

IN THE COURT OF APPEAL OF MALAYSIA

(APPELLATE JURISDICTION)

COURT OF APPEAL CRIMINAL APPEAL NO. A-05-436-09/2024

PUBLIC PROSECUTOR

...APPELLANT

AND

TAN HOO ENG

... RESPONDENT

CORAM

COLLIN LAWRENCE SEQUERAH, JCA

NOORIN BINTI BADARUDDIN, JCA

MOHD RADZI BIN ABDUL HAMID, JCA

GROUND OF JUDGEMENT

A) INTRODUCTION

- [1] This appeal arises from a decision where the High Court allowed the Respondent's application to strike out all criminal charges proffered against her in the Sessions Court, Ipoh.



- [2] The Public Prosecutor (Appellant) being aggrieved by the decision, has filed an appeal to this court.

B) PERTINENT BACKGROUND FACTS

- [3] The salient and pertinent facts of the case arises out of a relationship between the Respondent and a Mr. Lim Keck Eng, both of whom are directors and equal shareholders of a company known as Blue Star Moulding Sdn Bhd ("BSM").
- [4] On 7th April 2014, Lim Keck Eng lodged a police report against the Respondent, accusing her of criminal breach of trust ("CBT") in relation to the company's funds. Following this report, the investigating officer, Inspector Muhammad Noorariff bin Zainuddin Shah ("Insp Ariff"), initiated an Anti-Money Laundering Act ("AMLA") investigation against the Respondent on 24th April 2014, leading to the freezing and seizure of the Respondent's assets, as well as those of her family members, including her son, Lim Hui Jin.
- [5] In retaliation, the Respondent filed a police report on 13th May 2014, alleging threats against her and her family by Lim Keck Eng and his associates and further accusing Lim Keck Eng of CBT. However, despite being referred for



investigation, the Respondent alleged that her report was never pursued by the authorities.

- [6] On 15th July 2015, the Respondent faced her first prosecution, which included 8 CBT charges amounting to RM16,544,328.11 and 21 AMLA charges totalling RM25,912,989.44. These charges were brought to her attention when she was summoned to the police station and arrested.
- [7] The Respondent alleged that she had fainted in the police station and was hospitalised, and bail imposed was set at RM2 million. The prosecution later preferred more charges on 18th July 2016, in what became the second prosecution, raising the amounts involved to RM26,270,022.72 for the CBT charges and RM36,660,439.44 for the AMLA charges.
- [8] During the trial, the Respondent alleged that Lim Keck Eng made certain admissions that weakened the case against her, which led the prosecution (Appellant) to request a discharge not amounting to an acquittal ("DNAA") on 6th October 2017. The sum involved in the charges were subsequently revised downward in the third prosecution, with RM4,128,264.57 for the CBT charges and RM 9,562,263.34 for the AMLA charges.



[9] Subsequently, further revisions and amendments to the 3rd prosecution, which is referred to as the fourth prosecution on 19th August 2019, resulted in even lower sums involved in the charges, ultimately leaving the Respondent facing significantly reduced amounts involved in the said charges compared to the sums involved in the original charges.

[10] As a whole, the Appellant's actions have led to substantial reductions in the sums involved in the charges, with a total of RM14,864,370.84 being dropped from the CBT charges and RM27,098,176.10 from the AMLA charges.

[11] As a result, the Respondent brought the instant application which has resulted in this appeal, based upon what she alleged was an unfair, tainted, and biased investigation conducted by the investigating officers against the Applicant, which violated the Applicant's rights under Article 5(1) of the Federal Constitution to a fair trial.

[12] The Respondent also alleged that from the chronology of events, there was a delay in a fair trial, which violated the Applicant's rights under Article 5(1) of the Federal Constitution.

[13] The Respondent further alleged that there was mala fide prosecution, oppression, and an abuse of the court



process and that she has suffered prejudice, resulting in a miscarriage of justice.

C) PARTIES SUBMISSIONS

[14] The summary of the respective parties positions are set as below.

Appellant

[15] The Appellant essentially submitted that the Learned High Court Judge ("HCJ") had erroneously invoked the Court's inherent powers in circumstances where there was no legal basis to do so.

[16] The reason, the Appellant submitted, was firstly, that the HCJ had entirely disregarded the decision of the Court of Appeal ("COA") in **Tan Hoo Eng v PP [2019] 1 LNS 893 (A-05-456-09/2018)**, which was subsequently affirmed by the COA in a review application filed by the Respondent (A-06-4-08/2019), wherein the allegations of bias, incomplete investigation, and violation of the Respondent's constitutional rights under Article 5 and 8 of the Federal Constitution were fully argued, considered and adjudicated by the COA in 2019.



[17] Secondly, the HCJ had relied on irrelevant and inadmissible evidence in exercising the Court's inherent power to set aside all the criminal charges against the Respondent in the Sessions Court which decision was based solely on the Notes of Proceedings from a separate civil High Court Suit, in contravention of section 33 and section 43 of the Evidence Act 1950.

[18] Thirdly, it was submitted that the HCJ had failed to appreciate that any defect, omission or failure to investigate on the part of the police cannot, in law, constitute a valid ground to strike out all the criminal charges against the Respondent.

