QUEK GIN HONG

v.

PP

HIGH COURT MALAYA, MELAKA
SURIYADI HALIM OMAR J
[CRIMINAL APPEAL NO: 42-17-1997]
24 AUGUST 1998

CRIMINAL LAW: *Conviction - Validity of conviction - Open burning offence - Power and conduct of prosecution by Director General - Environmental Quality Act 1974, s. 44 - Whether power of prosecution exclusive domain of Public Prosecutor - Federal Constitution, Art. 145(3) - Whether written authorisation from Public Prosecutor required - Criminal Procedure Code, s. 377(b)(3) - Whether new amendment to s. 44 of the 1974 Act applied - Whether an offence existed under reg. 12 of Environmental Quality (Clean Air) Regulations 1978 - Whether s. 422 of Criminal Procedure Code applied to save invalid prosecution*

CONSTITUTIONAL LAW: *Fundamental liberties - Conviction of accused - Whether prosecution of accused was ultra vires the Federal Constitution - Whether constitutional rights of accused infringed*

WORDS AND PHRASES: *Sanction and consent - Meaning of*

The accused was charged and convicted for committing an offence without licence under s. 22(1) of the Environmental Quality Act 1974 ('the 1974 Act') for allowing the open burning of combustible materials contrary to the conditions acceptable under reg. 12 of the Environmental Quality (Clean Air) Regulations 1978 ('the 1978 Regulations'). The accused was, thereafter, sentenced to six months imprisonment. Pursuant to s. 305 of the Criminal Procedure Code ('CPC'), the accused filed a notice of appeal against the excessive severity of the sentence after which he requested for a revision in spite of having filed the appeal.

In this instance, the main issue for consideration was whether there was a legal prosecution, and the court had to determine the following: (1) whether s. 44 of the 1974 Act which provided for the power and conduct of the prosecution was *ultra vires* the Federal Constitution; (2) whether there was a written ground to prosecute from the Public Prosecutor ('PP') pursuant to s. 377 of the CPC; and (3) whether reg. 12 of the 1978 Regulations under which the accused was charged with created an offence.

Held:

[1] The route taken by the accused was not improper as once an appeal had been lodged, the accused was not prevented from contending that the conviction was illegal by requesting for a revision.

[2] Section 44 of the 1974 Act which provides for the power and conduct of the prosecution endows the Director General ('DG') with powers at par with the PP. However, the power of prosecution is the exclusive domain of the PP and as such, s. 44 is inconsistent with Art. 145(3) of the Federal Constitution. Further, Art. 145(3) is supplemented with s. 376 of the Criminal Procedure Code. Therefore, by virtue of Art. 4 of the Federal Constitution, s. 44 of the 1974 Act is void for inconsistency and *ultra vires* the Federal Constitution.

[3] Section 377 of the CPC provides that the Attorney General may authorise certain officers to conduct the prosecution. On the premise that the DG is not conferred with the power to institute or conduct any prosecution, then he is powerless to delegate authority or for any one else to prosecute on his behalf. On that account any documented authorisation emanating from the DG is worthless and will not validate any shortcomings in the want of authority to prosecute.

[3a] The new amendment to s. 44 which states that no prosecution shall be instituted without the consent in writing of the PP will bring in line the 1974 Act with Art. 145(3) of the Federal Constitution and s. 376 of the CPC. However, the amendment has yet to come in force and as such the present s. 44 still applies.

[3b] Any consent from the PP will entail deep consideration by the latter as compared to a sanction. A sanction is an order directing the prosecution of a certain person to the authorities concerned who are responsible for initiating prosecution in the locality in question.

[4] Section 422(a) of the CPC was inapplicable to save the instant invalid prosecution as it anticipated some form of error, omission or irregularity in a sanction or consent that was earlier issued. Section 422(b) was also inapplicable as s. 129 of the CPC which lays down certain offences that require the sanction of the PP is silent as to the requirement of sanction for other specific acts. Within the 1974 Act, there is no provision that requires a sanction similar to that of s. 129 of the CPC. The want of a sanction does not vitiate a conviction, unless there is evidence that a failure of justice had occasioned. In this instance, there was a failure

of justice as the PP never had the opportunity to peruse the file much to the chagrin of the accused who had been deprived of his constitutional right.

[5] In light of the above, injustice had occurred when: (1) the prosecuting officer of the Environmental Quality Department did not possess the written authorisation from the PP pursuant to s. 377(b)(3) of the CPC. The letter of authorisation pursuant to s. 377(b) is not of the same strength and quality as a sanction pursuant to s. 129 of the CPC which requires due consideration by the PP; (2) the PP was totally oblivious to the prosecution and never had the opportunity to peruse and decide on the viability of the prosecution; (3) the prosecution was initiated pursuant to a provision *ultra vires* the Federal Constitution; and (4) the regulation the accused was charged under, ie, reg. 12, did not create an offence. This is a provision that lays down factors for the subjective consideration of the DG prior to the granting of any license.

