

FEDERAL COURT CRIMINAL APPEAL NO: 05(HC)-153-11/2020 (W)

High Court of Malaya at Kuala Lumpur Criminal Application

No. WA-44-207-10/2020

ZAIDI BIN KANAPIAH

... APPELLANT

AND

1. ASP KHAIRUL FAIROZ BIN RODZUAN

2. MAJISTRET MAHKAMAH MAJISTRET KUALA LUMPUR

3. KETUA POLIS NEGARA MALAYSIA

4. KERAJAAN MALAYSIA

... RESPONDENTS

Heard together with

FEDERAL COURT CRIMINAL APPEAL NO: 05(HC)-155-11/2020 (W)

High Court of Malaya at Kuala Lumpur Criminal Application

No. WA-44-206-10/2020

MOHD HAIRY BIN MOHAMMAD

... APPELLANT

AND

1. ASP KHAIRUL FAIROZ BIN RODZUAN

2. MAJISTRET MAHKAMAH MAJISTRET KUALA LUMPUR

3. KETUA POLIS NEGARA MALAYSIA

4. KERAJAAN MALAYSIA ... RESPONDENTS

And

FEDERAL COURT CRIMINAL APPEAL NO: 05(HC)-156-11/2020 (W)

High Court of Malaya at Kuala Lumpur Criminal Application

No. WA-44-208-10/2020

MUHAMAD AMIN NUR RASHID BIN MOHAMED PUAD ...

APPELLANT

AND

1. ASP KHAIRUL FAIROZ BIN RODZUAN

2. MAJISTRET MAHKAMAH MAJISTRET KUALA LUMPUR

3. KETUA POLIS NEGARA MALAYSIA

4. KERAJAAN MALAYSIA ... RESPONDENTS

CORAM

TENGGU MAIMUN TUAN MAT, CJ

VERNON ONG LAM KIAT, FCJ

ZALEHA YUSOF, FCJ

HASNAH MOHAMMED HASHIM, FCJ

RHODZARIAH BUJANG, FCJ

SUMMARY OF GROUNDS OF JUDGMENT

[1] The central issue in these appeals is the constitutionality of Section 4 of the Prevention of Crime Act 1959 ("**POCA**"). The Federal Constitution ("**FC**") is the heartbeat of this great Nation defining the Legislature, Executive, and Judiciary parameters, intricately woven yet profoundly independent of each other. The sanctity of the FC must be respected, jealously protected, staunchly defended, and guarded at all times.

[2] The Questions for our determination are as follows:

- (i) Whether Section 4 of POCA is unconstitutional as it violates the doctrine of separation of powers by requiring the judicial arm to act upon the dictate of the Executive;
- (ii) Clause (2) Article 5 of the FC is a fundamental right that POCA has not excluded and it is not open to the High Court to entertain preliminary objections or objections based on

technicalities as this will be contrary to the mandatory provisions of Clause 2 Article 5 FC;

- (iii) Whether the detention of the Appellants in this case is *mala fide* because the police officers making the arrest and recommending the detention were subject of an inquiry by MACC into their corrupt activities. The Appellants are material witnesses in that inquiry;
- (iv) Whether the Minister abused the power entrusted to him by section 22 of POCA by including the **Common Gaming Houses Act 1953 (CGHA)** as item 5 of the First Schedule. The Minister's power is provided by Article 149 FC as well as the recitals to the POCA. Gaming by itself does not come within Clause (1)(a) of Article 149 FC; and
- (v) Whether the allegations made against the Appellants do not come within the scope of POCA because it is not a crime of "organised violence".

[3] I shall address the principal arguments raised by the Appellants relating to the constitutionality of POCA and Section 4 POCA. My learned brother, Justice Vernon Ong, FCJ will address inter alia, the powers and jurisdiction of the Magistrate under Section 4 POCA.

[4] The appeals emanated from the decision of the learned Judicial Commissioner (JC) made on 2.11.2020 and concern the arrest and detention of three individuals (collectively referred to as "the Appellants"). Zaidi bin Kanapiah, the Appellant in **Appeal No.:05(HC)-153-**

11/2020(W) who is a businessman. Mohd Hairy bin Mohammad the Appellant in **Appeal No.: 05(HC)-155-11/2020(W)** and Muhamad Amin NurRashid bin Mohamed Puad, the Appellant in **Appeal No.: 05(HC)-156- 11/2020(W)** both police officers. The Appellants were arrested pursuant to sub-section 3 (1) of POCA on 13.10.2020.

[5] Satisfied that the detention orders issued by the Magistrate against the Appellants were lawfully made the learned JC dismissed the Appellants' applications for a writ of habeas corpus. Aggrieved by the decision of the High Court the Appellants filed their respective appeals.

[6] We heard the oral submissions of the respective counsel for the parties on 28.12.2020. As we needed time to consider the submissions of the parties we had indicated to the parties that we will inform them of our decision once we are ready to do so. This is the majority decision and the reasons for having so decided.

[7] The Appellants were detained under **sub-section 4(1) of POCA** for an initial period of **21 days** from **14.10.2020** to **3.11.2020**. On **30.10.2020**, the police obtained a further remand order under sub-section 4(2) of POCA for a further **38 days detention until 6.12.2020**.

