MALAYSIAN VERMICELLI MANUFACTURERS (MELAKA) SDN BHD

v.

PP

HIGH COURT MALAYA, MELAKA
AHMAD MAAROP JC
[CRIMINAL APPEAL NO: 42-1-2001]
23 JULY 2001

CONSTITUTIONAL LAW: *Legislature - Federal and State laws - Scope of applicability - Laws on the environment - Breach - Discharge of effluent into inland waters - Environmental Quality (Sewage and Industrial Effluents) Regulations (the 'Regulations') - True purpose and nature of the Regulations - Competence of the Federal Government to make the Regulations - Whether affected by accidental transgression into entries of the State List by the Regulations - Applicability of Environmental Quality Act 1975 (the 'EQA') - Whether Regulations and s. 25 of the EQA are applicable and enforceable in Malacca - Environmental Quality Act 1975, ss. 21, 25, 38 & 51; Environmental Quality (Sewage and Industrial Effluents) Regulations 2-20, paras 1, 2, 3 & 4, First Schedule; Federal Constitution, arts. 74, 128, State List & Concurrent List in Ninth Schedule; Interpretation Acts 1948 & 1967, s. 17A*

ADMINISTRATIVE LAW: *Exercise of administrative powers - Whether Minister empowered to make regulations under s. 51 of the Environmental Quality Act 1975 subject to qualification that regulations must only be with respect to matters enumerated in the Federal List - Whether Regulations were ultra vires the powers of the Minister and not applicable to Malacca - Whether charge preferred against appellant valid - Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubik & Ors*

STATUTORY INTERPRETATION: *Construction of statutes - Whether para 4 of the First Schedule to the Environmental Quality (Sewage and Industrial Effluents) Regulations to be read conjunctively or disconjunctively - Legislative intent - Purpose and object of Regulations and EQA - Whether appellant exempted from the effects of Regulations*

EVIDENCE: *Appeal - Appeal against conviction and sentence - Whether Sessions Court judge had erred in disallowing findings of facts and evidence of witnesses - Whether sentence passed by the Sessions Court judge was grossly excessive, improper or unreasonable - Element of public interest - Evidence Act 1950, ss. 5, 105 & 136*

This is an appeal against the Sessions Court judge's decision to convict and sentence the appellant company to a fine, in default of one year imprisonment on a charge of discharging effluent into inland waters *ie*, into the Malacca river, contrary to reg. 8(1)(b) of the Environmental Quality (Sewage and Industrial Effluents) Regulations (the 'Regulations') without a license, an offence under s. 25(1) of the Environmental Quality Act 1975 (the 'EQA').

The appellant, here, raised the same arguments as those raised at the trial in the Malacca Sessions Court. Firstly, the appellant argued that the applicability of the EQA to the State of Malacca (Malacca) was limited to those matters enumerated in the Federal List; *ie*, List 1, Ninth Schedule to the Federal Constitution. It contended that the Minister had the power to make regulations under s. 51 of the EQA, subject to the qualification that the regulations must only be with respect to matters enumerated in the Federal List. This, as submitted, was because s. 51 of the EQA could only empower the making of subsidiary legislation on matters concerning which the Federal Government had the legislative competence but not otherwise. The appellant further contended that since the Regulations affected inland waters (which was within the legislative competence of the State), the Regulations were *ultra vires* the powers of the Minister and were not applicable to Malacca. As such, the appellants argued that no offence was validly created and the charge preferred against it could not stand. The appellant relied on *Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubik & Ors* (the '*Bakun*'s case') to support its contention.

Secondly, the appellant contended that the Sessions Court judge had given the wrong interpretation to para 4 of the first schedule to the Regulations in holding that the four conditions under all the sub-paras under para 4 should be read conjunctively. The appellant argued that para 4, instead, should be read disjunctively. It concluded by saying that if para 4 of the First Schedule is read disjunctively, no offence had been committed as the appellant would be exempted from the effects of the Regulations.

Thirdly, the appellant contended that the Sessions Court judge had erred in disallowing DW2, a chemist, and DW3, a Senior Environmental Consultant, to give evidence and that the ruling had prejudiced the appellant's defence.

Fourthly, the appellant's contention was that; as the pipe which was running from the appellant's factory to the Malacca river was not visible, there was a possibility of other pipes being connected to the pipe which discharged effluent into the said river.

Held:

[1] It is clear that the true nature and character of the Regulations is for the prevention, abatement and control of pollution as well as the enhancement of the environment as declared by the long title to the EQA. The real purpose of all these is the protection, promotion, maintenance and enhancement of the health of the public in general. However, the Regulations are not legislation with respect to "water, that is to say water (including water supplies, rivers and canal)". Further, the Regulations are in pith and substance a legislation with respect to: "public health, sanitation and the prevention of diseases"; an entry in item 7 in the Concurrent List (List III in the Ninth Schedule to the Federal Constitution).

[1b] As such, even though it is true that the environment in this case is within Malacca, but since the Regulations are in pith and substance a legislation with respect to item 7 above, any accidental transgression by the Regulations into the entries in item 6(c) and item 2 of the State List does not affect the competence of the Federal Government to make the Regulations.

[1c] Applying the same principles, the purpose of s. 25 of the EQA too, are for the real aim of protection, promotion, maintenance and enhancement of the health of the public in general. Therefore, s. 25 of the EQA is also a law with respect to: "public health, sanitation and the prevention of diseases"; under item 7 of the Concurrent List. Moreover, since, s. 25 also creates an offence and its punishment in respect of legislation made by the Federal Government, it is also covered by entry in item 4(h) in the Federal List, *ie*, "creation of offences in respect of any matters included in the Federal List or dealt with by Federal Law". In this respect, the Regulations and s. 25 of the EQA are applicable and enforceable in Malacca. The charge preferred against the appellant is therefore valid.

[2] Following the scheme and manner in which para 1, 2 and 3 have been written, if the law maker had intended sub-para (1) to (4) of para 4 to be read disjunctively, thus creating four more separate and independant sets of circumstances having independant force and effect, and each providing a complete exemption, then, the four sub-paras of para 4 would instead have been written in the form of four more paragraphs. There would then be seven paragraphs under the first schedule instead of the present four.

[2b] To interpret the sub-paragraphs under para 4 disjunctively as contended by the appellant would lead to unsatisfactory and absurd consequences. The interpretation advocated by the appellant would not promote the true object and purpose of the Regulations and the EQA. Hence, it is concluded that the sub-paragraphs under para 4 of the first schedule are to be given conjunctive reading and therefore, the appellant is not exempted from the effects of the Regulations.

[3] In this instance, the offence was alleged to have been committed on 27 November 1996. The sample of effluent discharged from the appellant factory, which constituted the basis for the charge was taken by the prosecution on the same date. DW2's evidence showed that the sample of effluent analysed by him was taken by DW3 between 12 August 1997 to 23 August 1997, *ie*, eight months after the alleged offence. Hence, there is no indication how the samples taken by DW3 much later after the alleged offence would be relevant. Therefore, the ruling of the judge in disallowing the evidence of DW2 and DW3 could not be faulted.

[4] On the evidence available, when investigations were carried out at the appellant's factory, the factory was in operation while the pipe which emanated from the factory ran continuously to the bank of the Malacca river and was notably discharging effluent into the river. Evidently, there was no other pipe connected to the said pipe. Further the pipe did not appear broken or faulty in any way so as to permit outside contaminants to seep through the said pipe thereby affecting the concentration and contents of the effluent running through the pipe.

[5] The element of public interest was foremost in the learned Sessions Court judge's mind in assessing sentence. The offence with which the appellant was charged was serious. Thus, the sentence passed by the Sessions Court judge was not grossly excessive, improper or unreasonable having regards to the nature of the offence and the circumstances of the case.

[Appellant's conviction and sentence affirmed; appeal dismissed.]

Case(s) referred to:

Aik Meng v. Chang Ching Chuen [1995] 3 CLJ 639 ***(refd)***
Becke v. Smith [1836] 2 M & W 191 ***(refd)***
Browne v. Dunn [1893] 6R 67 ***(refd)***
Chua Beow Huat v. PP [1970] 2 MLJ 29 ***(refd)***
Dato' Mohamed Hashim Shamsuddin v. Attorney General Hong Kong [1986] 1 CLJ 377; [1986] CLJ (Rep) 89 ***(foll)***
Emperor v. Dahayabhai AIR [1941] Bom 273 ***(refd)***
Grannal v. Marrickville Margarine Proprietary Ltd [1954-55] 93 CLR 55 ***(refd)***

Huddart, Parker & Co, Proprietary Ltd v. Moorehead [1908] 8 CLR 331 ***(refd)***
JC Waghmare & Ors v. The State of Maharastra AIR [1978] Bom 119 ***(foll)***
Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubik & Ors [1997] 4 CLJ 253 ***(dist)***
Leaw Mei Lee v. Attorney General & Ors [1967] 2 MLJ 62 ***(foll)***
Lee Chin Hock v. PP [1972] 2 MLJ 30 ***(refd)***
Lim Moh Joo v. PP [1970] 2 MLJ 113 ***(foll)***
Muthusamy v. PP [1948] 14 MLJ 57 ***(foll)***
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 ***(foll)***
PP v. Datuk Harun Idris & Ors [1976] 2 MLJ 116 ***(refd)***
PP v. Hambali [1968] 2 MLJ 156 ***(refd)***
PP v. Puah Thian Kang [1971] 2 MLJ 149 ***(refd)***
PP v. Ta Hsin Enterprise Sdn Bhd [1998] 4 CLJ Supp 241 ***(refd)***
PP v. Yap Kok Meng [1974] 1 MLJ 108 ***(refd)***
Sevaraman Nair v. Menteri Dalam Negeri Malaysia & Anor [2000] 7 CLJ 140 ***(refd)***
State of Bombay v. Narotamdas All ER [1947] PC 60 ***(refd)***
Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor [1999] 1 CLJ 481 ***(refd)***
Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor [1999] 2 CLJ 707 ***(refd)***
Yeong Peng Wah v. Bahal Singh [1961] 27 MLJ 316 ***(refd)***