[6] Based on the case of *Repco Holdings Bhd v. PP*, as no authorisation was obtained from the PP, the prosecution of the instant case was therefore illegal.

[Accused acquitted and discharged.]

Cases referred to:
Abdul Hamid v. PP [1956] 22 MLJ 231 ***(refd)***
Hassan Bin Ishak v. PP [1948-1949] MLJ Supp 179 ***(cit)***
Kyohei Hosoi v. PP [1998] 1 CLJ 1063 ***(cit)***
Lyn Hong Yap v. PP [1956] 22 MLJ 226 ***(cit)***
Mohd Dalhar Bin Redzwan & Anor v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur [1955] 1 MLJ 645 ***(cit)***
Ng Song Luak v. PP [1985] 1 CLJ 365 ***(cit)***
Periasamy & Anor v. PP [1993] 3 CLJ 46 ***(cit)***
PP v. Chua Chor Kian [1998] 1 MLJ 167 ***(cit)***
Repco Holdings Bhd v. PP [1997] CLJ 1 ***(foll)***
Rex v. Retnam [1934] MLJ 6 ***(cit)***
R Metz 11 Cr App R 164 ***(cit)***
Salleh And Husin v. Rex [1908] SSLR vol X, 27 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 129, (3), 135, 305, 376, 377, (b), (b)(3), 422, (a), (b)
Environmental Quality Act 1974, s. 44
Environmental Quality (Clean Air) Regulations 1978, reg. 12
Federal Constitution, arts. 4, 145(3)

For the accused - Low Kian Boon; M/s JA Nathan & Co
For the prosecution - Anselm Charles Fernandis; State Legal Adviser's Chambers

Reported by Usha Thiagarajah

JUDGMENT

Suriyadi Halim Omar J:

The accused was supposed to have committed an offence on 20 September 1997, with a report filed against him on 27 September 1997. He was later charged, and found guilty pursuant to a plea of guilt before the Sessions Court judge on 17 November 1997. He was thenceforth sentenced to six months imprisonment. For completeness, permit me to reproduce the charge, which reads:

> Bahawa kamu Quek Gin Hong pada 20hb. September, 1997 jam lebih kurang 11.00 pagi di lot DSPN 21, 24, 25, 26, 27 & 28, Mukim Machap, Daerah Alor Gajah, di dalam Negeri Melaka, sebagai kontraktor, didapati tanpa lesen di bawah Seksyen
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> 22(1), Akta Kualiti Alam Sekitar, 1974 telah membiarkan pembakaran terbuka terhadap bahan-bahan yang boleh terbakar (sisa-sisa tumbuhan) berlawanan dengan syarat yang boleh diterima di bawah Peraturan 12, Peraturan-Peraturan Kualiti Alam Sekeliling (Udara Bersih) 1978 dan boleh didenda di bawah Seksyen 22(3), Akta Kualiti Alam Sekeliling (Pindaan) 1996.

Pursuant to s. 305 of the Criminal Procedure Code, an accused's right of appeal is limited only to the extent and legality of the sentence. In compliance with this provision, the accused filed the notice of appeal on 20 November 1997, as against the excessive severity of the sentence. On 26 January 1998, the court received a letter from the accused's counsel, requesting for a revision inspite of having filed that appeal. This route taken by the accused is not improper, as once an appeal has been lodged, the latter is not prevented from contending that the conviction is illegal, and thenceforth request the judge to act in revision (*Mohd Dalhar Bin Redzwan & Anor v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1955] 1 MLJ 645).

Having received that letter, and having understood the consternation of the accused's counsel, I accordingly called up the file. On 17 August 1998 after hearing the case, I set aside the order and acquitted the accused. I now give my reasons for that decision. In principle there were three main grounds which persuaded me to arrive at that decision, namely:

1. section 44 of the Environmental Quality Act 1974 (Act 127), is *ultra vires* Art. 145(3) of the Federal Constitution;

2. there was no written authority to prosecute from the public prosecutor, pursuant to s. 377 of the Criminal Procedure Code; and

3. that he was charged for an offence under Peraturan 12, Peraturan-Peraturan Kualiti Alam Sekeliling (Udara Bersih) 1978, punishable under s. 22(3) of the Akta Kualiti Alam Sekeliling (Pindaan) 1996, an offence which is unknown to law.