[8] Pursuant to the Orders issued under **sub-section 19A (1) of POCA** the Appellants were remanded for a period of two (2) years from 25.11.2020. The Appellant, Zaidi bin Kanapiah is detained in Pusat Pemulihan Khas (PPK) Pokok Sena Kedah, Mohd Hairy bin Mohammad is detained in PPK Bentong, Pahang and MuhamadAmin Nur Rashid bin Mohamed Puad is detained in PPK Simpang Renggam, Kluang, Johor.

[9] At the High Court it was argued by learned Appellants' counsels that the detention violated the rights of the Appellants and the applications for habeas corpus should be allowed for the following reasons:

- (i) The detention by the police was made in bad faith or *mala fide*, as the Appellants are material witnesses in an on-going investigations conducted by the Malaysian Anti-Corruption Commission (MACC). The Appellants have been made scapegoats as they are material witnesses in relation to investigations being conducted by MACC with regards to alleged corrupt practice amongst members of the Royal Malaysian Police Force (PDRM) in an online gambling activities known as the Macau Scam;
- (ii) The detention is procedurally improper and/or in breach of the Appellants' constitutional right to be informed of their grounds of arrest as provided under Clause 5 of Article 5 of the FC as the applicants were never notified of their grounds of arrest; and
- (iii) The detention is illegal and/or irrational as the Respondents failed to show that any grounds exist justifying the holding of an inquiry into the Appellants under sub-section 3 (1) POCA.

[10] The learned JC found that the Appellants failed to prove any evidence of *mala fide* as it was only their allegation that they have been

detained by the police to stop them from disclosing information to the MACC. Based on the affidavits the Appellants are suspects in the MACC's investigations and not witnesses as claimed.

[11] After considering the oral and written submissions of learned counsels, the learned JC concluded that all the requirements under Section 4 POCA had been complied. On the illegality of the detention order, since there were no grounds to justify the holding of an inquiry under POCA, the learned JC held that the Respondents had given their reasons in the affidavits for the detentions, that the Appellants are suspected to be persons concerned in the organisation and promotion of unlawful gaming.

The academic issue

[12] It was argued before us by the learned SFC that the appeals are academic as the basis of the application no longer exists. The learned SFC argued that the application for a writ of Habeas Corpus should be directed only to the current detention order and in support, cited the case of **Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] 4 CLJ 613**. The subject matter of the appeal, which is the remand order granted by the Magistrate on 14.10.2020 allowing the application of the Respondent to remand the Appellants for a period of 21 days from 14.10.2020 to 3.11.2020, has lapsed by virtue of the further remand order that was granted upon the application of the Respondents on 30.10.2020. The 21-days remand order made pursuant to **paragraph 4 (1) (a)** of POCA had **expired on 30.10.2020** and replaced by the 38-days remand order under **paragraph 4 (2) (a) POCA**. The applications were fixed for hearing in the High Court on a Monday. However, the Respondents obtained the 38 days order on the Friday before the

hearing. On the following Monday, the Respondents objected to the applications on the grounds that it was academic. The learned JC referred to the Federal Court cases of **Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors** [2006] 1 MLJ 309 and **L Rajanderan a/l R Letchumanan v Timbalan Menteri Dalam Negeri, Malaysia & Ors** [2010] 7 CLJ 653 where the Court held that nothing which has happened before the present detention took effect will be relevant to the issue before the court.

[13] Learned counsel for the Appellants in support of his arguments cited the case of **Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals** [2002] 4 CLJ 309 where this Court rejected the preliminary objection that the appeal before it was academic. The five distinguished members of the Panel in **Ezam** (supra) decided that since the basis for the detention orders signed by the Minister under Section 8 ISA was the outcome of the police investigations conducted on the appellants whilst they were being detained thus, the correctness of the decision of the High Court remained a live issue.

[14] The Federal Court in **Mohd Faizal** (supra) however, took a different approach and held that the writ of *habeas corpus* must be directed against the current order of detention even when the earlier arrest is irregular. It follows that where a detention order has been made the writ of *habeas corpus* must be directed against the current detention order even if the earlier arrest and detention are irregular. Hence, any irregularity in a detention order made when it has been superseded by one under sub-section 6(1) of the Dangerous Drugs (Special Preventive

Measures) Act 1985 is not a relevant matter for consideration. A prior illegality that has ceased cannot be the subject matter of inquiry.

[15] Despite the Respondents' preliminary objection, the High Court proceeded to hear the substantive issues in the application as the Appellants had not challenged the 21-days remand order. I am of the view that in the interest of justice, the Appellants should be allowed to argue on the propriety of the Remand Orders issued against them.

[16] The principal issue in these appeals before us hovers on the constitutionality of POCA, in particular Section 4 POCA. This Court in the case of **Rovin Joty Kodeeswaran v Lembaga Pencegah Jenayah & Ors And Other Appeals** [2021] 1 LNS 46 decided that POCA having been legally birthed under **Article 149 FC** is not unconstitutional as elucidated by Zabariah Mohd Yusof, FCJ:

[95] Therefore, in approaching the present appeals, the court must be guided by the clear words of the FC and POCA, in this case Article 149, Article 151(3), section 15B and section 21A of POCA. We have discussed in the preceding paragraphs 82-86 of this judgment, **that it is within the province of the legislature in accordance to the powers given to it under Article 149 of the FC to enact the impugned provision to address the mischief of national security.** It is also within the realm of the legislature's power to enact the impugned provisions which provides for limited judicial review.