Legislation referred to:

Control of Rent Ordinance 1956, s. 12(1), (a)-(n)
Drug Dependants (Treatment and Rehabilitation) Act 1983, s. 6(1)(a)
Evidence Act 1950, ss. 5, 105, 136
Environmental Quality Act 1974, ss. 21, 25(1), (3), 34, 34A, 38, 51(1)
Environmental Quality (Sewage and Industrial Effluents) Regulations, regs. 2-20, paras 1, 2, 3, 4(1), (2), (3), (4), First Schedule, (vii)-(xvii), Third Schedule
Federal Constitution, arts. 74(1), 128, List I, items 4(h), 8(i), (1), List II, items 2(a), 6(c), List III, item 7, List IIIA, item 13, Ninth Schedule
Interpretation Acts 1948 & 1967, s. 17A

For the appellant - J Amardas; M/s KP Ng & Amardas
For the respondent - Anselam Charles Fernandis DPP

Reported by Raja Vishnu Sivarajah

JUDGMENT

Ahmad Maarop JC:

On 13 January 2000 the Malacca Sessions Court convicted and sentenced the appellant to a fine of RM75,000 in default one year imprisonment on a charge of discharging effluent into inland waters (Malacca river) contrary to reg. 8(1)(b) of the Environmental Quality (Sewage and Industrial Effluents) Regulations (the Regulations) without a licence, an offence under s. 25(1) of the Environmental Quality Act 1974 (EQA) punishable under s. 25(3) of the same Act.

More specifically the charge preferred against the appellant is as follows:

> Bahawa kamu Malaysian Vermicelli Manufacturers (Melaka) Sdn. Bhd., Batu 4, Batu Berendam, Daerah Melaka Tengah, di dalam Negeri Melaka, pada 27 November 1996 jam lebih kurang 12.00 tengahari, didapati tanpa lesen melepaskan effluen ke dalam pengairan daratan melebihi kepekatan yang ditentukan di bawah Peraturan 8(1)(b), Peraturan-Peraturan Kualiti Alam Sekeliling (Kumbahan dan Effluen-Effluen Perindustrian) 1979, dengan itu kamu telah melakukan kesalahan di bawah Seksyen 25(1), Akta Kualiti Alam Sekeliling, 1974 (Pindaan) 1996 boleh dihukum di bawah Seksyen 25(3), Akta yang sama.

The trial commenced on 12 July 1999. The appellant claimed trial to the charge. The prosecution called four witnesses. At the close of the case for the prosecution, after hearing submission of learned counsel for the appellant and the learned DPP, the learned Sessions Court judge called upon the appellant to enter on its defence. The appellant called five witnesses. At the end of the case, the learned Sessions Court judge concluded that the prosecution had proven its case beyond reasonable doubt and found the appellant guilty as charged.

The case for the prosecution is as follows:

On 27 November 1996, at about 10am, PW2, En. Shaari bin Amat, officer from the Jabatan Alam Sekitar Melaka (DOE) together with a DOE technician (PW3) went to conduct an investigation on the appellant factory at Batu 4, Batu Berendam, Melaka. On arrival at the scene, PW2 and PW3 did not go into the factory run by appellant straight away. Instead they first investigated a pipe which was running from the factory to the Malacca river. As shown by the sketch plan (exh. P6), the pipe ran from a pit inside the defendant's factory, all the way to the Malacca river. The existence of this pipe was not disputed by the defence. What was disputed was that effluent was discharged from this pipe by the appellant factory. Both PW2 and PW3 stated that when they followed the pipe to the river, they saw it was discharging milky white liquid into the river. After having examined the discharge, PW2 and PW3 then proceeded to the factory. They introduced themselves to the security guard and asked to see the manager of the factory. PW2 and PW3 were granted access into the factory. There they met Mr. Koh Ban Tong the Administrative Manager of the factory (DW1). Together with Mr. Koh Ban Tong they carried out an inspection of the factory. The factory was then being used to process meehoon. PW2 and PW3 inspected the processing and the filteration system of the factory. PW2 stated that he saw milky white water, which was the result of washing of rice, flowing into a small pond. From the pond, the milky white water exited through a pipe, which led out of the factory. This was the pipe he saw earlier which according to him was discharging the milky white water

into the Malacca river. According to PW2, he saw that the milky white water in the pond, which led to the filteration system, overflowing. The system was apparently having some problem. He said the factory worker responsible for the operation of the system appeared panicky.

The pipe was buried from the pond until the parameter fence of the factory. From outside the fence of the factory, the pipe was visible. Accompanied by DW1 and two other factory workers, PW2 and PW3 then followed the direction of the pipe all the way to the river. According to PW2, the pipe outside the factory was visible, as it was not fully buried and that it was only covered with undergrowth. He also stated that he did not see any other pipes from other sources, connecting to the pipe carrying the effluent from the appellant's factory into the Malacca river. When they arrived at the river, PW2 requested one of the factory's workers (DW4) to collect samples of the effluent. The samples taken were put in three bottles. The samples were handed over to PW2, who marked them A, B and C and with reference No. ASMK/MVM/96-1. On the same day PW2 and PW3, sent them to the chemist, PW1. PW1 examined and analysed the samples (exh. P2, P3 and P4.)

Upon analysis, the chemist found the samples to contain the following:

Parameter	Standard (B)	Sample (A)	Sample (B)	Sample (C)
PH value	5.5-9.0	4.1	-	-
Suspended Solid mg/*l*	100	11,000		
BOD at 20C mg/*l*	50	9,400	-	
COD mg/*l*	100		19,600	-
Oil & Grease mg/*l*	10	-	-	40

The evidence of the chemist established that the effluent discharged from the appellant's factory contained substances having concentration greater than those specified in the acceptable standards set out in the third schedule to the Regulations.

The charge against the appellant alleged that the effluent discharged from the appellant's factory exceeded the concentration limit set by reg. 8(1)(b) of the Regulations which refers to standard B shown in the fourth column of the Third Schedule. Standard B is the parameter limits for inland waters. Standard A is the parameter limits for inland waters within catchment areas.

The evidence of the chemist revealed that except for PH value, the other substances in the samples of effluent discharged from the appellant's factory, namely, suspended solids, BOD, COD and oil and grease were in concentration greater than the parameter limits set by Standard B.

Learned counsel for the appellant raised a number of issues in his submission. The issues raised were the same as those raised by him at the trial in the Sessions Court. For convenience I have categorised the issues as follows:

(1) The constitutional issue;

(2) The exemption issue;

(3) The exclusion of PW2 and PW3's evidence;

(4) Whether the pipe which discharged the effluents into the Malacca river flowed from the appellant's factory.

The Constitutional Issue

In order to appreciate the submission of the appellant on this issue, reference must be made to the Regulations. The Regulations under which the appellant was charged, was made by the Minister charged with the responsibility for environmental protection, in the exercise of his powers under s. 51(1) of the Environmental Quality Act 1974 (EQA). Section 51(1) empowers the Minister, after consultation with the Environmental Quality Council to make Regulations for or with respect to:

(a) prescribing fees for examining plans, specifications and information relating to installations or proposed installations the subject of applications for licences or for any other forms of approval given under this Act or any Regulations made thereunder;

(b) prescribing standards or criteria for the implementation of any declared environmental policy of classification for the protection of the environment and for protecting beneficial uses;

(c) prescribing standards or criteria for determining when any matter, action or thing is poisonous, noxious, objectionable, detrimental to health, or within any other description referred to in this Act;

(d) *prohibiting the discharqe, emission, or deposit into the environment of any matter, whether liquid, solid, or gaseous and prohibiting or regulating the use of any specified fuel;*

(e) prescribing ambient air quality standards and emission standards and specifying the maximum permissible concentrations of any matter that may be present or discharged into the atmosphere;

(ee) *prescribing ambient water quality standards and discharge standards and specifying the maximum permissible loads that may be discharged by any source into inland waters, with reference either generally or specifically to the body of waters concerned*;

(f) prohibiting the use of any equipment, facility, vehicle, or ship capable of causing pollution or regulating the construction, installation or operation thereof so as to prevent or minimize pollution;

(g) requiring the giving of pollution warnings or alerts;

(h) prohibiting or regulating the open burning of refuse or other combustible matter;

(i) regulating the establishment of sites for the disposal of solid or liquid wastes on or in land;

(j) defining objectionable noise and prescribing standards for tolerable noise;

(k) prohibiting or regulating bathing, swimming, boating or other aquatic activity in or around any waters that may be detrimental to health or welfare or for preventing pollution;

(l) any matter or thing which by this Act is authorised or required or permitted to be prescribed or which is necessary or expedient to be prescribed for carrying this Act into effect;

(m) (Deleted by Act A636);

(n) (Deleted by Act A636);

(o) (Deleted by Act A636);

(p) requiring any person handling, storing or using oil or mixture containing oil report discharges and spillages of oil or mixture containing oil into Malaysia waters;

(q) requiring any person handling, storing or using oil or mixture containing oil to store such substance or material and equipment necessary to deal with any oil pollution of the Malaysian waters that may arise in the course of their business;

(r) (Deleted by Act A636);

(s) (Deleted by Act A636);

(t) regulating environmental audit and the submission of an audit report and the appointment of qualified personnel to assist the Director General in carrying out an environmental audit of any vehicle, ship or premises, irrespective of whether the vehicle, ship or premises are prescribed under s. 18 or otherwise, and their manner of operation, and prescribing the fees chargeable;

(u) prohibiting or regulating the manufacture, storage, transportation, or the application or use, emission, discharge, or deposit into the environment, of any environmentally hazardous substances;

(v) regulating measures to assess, control, reduce or eliminate environmental risk;

(w) regulating the competency of persons qualified to maintain and operate any equipment or control equipment.

