a

PUBLIC PROSECUTOR

v.

PENGURUS, MBF BUILDING SERVICES SDN BHD

b

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[43-11-97]
[1998] CLJ JT(1)
3 DECEMBER 1997

c ***CONSTITUTIONAL LAW:*** *Legislation - Constitutionality - Whether absence of provision in Act providing for sanction or consent of Attorney General to institute criminal proceedings invalidates Act - Federal Constitution, art. 145(3) - Environmental Quality Act 1974, ss. 25, 37*

d ***CRIMINAL PROCEDURE:*** *Prosecution - Public Prosecutor - Control and direction of criminal prosecutions - Whether Public Prosecutor is the sanctioning authority - Exercise of discretion by Public Prosecutor - Whether exercise of discretion has to be manifested to court before court can take cognisance of offence - Criminal Procedure Code, s. 376*

e This was a transmission of the record of proceedings of a criminal matter before the Sessions Court to the High Court pursuant to s. 30(1) of the Courts of Judicature Act 1964. The defendant was charged in the Sessions Court with two offences under ss. 25 and 37 of the Environmental Quality Act 1974 ('the EQA') respectively. At the trial, counsel for the defendant objected to the f proceedings on a preliminary point, ie, that no prosecution could be initiated against the defendant as the EQA has no provision for the sanction of the Attorney General ('the A-G') to institute proceedings for offences under the EQA. The defendant contended that such a provision would be necessary so as to provide a nexus between the EQA and art. 145(3) of the Federal Constitution; that it would be unconstitutional to allow a person other than g the A-G to institute such proceedings; and that the Director General of Environmental Quality has no power to institute such proceedings. Hence, the only issue that fell for determination before the instant court was: whether, in the absence of a provision in the EQA stating that no prosecution for any offences under the EQA may be instituted except with the sanction or consent h of the A-G, there can be any institution of proceedings for an offence under the EQA.

i

Held:

[1] The effect of s. 376(1) of the Criminal Procedure Code is that the sanctioning authority is the Public Prosecutor; the Public Prosecutor is invested with the control and direction of criminal prosecutions. Parliament may require that the exercise of the power by the Public Prosecutor to institute proceedings be shown to the court before the court takes cognisance of an offence. An example of the exercise of discretion vested in the A-G is through a sanction by the Public Prosecutor. Where there is a requirement for an example of the exercise of discretion by the Public Prosecutor expressed in law for the institution of a particular offence, it has to be manifested to the court before the court can take cognisance of such an offence.

[2] All laws of the Federation have to be read subject to the supreme law of the Federation, ie, the Federal Constitution; any law passed which is inconsistent with the Federal Constitution shall, to the extent of the inconsistency, be void.

[2a] Thus, it would be **otiose** to express art. 145(3) of the Federal Constitution as a provision in the EQA (in relation to the offences created under the EQA) as any provision in the EQA which is inconsistent with art. 145(3) of the Federal Constitution would in the first place be invalidated.

[2b] Parliament may choose to require the exercise of discretion vested in the A-G under art. 145(3) of the Federal Constitution in respect of certain offences, and for such exercise to be manifested either through his sanction or with his consent or through his written authorisation before a court takes cognisance of the offences. In respect of the EQA, Parliament has chosen **not** to so require. Consequently, the lack of a provision in the EQA providing for a sanction by the A-G or his consent to institute proceedings for offences under the EQA does **not** invalidate the EQA.

Cases referred to:
PP v. Choy Kok Kuan 3 MC 200 ***(refd)***
PP v. Datuk Harun Idris & Ors [1976] 2 MLJ 116 ***(refd)***
PP v. Lim Shui Wang [1979] 1 MLJ 65 ***(refd)***
Repco Holdings Bhd v. Public Prosecutor [1997] 4 CLJ 740; [1997] CLJ JT(15) ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 30(1), (2), (3), 84
Criminal Procedure Code, ss. 129, 376(1), (3), (4)
Dangerous Drugs Act 1952, s. 39B(3)

Environmental Quality Act 1974, ss. 25(3), 37(1), (2)
Federal Constitution, art. 4(1), 128(2), 145(3)
Internal Security Act 1960, s. 80
Law Reform (Marriage and Divorce) Act 1980, s. 43
Poisons Act 1952, s. 34
Prevention of Corruption Act 1971, s. 26
Securities Commission Act 1993, s. 39
Securities Industries Act 1983, s. 126(1)
Women and Girls' Protection Act 1973, s. 31

For the prosecution - Stanley Augustin & Hasila Awang, DPPs
For the defendant - Teh Beng Boon; M/s Heng & Mogan

JUDGMENT

KC Vohrah J:

The Sessions Court in Kuala Lumpur, a subordinate court, has transmitted the record of proceedings of a criminal matter before it to the High Court under s. 30(1) of the Courts of Judicature Act 1964 (the 1964 Act).