[17] The basis of the Appellants' complaints is that their rights under the FC have been unjustly violated. Learned counsels for the Appellants argued in submission that in Malaysia, there is no necessity to resort to the theory of an implied limitation upon the power of Parliament to amend

a provision of the Constitution to give effect to the basic structure doctrine as the doctrine is integrated into the FC by virtue of Clause 1 of Article 4 which states that "inconsistent with this Constitution" and not "inconsistent with any provision of this Constitution". It is the submission of the learned counsels for the Appellants that a harmonious result is obtained by interpreting Clause (1) of Article 4 and Article 159 FC through either the direct consequence test or by applying the pith and substance canon of construction.

[18] In considering the constitutionality of the amendment to Clause 4 of Article 5 FC, the basic structure doctrine was addressed and rejected by the Federal Court in the case of **Loh Kooi Choon v Government of Malaysia** [1977] 2 MLJ 187. In **Loh Kooi Choon** (*supra*) the Federal Court rejected the doctrine of implied substantive limitations and held that there were only certain procedural limitations and by following the required procedural limitation constitutional guarantees might be removed. In his illuminating judgment, the eminent Raja Azlan Shah, FCJ explained the reasons for rejecting the basic structure doctrine and that if the framers of the FC had intended Part II of the FC was unamendable, they would have made it explicitly and expressly clear. I find it necessary to reproduce the relevant paragraphs of the judgment to impress that **Loh Koi Choon** (*supra*), even after four decades through the test of time, remains good law and authority:

The question whether the impugned Act is "harsh and unjust" is a question of policy to be debated and decided by Parliament, and therefore not meet for judicial determination. To sustain it would cut very deeply into the very being of Parliament.

.....

Each country frames its constitution according to its genius and for the good of its own society. We look at other Constitutions to learn from their experiences, and from a desire to see how their progress and well-being is ensured by their fundamental law.

.....

It is therefore plain that the framers of our Constitution prudently realised that future context of things and experience would need a change in the Constitution, and they, accordingly, armed Parliament with "power of formal amendment". They must be taken to have intended that, while the Constitution must be as solid and permanent as we can make it, there is no permanence in it. There should be a certain amount of flexibility so as to allow the country's growth. In any event, they must be taken to have intended that it can be adapted to changing conditions, and that the power of amendment is an essential means of adaptation. A Constitution has to work not only in the environment in which it was drafted but also centuries later.

.....

This reasoning, in my view, is based on the premise that the Constitution as the supreme law, unchangeable by ordinary means, is distinct from ordinary law and as such cannot be inconsistent with itself. It is the supreme law because it settles the norms of corporate behaviour and the principle of good government.

(Emphasis added)

[19] Wan Suleiman, FCJ in the same case, observed ad idem that it is the function of Parliament to decide whether an amendment is necessary or otherwise and it is not the role of the judiciary to second-guess the wisdom for the amendment:

Coming back to the issue before us, there is thus persuasive authority that whilst abrogation of the fundamental rights may not come within the ambit of our Article 159, reasonable abridgement of such rights are constitutional; **that Parliament should decide when such amendment is necessary and it is not for this court to question the wisdom or need for such amendment.**

I do not feel that the issue before this court would call for my view on whether there are indeed inherent or implied limitations to the power of amendment under Article 159, and must perforce confine myself to the issue before us viz. is the amendment to the fundamental right set out in Article 5 by Act A354/76 constitutional? Nor do I feel called upon to answer the broader issue of whether the power to amend includes the power to abrogate a fundamental right.

The power to amend would not, in this country, be restricted by anything set out in a Preamble for there is no Preamble to our Constitution. It seems to me to be clear that if there is to be any restriction to the right to amend any of the fundamental rights set out in Part II, such restriction would have been set out in one of the various clauses of Article 159 itself.

[20] The doctrine of the supremacy of parliament does not apply in Malaysia as explained succinctly by Mohammed Suffian Hashim (Lord President) in **Ah Thian v. Government of Malaysia** [1976] 1 LNS 3. His Lordship reiterated that the doctrine of supremacy of Parliament has no place in Malaysian jurisprudence. Suffian reminded us that it is the Constitution that is supreme and that Parliament and State Legislatures' powers to enact laws is prescribed by the provisions of the FC:

The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.

[21] His Lordship in **Ah Thian** (supra) explained that any Federal or State law may only be declared invalid on one of three grounds as provided under the FC. The Constitution of this Nation is a written constitution designed with safeguards to protect its citizen's fundamental rights and liberties. Amendments to any law or enacting any law must be within the defined framework of the provisions of the FC. In crafting the FC the designers, in their wisdom, gave Parliament the powers to amend the Constitution subject to the strict requirements as provided under Article 159 FC. There may be circumstances where it is necessary to amend the Constitution and in doing so the provision of Article 159 FC must be strictly adhered.

[22] The Federal Court comprising of Mohammed Suffian, LP, Wan Suleiman and Syed Othman in **Phang Chin Hock v PP** [1980] 1 MLJ 70 unanimously agreed with Raja Azlan Shah FCJ in **Loh Kooi Choon** (supra) and held that Parliament has the power to make constitutional amendments. In construing Clause 1 of Article 4 and Article 159 the rule of harmonious construction requires the court to give effect to both provisions and that Parliament may amend the Constitution in any way they think fit, provided that all the conditions precedent in accordance to the prescribed manner and form as expressly provided the Constitution.

[23] In **Phang Chin Hock** (supra) Suffian, LP distinguished the Indian Constitution and the FC:

Our Constitution has no preamble and no directive principles of state policy.

Indian Courts draw a distinction between the power of the Indian Parliament to amend the Constitution in its constituent capacity and to make ordinary law in its ordinary legislative capacity.