The parameter limits of effluents to be discharged into inland waters are specified in the Third Schedule to the Regulations. Apart from s. 51 of the EQA, the Minister is also empowered to specify such acceptable conditions for the discharge of environmentally hazardous substances, pollutants or wastes into any area, segment or element of the environment pursuant to the provisions under s. 21 of the EQA. Section 25(1) of the EQA provides that:

> No person shall, unless licensed, emit, discharge or deposit any environmentally hazardous substances, pollutants or waste into any inland waters in contravention of the acceptable conditions under Section 21.

Contravention of s. 25(1) of the EQA would attract the penalty under s. 25(3) which provides that:

> Any person who contravenes subsection (1) shall be guilty of an offence and shall be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a period not exceeding five years or to both and to a further fine not exceeding one thousand ringgit a day for every day that the offence is continued after a notice by the Director General requiring him to cease the act specified therein has been served upon him.

Learned counsel for the appellant made it clear that the appellant was not challenging the validity of the EQA but the applicability of the Regulations to the State of Malacca. The thrust of his submission was that the applicability of the EOA to the State of Malacca was limited to those matters enumerated in the Federal List (ie, List I, Ninth Schedule to the Federal Constitution). He contended that the Minister had the power to make regulations under s. 51 of the EQA, subject to the qualification that the regulations must only be with respect to matters enumerated in the Federal List. This, in his

submission was because s. 51 of the EQA could only empower the making of subsidiary legislation on matters concerning which the Federal Government had the legislative competence but not otherwise. He contended that since the Regulations affected inland waters (which was within the legislative competence of the State), the Regulations were *ultra vires* the powers of the Minister and were not applicable to the State of Malacca. Since the Regulations were not applicable to the State of Malacca, no offence was validly created. Hence, the charge preferred against the appellant (ie, discharging effluents into inland waters contrary to reg. 8(1)(b) of the Regulations) could not stand.

To support his contention, learned counsel for the appellant relied on the judgment of the Court of Appeal in *Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubik & 2 Others* [1997] 4 CLJ 253 (the *Bakun*'s case). That case is about the construction of the Bakun Hydro-Electric Project near Balaga in the Kapit Division in the State of Sarawak. The project involved the inundation of a very large tract of land, the creation of a reservoir and a water catchment area. The effected land was owned by the State of Sarawak. The respondents were members of a native group whose ancestors have lived on and cultivated the land effected by the project since time immemorial. The respondents argued that they had been deprived of procedural fairness because, prior to the implementation of the project, they were not given an opportunity to make representations as to the impact of the project on the environment, ie, that they were not given a copy of the Environment Impact Assessment (EIA) report. On 20 April 1995, the respondents filed an application for a declaration that the EQA applied to the project and therefore, that EKRAN, the company which was constructing the project, must make public the EIA report before continuing with the project. Under s. 34 of the EQA, read with the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987, any person who intends to carry out a prescribed activity like the project, must, in accordance with the Handbook of EIA Assessment Guidelines, submit an EIA report to the Director-General of Environmental Quality. The guidelines also required that such an EIA report to be made available to the public, who were invited to comment on the proposed project to a Review Panel. The Review Panel would later formulate its recommendation to the Director General of Environmental Quality for his consideration and decision. On the same day (20 April 1995), the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Amendment Order 1995 (1995 Order) was gazetted with retrospective effect thereby excluding the operation of the environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987 to Sarawak.

The respondents applied for declarations that the 1995 Order was invalid and that EKRAN had to comply with the EQA, including s. 34A and/or the guidelines before carrying out the prescribed activity. The High Court granted the respondent's application and the appellants appealed.

One of the issues raised for the determination of the Court of Appeal was whether the EQA applied to the project in Sarawak. The appellants contended that the EQA did not apply to Sarawak. While the respondents argued that it did. The Court of Appeal held that the EQA did not apply to the environment that was the subject matter of the case. The Court of Appeal accepted the submission of the appellant that the term environment was a multi-faceted and multi-dimensional concept; its meaning depending upon the context of its use. At p. 271, Gopal Sri Ram JCA, said:

> In my judgment, the activity described in para. 13(b) of the 1987 Order cannot exist in the abstract. Dams, hydro-electric power schemes, reservoirs and the like must exist on land, which of course, is part of the environment, as is the very air that we breathe. Admittedly, the land and river on which the Project is to be carried out lie wholly within the State of Sarawak and are its domain. So, when the respondents speak about "the environment" in this case, they are in fact referring to environment that wholly belongs to the State of Sarawak; subject, of course, to those customary or other rights recognised by its laws.
>
> This exemplifies, and proves accurate, the argument of Dato' Gani Patail that the term "environment" is a multi-faceted and multi-dimensional concept, depending for its meaning upon the context of its use. So, there may be environment within the State of Sarawak which may fall outside its legitimate and constitutional control and within that of the Federal Government. It is to such limited cases that the EQA will apply.

The Court of Appeal held that on the facts of the case, the "environment" upon which the project would have an impact was land and water (ie, the place where the power is to be generated). Since the environment in question, by the operation of the application of the State List for Sarawak (Item 2(a) of List II and item 13 of List III A) (Supplement to Concurrent List for Sabah and Sarawak), lies wholly within the legislative and constitutional province of the State of Sarawak, the State has exclusive authority to regulate by legislation, the use of it in such manner as it deems fit.

Similarly, in this case, learned counsel for the appellant contended that, the subject matter of the offence which was alleged to be contravening reg. 8(1)(b) of the Regulations, was pollution of the Malacca river, which was wholly within the state of Malacca. According to learned counsel for the appellant, the pith and substance of the Regulations was the discharge of effluents into inland waters (the Malacca river), which was wholly within the legislative and

constitutional competence of the State of Malacca. Therefore, learned counsel for the appellant contended that the Regulations could not apply to the discharge of effluents into inland waters within the state of Malacca.

The learned DPP in his reply, submitted that the *Bakun's* case could be distinguished on the facts. The DPP submitted that s. 25(1) of the EQA does not concern merely with inland waterways. Section 25 provides for emission, discharge or deposit of any environmentally hazardous substances, pollutants or wastes into any inland waters. The DPP urged the court to consider item 8(i) and (1) in the Federal List in the Ninth Schedule to the Federal Constitution. Item 8(i) and (1) are entries with respect to:

> 8. Trade, commerce and **industry**, including:
>
> (i) **Industries; regulation of industrial undertakings;**
>
> (l) Dangerous and inflammable substances.

The DPP submitted that the combined effect of these two entries in the Federal List validates the Regulations in its application to the State of Malacca.

The DPP also urged the court to follow the decision of the Kuching High Court in *PP v. Ta Hsin Enterprise Sdn Bhd* [1998] 4 CLJ Supp 241. In that case, the respondent factory was also charged with discharging effluents into inland waters contrary to reg. 8 of the Regulations, an offence under s. 25(1) of the EQA and punishable under s. 25(3) of the EQA. At the hearing before the Session Court, the accused raised a preliminary objection that the EQA did not apply to that case. The Sessions Court upheld the objection and ordered the accused to be discharged. The learned Sessions Court judge in his judgment said:

> If the 'environment' upon which the activity ie, discharge of waste from factory lies wholly within the state of Sarawak, ie, land and water, then the *Bakun* case (ie, *Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors and Other Appeals* [1997] 4 CLJ 253 is already authoritative in stating the EQA will not apply. No more need to be said.

On appeal by the public prosecutor, the High Court allowed the appeal and set aside the order of the Sessions Court. The High Court held at p. 244:

> With respect, it is plain that the finding of the learned Sessions Court judge cannot be supported as the EQA expressly applies to the whole of Malaysia. Section 1(1) of the EQA states:
>
> > This Act may be cited as the Environmental Quality Act 1974 and shall apply to the whole of Malaysia.

At p. 246 the High Court also held:

> In the instant case, the subject matter does not relate wholly to environment as such, it is concerned mainly with the discharge of waste into inland waters without a licence, in contravention of s. 25 of the EQA. In this respect, there is no evidence to show that the power under the EQA has been ousted or precluded by any orders, and also there is no such specific provision being made or provided for under the Sarawak Ordinance. Although Pending Industrial Estate is geographically within the state of Sarawak, it is not precluded from the operation of the EQA. In other words, the *Bakun* case does not propose the total ban on all activities *per se*, for instance, as in this case; it is specifically applicable in cases of the construction of dams in the state of Sarawak, eg the Bakun dam. It does not make sense to suggest that a factory in Sarawak may discharge its effluent far exceeding the limits prescribed in reg. 8(1)(b) of the 1979 Regulations without a licence. It is a fallacy to think that, as in this case, the inland waters in the state of Sarawak are exclusive, therefore, the EQA is inapplicable in Sarawak.

As a starting point for the consideration of the constitutional issue, I have reminded myself that the jurisdiction to determine the validity or otherwise of a law made by Parliment or a state legislature has been specifically reserved under art. 128 of the Federal Constitution, to the Federal Court. However, as is apparent from the submission advanced on behalf of the appellant, this court was not called upon to declare the validity or otherwise of the EQA or the impunged Regulations. In the *Bakun's* case, referring to the role assigned to the court in that case and art. 128 of the Federal Constitution, the Court of Appeal said at p. 274:

> This court is not pronouncing upon the validity or otherwise of a Federal or State law. That role had been specifically reserved by the Supreme law to the Federal Court under Article 128. What concerns this court in the present instance is merely a question of interpretation of the Federal Constitution in relation to the applicability of the EQA to Sarawak. All references to legislative competence in this judgment are therefore confined to this narrow issue.

Similarly, the appeal before me involves merely a question of the interpretation of the Federal Constitution in relation to the applicability of the EQA and the Regulations to the State of Malacca. All references to legislative competence in this judgment are confined to this narrow issue. In my view the issue is within the jurisdiction of this court to consider. Having settled the question of jurisdiction, I move on to consider the relevant approach which the court should adopt in interpreting the Federal Constitution.