Built into the Environmental Quality Act 1974 (Act 127), is s. 44 which provides for the power and conduct of the prosecution. This provision reads

> Prosecutions in respect of offences committed under this Act or regulations made thereunder may be conducted by the Director General or any officer duly authorized in writing by him or by any officer of any local authority to which any powers under this Act has been delegated.

A simple reading of this provision, and without having to produce a lengthy dissertation of it, highlights another glaring example of a director general being endowed with powers at par with the public prosecutor. I need only say that the power of prosecution is the exclusive domain of the public prosecutor, and as such this provision is void for inconsistency, with Art. 145(3) of the Federal Constitution. Article 4 of the Federal Constitution, in crystal clear terms has provided that the Federal Constitution is the supreme law of the Federation, and any law passed after Merdeka Day, which is inconsistent with this constitution, to the extent of the inconsistency, is void (*Public Prosecutor v. Chua Chor Kian* [1998] 1 MLJ 167. For easy reference I reproduce Art. 145(3) of the Federal Constitution, which reads:

> 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.

To streamline this article, it is further supplemented by s. 376 of the Criminal Procedure Code which reads:

> (1) The Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code.

To carry out his onerous and manifold functions smoothly, he may authorise certain officers to conduct the prosecution, as provided for under s. 377 of the Criminal Procedure Code, as amended by Act A1015. This section reads:

Every criminal prosecution before any court and every inquiry before a Magistrate shall, subject to the following sections, be conducted –

(a) ...;

(b) subject to the control and direction of the Public Prosecutor, by the following persons who are authorised in writing by the Public Prosecutor:

(1) ...;

(2) ...;

(3) an officer of any Government department;

(4) ...;

(5) ...;

(6) ... .

On the premise that the director general is not conferred with the power to institute or conduct any prosecution, then needless to say he is powerless to delegate authority, or for anyone else to prosecute on his behalf. On that account, any documented authorisation emanating from the director general, is worthless and will not validate any shortcomings in the want of authority to prosecute. It must have dawned upon the relevant authorities of the void in the sphere of prosecution, as Parliament subsequently promulgated the Environmental Quality (Amendment) Act 1998 (Act A1030). Inspite of the passing of that Act, as the relevant Minister is yet to notify the effective date in the *Gazette*, the present s. 44 with all the debilitating defects are still left untouched in the statute. The amended s. 44, for purposes of an academic discussion of the problem at hand, reads:

> No prosecution shall be instituted for an offence under this Act or the regulations made thereunder without the consent in writing of the Public Prosecutor.

This new amended provision will bring in line Act 127, with Art. 145(3) of the Federal Constitution and s. 376 of the Criminal Procedure Code, in that future prosecutions by officers of the Environmental Department will be flawless. Any consent obtained from the public prosecutor will entail deep consideration by the latter, as compared to a sanction. To quote Smith J in *Abdul Hamid v. Public Prosecutor* [1956] 22 MLJ 231, at p. 232:

> ... full consideration is required for consent since "'Consent' is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side" (Stroud 3rd Edition vol. I page 582).

On 1 April 1998, conservatively about six months after the accused was sentenced, the Criminal Procedure (Amendment) Act 1998 (Act A1015), came into effect. This latter Act amended the Criminal Procedure Code, *inter alia*, s. 422 which reads:

> Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of –
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> (a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code;
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> (b) the want of any sanction; or
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> (c) the improper admission or rejection of any evidence,
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> unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

For purposes of the current case, s. 422(a) is inapplicable as it anticipates some form of error, omission or irregularity in a sanction or consent (both statutorily provided to be in writing eg, a sanction must be in writing as provided in s. 129(3) of the Criminal Procedure Code; *Rex v. Retnam* [1934] MLJ 6) that was earlier issued. As none were issued by the public prosecutor, it is unnecessary for me to consider this subsection. Having eliminated this subsection, the next provision left for consideration is subsection (b) which is capable of saving the court's sentence or order. Under the Criminal Procedure Code the specific provision is s. 129 of the Criminal Procedure Code which lays down certain offences that require the sanction of the public prosecutor. It is silent as to the requirement of sanction for other specific Acts. In brief, a sanction is an order directing the prosecution of a certain person, and in the ordinary way, that order is conveyed to the authorities who are responsible for initiating prosecution in the locality in question. Within the Environmental Quality Act 1974, nothing is built into it which requires a sanction similar to that of s. 129 of the Criminal Procedure Code. On that score, sub-s. 422(b) of the Criminal Procedure Code is also inapplicable for the current case.

