

**IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)
CIVIL APPEAL NO. 02(i)-77-11/2020(W)**

Between

AJS ... Appellant

And

JMH ... Respondent

(HEARD TOGETHER WITH)

**IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)
CIVIL APPEAL NO. 02(i)-82-12-2020(W)**

Between

AJS ... Appellant

And

JMH ... Respondent

Coram:

Tengku Maimun binti Tuan Mat, CJ
Mohd Zawawi bin Salleh, FCJ
Nallini Pathmanathan, FCJ

**GROUND OF JUDGMENT
(MAJORITY)**

INTRODUCTION

[1] These appeals concern primarily the interpretation of sections 3 and 58 of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA').

BACKGROUND FACTS

[2] The appellant in both these appeals filed a judicial separation petition in the High Court at Kuala Lumpur (Family Division) against her husband. The appellant alleged that the husband had committed adultery with the respondent in the present appeals.

PROCEEDINGS IN THE HIGH COURT

[3] The appellant pleaded, in accordance with section 54(1)(a) of the LRA, that as a result of her husband's adulterous relationship with the respondent, who is a Muslim, the appellant had been abandoned by her husband and that her marriage had broken down.

[4] In her judicial separation petition, the appellant cited her husband as the respondent and named the respondent in the instant appeals as co-respondent. The appellant prayed that the respondent be condemned in damages under section 58 of the LRA and that the husband as well as the co-respondent bear the costs of the petition.

[5] The respondent contended that she had been wrongly cited as a party. She filed an application under O. 18 r 19(1)(a) of the Rules of Court 2012 ('ROC 2012') and/or Rule 103 of the Divorce and Matrimonial

Proceedings Rules 1980 ('DMPR 1980') and/or the inherent jurisdiction of the court to strike out the judicial separation petition against her.

[6] The application to strike out was premised on the following grounds:

- (i) That by virtue of section 3(3) of the LRA, the LRA does not apply to a Muslim; and
- (ii) That a claim for damages against a co-respondent under section 58 of the LRA only applies in respect of a petition for divorce and not a petition for judicial separation.

[7] Section 3 of the LRA reads:

“Application

3. (1) Except as is otherwise expressly provided this Act shall apply to all persons in Malaysia and to all persons domiciled in Malaysia but are resident outside Malaysia.

(2) For the purposes of this Act, a person who is a citizen of Malaysia shall be deemed, until the contrary is proved, to be domiciled in Malaysia.

(3) This Act shall not apply to a Muslim or to any person who is married under Islamic law and no marriage of one of the parties which professes the religion of Islam shall be solemnized or registered under this Act; but nothing herein shall be construed to prevent a court before which a petition for divorce has been made under section 51 from granting a decree of divorce on the petition of one party to a marriage where the other party has converted to Islam, and such decree shall, notwithstanding any other

written law to the contrary, be valid against the party to the marriage who has so converted to Islam.”.

[8] While section 58 provides:

“Damages for adultery may be claimed against co-respondent

58. (1) On a petition for divorce in which adultery is alleged, or in the answer of a party to the marriage praying for divorce and alleging adultery, the party shall make the alleged adulterer or adulteress a co-respondent, unless excused by the court on special grounds from doing so.

(2) A petition under subsection (1) may include a prayer that the co-respondent be condemned in damages in respect of the alleged adultery.

(3) ...”.

[9] The High Court allowed the respondent’s striking out application. The learned judge applied the principle of *noscitur a sociis* and adopted the purposive approach in holding among others that –

(i) The LRA was enacted to govern the marriage and divorce of non-Muslims in Malaysia and that it expressly excludes the marriage and divorce of Muslims and non-Muslims who married with any person under Islamic law;

(ii) That the alleged adulterer or adulteress is a Muslim is no bar against him/her being named as co-respondent in a divorce petition and for damages for adultery to be claimed against the Muslim co-respondent under section 58 of the LRA; and

- (iii) Section 58 of the LRA is only applicable to petitions for divorce. As such, in a judicial separation petition, the court has no jurisdiction to condemn the co-respondent for damages under section 58 of the LRA for adultery.