To begin with, the language of the constitution must be given a broad and liberal construction in order to advance the intention of its framers. A court, while rendering a broad and liberal construction to the language employed by

the Federal Constitution, is not entitled to stretch or pervert the language of the enactment in the interest of any legal or constitutional theory, or even for the purpose of supplying omissions or correcting suppossed errors. This general rule is, however, subject to an important qualification. Where the language of the constitution is open to two constructions, a court should adopt the construction which will ensure the smooth and harmonious working of the constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well-established provisions of law nugatory. (*Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 CLJ 481).

Secondly, there is a presumption of constitutionality operating in favour of the impugned legislation with the burden of proof on whoever alleges otherwise (Per Abdoolcader J (as he then was) at p. 117 in *PP v. Datuk Harun bin Idris & Others* [1976] 2 MLJ 116). Elaborating on this rebuttable presumption, the Court of Appeal said at p. 273 in the *Bakun's* case:

> In the context of State and Federal relations as enshrined in the supreme law, Parliament is presumed not to encroach upon matters that are within the constitutional authority of a State within the Federation. The principle of interpretation that emerges in consequence is that the court should, when determining the scope of Federal and State legislation upon a particular subject, ensure that the enactments of each legislative power are read so as to avoid inconsistency or repugnancy between them. Thus, wherever a question arises as to whether it is a Federal or State enactment that should apply to a given set of facts, a harmonious result should, as far as possible, be aimed at and
>
> > "An endeavour must be made to solve it, as the Judicial Committee have said, by having recourse to the context and scheme of the Act, and a reconciliation attempted between two apparently conflicting jurisdictions ..." In *re the Central Provinces and Berar Sales of Motors Spirit and Lubricants Taxation Act 1938* AIR [1939] FC 1, per Gwyer CJ, at p. 8.

Thirdly, it is a settled principle of constitutional interpretation that every entry in each legislative list must be given its widest amplitude and that its scope cannot be curtailed saved to the extent necessary to give effect to other legislative entries. In the *Bakun's* case the Court of Appeal, quoting Tulzapurkar Ag CJ in *JC Waghmare & Ors v. The State Of Maharastra* AIR [1978] BOM, 119 at 137, said at p. 272:

> From the above discussion the following general principles would be clearly deducible:
>
> (a) Entries in the three Lists are merely legislative heads or fields of legislation, they demarcate the area over which the appropriate legislatures can operate;

(b) Allocation of subjects in the Lists is not by way of scientific or logical definition but is a mere enumeration of broad and comprehensive categories; dictionary meaning of the words used, though helpful, is not decisive;

(c) Entries should be interpreted broadly and liberally, amplitude being given to the words employed, because few words of an entry are intended to confer vast and plenary powers;

(d) Entries being heads of legislation, none of the items in the Lists is to be read in a narrow and restricted sense but should be read broadly so as to cover or extend to all cognate, subsidiary, ancillary or incidental matters, which can fairly and reasonable be said to be comprehended in it;

(e) Since the specific entries in the three Lists between them exhaust all conceivable subjects of legislation, every matter dealt with by an enactment should as far as possible be allocated to one or the other of the Entries in the List and the residuary Entry 97 in List I should be resorted to as the last refuge; and

(f) If entries either from different Lists or from the same List overlap or appear to conflict with each other, every effort is to be made to reconcile and bring out harmony between them by recourse to known methods of reconciliation.

Fourthly, the words "with respect to" in art. 74 of the Federal Constitution must not be forgotten in considering the extent of legislative powers conferred on the Federation and the States, for what they require is a relevance to or connection with the subject assigned to the appropriate legislature (*Grannal v. Marrickville Margarine Proprietary Ltd* [1954-55] 93 CLR, para. 55 at p. 77).

In the *Bakun's* case the Court of Appeal said at p. 273:

> It is also well-settled that the phrase "with respect" appearing in Article 74(1) and (2) of the Federal Constitution – the provision conferring legislative power upon the Federal and State Governments respectively – is an expression of wide import. As observed by Latham CJ in *Bank of New South Wales v. The Commonwealth* [1948] 76 CLR 1, 186, in relation to the identical phrase appearing in s. 51 of the Australian Constitution which confers Federal legislative authority:
>
> > A power to make laws 'with respect to a specific subject is as wide a legislative power as can be created. No form of words had been suggested which would give a wider power. The power conferred upon a Parliament by such words in an Imperial statute is plenary – as wide as that of the Imperial Parliament itself: *R v. Burah* [1978] 3 App Cas 889; *Hodge v. The Queen* [1883] 9 App Cas 117. But the power is plenary only with respect to the specified subject.

The words "with respect to" had been interpreted to mean "on the subject of". In *Huddart, Parker & Co, Proprietary Limited v. Moorehead* [1908] 8 CLR 331, at p. 409 Higgins J said:

> This consideration does not settle the matter, however; for whatever Parliament thought, whatever was Parliament's motive, the question remains, is this a law **"with respect to"** – that is to say, as I understand it, **on the subject** of – corporations.

As I have stated earlier, learned counsel for the appellant contended that the pith and substance of the Regulations was pollution (ie, discharge of effluent) into inland waters – a matter within the legislative competence of the legislature of the State of Malacca. For this he relied solely on item 6(c) of the State List (List II in the Ninth Schedule to the Federal Constitution). Item 6(c) is the entry with respect to:

> State works and water, that is to say:
>
> (c) **Subject to The Federal List, water (including** water supplies, **rivers and canals)** control of silt; riparian rights.

The vital question for the determination of this court is what really is the subject of the s. 25(1) of the EQA and the Regulations? Are the Regulations legislation with respect to "water, that is to say water supplies, river and canals" as contended by the appellant? To answer this question, it is necessary to investigate the object, purpose and design of s. 25(1) of the EQA and the Regulations in order to ascertain the true nature and character of the section and the Regulations so that the class of subject to which they really belong could be ascertained.

As stated earlier, the Regulations are known as the Environmental Quality (Sewage and Industrial Effluents) Regulations. Regulation 3 provides that the Regulations shall apply to discharge of effluent into any inland waters, but do not apply to effluents discharged from prescribed premises or other premises specified in the First Schedule or both. "Effluent is defined under reg. 2 of the Regulations to mean sewage and or **industrial effluent**. "Industrial effluent" means liquid water, wastewater produced by reason of the production processes taking place at any **industrial premises**. This would narrow down the scope of "effluents" under the Regulations to effluents discharged from any industrial premises. However, "sewage", another component of effluent, is defined to mean any liquid waste or wastewater discharge containing animal or vegetable matter in suspension or solution, and may include liquids containing chemicals in solution. This would appear to widen the scope of "effluent" to include any liquid not necessarily discharged from any industrial premises.

Regulation 4 provides that no person without written permission of the Director-General shall carry out any work on any premises that may result in a new source of **effluent discharge** or cause a material change in the quantity or quality of **the discharge** from an existing source; or construct on any land, any building designed or used for a purpose that may cause the land or building to result in a new source of **effluent discharge**.

Regulation 5 provides for the provision on the application for and the permission referred under reg. 4.

Regulation 6 prohibits the discharge by any person, of any inflammable solvent; any tar or other liquids immiscible with water and refuse, garbage, sawdust, timber, human and animal waste or solid matters into any inland waters.

Regulation 7 is the provision on standard method of analysis of effluents.

Regulation 8 sets out the parameter limits of effluent to be discharged into inland waters.

Regulation 9 prohibits the discharge by any person of any effluent **in or on any soil or surface of any land** without the written permission of the Director-General.

Regulation 10 prohibits the discharge by any person of any solid waste or sludges **in or on any soil or surface of any land** without the written permission of the Director-General.

Part V of the Regulations, Comprising Regulations 11 to 15, contains provisions relating to licence for contravention of acceptable conditions.

Regulation 16 is on matters relating to point or points of discharge of effluent which shall be determined by the Director-General.

Regulation 17 provides that no person shall dilute, or cause or permit to be diluted, any effluent, whether raw or treated at any time or point after it is produced at any premises unless prior written authorisation of the Director-General has been obtained.

Regulation 18 is on duty to inform the Director-General, of spill or accidental discharge of substances specified in reg. 8 which either directly or indirectly gain or may gain access into any inland waters.

Regulation 19 provides that a person who discharges effluent into inland **waters or onto any land,** shall in connection with such discharge, install such sampling test point or points, inspection chambers, flow-maters, and recording and other apparatuses as the Director-General may, from time to time require.

Regulation 20 provides that an occupier of any premises shall provide the Director-General or any other authorised officer, every reasonable assistance, or facility available at premises, including labour, equipment, appliances, and instruments that he may require for the purpose of taking any actions that he is empowered by s. 38 of the EQA to take in respect of the premises.

Part VII of the Regulations contains provisions relating to fees payable under the Regulations.