Sub-section (2) of s. 30 of the 1964 Act read with sub-s. (3) and art. 128(2) of the Federal Constitution empowers the High Court to examine the record and "where the judge considers that the decision of a question as to the effect of a provision of the Constitution is necessary for the determination of the proceedings he shall deal with the case in accordance with s. 48 as if it were a case before him in the original jurisdiction of the High Court in which the question had arisen." In passing, I like to note that due to an oversight, s. 48 mentioned in s. 30(2) was not substituted when the 1964 Act was amended by Act A 886; s. 48 should in fact read as s. 84.

The constitutional provision whose effect is under question is art. 145(3) which provides that the "Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court martial."

The narrow constitutional question relates to the institution of proceedings for offences in the context of the Environmental Quality Act 1974 (the 1974 Act). It is necessary to sketch out the background of the case to see the context and the question.

The defendant in this case was charged with two offences under the 1974 Act; one, as I understand it, under s. 25(3) for discharging liquid waste into inland waters, an offence punishable under s. 25(3); the other under s. 37(1) for failure to furnish information pursuant to a notice, an offence under s. 37(2).

On 16 October 1997 counsel for the defendant, Mr. Teh, objected to the proceedings on a preliminary point: that no prosecution can be had against the defendant because the 1974 Act does not contain a provision providing for a sanction by the Attorney General to institute proceedings for offences under the Act. As I understand him, his argument is that such a provision is required to be written into the Act so as to provide a nexus between the Act and the constitutional provision; that the defendant cannot therefore be prosecuted for the two offences as the Director General of Environmental Quality has no power to institute such proceedings.

Before me, Mr. Teh elaborated on the same argument that there should be a provision in the 1974 Act for either the sanction or consent of the Attorney General to institute criminal proceedings, otherwise it would allow a person other than the Attorney General to institute such proceedings and that is unconstitutional.

The issue for determination is this: whether in the absence of a provision in the 1974 Act stating that no prosecution for any offence under the said Act can be instituted except with the sanction or consent of the Attorney General, there can be any institution of proceedings for an offence under the 1974 Act.

Before I go further, it has to be noted here that s. 39 of the Securities Commission Act 1993 provides that prosecution in respect of offences committed under the Act or regulations made thereunder may be **conducted** by certain officers and no doubt for the interpretation of that provision resort may be held to the judgment given on 2 October 1997 in the case of *Repco Holdings Berhad v. Pendakwa Raya* Semakan Jenayah No W-43-7-97; [1997] CLJ JT(15). The court in that case relying on several authorities held, *inter alia*, also held that the Attorney General has the sole power, exercisable at his discretion, to institute, conduct and discontinue criminal proceedings.

So as to put the office of the Attorney General in the correct perspective so far as criminal prosecutions are concerned, s. 376 of the Criminal Procedure Code (the CPC) needs looking into. Section 376(1) provides that "[the] Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions under this Code." In other words the sanctioning authority is the Public Prosecutor and he is invested with the control and direction of criminal prosecutions. Powers are vested in the Public Prosecutor (exercisable by him personally, see s. 376(4)) allowing him to appoint Deputy Public Prosecutors and these officers shall be under his general control and direction and they may exercise all rights and powers vested in and exercisable by him under the code or any other written law except any right or power expressed to be exercisable by the Public Prosecutor personally (see s. 376(3)).

Turning to the meaning of "institute" in the context of art. 145(3) it is, as usual, illuminating to go back to the clarifying words of Abdoolcader J (as he then was) in *PP v. Datuk Hj. Harun bin Hj. Idris & Ors* [1976] 2 MLJ 116 at 119 where he interpreted the significance of the words "institute, conduct or discontinue." In relation to the word "institute", his Lordship stated,

> ("Institute" in art. 145(3)) must necessarily refer to the commencement of proceedings and prosecutions ... It may be ... that the Public Prosecutor has power ... to direct any case triable in the Magistrate's or Sessions court to be tried in the High Court after a preliminary enquiry. This power so to direct would, if exercised fall squarely within his discretion to institute and conduct criminal prosecutions and proceedings.