[10] Aggrieved by the decision of the High Court that a Muslim or otherwise cannot be named as a co-respondent in a judicial separation petition to be condemned in damages under section 58 of the LRA, the appellant appealed to the Court of Appeal.

[11] The respondent who was dissatisfied with the decision of the High Court that in divorce proceedings under section 58 of the LRA, a Muslim can be named as a co-respondent, similarly filed an appeal to the Court of Appeal.

PROCEEDINGS IN THE COURT OF APPEAL

[12] In a unanimous decision, the Court of Appeal dismissed the appellant's appeal and allowed the respondent's appeal.

[13] Essentially, the Court of Appeal adopted the literal approach to construe sections 3(3) and 58 of the LRA. It held inter alia that:

- (i) the words 'This Act shall not apply to a Muslim' admits of only one meaning, namely that the LRA does not apply to a Muslim and therefore the co-respondent who is a Muslim cannot be named in a judicial separation petition;

- (ii) The only exception provided for in section 3(3) is in respect of the conversion to Islam of one party to a civil marriage. The exception does not extend to damages for adultery; and
- (iii) The purposive canon of interpretation only applies when the plain meaning is in doubt.

PROCEEDINGS IN THE FEDERAL COURT

[14] The appellant obtained leave to appeal to this Court on the following questions of law ('Questions'):

"Question 1

Whether section 3(3) of the LRA precludes a non-Muslim petitioner from citing a Muslim as a co-respondent on an allegation, inter alia, of adultery to a petition for judicial separation under section 64 of the LRA, having regard to the decision of the Malaysian Supreme Court in *Tang Sung Mooi v Too Miew Kim* [1994] 3 MLJ 117;

Question 2

Whether a court, when interpreting section 3(3) of the LRA should have regard to the presumption that Parliament does not intend to legislate in violation of Articles 5(1) and 8(1) of the Federal Constitution, having regard to the cases of *ML Kamra v New India Assurance Air* 1992 SC 1072 and *Durga Parshad v Custodian of Evacuee Property* AIR 1960 Punjab 341.".

SUBMISSIONS OF PARTIES

The Appellant's Case

[15] Learned counsel for the appellant submitted that the High Court was correct in giving section 3(3) of the LRA a wide meaning and that the Court of Appeal's interpretation of section 3(3) violates the appellant's right to live with dignity, the right to access to justice which includes remedial justice both encapsulated in Article 5(1) and the requirement of proportionality housed in Article 8(1) of the Federal Constitution.

[16] It was argued by learned counsel for the appellant that the fundamental right to live with dignity, would be rendered completely illusory should the appellant be barred from even naming the respondent as a party to her judicial separation petition.

[17] As for the right to access to justice, learned counsel contended that procedural justice requires that the respondent be named as a party be it in a divorce petition or a judicial separation petition.

[18] On the proportionality point, it was submitted that the Court of Appeal's interpretation of section 3(3) violates the proportionality principle housed in the equal protection limb of Article 8(1), as Muslims would be cloaked with complete immunity from a claim for damages for adultery simply by virtue of their religion and that any form of state action, including judicial action, must be proportionate. Learned counsel posited that the Court of Appeal's decision which is discriminatory against non-Muslims on the ground of religion cannot be sustained as it is not the law that religion is now a recognised ground which negates proportionality.

[19] Learned counsel also repeated the submissions in the Courts below that to exclude a Muslim from being cited as a co-respondent on the allegation of adultery would produce a harsh and unjust result to the

petitioner and that Parliament does not intend to produce injustice. Hence, a non-Muslim petitioner should be allowed to add a Muslim in the petition. Further, citizens must have remedy in court. In that regard, section 3(3) must be read consonant with principles of Article 5 and Article 8 which give the injured party a remedy.

