

**DALAM MAHKAMAH TINGGI DI KUALA LUMPUR
WILAYAH PERSEKUTUAN
PERMOHONAN JENAYAH NO: 44-1-2001**

(Dalam Mahkamah Seksyen Kes Saman: 1-63-22-2000)

PENDAKWA RAYA

... PEMOHON

LAWAN

ACMATEC SDN BHD

... RESPONDEN

CIVIL PROCEDURE: Question of constitutional law - Reference from Sessions Court regarding consitutional validity of law - Correct process for question - Whether special circumstance exist (Record returned to Sessions Court)

DECISION

Reference was made under section 30(1) of the Courts of Judicature Act 1964 to the High Court for examination by a Judge thereof under section 30(2) whether the following section 44 of the Environmental Quality Act 1974 effective at the time the charge against the accused Acmatec Sdn Bhd is contrary to Art 145(3) of the Federal Constitution and may validly be proceeded with:-

Section 30 of the Courts of Judicature Act 1964 provides as follows:-

30. Reference of constitutional question by subordinate court.

- (1) Where in any proceedings in any subordinate court any question arises as to the effect of any provision of the Constitution the presiding officer of the court may stay the proceedings and may transmit the record thereof to the High Court.
- (2) Any record of proceedings transmitted to the High Court under this section shall be examined by a Judge of the court 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 section 84 as if it were a case before him in the original jurisdiction of the High Court in which the question had arisen.

Subsections (1) and (2) shall be deemed to be rules of court for the purposes of Article 128(2) of the Constitution.

Sub-section (2) of s. 30 of the 1964 Act read with sub-section (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.

Art. 128 however draws a distinction between a) questions whether a law made by Parliament or by the Legislature of a State is invalid as being made upon a matter with respect to which Parliament or the Legislature of a State has no power to make laws, and questions between States or between the Federation and any State on the one hand, and b) where questions as to the effect of any provision of the Constitution arises in the course of proceedings, on the other hand. In the case of the former, the Federal Court has exclusive jurisdiction, whilst in the latter, the Art. 128(2) simply gives jurisdiction to the Federal Court in addition to powers it has in its appellate jurisdiction. In the case of the latter the matter is not reserved exclusively to the jurisdiction of the Federal Court, but may be decided upon first by other Courts, and appear in the Federal Court by way of appeal. In such cases therefore, the special power under Art. 128(2) is one to be prevailed upon sparingly. Art. 128(2) is not intended to permit Courts otherwise having jurisdiction, to shift cases to the Federal Court. Therefore the decision under section 30(2) of the 1964 Act of whether the decision of a question as to the effect of a provision of the Constitution is necessary for the determination of the proceedings, must be based not simply on the fact of existence of a question as to the effect of a provision of the Constitution, but whether it is necessary to be decided first by the Federal Court before the proceeding proceeds any further, rather than being dealt with through the normal appellate process. That it is merely

convenient for the question to be resolved by the Federal Court first is not the correct criterion to be applied.

The effect of Art. 145(3) has been dealt with in various cases, commencing *Repco Holdings Bhd v. PP* [1997] 4 CLJ 740, where similar provisions were held to be contrary to Art. 154(3) of the Constitution and therefore invalid. The view that Art. 145(3) confers sole power upon the Attorney General was doubted in *Rajendran a/l Gurusamy v. PP* KL Criminal Revision 43-2-2000 (unreported) and rejected in *Datuk Seri S Samy Vellu v. S Nadarajah* KL Criminal Appeal 44-71-96 (unreported). Although differences seem to exist between decisions of the High Court as to the effect of Art. 145(3), the differences themselves do not require *per se* a decision on the effect of a provision of the Constitution, but may be resolved by the application of the established rules of stare decisis and the interpretation and resolution of those decisions. Such resolution of the differences itself does not involve directly any provision of the Constitution.

There being no special reasons other than that of convenience, I find that it is unnecessary to transmit the record of the proceedings to the Federal Court under section 30(2) of the Courts of Judicature Act. The record is returned forthwith to the Sessions Court for continuation.

Dated: 29 JANUARY 2001

DATUK ABDUL WAHAB PATAIL

Judge
High Court of Malaya
Kuala Lumpur

For the Appellant: Encik Vong Poh Fah,
 Timbalan Pendakwa Raya,
 Jabatan Peguam Negara
 Malaysia

For the Respondent: Encik CN Khoo,
 Tetuan Khoo Chin Nam & Co