Considering the Regulations in its entirety, it is clear to me that the Regulations relate to the prevention, abatement and control of the discharge of effluent, any inflammable solvent, any tar or other liquids immiscible with water, refuse, garbage, sawdust, timber, human or animal waste or solid matters and sludges into inland waters. The Regulations also prevent, regulate and control the discharge of effluent or sludges in or on any soil or surface of any land. The prevention, abatement, control and monitoring of the substances as aforesaid, which clearly is the dominant and the most important feature of the Regulations, is done by creating a number of prohibitions in the Regulations. These prohibitions appear to be conditional in the sense that discharge of effluent, waste or sludge could be done with prior written permission or licence of the Director General. Under the Regulations, control, regulation and monitoring is also enforced by specifying acceptable conditions of discharge, requirement of licences and approval of the Director General of Enviromental Quality for the various activities and actions relating to the discharge of effluent and other substances as specified in the Regulations, as well as mandatory requirement of reporting to the Director-General, the occurrence of any spill or accidental discharge of substances specified in the Regulations. Careful consideration of the provisions under the Regulations, leads me to the conclusion that the object and purpose of the Regulations are the prevention, abatement and control of pollution as well as the enhancement of the environment as declared by the long title to the EQA. To my mind the real object and purpose of all these is the protection, promotion, maintenance and enhancement of the health of the public in general. That is the true nature and character of the Regulations. When the true test is applied to the Regulations, it is clear that the Regulations are not legislation with respect to "water, that is to say water (including water supplies, rivers and canal). I do not think a law which has, as its object and purpose, the prevention, abatement and control of pollution can be classified as a legislation with respect to (on the subject of) "state works and water, that is to say: subject to the Federal List, water (including water supplies, rivers and canals) control of silt; riparian rights". In my judgment the Regulations are in pith and substance a legislation with respect to "public health, sanitation and the prevention of diseases," an entry in item 7 in the Concurrent List (List III in

the Ninth Schedule to the Federal Constitution). This conclusion is arrived at after giving the entries in item 6(c) in the State List and item 7 in the Concurrent list their widest significance and amplitude. I also have no doubt that it is the conclusion which would bring out harmony between the entries and would ensure the smooth and harmonious working of the Federal Constitution, avoid practical inconvenience and would not make well-established provisions of law nugatory.

It is true that the environment in this case (the inland waters and land) are within the State of Malacca. But since the Regulations are in pith and substance a legislation with respect to item 7 in the Concurrent List (which is within the legislative competence of the Federal Government), any accidental transgression by the Regulations into the entries in item 6(c) and item 2 of the State List does not affect the competence of the Federal Government to make the Regulations (*State of Bombay v. Narotamdas* All ER [1947] PC 60). Indeed even applying the multifaceted and multi-dimensional concept of environment as expounded in the *Bakun*'s case, the result is still the same, because although the environment in this case is within the State of Malacca, considering the context of its use, it is outside the legitimate and constitutional control of the State of Malacca and in fact it is within the legislative competence of the Federal Government. This is supported by the statement of the Court of Appeal in the *Bakun*'s case at p. 271:

> This exemplifies, and proves accurate, the argument of Dato' Gani Patail that the term "environment" is a multi-faceted and multi-dimensional concept, depending for its meaning upon the context of its use. So, there may be environment within the State of Sarawak which may fall outside its legitimate and constitutional control and within that of the Federal Government. It is to such limited cases that the EQA will apply.

Under art. 74(1) of the Federal Constitution, the Federal Government has the power to make law not only with respect to matters in the Federal List but also the Concurrent List. Since the Regulations are with respect to matters in respect of which the Federal Government has the legislative competence to make, the exercise of the power by the Minister under s. 51(1) of the EQA in making the Regulations is valid.

Applying the same principles and approach adverted to earlier, I also have no hesitation in concluding that the object and purpose of the s. 25 of the EQA too, are the prevention, abatement and control of pollution, again with real aim of protecting, promoting, maintenance and enhancement of public health in general. Therefore s. 25 of the EQA is also a law with respect to "public health, sanitation and the prevention of diseases" under item 7 in the Concurrent list. Morever, since s. 25 also creates an offence and its punishment

in respect of legislation made by the Federal Government, it is also covered by entry in item 4(h) in the Federal List, ie, entry with respect to "creation of offences in respect of any matters included in the Federal List or dealt with by federal law".

The upshot of this is that the Regulations and s. 25 of the EQA are applicable and enforceable in the State of Malacca. The charge preferred against the appellant is therefore valid.

The Exemption Issue

Counsel for the appellant contended that the learned Sessions Court judge had given the wrong interpretion to para. 4 of the First Schedule to the Regulations in holding that the four conditions under all the sub-paragraphs under para. 4 must be read conjunctively. He submitted that if para. 4 of the First Schedule is given conjunctive reading it would lead to absurd consequences, because suppose a factory were to be taken as an example, para. 4(4) could never be fufilled because a factory would not be involved in housing development.

Further, counsel for the appellant contended that if the four sub-paragraphs under para. 4 were intended by the law maker to be read conjunctively, there is no need to use the words "without effecting the generality of 4(3)" in para. 4(4). The use of those words, he contended, support his submission that para. 4 should be read **disjunctively**. He concluded his submission on this point by saying that if para. 4 of the First Schedule is to be read disjunctively, no offence had been committed as the appellant had a defence in that no effluent set out in parameters (vi) to (xvi) in the first column of the third schedule had been discharged.

In his reply on this point, the DPP firstly submitted that by virtue of s. 105 of the Evidence Act 1950, the burden was on the appellant to establish that it came within the exception provided under reg. 3 of the Regulations.

The DPP submitted that through the evidence of PW1 (the chemist), the prosecution had adduced sufficient evidence to show that the effluents discharged by the appellant factory contravened the law. The DPP contended that PW1 was never challenged. The exemption was crucial to the defence as it was the crux of the defence's case. So the DPP contended that the defence should have at least put to PW1 when she was giving evidence, the exemption it claimed the appellant was entitled to rely on.

Further, it was contended by the prosecution that sub-paras. (1), (2), and (3) of para. 4 of the First Schedule should be read **conjunctively** and sub-para. 4 to be read disjunctively. This, according to the prosecution was because sub-paras. (1), (2) and (3) contained provisions about effluents. There is therefore

some unity of the subject matter. With regard to para. 4, the DPP contended that it was something else. Sub-paragraph 4(3) is of general application. It applies to sub-para. (1) and (2). But sub-para. 4 is on different subject matter so it has to be read disjunctively from the rest of the sub-paragraphs. According to the prosecution the appellant had to adduce evidence to prove the existence of the conditions under the relevant sub-paragraphs to establish that the appellant was entitled to the exemption under para. 4.

It was also contended by the prosecution that if the four sub-paragraphs under para. 4 are read disjunctively, it would lead to absurd or dangerous result. The prosecution argued that if para. 4 is read disjunctively, it would mean that a factory which fulfills sub-para. 1 (but not sub-paras. (2) and (3), would still be within the exception. Similarly another factory which fulfills sub-paras. (1) or (3), could discharge the metal mercury or other metals set out in paras. (vii) to (xvii) in the first column of the Third Schedule. This, according to the DPP would lead to dangerous consequences. The DPP contended that surely that was not the intention of the law-maker in making the Regulations. The DPP urged the court to consider the purpose of EQA. He urged the court to use the provision under s. 17A of the Interpretation Acts 1948 and 1967 (Consolidated and Revised – 1989) (Act 388). The case of *Sevaraman Nair v. Menteri Dalam Negeri Malaysia & Anor* [2000] 7 CLI 140 was cited in support.

I accept the submission that a statute is to be construed in such a way as to promote the purpose and object of the statute. This is provided under s. 17A of Act 388 which reads:

> 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.

This provision was applied by the learned judge in *Sevaraman Nair v. Menteri Dalam Negeri* [2000] 7 CLI 140 in constructing s. 6(1)(a) of Drug Dependants (Treatment and Rehabilitation) Act 1983. In my view the principle of construction embodied in s. 17A of Act 388 is also applicable in interpreting a subsidiary legislation made pursuant to the powers given under the parent Act (the EQA).

It is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the words used and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience

but no further. (Parke B in *Becke v. Smith* [1836] 2 M & W 191 at p. 195, *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor* [1999] 2 CLJ 707).

In *Lim Moh Joo v. PP* [1970] 2 MLJ 113, Wan Suleiman J (as then was) said at p. 114:

> This is, in my judgment, a case where this court must modify the language of the law to meet what must be the intention of the legislature. I need hardly add that there is ample authority to support this course. As Denning LJ said in *Seaford Court Estates, Ltd. v. Asher*.
>
> It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature. That was clearly laid down (3 Co. Rep. 7b by the resolution of the judges Sir Roger Manwood C.B. and the other barons of the Exchequer) in *Heydons Case* and it is the safest guide today.

In *Leaw Mei Lee v. Attorney General & Ors* [1967] 2 MLJ 62, at p. 65 Ong Hock Thye, FJ said:

> If a too literal adherence to the words of an enactment appears to produce an absurdity or an injustice, it should be the duty of the courts to ascertain whether the language is capable of any other fair interpretation. In a endeavour to arrive at the true interpretation, therefore, the word that raises such controversy here ought not to have been viewed as detached from its context. As Blackburn J said in *Rein v. Lane*:
>
> > It is, I apprehend, in accordance with the general rule of construction in every case, that you are not only to look at the words, but you are to look at the context, the allocation, and the object of such words relating to such a matter, and interpret the meaning according to what would appear to be the meaning intended to be conveyed by the use of the words under such circumstances.

So how does one construe para. 4 of the First Schedule to the Regulations?

What is exempted from the operation of the Regulations under para. 4 of the First Schedule is processing, manufacturing, washing or servicing of any products or goods **other than those** products or goods set out in paras. 1, 2 and 3 of the First Schedule. In my view this is so because of the usage of the words "any other products or goods" instead of "any products or goods"

in para. 4. The next question, which is more crucial for the purpose of this case is, whether the exception applies to the processing, manufacturing, washing or servicing of any other products or goods which fulfill **all** the requirements under sub-paras. (1) to (4) (conjunctive reading), or whether the exception applies to the processing, manufacturing, washing or servicing of any other products or goods that fulfills **any** of the requirements under sub-paras. (1) to (4) (disjunctive reading)?

The learned Sessions Court judge held that conjunctive reading must be given to para. 4 and that in order to qualify for exemption thereunder, all the conditions in sub-paras. (1) to (4) must be fulfilled. In his judgment at p. 56 of the appeal records, the learned trial judge said:

> With respect, this submission is without merit. In order to qualify for an exemption under section (4), one has to satisfy all the (4) conditions listed in the said section. This is because each condition has a semi colon after it, which ends with a full stop, only after condition no. 4. As such, the (4) conditions in section (4) must be read conjunctively. A semicolon, according to the *Oxford Advanced Learner's Dictionary of Current English* is a punctuation mark used in writing between comma and a full stop in value. As section 4(2) of (regulation 3) of the First Schedule, ends with a semicolon at the end of it, it cannot be read independently from the rest of section 4.