[20] On section 58 of the LRA, learned counsel submitted that it was a procedural provision and there was nothing to prevent a petitioner in a judicial separation petition from claiming for damages for adultery. Learned counsel highlighted that the sections governing a petition for divorce and judicial separation are both placed under the same header (Part VI – DIVORCE), which means that the operation of those sections under Part VI cannot be segregated.

[21] This indication, according to learned counsel is fortified by section 65(2) which provides that on a petition for divorce, a decree of judicial separation previously granted on the ground of adultery may be treated as sufficient proof for purposes of the petition. The above arrangement therefore speaks for itself, in that the two petitions are not substantially different and the one may even, in some circumstances, be treated as proof of presentation for the other.

The Respondent's Case

[22] In response, the crux of the respondent's submissions is as follows:

- (i) In Malaysia, there are two separate jurisdictions in matters of personal law: civil and Syariah. The LRA regulates the personal law of non-Muslims before the civil Courts and

likewise, the various Syariah State enactments regulate the personal law of the Muslims before the Syariah Courts;

- (ii) The above separation is clearly memorialised and embodied in Article 121(1A) of the Federal Constitution;
- (iii) Both Articles 5 and 8 of the Federal Constitution are not applicable on the facts of this case. Even if they apply, Article 5 is circumscribed by law, which is section 3(3) of the LRA and Article 121(1A) of the Federal Constitution. Article 8 does not apply by reason of clause (5)(a) of the said Article, the LRA being personal law and therefore being a 'provision regulating personal law';
- (iv) The word 'or' in section 3(3) is not superfluous and it is the clear intention of the legislature to exclude Muslims; and
- (v) By the plain reading of section 3(3) of the LRA, Muslims are excluded from the civil courts in the same manner that non-Muslims are excluded from Syariah courts.

FINDINGS/ANALYSIS

Statutory Interpretation – Section 3(3) of the LRA

The Literal Rule of Construction

[23] The issue for our determination is whether the words 'This Act shall not apply to a Muslim' in section 3(3) of the LRA excludes the application

of the LRA to all Muslims *in toto* or it only excludes Muslims who are married under Islamic law.

[24] It is pertinent to note that there are four (4) clearly discernible parts to section 3(3) of the LRA, as follows:

- (i) The LRA shall not apply to a Muslim;
- (ii) The LRA shall not apply to any person who is married under Islamic law;
- (iii) Marriage of one of the parties which professes the religion of Islam shall not be solemnized nor registered under the LRA; and
- (iv) A decree of divorce may be made under section 51 of the LRA although one party to the marriage has converted to Islam.

[25] The appellant posited that the words ‘... a Muslim or to any person..’ in the first and second parts of section 3(3) should be read to mean a Muslim who is married under Islamic law and any person who is married under Islamic law.

[26] In my judgment the words ‘This Act shall not apply to a Muslim’ in the first part excludes a Muslim *in toto* from the application of the LRA and it should not be interpreted to mean that it refers to a Muslim who is married under Islamic law, as marriage under Islamic law is covered under the second part of section 3(3). Further, Parliament does not legislate in vain by inserting the word ‘or’ if its intention in enacting section 3(3) of the

LRA was not to exclude the application of the provisions of the LRA entirely to Muslims. This word will then be rendered otiose or redundant.

[27] The plain meaning of the words 'This Act shall not apply to a Muslim' admits of no exception. The only exception as seen in the fourth part of section 3(3) is where a party to the civil marriage has converted to Islam, as stipulated in section 51 of the LRA which reads:

“Dissolution on ground of conversion to Islam

51. (1) Where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce;

Provided that no petition under this section shall be presented before the expiration of the period of three months from the date of the conversion.

(2) The Court upon dissolving the marriage may make provision for the wife or husband, and for the support, care and custody of the children of the marriage, if any, and may attach any conditions to the decree of the dissolution as it thinks fit.