We do not think that we can draw such a distinction here as our Constitution was not drawn up by a constituent assembly and was not "given by the people."

(Emphasis added)

[24] It is perhaps worth setting out excerpts of Abdul Rahman Sebli, FCJ judgment in **Maria Chin** (supra) where in his usual eloquent manner explained the rationale of the inapplicability of the basic structure doctrine in the Malaysian context:

[130] I must start by saying that it is not so much the existence of "basic structures" in the Federal Constitution that gives rise to controversy. There is nothing wrong to describe the fundamental features of the Federal Constitution as its "basic structures". What poses a problem in the context of a written constitution is the application of the so-called "doctrine" of basic structure. Under the doctrine, any law passed by Parliament that "offends" the Federal Constitution is void.

[131] The difficulty with the doctrine is that "basic structure" is not confined to the written terms of the Federal Constitution. It has been extrapolated to include a doctrine of law, in this case the doctrine of separation of powers. This leads to a situation where a law that is duly passed by Parliament is rendered void for offending the doctrine of separation of powers even where it is not inconsistent with the express terms of the Federal Constitution. Herein lies the paradox.

[25] Similar issues in respect of the basic structure doctrine were raised and argued extensively in **Letitia Bosman v PP and other appeals** (No 1) [2020] 5 MLJ 277, **Maria Chin Abdullah v. Ketua**

Pengarah Imigresen & Anor [2021] 2 CLJ 579, and more recently in **Rovin Joty** (supra). In light of the clear and purposeful intention of the architects of our Constitution as well as the judgments of this Court in **Loh Kooi Choon** (supra), **Phang Chin Hock** (supra) and in **Letitia Bosman** (supra), **Maria Chin** (supra) and **Rovin Joty** (supra), the basic structure doctrine has no place in Malaysia. A departure from these Federal Court decisions would be anathema to the judgment of the majority.

The Federal Constitution

[26] To address the alleged infringements as argued by the Appellants, it is instructive to set out the relevant Articles of the FC. I begin with **Article 4 FC** :

Article 4. Supreme Law of the Federation.

- (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.**
- (2) The **validity of any law** shall not be questioned on the ground that-
 - (a) it imposes restrictions on the right mentioned in Article 9(2) but does not relate to the matters mentioned therein; or
 - (b) it imposes such restrictions as are mentioned in Article 10(2) but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article.
- (3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or—

- (a) if the law was made by Parliament, in proceedings between the Federation and one or more States;
- (b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.

(4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause. 19

(Emphasis added)

[27] **Clause 1 of Article 4 FC** declares the supremacy of our Federal Constitution and states that any law passed after Merdeka Day which is inconsistent with the provisions of the FC shall, to the extent of the inconsistency, be void. Any legislation passed by Parliament after Merdeka in 1957 must be in accordance with the explicit provisions of the Articles to the FC. **Clause (1) of Article 4 FC** allows the competency of any legislation enacted by Parliament to be challenged and if found to be inconsistent with the FC, such impugned legislation can be declared void.

[28] The validity of any law shall not be questioned on the ground that it imposes restrictions on the right as stipulated in **Clause (2) of Article 9(2) FC** but does not relate to the matters mentioned therein as well if it imposes such restrictions as are provided in **Clause (2) of Article 10 FC**. However, those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article (see: **Clause 2 of Article 4 FC**).

[29] The word “law” is defined under **Article 160 FC**, the interpretation Article or provision under the FC:

"Law" includes 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;.

[30] Article 160 FC defines **“Federal Law”**:

"Federal law" means—

- (a) **any existing law relating to a matter with respect to which Parliament has power to make laws**, being a law continued in operation under Part XIII; and
- (b) **any Act of Parliament;.....”**

[31] **“Written Law”** is also defined under Article 160 FC and it:

“includes this Constitution and the Constitution of any State;’

[32] The FC empowers Parliament, the legislative branch of the Government to make laws with respect to any of the matters as listed in **Clause (1) of Article 74 FC**. Under Article 4 FC the reference to law will include written law that is, federal laws enacted by Parliament within the definitive confines of the Legislative List as provided under **Ninth Schedule FC: the Federal List, the State List** and the **Concurrent List**.

[33] The Article which is the basis of the displeasure and discontent of the Appellants is **Article 149 FC**. **Article 149 FC** is unique as it empowers the Parliament to enact laws designed to stop or prevent any

threat or danger to national security and public order by a body of substantial persons. **Clause (1) of Article 149 FC** prescribes the circumstances such a legislation can be enacted and it is only for the purposes as specified in paragraphs (a) – (f) of Clause (1) Article 149 FC. Under Article 149 FC, Parliament can legislate law which is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament. There are constitutional safeguards as provided by **Clause (1) of Article 151 FC** to prevent any aberration and transgression.

[34] Article 159 FC empowers the Parliament to amend the FC:

Article 159. Amendment of the Constitution.

(1) Subject to the following provisions of this Article and to Article 161E the **provisions of this Constitution may be amended by federal law.**

(2) *(Repealed).*

(3) A Bill for making any amendment to the Constitution (other than an amendment excepted from the provisions of this Clause) and a Bill for making any amendment to a law passed under Clause (4) of Article 10 shall not be passed in either House of Parliament **unless it has been supported on Second and Third Readings by the votes of not less than two-thirds of the total number of members of that House.**

(4) The following amendments are excepted from the provisions of Clause (3), that is to say:

- (a) any amendment to Part III of the Second or to the Sixth or Seventh Schedule;
- (b) any amendment incidental to or consequential on the exercise of any power to make law conferred on Parliament

by any provision of this Constitution other than Articles 74 and 76;

(bb) subject to Article 161E any amendment made for or in connection with the admission of any State to the Federation or its association with the States thereof, or any modification made as to the application of this Constitution to a State previously so admitted or associated;

(c) any amendment consequential on an amendment made under paragraph (a).