Inspite of its draconian effect, this amended s. 422 may not save completed flawed cases, if it occasions a failure of justice. This amended section as I see it, is no different to the views held by Hyndman Jones, CJ in *Salleh And Husin v. Rex* [1908] SSLR vol. X p. 27, when His Lordship opined that the want of sanction or complaint under the then s. 135 of the Criminal Procedure Code did not vitiate a conviction, unless there was evidence that a failure of justice had been occasioned. Without prejudging the evidence, how could it

not attract a failure of justice in this case, when the public prosecutor never even had the opportunity to peruse the file. The public prosecutor was unaware of this prosecution, much to the chagrin of the accused who had been deprived of his constitutional right. At the risk of repeating, injustice had occurred here when:

1. the prosecuting officer of the Environmental Quality Department did not possess the written authorisation from the public prosecutor, pursuant to s. 377(b)(3) of the Criminal Procedure Code. It must be stressed that the letter of authorisation pursuant to s. 377(b), is not of the same strength and quality as a sanction, pursuant to s. 129 of the Criminal Procedure Code which requires due consideration by the public prosecutor (*Salleh And Husin v. Rex (supra)*);

2. the public prosecutor was totally oblivious to the prosecution, and never had the opportunity to peruse and decide on the viability of the prosecution. If the accused had the privilege of the highest placed legal brain in the country perusing the investigation papers, he might not even have been charged. A perusal of the notes of the proceeding will confirm that he had been deprived of relevant substantive legal protection devised by law, for a person who is supposed to be innocent before being found guilty;

3. the initiation of the prosecution of the accused was pursuant to a provision *ultra vires* the constitution. This was not a case of a person charged after having received the concurrence of the public prosecutor, subsequently flawed by technicalities, but a prosecution founded on illegality from the word go (*Lyn Hong Yap v. Public Prosecutor* [1956] 22 MLJ 226; *R Metz* 11 Cr App R 164. See the case of *Hassan Bin Ishak v. Public Prosecutor* [1948-1949] MLJ Supp 179 where Pretheroe ACJ as regards the matter on trial, opined that in the absence of the sanction of the public prosecutor the proceedings at the lower courts were null and void); and

4. the factor of being charged under Regulation 12 which does not create an offence (*Periasamy & Anor v. Public Prosecutor* [1993] 2 MLJ 551). For clarification I reproduce Regulation 12 which reads:

> A licence to carry out open burning may be granted if the Director-General is satisfied that –
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> (i) open burning is the only economically practicable method of disposal; and
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> (ii) such open burning is not likely to cause pollution.

This is a provision that lays down the factors for the subjective consideration of the director general prior to the granting of any licence. There is no reference under this provision to the ingredient of "membiarkan pembakaran terbuka terhadap bahan-bahan yang boleh terbakar (sisa-sisa tumbuhan) berlawanan dengan syarat yang boleh diterima dibawah Peraturan 12."

In the event this expression of "membiarkan pembakaran terbuka" falls within the ambit of the words "cause" (menyebabkan), "allow" (membenarkan/ membiarkan) and "permit" (mengizinkan), all these words involve power and rights. To exercise all these powers, and fall within the ambit of these words, the offender must be the owner of the material land or a person having acquired the powers of the owner. In open court I was informed in no uncertain terms that the accused was not the owner of the land. The report and the facts of the case are silent as to that fact or of the accused's relationship with the land and the fire. Since there was absolutely no evidence to connect the accused with those two factors, I was therefore dissuaded from framing a charge based on Regulation 11 of the Environmental Quality (Amendment) Act 1996 (*Ng Song Luak v. Public Prosecutor* [1985] 1 MLJ 456).

As s. 44 of the Environmental Quality Act is *ultra vires* the constitution, with s. 422 of the Criminal Procedure Code being inapplicable for the current case, I was therefore guided and bound by *Repco Holdings Bhd v. Public Prosecutor* [1997] CLJ 1. In that case the prosecution was also invalidated due to the want of authority to prosecute from the public prosecutor. In this case, by analogy as no authorisation was obtained from the public prosecutor, this prosecution therefore was illegal (see also *Kyohei Hosoi v. Public Prosecutor* [1998] l CLJ 1063). Pursuant to all the above reasons, I acquitted and discharged the accused. As much as the country is being beset by atmospheric pollution, and spearheaded by every responsible department to ensure that the haze does not rear its ugly head again, the law and rights of individuals must not be compromised. In the normal course of events, for cases where the orders of judges are set aside on grounds of nullity, the substitute orders will invariably be to discharge the accused not amounting to an acquittal. In this case, the public prosecutor could not be said to be interested in the prosecution, as the case was never even within his knowledge in the first place, for no fault of his. Reverting to the predicament of the accused, had it not been for this revision, he would now be deprived of six months of freedom, due to the infringement of his constitutional rights. Having gone through the turmoil of uncertainty, brought about by an illegal prosecution, let alone a charge that will not stand this order therefore would be an appropriate one.