(3) Section 50 shall not apply to any petition for divorce under this section.”.

[28] The purpose of section 51 of the LRA is to ensure that all obligations and liabilities of parties who contracted a civil marriage be dealt with accordingly under the civil law. Hence, although a party might subsequently convert and become a Muslim, he or she is subject to the LRA for purposes of a divorce petition and related issues under section 51 of the LRA.

[29] The High Court relied on the maxim of *noscitur a sociis* to hold that the words ‘This Act shall not apply to a Muslim’ refer to a Muslim who is married under Islamic law. With respect, it is my view that reliance on the maxim is misplaced as there is no ambiguity in the meaning of the words ‘This Act shall not apply to a Muslim’.

[30] Further, applying a plain and literal construction to section 3(3) does not lead to an absurdity, rather it accords with the object and the underlying purpose of the LRA and with the demarcation of jurisdictions ordained by Article 121(1A) of the Federal Constitution.

The Purposive Rule of Construction

[31] I now turn to consider the purposive rule of construction of statutes. In this regard, section 17A of the Interpretation Acts 1948 and 1967 (‘the Interpretation Acts’) reads:

“17A. Regard to be had to the purpose of the Act.

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.”.

[32] The standard canon of construction has always been that the Courts should, in usual cases, begin with the literal rule and that the purposive rule only ought to be relied on where there is ambiguity. This was clarified by this Court most recently in *PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals* [2021] 2 MLJ 60.

[33] The application and scope of section 17A of the Interpretation Acts was determined by this Court in the case of *Malaysian Estates Staff Union v Rajasegaran & Ors* [2006] 4 CLJ 195 (as affirmed in *PJD Regency* (supra)) and also *Yong Tshu Kin & Anor v Dahan Cipta Sdn Bhd & anor and other appeals* [2021] 1 MLJ 478 where this Court stated the application of section 17A of the Interpretation Acts thus:

“Section 17A of Act 388 requires that in the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act shall be preferred to a construction that would not promote that purpose or object. ... It is a settled principle of law that the purposive rule applies where there is ambiguity in a statute such as when a literal reading of it opens it to two or more meanings.”.

[34] Thus, it is trite that where words in a statute are ambiguous and capable of two meanings, then resort may be had to the history of the legislation. And it is also trite that statutory construction is exclusively a matter for the Judiciary but Hansard and Parliamentary speeches serve as an interpretive aid (see the judgment of this Court in *Maple Amalgamated Sdn Bhd & Anor v Bank Pertanian Malaysia Bhd* [2021] 8 CLJ 409, at [53]).

[35] Although as alluded to earlier there is no ambiguity in the words ‘This Act shall not apply to a Muslim’ and that a literal meaning accorded to the words do not give rise to two constructions as it is clear that it excludes a Muslim *in toto*, for completeness, it is my considered view that section 3(3), even when construed in light of the object and purpose and the legislative history of the LRA results in the same conclusion as the literal interpretation.

[36] As I understand it and as gathered from the long title, the object is to govern marriage and divorce, particularly monogamous marriages among non-Muslims. That said, the object of the LRA is not only that. In my view, the larger object is to demarcate clearly the separate personal laws applicable to Muslims and non-Muslims in this country, as can be seen from the parliamentary speeches.

[37] A careful reading of the whole Hansard as well as the Joint Select Committee on the Law Reform (Marriage and Divorce) Bill 1975 will reveal that the intention of Parliament in enacting the LRA is not only to provide for monogamous marriages but also to draw the boundaries of the application of the LRA. Section 3(3) of the LRA paints a clear picture about the intention of Parliament to exclude Muslims entirely from the application of the LRA and the only exception for this exclusion is as stipulated in section 3(3) of the LRA itself (where a non-Muslim spouse subsequently converts to Islam after his or her civil marriage).

[38] In light of the above, I am unable to agree with the appellant that section 3(3) of the LRA only excludes a marriage under the Islamic law and not a Muslim *in toto*.