Punctuation marks may be used as a guide in the interpretation of a statute. In *Dato' Mohamed Hashim Shamsuddin v. Attorney General Hong Kong* [1986] 1 CLJ 377, the Supreme Court said:

> Its punctuation forms part of any statutory enactment and may be used as a guide to interpretation. The day is long past when the courts would pay no heed to punctuation in any written law *(Hanlon v. Law Society* at 197-198 per Lord Lowry) and the presence or absence of a comma may be highly significant *(Re steel deceased, Public Trustee v. Christian Aid Society; Marshall v. Cottingham).*

In *Yeong Peng Wah v. Bahal Singh* [1961] 27 MLJ 316, the Court of Appeal had to construe the provision under s. 12(1)(n) of the Control of Rent Ordinance. Section 12(1) of that Ordinance prohibited recovery of premises except in certain specified cases which were alphabetically numbered (a) to (n). The relevant part of the section which had to be considered provided as follows:

> 12(1) No order or judgment for the recovery of possession of any premises comprised in a tenancy shall be made or given except in the following cases, namely –

> xxx; and (n) in any case, whether falling within any of the preceding paragraphs or not, where the Court considers it reasonable that such an order or judgment be made or given and is satisfied that suitable alternative accomodation is available for the tenant or will be available for him when the order or judgment takes effect.

In his judgment in that case Ong J held at p. 316:

> My own view is that no occasion arises for construing the word "and" as "or". The fourteen exceptions are distinctly and separately set out in exactly the same manner as one would say "Tom, Dick and Harry", so that "and" is properly a cumulative. As such, and in its context – being among the exceptions – this word extends rather than restricts the scope of the exceptions to section 12(1). Clearly then paragraph (n) provides an additional case, over and above the preceding thirteen, where a landlord may recover possession.
>
> This view is indeed reinforced by the words following, namely, "in any case, whether falling within any of the preceding paragraphs or not." I need hardly add that it is a cardinal rule of construction that in construing any particular clause in a statute one has to look to its connection with other clauses in the same statute, and the conclusions which, on comparison with other clauses, may reasonably and obviously be drawn. If comparison of one clause with others in the statute makes a certain proposition clear and undoubted, the Act must be construed so as to make it a consistent and harmonious whole. If after all it turns out that that cannot be done, the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail.

The learned judge was of the view that there were two alternative constructions of s. 12(1)(n) of the Ordinance. Either it is to be contrued as enlarging the scope of the exceptions to s. 12(1) or as restricting it. In the former, each of the paras. (a) to (n) had independent force and; in the latter, para. (n) made the rest redundant.

Later in his judgment (at p. 317), the learned judge briefly summed up the way he had interpreted para. (n), which I find very illuminating:

> My interpretation of paragraph (n) gives effect to the whole of that paragraph and of every other in section 12(1); it raises no question of absurdity, inconsistency, repugnance, or implied repeal, and it fully accords with the intention of the legislature.

As I have adverted to elsewhere in this judgment, the prevention, abatement, control and monitoring of the discharge of effluent defined under the Regulations is implemented and enforced by a number of prohibitions provided under the Regulations. Prevention, abatement, control and monitoring is also enforced *inter alia*, by provisions in the Regulations, specifying the acceptable condition of discharge, requiring the obtaining of licence and approval of the

Director General of Environmental Quality for the various activities and actions relating to the discharge of effluents, as well as requiring the reporting to the Director-General of the occurence of any spill or accidental discharge of specified substances.

However, the First Schedule to the Regulations which contains provisions amplifying the effect of the provision under reg. 3 of the Regulations, sets out the list of discharges of effluents to which the Regulations shall not apply. The discharges listed under the First Schedule are therefore exempted from the operation of the various provisions in the Regulations. This would mean that the discharges listed under the First Schedule shall not be subject to the various prohibitions and other mechanisms of prevention, abatement, control and monitoring provided under the Regulations as aforesaid which are necessary for the protection, promotion, maintainence and enhancement of public health and sanitation.

In considering the four sub-paragraphs under para. 4 to the First Schedule, it is useful to refer to all the preceding paragraphs in the said schedule in order to see how exemption is granted under those paragraphs. In my view, when the opening sentence in the schedule is read together with paras. 1, 2 and 3, the resulting exemption is as follows:

(1) The Regulations shall not apply to discharge of effluent into any inland water from processing of oil palm fruit or oil palm branches into crude palm oil whether as intermediate or final product.;

(2) The Regulations shall not apply to discharge of effluent into any inland waters from processing of natural rubber in technically specified form, latex form including prevulcanised or the form of modified and special purpose rubber, conventional sheet, skim, crepe or scrap rubber;

(3) The Regulations shall not apply to discharge of effluent into any inland waters from mining activities.

In other words paras. 1, 2 and 3 are to be read disjunctively, each of them has distinct and independent force and effect in providing the exemption, once the requirement under each of them is fulfilled. Following the scheme and manner in which paras. 1, 2 and 3 have been written, if the law maker had intended sub-paras. (1) to (4) of para. 4 to be read disjunctively, thus creating four more separate and independant sets of circumstances having independent force and effect, and each providing a complete exemption, then, the four sub-paragraphs of para. 4 would instead have been written in the form of four more paragraphs. In other words there would then be seven paragraphs under the First Schedule instead of the present four.

Further, to interpret the sub-paragraphs under para. 4 disjunctively as contended by the appellant would, to my mind, lead to unsatisfactory and absurd consequences. It would mean for example, that a person who is involved in processing of any other products or goods in any housing or commercial development (or both) with less than 30 units would fulfill the requirement under para. 4 and be exempted even if that processing activity (i) produces effluent more than 60 cubic meters per day, (ii) produces effluents which contain the contaminants listed as parameter (vi) to (xvi) in the first column of the Third Schedule (which includes mercury, Arsence, Cyanide, lead, oil and grease as well as other contaminants); and (iii) produces any other products or goods where the total load of biochemical oxygen demand of the effluent fixed at 20 degrees Centigrade for five days or suspended solid or both, exceeds six kilograms per day.

As another example, suppose there is a factory (not in any housing or commercial development). This factory is involved in the manufacturing of any other products or goods, where the total load of biochemical oxygen demand of the effluent fixed at 20 degree Centigrade for five days or suspended solid or both does not exceed six kilogram per day (thus fulfilling the requirement under sub-para. (3)). However this factory produces effluent very much more than 60 cubic meters per day and the effluent produced contains all the contaminants listed as parameter (vi) to (xvi) in the first column of the Third Schedule. If the appellant's submission is accepted as correct, it would mean that the Regulations shall not apply to the factory, although the effluent it produces contains deleterious contaminants which are dangerous to public health.

Surely such consequences could not possibly have been intended by the law-maker. Clearly the interpretion advocated by the appellant would not promote the true object and purpose of the Regulations and the EQA. I therefore have no hesitation in concluding that the sub-paragraphs under para. 4 of the First Schedule are to be given conjunctive reading.

In my judgment in order to be exempted under para. 4 of the First Schedule, if the processing, manufacturing, washing or serving of any other products or goods is in any housing or commercial development, then the conditions under all the sub-paragraphs of para. (4) must be satisfied. In other words, for processing, manufacturing, washing or servicing of any other products or goods in any housing or commercial development, the first condition is that the housing or commercial development must be one with less then 30 units. Having fulfilled that condition, the other condition which must be fulfilled is that the processing, manufacturing, washing or servicing of any other products or goods in that housing or commercial development must fulfill all the

requirements under sub-paras. (1) to (3). For processing, manufacturing, washing or servicing **other than** in any housing or commercial development, all the requirements under sub-paras. (1) to (3) must be fulfilled.

To complete the discussion on the exemption issue, I will now touch on the burden of proving the exemption. In this case the burden of proving the existence of circumstances bringing it under the provisions in the First Schedule to the Regulations is on the appellant. (See s. 105 of the Evidence Act 1950, *PP v. Puah Thian Kang* [1971] 2 MLJ 149, *PP v. Hambali* [1968] 2 MLJ 156, *Lee Chin Hock v. PP* [1972] 2 MLJ 30 and *Emperor v. Dahayabhai* AIR [1941] BOM 273). Indeed this was admitted by the appellant. So even if the appellant was right in contending that the sub-paragraphs in para. 4 to the First Schedule should be read disjunctively, it was for the appellant to adduce evidence to show that its case fall within any of the sub-paragraphs under para. 4. As pointed out earlier, counsel for the appellant submitted that no offence had been committed by the appellant because it had a defence in that no effluent with any of the contaminants set out in parameters (vi) to (xvi) in the first column of the Third Schedule had been discharged. But is there evidence to that effect? I have scrutinised the notes of evidence in the appeal record but I could not find any evidence to that effect elicited by the appellant in the cross-examination of the chemist. Neither is there any evidence from which I could infer that the condition under any of the sub-paragraphs of para. 4 had been established by the appellant. Indeed as contended by the prosecution this crucial element of exemption was never even raised by the appellant or put to PW1 when she was giving evidence. I hasten to add that the importance of such challenge could not and should not be taken for granted. Reference needs only be made to *Browne v. Dunn* [1893] 6R 67, *Chua Beow Huat v. PP* [1970] 2 MLJ 29, *Aik Meng v. Chang Ching Chuen* [1995] 3 CLJ 639.

The submission of the appellant on the exemption issue therefore fails.

The Exclusion Of DW2 And DW3's Evidence

In order to appreciate the appellant's submission on this point it is useful to set out the background leading to the exclusion of the evidence of these two witness.