(5) A law making an amendment to Clause (4) of Article 10, any law passed thereunder, the provisions of Part III, Article 38, 63(4), 70, 71(1), 72(4), 152, or 153 or to this Clause shall not be passed without the consent of the Conference of Rulers.

(6) In this Article "amendment" includes addition and repeal; and in this Article and in Article 2(a) "State" includes any territory.

[35] The Articles as contained in the FC are of equal stature and importance and therefore must be interpreted harmoniously. The Judiciary is the first vanguard and the final bastion of defence against any challenge to the FC and the laws legislated by Parliament. It is inherently clear and unequivocal that the cardinal rule when interpreting the FC and determining the intent of the Article, the language of the FC must neither be tampered nor tempered. A puritanical stance is necessary so that the FC must be read and construed as the architects of the Constitution had designed it to be. **NS Bindra's Interpretation of Statute** Eight Edition at page 857 described the Constitution as:

"the very framework of the body policy: its life and soul; it is the fountain head of all its authority, the mainspring of all its strength and power: The Executive, the Legislative, and the Judiciary are all its creations and derive their sustenance from it. It is unlike other statutes which can be at any time altered, modified or repealed.

Therefore the language of the Constitution should be interpreted as if it were a living organism capable of growth and development of interpreted in the broad and liberal spirit and not in a narrow and pedantic sense."

[36] To discourage and prevent frivolous or vexatious challenges on the relevant legislation, the validity or constitutionality of the laws should not be questioned by way of collateral attack. The Supreme Court in **Stephen Kalong Ningkan v Tun Abang Haji Openg & Tawi Sli (No 2)** [1967] 1 MLJ 46 49 held that Clauses (3) and (4) of Article 4 of the FC are designed to prevent the possibility of the validity of laws made by the legislature being questioned on the ground mentioned in that article incidentally. Article 4 requires that such a law may only be questioned in proceedings for a declaration that the law is invalid. In other words, there must be a specific declaration of invalidity.

[37] The presumption of constitutionality means that the Judiciary must presume that Acts legislated by Parliament to be constitutional. When scrutinising any challenge to the Constitution, the Court should try to sustain the validity of the legislation. It is only when it is not possible to constitutionally sustain it then the Court can strike it down. Hashim Yeop Sani J in **PP v Su Liang Yu** [1976] 2 MLJ 128 explained this presumption succinctly and alluded when Parliament performs its legislative powers the interest and the needs of the Nation has been taken into consideration:

(8) It must be presumed that the legislature understands and correctly appreciates the need of its own people and that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds provided however that while good faith and knowledge of the existing conditions on the part of the legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances on which the classification may be reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of holding that there must be some undisclosed and unknown reasons for the discrimination.

[38] Hashim Yeop Sani, SCJ again in **Abdul Karim bin Abdul Ghani v Legislative Assembly of Sabah** [1988] 1 MLJ 171 observed:

Article 4(3) and (4) of the Federal Constitution is designed to prevent the possibility of the validity of laws made by the Legislature being questioned on the ground mentioned in that article incidentally. The article requires that such a law may only be questioned in proceedings for a declaration that the law is invalid. The subject must ask for a specific declaration of invalidity in order to secure that frivolous or vexatious proceedings for such declarations are not commenced. Article 4(4) requires that the leave of a judge of the Supreme Court must first be obtained.

[39] In the same vein the Federal Court through the majority judgment of Ariffin Zakaria, CJ in **Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors** [2014] 4 MLJ 765 held that the party seeking to challenge the validity or constitutionality of the impugned provision must specifically ask for a declaration that the law is invalid, and such a proceeding may only be commenced with leave of a judge of the Federal Court:

[42] The effect of cl (3) and (4) of art 4 as explained by the Supreme Court in *Abdul Karim bin Abdul Ghani* is that the validity or constitutionality of the laws could not be questioned by way of collateral attack, as was done in the present case. This is to prevent any frivolous or vexatious challenge being made on the relevant legislation. Clause (3) of art 4 provides that the validity or constitutionality of the relevant legislation may only be questioned in proceedings for a declaration that the legislation is invalid. And cl (4) of art 4 stipulates that such proceedings shall not be commenced without the leave of a judge of the Federal Court. This procedure was followed in a number of cases (see *Fathul Bari bin Mat Jahya*; *Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications* [2009] 6 MLJ 354; [2009] 2 CLJ 54 (FC); *Mamat bin Daud & Ors v Government of Malaysia* [1986] 2 MLJ 192; [1986] CLJ Rep 190 (SC).

[40] The Appellants in these appeals sought to declare Section 4 POCA as invalid as it is **inconsistent with the pre-amended Article 121(1) FC**. In essence, it is a collateral attack on the validity of the amendment to Article 121 of the FC in 1988. This collateral attack against the validity of Article 121(1) FC cannot be sustained. I simply cannot ignore these plethora of wise decisions of this Court. A specific declaratory application must be made under Article 4 FC, which the Appellants clearly failed to do so in the first instance.