[39] It was contended by the appellant that the Court of Appeal failed to take into consideration that in deciding if the respondent was responsible for causing the breakdown of marriage between the appellant and her husband, it is the conduct of the respondent that will come under scrutiny and not her personal law and as such the civil court has jurisdiction over the respondent.

[40] With respect, I am unable to sustain the appellant's contention. Although in determining the grounds of judicial separation petition the personal law of the respondent was not an issue in the High Court, the respondent's conduct in the alleged adultery impacts on her personal law. For instance, the respondent can be charged in the Syariah court for the offence of *khalwat* and for instigating the husband to neglect his duties to the petitioner, which will in turn lead to double jeopardy.

[41] Further, the power of the Court to condemn in damages a co-respondent such as the respondent in this case under section 58 of the LRA is also a specific power conferred unto the Court as part of non-Muslim personal law. Allowing a non-Muslim petitioner to condemn a Muslim co-respondent is tantamount to enforcing non-Muslim personal law on a Muslim.

[42] Similar options are not and cannot be legally made available to Muslim parties in litigation with each other in the Syariah Court but which might involve a non-Muslim as well. It follows that just as a non-Muslim co-respondent cannot be brought to Syariah court, a Muslim co-respondent cannot be brought to a civil court – in light of the clear demarcation of jurisdictions under Article 121(1A) of the Federal Constitution.

Unjust Result

[43] The appellant argued that the decision of the Court of Appeal will give rise to an absurdity as a non-Muslim adulterer or adulteress, upon being named as a co-respondent will escape liability by converting to Islam. This concern has been addressed by a long line of authorities

which lay down the principle that a person's antecedent obligations under the LRA are not avoided by converting to Islam (see for instance *Subashini Rajasingam v Saravanan Thangathoray and Other Appeals* [2008] 2 CLJ 1).

Remedy Not Lost

[44] It is also my view that the law as it stands provides some means for redress in answer to cases where the co-respondent is a Muslim such as the present case, as follows.

[45] Firstly, a Muslim if found to engage in the immoral act of committing adultery is answerable to the criminal side of the Syariah system. It remains open for the non-Muslim party to lodge a complaint with the religious authorities that the Muslim co-adulterer/adulteress has committed an offence under Syariah law. See for example sections 24 and 27 of the Syariah Criminal Offences (Federal Territories) Act 1997 which respectively outlaw intercourse out of wedlock and *khalwat* (close proximity between men and women who are not otherwise married or who are within the categories of prohibited relationships for marriage or 'mahram').

[46] That in my view accords with the purpose of section 58 of the LRA. The point of seeking condemnation of the co-respondent who committed adultery is not to profit from the fact of breakdown of the marriage by seeking a windfall in damages. The purpose of the section, despite the use of the words 'condemn in damages' is compensatory and not punitive. (see *Butterworth v Butterworth & Anor* [1920] P 126; *Scott v Scott and Another* [1957] 1 All ER 63 and *Pritchard v Pritchard and Sims* [1966] 3

All ER 601; *Kang Ka Heng v Ng Mooi Tee* [2001] 2 CLJ 578; *Tan Kay Poh v Tan Surida & Anor* [1989] 1 MLJ 276.

[47] In this sense, even if a non-Muslim is found guilty of adultery, the civil secular courts do not have the power to punish them for it. This is different in the case of Muslims who are subject to moral laws under their personal laws which are religious and customary in nature.

[48] Thus, any person is entitled to file a criminal complaint against a Muslim for committing 'adultery' in the manner recognised by Syariah law for either intercourse out of wedlock or *khalwat*.

[49] Speaking monetarily, the petitioner may still, post-breakdown of marriage, seek adequate redress through prayer for maintenance. (see *Leow Kooi Wah v Philip Ng Kok Seng & Anor* [1997] 3 MLJ 133).

