' ABDUL HAMID BIN HAJI MOHAMAD)
Presiden Mahkamah Rayuan,
Malaysia.

Tarikh : 23 Oktober 2007.

Tarikh Sidang : 17 September 2007.

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