[42] In his book “**An Introduction to the Constitution of Malaysia**” Mohamed Suffian Hashim described the Constitution as a partnership agreement regulating the relations between the three branches:

Our constitution is a working document. It is a partnership agreement regulating the relations between the component members of the federation. Every partner insisted on safeguards for its own interests and consequently the constitution contains *minutiae* not to be found in other constitutions.

That the framers of the constitution themselves regarded these as *minutiae* is obvious from the fact they provided that some provisions may be amended by a simple majority. As a working document, the constitution is in use every day by all fourteen governments. When certain provisions are found from experience to be unsatisfactory or no longer appropriate to present circumstances, should these provisions be regarded as sacred and immutable? Or should they be amended to bring them in accord with current needs and thinking? A balance has to be struck between the two opposing points of view implied in these questions.

[43] Clause (1) of Article 4, Article 128 and Clause (6) 162 FC provide in clear and unequivocal terms that Parliament exercises its powers subject to the provisions of the Constitution. The Legislature, the Judiciary and the Executive derive its respective powers from the FC and though independent of each other the three branches in fact co-exist which is why under specific circumstances the powers, may overlap. Tun Abdul Hamid Mohamad, PCA (as he then was) in **PP v. Kok Wah Kuan** [2008] 1 MLJ 1 explained this unique feature of our FC:

[17] 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 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.⁸

[44] Expressing the same view, Azahar Mohamed FCJ (as he then was) in **JR Resources Sdn Bhd v. Kuwait Finance House (Malaysia) Bhd** [2019] 5 CLJ 569 explained the defined demarcation of the three branches:

[168] It has been said that for one branch of the Government to usurp the rightful authority and power of another is to undermine the doctrine of separation of powers. Having said that, I note at the same time that the doctrine recognises that, where necessary, one branch of the Government should be allowed to exercise part of the powers of another branch and the delegation of power by one branch of the Government to another.

[45] Undeniably a delicate demarcation exists between the branches, and such a porous border may inevitably lead to an overlapping of powers. Nevertheless, each component respecting and safeguarding the powers anointed respectively to it under the FC being the supreme law of the Land.

[46] In respect of the creation of offences, be it criminal or security as well as the procedures and sentences, it is a prerogative right of the Parliament. A question that involved controversial moral and social issues are matters of policy consideration within in **Letitia Bosman** (supra) where Azahar Mohamad (CJM) held that the Parliament has the legislative power to enact offences and prescribe its punishment:

“In my opinion controversial matter of policy involving differing views on the moral and social issues involved is one circumstance where parliament is better placed to assess the needs of society and to make difficult choices

between competing considerations. Courts should accept and recognise parliament is better placed to perform those functions.

...

The presumption of constitutionality exists because Parliament is deemed better placed than the Courts to determine social policy. Parliamentarians are democratically elected and represent the will of the people.

...

Indeed, controversial matter of policy involving differing views on the moral and social issues involved is inherently a matter for determination by the elected Legislature rather than the court.

...

With respect, I fully agree with the views of Lord Sumption that generally matters concerning sensitive and controversial moral and social issues are inherently legislative questions, calling for the representatives of the general body of citizens to decide on them. As he observed the parliamentary process is a better way of resolving issues involving controversial and complex questions of fact arising out of moral and social dilemmas. His opinion can be viewed as a case in which court attach weight to the judgment of the democratically elected legislature.”.

(Emphasis added)

[47] In performing its functions as a legislative body, Parliament must undoubtedly take into consideration the needs and interests of the Nation paramount above the needs of the individual. Parliament is in a better position to formulate policy and legislate laws within the boundaries of the FC. The Judiciary’s role is to ensure that the checks and balances are stringently observed by the Legislature and the Executive.

Legislative History of POCA and the Related Provisions

[48] It is important to understand the historical background of the legislation in question. POCA was enacted as an Ordinance (F.M.

Ordinance No. 13 of 1959) and revised in 1983. When the Prevention of Crime Bill, 1959 was tabled in the Legislative Council **62 years ago on 19.2.1959** by the Hon. Encik Suleiman, Minister of Interior and Justice, he explained in his speech the objective and intent of the Bill. The concerns which forms the basis of the Bill were the criminal activities by secret societies, gangsters and triads and the threat of the activities to public safety and order. Before POCA, the activities of secret society gangsters were to some extent controlled by the application of the Banishment Law. The method proposed in this Bill is to attempt to identify such persons and to place their names on a Register. They will then be liable to be subjected to certain restrictions which it is hoped will prevent or deter them from committing crimes, and if they do commit crimes make it easier for them to be apprehended by the Police.

[49] POCA was enacted as an ordinary legislation applicable only to West Malaysia. Subsequently, in 2014 by the Prevention of Crime (Amendment and Extension) Act 2014 [Act A1459] POCA became a law pursuant to **Article 149 of the FC**, applicable throughout Malaysia.

[50] The **Explanatory Statement to Act A1459** clarified that in order to allow the introduction of detention without criminal charge or trial as previously provided in the repealed Emergency (Public Order and Prevention of Crime) Ordinance 1969 [Ordinance 5, 1969, P.U. (A) 187/1969] and the Internal Security Act 1960 [Act 82], Act 297 is to be changed to a law made pursuant to Article 149 of the Federal Constitution, and its application extended throughout Malaysia. The other provisions in POCA were amended to enhance the inquiry process to determine whether a person should be subject to registration and supervision under the Act.