Procedural Justice

[50] While section 58 stipulates that the co-respondent 'shall' be named in the petition, the Court can be minded to exclude them and the fact that the co-respondent is a Muslim is one such ground. This is supported by rule 11(1) of the DMPR 1980 which allows the petition to contain a statement that the identity of the co-adulterer/adulteress identity is not known to the petitioner or if the Court otherwise directs. Hence, I do not see how there is per se any procedural injustice to the petitioner if he or she cannot name the co-adulterer/adulteress as a party to the petition when the written law clearly has made contingencies for not naming them.

[51] Based on the foregoing, I find no error on the part of the Court of Appeal in its interpretation of section 3(3) of the LRA. Question 1, in this regard, is therefore answered in the affirmative.

Question 2

[52] I now move to Question 2 which for convenience, is reproduced below:

“Whether a Court when interpreting section 3(3) of the LRA should have regard to the presumption that Parliament does not intend to legislate in violation of Articles 5(1) and 8(1) of the Federal Constitution having regard to the cases in *ML Kamra v New India Assurance AIR 1992 SC 1072* and *Durga Parshad v Custodian of Evacuee Property AIR 1960 Punjab 341?*”.

[53] The appellant’s complaint was that the Court of Appeal’s interpretation of section 3(3) of the LRA violates her right to live with dignity and the right to access to justice housed in Article 5(1) and the requirement of proportionality housed in Article 8(1) of the Federal Constitution.

[54] Question 2 pre-supposes that in construing section 3(3) in its plain and ordinary meaning, the Court of Appeal had violated Articles 5(1) and 8(1) of the Federal Constitution.

[55] In my view, the premise of Question 2 is flawed. Article 5(1) speaks of deprivation of life and personal liberty in accordance with law. By virtue of Article 121(1A) of the Federal Constitution, there is a clear and distinct

demarcation between the Muslims and non-Muslims in terms of personal law.

[56] The same reasoning applies to the argument on Article 8(1). By reason of Article 8(5)(a) which reads: “This Article does not invalidate or prohibit any provision regulating personal law”, I find that the interpretation accorded by the Court of Appeal to section 3(3) with which I agree, does not result in any violation of Articles 5(1) and 8(1) of the Federal Constitution.

[57] In the circumstances, I find no reason to answer Question 2.

Whether Section 58 of the LRA applies to Petitions for Judicial Separation

[58] The final issue which remains to be considered is whether a claim for damages can be made against an alleged co-adulterer/adulteress in a petition for judicial separation.

[59] It was submitted for the appellant that the High Court erred in misinterpreting section 58(1) of the LRA by limiting it only to petitions for divorce and not petitions for judicial separation. I agree with the appellant.

[60] In this vein, section 64(1) provides as follows:

“(1) A petition for judicial separation may be presented to the court by either party to the marriage on the ground and circumstances set out in section 54 and that section shall, with the necessary modifications, apply in relation to such a petition as they apply in relation to a petition for divorce.”.

[61] Given that section 54 is not only applicable to a divorce petition but also to a petition for judicial separation, with necessary modifications, I hold that section 58(2) does not limit a claim or prayer that a co-respondent be condemned in damages in respect of an alleged adultery to a divorce petition. A petitioner in a petition for judicial separation may also include a prayer that a co-respondent be condemned in damages in respect of the alleged adultery.

[62] However, given my earlier finding that the respondent being a Muslim is excluded from the application of the LRA, she is not capable of being condemned in damages under section 58(2). The Court of Appeal was therefore correct to strike out the respondent from the petition on that ground.

CONCLUSION

[63] In the circumstances, both appeals are dismissed with costs.

[64] My learned brother Justice Mohd Zawawi Salleh has read this judgment in draft and has expressed his agreement with it.

Dated: 1st December 2021

(TENGGU MAIMUN BINTI TUAN MAT)
Chief Justice,
Federal Court, Malaysia.

Note: This is only a summary of the final grounds of judgment. The authoritative text is the final grounds of judgment.