The appellant had called DW2 (Arman bin Ali) to give evidence. DW2 was a chemist with Applied Chemical Consultancy Malaysia Sdn. Bhd, Air Keroh, Malacca. According to DW2, he obtained BSC (chemistry) degree from the University of Arizona USA. At the time of giving evidence he had worked as a chemist for 5 1/2 years. DW2 had never given evidence in court before. According to DW2, his job was to analyse effluent discharged from factories.

DW2 said he received sample of effluents from the appellant's factory which was taken between the period 12 August 1997 to 23 August 1997. According to DW2 he received the sample from En Godwin Singam (DW3).

The DPP objected to DW2's evidence on the ground that the sample was taken about eight months after the offence was committed. Therefore, the DPP submitted that the evidence of DW2 was not relevant. In his submission replying to the DPP's objection, counsel for the appellant said that DW3 had made research on the appellant's factory between July 1997 to May 1998. The object of the research was related to industrial pollution reduction demonstration project.

After hearing the submission of learned counsel for the appellant, the Sessions Court judge ruled that DW2's evidence was not relevant as the sample was taken long after the offence was commited.

The defence next called DW3 to testify. DW3 was a Senior Environmental Consultant attached to the Centre For Environmental Technologies in Petaling Jaya. He had a BSC (chemical Engineering degree). He had not given evidence in court before. According to DW3 he was working in industrial waste management. DW3 said that between June 1997 to May 1998 he was a consultant to the appellant factory on waste management and upgrading of the treatment plant. He said he took samples of the effluent discharged by the appellant factory and conducted tests on them. According to DW3 the tests were done by DW2.

At that juncture, the DPP objected to the evidence of DW3 on the ground that the samples were taken after the date of the offence ie, several months later and therefore that evidence was not relevant.

In his submission, learned counsel for the appellant said that the analysis of the effluent carried out between Jun 1997 to May 1998 was with regard to total waste output treated and untreated and input at the meehon factory. He submitted that was done to show that the level of effluent could not be as stated by the prosecution.

The trial judge ruled that the tests were conducted on samples taken long after the date of the offence and as such the evidence was not relevant.

Before me the appellant contended that the Sessions Court judge had erred in disallowing DW2 and DW3 to give evidence and that the ruling had prejudiced the appellant's in that it deprived the appellant of the opportunity to present its defence that the effluent discharged from the appellant's factory on the date and time of the alleged offence could not have reached the high level alleged

by the prosecution and that this could have been caused by other intervening factors such as pipes from surrounding areas or from seepage, which could have disturbed the water contents and concentration. Counsel for the appellant submitted that the trial judge should have allowed DW2 and DW3 to give evidence and later decide whether the evidence was relevant or not. The case of *PP v. Yap Kok Meng* [1974] 1 MLJ 108 was cited in support.

With respect I do not agree. While the defence should be allowed the opportunity to establish possible defence, the evidence given in support of that defence must be relevant and admissible. Under s. 136 of the Evidence Act 1950 read with s. 5 of the same Act, the trial judge was empowered to permit only such evidence to be given which in his opinion was relevant and admissible. In order to do this, s. 136 of the Evidence Act empowers a judge to ask the party proposing to give evidence in what manner the alleged fact, if proved, would be relevant, and he may then decide as to its admissibility. The judge does not have to hear the evidence objected to and then later, after it is completed and after much time is wasted, decide whether the evidence is relevant and admissible. The law on the subject had been clearly restated in *PP v. Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 CLJ 215, where at p. 397 Augustine Paul J said:

> The first matter that requires consideration is the power of the court to require a party to disclose the relevancy of the evidence of a proposed witness before the witness gives evidence. This brings into focus section 136(1) of the Evidence Act 1950 which reads as follows:
>
> > When either party proposes to give evidence of any fact, the court may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the court shall admit the evidence if it thinks that the fact, if proved, would be relevant, and not otherwise.
>
> Questions of admissibility of evidence are questions of law and are determinable by the judge. If it is the duty of the judge to admit all relevant evidence, it is no less his duty to exclude all irrelevant evidence. Section 5 of the Evidence Act 1950 declares that evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as declared to be relevant and of no others. If follows from this that a party to a suit or proceeding is entitled to give evidence of only facts which are declared relevant under the provisions of the Evidence Act 1950. The judge is empowered to allow only such evidence to be given as is, in his opinion, relevant and admissible and in order to ascertain the relevancy of the evidence which a party proposes to give, the judge may ask the party proposing to give evidence, in what manner the alleged fact, if proved, would be relevant, and he may then decide as to its admissibility (see *Sarkar on Evidence* (15th Ed pages 2152-2153). As the *Law of Evidence* by Monir (10th Ed) Vol II says at page 1399:

Commenting on the stage at which this power could be exercised by the court, the learned judge said at p. 170:

> It is therefore manisfestly patent that the court has been endowed with the power to exclude evidence which it considers to be irrelevant. A matter of critical importance is whether this power can be exercised by the court before a proposed witness begins to give evidence. In my opinion, the language employed in the subsection clearly contemplates the exercise of the power at that stage as it empowers the court to inquire from a party '... In what manner the alleged fact, if proved, would be relevant ...' When a party '... proposes to give evidence of any fact ...' And to admit the evidence only if it finds it to be relevant. The word 'proposes' means the court can exercise the power given by the subsection when a party wishes to call a witness, that is to say, before a proposed witness begins to give evidence. As *Field's Law of Evidence* (10th Ed) Vol VI says in its commmentary on the Indian equivalent section at page 5624:
>
> > The practice of admitting evidence and reserving the question of its admissibility for further consideration is unwise and much to be regretted. If the evidence is once admitted, it is impossible to say what its effect may be on the mind of the person who hears it. It is most desirable that the question of admissibility should be finally decided when the objection to question is taken: Per Petheram CJ in *Jadu Rai v. Bhubotaran Nundy* ILR 17 Cal 173 at page 186; see also *Emperor v. Panchkerji Duff* 1 LR 52 Cal 67, AIR [1925] Cal 587; *Seikh Abdul v. Emperor* AIR [1925] Cal 887 at page 888.
>
> It has been held that the court may conduct this exercise even when a party applies to summon a person as a witness. In saying this, I draw support from the *Law of Evidence* by Woodroffe and Amir Ali (16th Ed) Vol IV which says at page 3569:
>
> > Where a party applies for summoning a person as his witness to give evidence in the case, a duty is cast by section 136 of the Evidence Act on the court to inquire from the party summoning the witness in what manner the evidence of the witness would be relevant for the purpose of the case. The court should issue summons only if it thinks fit that the evidence would be relevant for the decision and not in mechanical manner (*Sankaran v. Dr Ambulakshan Nair* [1989] 2 KLT 570).

At p. 398 the learned judge opined that a party does not have an automatic right to call a person as a witness:

> The court has the power, and, indeed is duty-bound, to inquire into the relevancy of a proposed witness before he begins to give evidence. The object is to ensure that evidence is confined to relevant facts and does not stray beyond the proper limits of the issues at trial. In order to ask a party '... In what manner the alleged fact, if proved, would be relevant ...' as provided by

the subsection, it is necessary for the party to give a summary of the proposed evidence when asked by the court. It is only with such a summary can the court be in a position to rule on the relevancy of the proposed evidence. The court will then have to decide on its relevancy on the assumption that the proposed evidence will be successfully proved. I interpolate to add that the exclusion of witness on the principles that I have discussed is not an infringement of the right of an accused person to defend himself. I say this because such a right can be limited by the provisions of any written law (see *Yusuf Husain v. Emperor* AIR [1918] All 189). The Evidence Act 1950 limits the type of evidence that is admissible in a trial including the presentation of a defence. Section 136(1) is the vehicle for excluding evidence that is rendered irrelevant by the Evidence Act 1950. The power of the court under this subsection is therefore clear.

In this case the offence was alleged to have been committed on 27 November 1996. The sample of effluent discharged from the appellant factory, which constituted the basis for the charge was taken by the prosecution on the same date. DW2's evidence clearly shows that the sample of effluent analysed by him was taken by DW3 between 12 August 1997 to 23 August 1997, some eight months after the alleged offence. Unless it could be shown that the sample taken by DW3 was the same in contents and all the necessary characteristics with the sample taken by the prosecution and subsequently analysed by PW1, I do not see how the samples taken by DW3 much later after the alleged offence would be relevant.

In response to the DPP's objection to DW2's evidence, counsel for the appellant submitted that En. Godwin Singam (DW3) had done a research on the appellant factory from July 1997 to May 1998. The research was on industrial pollution reduction demonstration project (p. 38 of the Appeal Record). In response to the DPP's objection to DW3's evidence, counsel for the appellant submitted that the analysis of the effluent done between June 1997 to May 1998 was with regard to total waste output treated and untreated and the input to the meehon factory. That, according to him was to show that the level of effluent could not be as stated by the prosecution (p. 40 of the Appeal Record).

It is clear to me that there was nothing in the submission of counsel for the appellant to explain how the level of effluent discharged from the appellant's factory could not be as stated by the prosecution. There was also nothing in his submission to show or indicate how the samples taken by DW3 between 12 August 1997 to 23 August 1997 would have shown that the composition, quality and nature of the effluent discharged from the appellant factory on the date of the offence (27 November 1996) could not be as stated by the

prosecution or that the samples taken by the prosecution on 27 November 1996 was wrong or could not be representative of the effluent discharged into the Malacca river by the appellant's factory on the relevant date.

In the circumstances I do not see how the ruling of the trial judge in disallowing the evidence of DW2 and DW3 could be faulted as being erroneous in law and in fact. In this context it is to my mind not out of place to recall what was said by Taylor J in the off-cited case of *Muthusamy v. PP* [1948] 14 MLJ 57 at p. 58:

> It is the duty of the advocate to prepare his case with due regard to the real issues and with special care for the law of evidence. If he cannot show tersely that a proposed question is relevant he cannot complain if the magistrate promptly excluded it under section 5 which provides that evidence may be given of legally relevant facts "and of no others". These words are mandatory.