This signification was approved by the Supreme Court in *PP v. Lim Shui Wang* [1979] 1 MLJ 65 at 67.

Parliament may require that the exercise of the power by the Public Prosecutor to institute proceedings be shown to a court before the court takes cognisance of an offence (see eg, the case of *PP v. Choy Kok Kuan* 3 MC 200. An example of the exercise of discretion vested in the Attorney General (the Public Prosecutor) is through a sanction by the Public Prosecutor. Abdoolcader J in the case of *Datuk Hj. Harun Idris* at 120 in relation to art. 145(3), had this to say:

> The examples of discretion vested in the Public Prosecutor ... in relation to the issue and refusal of sanctions for prosecutions and the withdrawal of charges pertain to the institution and conduct of prosecution and not to the regulation of criminal procedure.

For examples of sanctions by the Public Prosecutor, see ss. 129 of the CPC which sets out the provisions under the Penal Code which require sanctions before a court can take cognisance of these offences. For an example outside the Penal Code, see s. 34 of the Poisons Act 1952.

There are other examples of discretion vested in the Public Prosecutor expressed in other laws. A requirement for consent by Public Prosecutor, as pointed out by Mr. Teh, appears under s. 126(1) of the Securities Industries Act 1983. The Public Prosecutor's consent is also required also under s. 80 of the Internal Security Act 1960, s. 39B(3) of the Dangerous Drugs Act 1952, and s. 26 of the Prevention of Corruption Act 1971. Another example, as pointed out by Deputy Public Prosecutor Mr. Stanley Augustin, where consent by the Public Prosecutor is needed is s. 31 of the Women and Girls' Protection Act 1973. Sometimes there is a requirement for the written authority of the Public Prosecutor as manifestation of the exercise of discretion as appears in s. 43 of the Law Reform (Marriage and Divorce) Act 1980.

I do not wish to go into a discussion as to the differences between a sanction, consent or written authority but suffice it to say that where there is a requirement for any one of these examples of the exercise of discretion by the Public Prosecutor expressed in a law for the institution of a particular offence, it has to be manifested to the court before the court of law can take cognisance of such offence brought before it.

Whether the exercise of discretion by the Public Prosecutor in respect of the institution of a particular offence under a law is through a sanction, consent or written authority the form is a matter of evidence which appraises the court that the Public Prosecutor has exercised his discretion before the court takes cognisance of the offence in accordance with what Parliament requires for that particular offence.

All laws of the Federation will have to be read subject to the supreme law of the Federation, the Federal Constitution; any law passed which is inconsistent with the Constitution shall, to the extent of the inconsistency, be void (see art. 4(1)). It would be otiose to express art. 145(3) of the Federal Constitution as a provision in the 1974 Act in relation to the offences created under the said Act since any provision in the Act which is inconsistent with it would in the first place be invalidated, as for example, vesting the power of instituting prosecution in offences under the Act, what is solely the power of the Attorney General (the Public Prosecutor), in the Minister charged with the responsibility for environmental protection or in the Director General of Environmental Quality. Parliament may choose to require the exercise of discretion vested in the Attorney General under art. 145(3) in respect of certain offences and for such exercise to be manifested either through his sanction or with his consent or through his written authorisation before a court takes cognisance of the said offences; Parliament has chosen not to do so in respect of the 1974 Act.

I therefore hold that the lack of a provision in the 1974 Act providing for a sanction by the Attorney General or his consent to institute proceedings for offences under the Act does not invalidate the Act.

In this case DPP Mr. Stanley has been commendably candid in bringing to the notice of the court that although there was a direction made in 1994 by the Public Prosecutor that investigations relating to certain offences in certain laws including the two offences with which the defendant was charged in the Sessions Courts, as a matter of public interest, be referred to the Prosecution Division of the Attorney General's Chambers, this particular case by the Department which brought this case was not referred to that Division or to the Legal Advisor (concurrently a DPP) with the Ministry responsible for the Department. He concedes that the Public Prosecutor did not institute the

criminal proceedings against the Manager of MBF in respect of the two offences. This court's duty in this case is to determine the constitutional issue and no more and therefore it will be up to the Deputy Public Prosecutor to inform the Sessions Court the true situation in regard to the two charges and for the court to make all necessary orders.

Reported by Gan Peng Chiang