The Constitutionality of Section 4 POCA

[51] The basis for challenging the constitutionality of Section 4 of POCA is the absence of judicial discretion, and, according to the Appellants, a contravention to the doctrine of separation of power. Learned counsel for the Appellants argued that Section 4 of POCA is unconstitutional as it is against the doctrine of separation of powers by requiring the judicial arm to act upon the dictate of the Executive and violates Article 121 (1) as it stood before it was amended in June 1988 vide Act A704. Learned counsels for the Appellant further submitted that under Section 4 POCA the Magistrate's hands are tied, so to speak as he or she has no discretion as to the detention and the imposition of the period of detention.

[52] **Section 4 POCA** deals specifically with the procedure before a Magistrate. Under the aforesaid Section the Magistrate shall on production of a statement in writing stating the grounds for believing that the name of that person should be entered on the Register, remand the person in police custody for a period of twenty one days. However, if no written statement is produced and no grounds on which the person is lawfully detained, the Magistrate may direct his release. This shows the presence of judicial discretion under Section 4 POCA. To say otherwise, with greatest of respect, is clearly a misinterpretation of the law. There is no element of executive dictation, an unnecessary illusion of the purpose and intent of the law.

[53] When legislation or a provision of the legislation is challenged for being inconsistent with the FC it must expressly state and identify the Article of the FC the impugned legislation violates. Section 4 POCA

according to the Appellants, erodes the discretionary power of the Magistrate a violation of the pre-amended **Clause (1) of Article 121 FC**.

[54] First and foremost, any challenge of the constitutionality of Section 4 of POCA must be based on the existing provision of Article 121 FC, and not based on the provision of Article 121 FC before it was amended as suggested by learned Counsel for the Appellants.

[55] Clause (1) of Article 121 FC must be examined. **Before the amendment**, Clause (1) of Article 121 FC reads:

Subject to Clause (2) **the judicial power of the Federation shall be vested in two High Courts** of co-ordinate jurisdiction and status, namely—

- (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and
 - (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Borneo and shall have its principal registry at such place in the States
 - c) (Repealed),
- and in such inferior courts **as may be provided by federal law**.

[56] **After the amendment** in 1988 Clause (1) Article 121 FC reads:

Article 121. Judicial power of the Federation.

- (1) There shall be two High Courts of co-ordinate jurisdiction and status, namely—

- (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and
- (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;
- (c) *(Repealed)*.

and such inferior courts as may be provided by federal law and **the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.**

[57] The words "judicial powers" remained in the title of Article 121 FC but deleted from the text by the Constitution (Amendment) Act 1988 (Act A704) on 10.6.1988. However, judicial powers still vest in the Courts as evident from the language of **Clause (1) of Article 121 FC** that the Courts' jurisdiction is expressly conferred by written laws enacted by Parliament.

[58] **Abdul Hamid Mohamad PCA (as he then was) explained in PP v. Kok Wah Kuan (supra)** that after the amendment to Clause (1) Article 121 FC:

[11], 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 of 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.

(Emphasis added)

[59] To interpret a law based on a provision that no longer reflects the position of the law, no longer in existence by virtue of an amendment, is misconceived and defies not only the canons of construction and interpretation but legal logic as well. To do so will create a fallacious precedent that will inevitably lead to unprecedented consequences. The absence of the words ‘judicial powers’ under Article 121 FC does not in any manner or form emasculate the powers of the courts. Au contraire, the jurisdiction and powers of the Judiciary remain intact with the Judiciary. Until and unless Clause (1) Article 121 FC is amended, the jurisdiction and powers of the Courts are as conferred by Federal law. Thus, it necessarily follows the jurisdiction and powers of the courts under POCA do not violate the amended Article 121 FC.

[60] With regards to the Schedule to POCA learned Counsel for the Appellants argued that the inclusion of “unlawful gaming” in paragraph 5 of Part I of the 1st Schedule of POCA falls beyond the ambit of “organised violence” against persons or property. Learned counsels for the Appellants contended that by incorporating “unlawful gaming” the Minister had abused his power under Section 22 of POCA as unlawful gaming is not a crime which can be classified as being as one that falls within the category of an organised violence. The Minister had wrongly

classified it as coming within the recital as prescribed by the FC and by doing so had acted ultra vires POCA.

[61] Learned counsel for the Appellants argued that gambling is not of a pervading character disturbing the general peace, tranquility and order of society and therefore does not affect public order, thus a fortiori it cannot come within the phrase "organised violence against persons or property" which governs the spirit and intendment of POCA. It is the submission of the Appellants that "unlawful gaming" is not within the definition of "organised violence against persons or property".

[62] **Section 22 POCA** reads as follows:

The Minister may, by order published in the *Gazette*, amend the Schedules.

[63] Part I of the First Schedule lists the Registrable Categories as follows:

1. All members of unlawful societies which—
 - (i) use Triad ritual; or
 - (ii) are constituted or used for purposes involving the commission of offences that are seizable under the law for the time being in force relating to criminal procedure; or
 - (iii) maintain secrecy as to their objects.
2. Persons who belong to or consort with any group, body, gang or association of two or more persons who associate for purposes which include the commission of offences under the Penal Code.