Moreover, the point that the level of effluent discharged from the appellant factory could not have reached the level stated by the prosecution was never raised with the chemist called by the prosecution when she was testifying. Again if this was a genuine defence and so crucial to the appellant's case, it should have been raised or at least put to PW1. Failure to do so in the absence of a valid explanation (and none was offered in this case), would be another reason to bar the appellant from raising it in his defence. *(Chua Beow Huat v. PP, Browne C Dunn & Aik Meng (M) Sdn. Bhd. v. Chang Ching Chuen).*

Before concluding the discussion on this issue, observation must be made about the case of *PP v. Yap Kok Meng* cited by counsel for the appellant. That case could be distinguished from the present case. In that case the learned President of the Sessions Court refused to allow the prosecution to recall PW1 on the objection by the defence that, PW1, after giving his evidence, was allowed to remain in court and had therefore heard the evidence of PW3. The High Court held that the learned President of the Sessions Court had confused admissibility of evidence with the weight to be given to it. This is different from the present case. In the present case the Sessions Court judge was concerned with the question of the relevancy of DW2's and DW3's evidence, which under s. 136 of the Evidence Act, he was entitled to consider and thereafter disallow.

In the result the appellant's contention on the exclusion of the evidence of DW2 and DW3 also failed.

Whether The Pipe Ran Continuously Without Any Break From The Appellant's Factory To The Malacca River

On this point the appellant contended that as the pipe was not visible, there was a possibility of other pipes being connected to the pipe which discharged effluent into the Malacca river. I have considered the evidence recorded in this case carefully. I do not think there is any merit in this contention.

PW2 had testified that before going into the appellant's factory, together with PW1, he had first examined the area outside the parameter fence of the appellant's factory up to the bank of the Malacca river, where he found the end of the pipe which was discharging whitish liquid into the Malacca river. PW1 and PW2 then followed the direction of the pipe in order to know where it originated from. They found that the pipe originated from the appellant's factory. This is clear from the evidence of PW2 at p. 11 and 12 of the Appeal Record:

> Sebelum saya masuki syarikat defendan, saya bersama Rahman telah membuat tinjauan di bahagian luar pagar kilang, sehinggalah ke tebing Sungai Melaka, di mana saya telah menemui muncung paip yang mengeluarkan air berwarna putih, ke dalam Sungai Melaka. Lalu saya dan Rahman mengikuti paip tersebut untuk mengetahui dari mana punca paip tersebut. Paip itu lebih kurang 4 inci diameter. Saya dapati paip itu berpunca daripada syarikat defendan. Saya dan Rahman telah memasuki syarikat defendan dengan memperkenalkan diri dipondok keselamatan untuk berjumpa dengan pengurus kilang.

Under cross-examination, PW2 disagreed with the suggestion by the defence that there was another pipe (from an old rubber factory), which was connected to the pipe in question. PW2 also disagreed that the pipe which he indicated in the sketch plan (exh. P6) did not run from the appellant's factory to the Malacca river. The reason for this is clear. According to PW2 the pipe was visible because it was not completely buried in the ground and was only covered by undergrowth. At p. 16 of the Appeal Record the evidence given by PW2 is as follows:

> Paip itu tidak jalan di bawah tanah (underground). Sebenarnya paip itu hanya terlindung dengan tumbuhan. Sketch plan ditandakan sebagai IDD/D1.
>
> Saya bersetuju dengan saluran paip yang ditandakan dalam ID/D1. Saya ada menyiasat keadaan paip itu. Separuh terbenam. Paip itu tidak penuh terbenam. Saya tidak bersetuju bahawa ada satu lagi paip dari kilang getah lama menyambung ke paip ini.

At p. 18 of the Appeal Record the evidence given by PW2 is as follows:

> Saya tidak bersetuju bahawa paip yang saya lukiskan dalam pelan P6 tidak menghubungi kilang itu ke Sungai Melaka.
>
> Apabila saya lawat kawasan itu pada 1996, saya tidak dapati tanah ditolak. Kini, bila kami melawat kawasan itu pada 12.7.99, saya dapati ada tanah ditolak. Pada masa lawatan saya pada 1996, jalinan paip walaupun separuh terbenam dari tebing sungai hingga berhampiran kilang defendan, masih jelas kelihatan kerana semak-samun pada ketika itu, tidak setebal, lawatan kami pada 12.7.99.

As to the possibility of the pipe from the old rubber factory connecting at the pipe in question, PW2's evidence as recorded at p. 19 of the Appeal Record is as follows:

> Pada lawatan saya pada 27.11.96 saya ada pergi ke kilang getah yang ditunjukkan dalam pelan defendan – ID/D1. Saya pergi bersama dengan juruteknik En. Rahman. Didalam kawasan kilang, tiada kelihatan mesin-mesin pemerosesan getah dan orang dalam kilang itu, kilang itu kosong dan tidak digunakan. Tiada kilang yang lain disepanjang paip itu. Saya tidak lihat apa-apa sambungan dari kilang getah itu kepada paip tersebut. Walaupun paip itu separuh terbenam, saya boleh ikuti paip itu dari kilang ke tebing sungai.

The evidence of PW2 was corroborrated in material particulars by the evidence of PW3. At p. 21 of the Appeal Record, PW3's evidence recorded is as follows:

> Pada 27.11.96 jam 10.30 pagi, kami menyiasat tebing Sungai Melaka yang berhampiran dengan kilang defendan. Saya telah nampak muncung pair air warna susu. Saya telah menyiasat jalinan paip daripada muncung tersebut sehingga ke jalan yang berdekatan dengan kilang defendan. Lepas saya pergi ke pondok kawalan kilang dan meminta izin untuk menjalankan siasatan dalam kilang itu ... Selepas itu saya, PW2 dan En. Koh telah menyusuri paip dari kilang ke tebing sungai. Pasa masa menyusuri, saya nampak paip separuh terbenam. Saya pasti tiada sambungan lain ke paip itu. Dimuncung paip di tebing sungai, seorang pekerja kilang telah ambil sample air itu. Namanya adalah En. Low Kia Aik dan dia memberi sample itu kepada PW2.

At p. 22 to 23 of the Appeal Record PW3's evidence appears as follows:

> Saya juga ada pergi ke kilang getah yang berhampiran dengan kilang defendan. Kilang tidak beroperasi pada masa itu. Kilang itu sudah tutup. Saya periksa kilang ini dan saya dapati tiada air buangan dalam kilang ini dan tiada sambungan paip.

Considering the totality of the evidence as alluded to above I hold that the learned judge was right in accepting the evidence of PW2 and PW3. In my judgment, on the evidence available it is clear beyond reasonable doubt that at the time when PW2 and PW3 carried out their investigation at the appellant's factory, the factory was in operation and that the pipe which emanated from the appellant's factory ran continuously to the bank of the Malacca river, and was discharging effluent into the latter. It is also clear beyond reasonable doubt that there was no other pipe connected to the said pipe and that the pipe was not broken or faulty in any way to permit outside contaminants to seep through the said pipe thereby affecting the concentration and contents of the effluent running through the pipe.

Lastly, I have also considered appeal record in this case in its entirety but I could not find anything which raises reasonable doubt as to the guilt of appellant or which could be construed in favour of the appellant to entitle it to an acquittal or a retrial. In my judgment the learned Sessions Court judge was right in finding that the charge against the appellant was proven beyond reasonable doubt and finding it guilty as charged.

Sentence

Counsel for the appellant submitted that the fine imposed by the Sessions Court judge was excessive. He submitted that the appellant had taken remedial measures to cooperate with the State Government. He further submitted that the offence was not intended and that the management of the factory had issued instruction not to use the pipe.

The part of the Appeal Record relevant for the purpose of considering the sentence passed by the sessions court appears at pp. 46 to 47 as follows:

Rayuan:

(1) Pipe telah disealkan, selepas kejadian.

(2) The was not used intentionally.

(3) The effluent discharged was non-toxic – not as serious as the pollutants within 6-16 of the third schedule.

(4) This factory was part of the Denced Project, which was the project undertaken by the state level to clean up the Malacca river. This shows the sincerity of the defendant company in reducing the pollution of the river.

DPP:

(1) The law of the punishment was amended on 1.8.96 by virtue of Amendment Act A 953/96, whereby the fine was increased to RM100,000.00. Previously it was RM10,000.

(2) The offence was committed after the amendment. The amendment shows the seriousness of the offence.

(3) I would ask the court to weigh the social costs of this pollution of this very important river – the Malacca River.

Hukuman:

I concur with the learned DPP that the Malacca River is an important river in the State of Malacca and the increase in the fine from RM10,000/- to RM100,000/- under section 25(3) of the Environmental Quality Act 1974 reflects the seriousness of the offence. Pollution cases of this nature are serious as it affects public interest directly and the social costs are high.

The sample of the effluent discharged by the defendant's factory shows that it is more than a thousand times above the parameter limits set by law.

Yang demikian, defendan didendakan sebanyak RM75,000/- i/d 1 tahun.

I am satisfied that the sentenced passed by the learned Sessions Court judge was not grossly excessive, improper or unreasonable having regards to the nature of the offence and the circumstances of this case. It is clear that the element of public interest was foremost in his mind in assessing sentence. The offence with which the appellant was charged was a serious one. This is made clear by Parliament under s. 25(3) of the EQA which provides that the offence thereunder is punishable with a fine not exceeding RM100,000 or to imprisonment for a period not exceeding five years or both and to a further fine not exceeding RM1,000 a day for everyday that the offence continued. It is the plain duty of the court to impose a sentence that brings home the seriousness with which the law views the criminal conduct of the appellant. To my mind, this duty had been discharged properly by the learned sessions court judge. In the circumstances I do not find the sentence passed by him to be excessive, harsh or unreasonable.

In the result the conviction and sentence on the appellant is affirmed and the appeal is dismissed.