3. All traffickers in dangerous drugs, including persons who live wholly or in part on the proceeds of drug trafficking.
4. All traffickers in persons, including persons who live wholly or in part on the proceeds of trafficking in persons.
5. **All persons concerned in the organisation and promotion of unlawful gaming.**
6. All smugglers of migrants, including persons who live wholly or in part on the proceeds of smuggling of migrants.
7. Persons who recruit, or agree to recruit, another person to be a member of an unlawful society or a gang or to participate in the commission of an offence.
8. Persons who engage in the commission or support of terrorist acts under the Penal Code.

[Emphasis added]

[64] We cannot summarily dismiss **Paragraph 5** of Part I of the 1st Schedule which has been in existence since POCA was promulgated in 1959 and even when Act A1459 amending POCA into a preventive law was laid down in Parliament, debated and passed, even before Article 121 FC was amended. The original text reads as follows:

5. All persons **habitually** concerned in **the organisation and promotion of unlawful gaming.**

(Emphasis added)

[65] The word “habitually” was deleted in 2014 vide the Prevention of Crime (Amendment of First and Second Schedule) Order 2014 [P.U.(A)

122/2014] everything else is *ceteris paribus*. With the deletion, paragraph 5 now reads:

5. All persons concerned in the organisation and promotion of unlawful gaming.

[66] It can be surmised then that from its inception in 1959, the Legislature had every intention to include unlawful gaming as one of the categories under POCA. Parliament saw the necessity more than sixty years ago to include the organisation and promotion of unlawful gaming activities due to an upsurge of undesirable criminal activity, causing the public to live in fear. With the advent of technology, the organisation and promotion of unlawful gaming have become sophisticated. Secret societies, triads and gangsters of yesteryears have morphed into criminal syndicates and cartels. It is inconceivable to deny Parliament not allowed or unable to address this criminal activities through legislation.

[67] The meaning of “organised violence against persons or property” must be assessed through the context and the entire scheme of POCA. The words “organised violence against persons or property” must not be interpreted restrictively as suggested. Unlawful gaming activity has evolved into a much more sophisticated illicit activity that even in this present day constitutes a threat to public order and safety.

[68] The intent of POCA as expressed in the long title of the Act is for effectual prevention of crime throughout Malaysia and for the control of criminals, members of secret societies, terrorists and other undesirable persons, and for matters incidental thereto.

[69] The CGHA is essentially an Act to suppress and control common gaming houses, public gaming and public lotteries. Unlike POCA, under CGHA lawful gaming is permitted by the issuance of a license by the Minister of Finance. The Minister of Finance under Section 27A CGHA may issue license authorising a company registered under the Companies Act 1965 [Act 125] to promote and organise gaming.

[70] The CGHA was never included in the Schedule to POCA, neither was there any intention to include CGHA under POCA as suggested by the Appellants. Thus, the argument of learned counsel for the Appellants that the inclusion of gaming in the Schedule to POCA is unconstitutional is untenable for the reasons I have stated above.

[71] One of the arguments canvassed by learned counsel for the Appellants in support of its contention that POCA is unconstitutional is that the recital did not set out in full Clause (1) of Article 149 FC. By **Act A1459** the following preamble was inserted in the Act:

“Whereas action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property;

And Whereas Parliament considers it necessary to stop such action;

[72] It is the argument of learned counsel that the failure of Parliament to incorporate in the Recital to the Act the complete Clause (1) of Article 149 FC prescribing the intent and purpose would necessarily mean that the POCA is invalid and therefore unconstitutional. With respect, we are unable to agree with learned counsel for the Appellants.

[73] The long title of an Act recites the intent and purpose of the Act. The preamble of POCA recited the purpose of the Act which is prevent any incursion or threat by a substantial body of persons within and outside Malaysia causing a substantial number of citizens to fear organised violence against persons or property. There is therefore no fundamental flaw in the Preamble as suggested by the Appellants to the extent that POCA be declared unconstitutional.

[74] The final argument canvassed by the Appellants is that the Appellants' detention is tainted because the police officers making the arrest and recommending the detention were also subject of an inquiry by MACC into their corrupt activities. The Appellants are material witnesses in that inquiry. The Appellants in my view have failed to show *mala fide* as it was only their allegation that the police have detained to shut them up from revealing information to the MACC.

[75] On the factual matrix of these appeals I agree with the learned JC that this argument is clearly flawed because the Appellants were detained first by the MACC before they were detained under POCA. Furthermore, based on the additional affidavit in support by Roy Azman bin Suhut the Appellants are suspects in the MACC's investigations and not witnesses as claimed. Therefore, it is clear the Appellants failed to discharge the burden of showing that the Respondents acted *mala fide* in their arrest and detention.

Conclusion

[76] In the present appeals, I am not persuaded that POCA and the provisions of POCA violate Article 121 of the FC. For the reasons

aforesaid, my answers to Questions 1,2,3,4 and 5 are in the negative in that POCA and Section 4 POCA are valid and constitutional.

[77] However, as I have stated in paragraph 52 and as explained by my learned brother Vernon Ong FCJ, in his Grounds of Judgment, under Section 4 POCA the Magistrate is bound to exercise his discretion judicially in order to ensure that all the legal procedural and constitutional safeguards are strictly complied with before issuing the remand order. There was no evidence of the Magistrate exercising the discretion as required. For that reason and that reason alone the appeals are allowed in terms of prayer 7 of the Habeas Corpus applications.

[78] My learned brother, Vernon Ong Lam Kiat, FCJ and my learned sister, Zaleha Yusuf, FCJ have read this judgment in draft and have expressed their agreement to it, to form the majority judgment of this court.

(HASNAH MOHAMMED HASHIM)

Judge

Federal Court

27th April 2021