Respondent

[19] The Respondent, by way of reply, submitted that the assertion of the Appellant that the decision in Tan Hoo Eng v PP (supra) which was subsequently affirmed by the COA in a review application filed by the Respondent (A-06-4-08/2019), wherein the allegations of bias, incomplete investigation, and violation of the Respondent's constitutional rights under Article 5 and 8 of the Federal Constitution were fully argued, considered and adjudicated by the COA in 2019, was untrue.



[20] The Respondent submitted that the first striking out decision was never heard on the merits and that it was struck out premised on the prosecution's ("Appellant's") Preliminary Objection ("PO") that the Order made by the learned JC in dismissing the Notice of Motion dated 30.8.2018 was not a final decision and therefore non-appealable. The appeal was therefore dismissed in limine.

[21] The Respondent also submitted that although the COA had made certain observations on matters which were part of the merits of the appeal in the Grounds of Judgement, that can only amount to obiter as the merits were not heard at all and thus not ratio decidendi and not a binding decision.

[22] Next, the Respondent submitted that section 40 to section 43 of the Evidence Act 1950 ("EA") in the submission of the Appellant is irrelevant because those sections involve "judgment" and not notes of proceedings.

[23] As a result, submitted the Respondent, the Appellant's submission contradicted the petition of appeal because in the submission, Appellant refers to "Notes of Proceedings" while in the Petition of Appeal (Ground 9 and 10), the complaint was regarding the "judgment" from the civil courts ("keputusan Mahkamah Tinggi dalam prosiding sivil") which do not fall under Section 40 to 43 EA.



[24] The Respondent submitted that the Appellant's reliance upon the case of Indian Supreme Court case of **Hema v State TR Insp of Police Madras [2013] AIR 2013** in advancing the proposition that a failure to investigate or an incomplete investigation by the police does not constitute a valid ground for acquittal, is based on a misunderstanding of the case before the High Court and has resulted in an erroneous interpretation and misapplication of Hema (supra) to the facts of this case.

[25] The Respondent pointed out that the complaint by the accused in Hema (supra) was that the genuine investigation (not unconstitutional investigation) was taken over by another investigative body (i.e. the CBI) and certain exhibits were not collected by the authorities or produced in Court by the prosecution, and hence the defective investigation.

[26] The Respondent submitted that the accused in Hema was not complaining that the investigation taken over by another investigative body was unfair, tainted, biased or one-sided but his complaint was that it was not permitted by law.

[27] The Respondent further submitted that in Hema, there were no allegations of unfair, one-sided, tainted, mala fide and biased investigations ("unconstitutional investigation") conducted by the authorities which vitiated



the accused's rights to fair investigation and fair trial under Article 20 and 21 of the Indian Constitution and hence, no proceedings to quash the charges were filed by the accused and the criminal trial proceeded until the end.

[28] The Respondent was also at pains to point out that the Indian Supreme Court in **Babubhai v State of Gujarat and Others (2010) 12 SCC 254** which held that an Investigating Officer cannot be permitted to conduct investigation in a tainted or biased manner was decided earlier than Hema and the decision in Hema did not depart from Babubhai and in fact reaffirmed the principles in Babubhai.

[29] The Respondent finally concluded that the submission by the Appellant was misconceived and misconstrued when they failed to distinguish between unconstitutional investigation and defective investigation. The HCJ was dealing with unconstitutional investigation which strikes at the heart of an accused's fundamental liberties, not merely incomplete or defective investigation.

D) OUR ANALYSIS

[30] After distilling the arguments of respective parties, we find that the main issues to be determined is firstly, whether the previous decision of the COA in Tan Hoo Eng v PP



(supra) binds the Respondent, secondly, the applicability of section 33 and 43 of the Evidence Act 1950 ("EA") and thirdly, whether defect, omission or failure to investigate on the part of the police constitute in law, a valid ground to strike out criminal charges.

[31] Each of these will be considered in turn.

- i) The previous decision of the COA in Tan Hoo Eng v PP (supra)

[32] Upon an examination of that decision, we found that the COA had allowed a preliminary objection and dismissed the appeal as being incompetent as it was not a matter which was appealable.

[33] Although the COA made certain observations in the course of dismissing the appeal, we find that these were matters which concerned the merits of the appeal and thus made by way of obiter.

[34] In the premises, we found that there were no merits to the submissions of the Appellant in respect of this point.



ii) Contravention of section 33 and section 43 of the Evidence Act 1950

[35] After having heard submissions, we find ourselves in agreement with the submission by the Respondent that the provisions of section 43 EA are inapplicable and irrelevant to the issue at hand.

[36] Section 43 reads:

“43. Judgments, etc., other than those mentioned in sections 40 to 42 when relevant Judgments, orders or decrees other than those mentioned in sections 40, 41 and 42 are irrelevant unless the existence of such judgment, order or decree is a fact in issue or is relevant under some other provision of this Act.”

[37] It is clear that the section deals with judgments, orders or decrees. Therefore, the section is irrelevant in the context of the issue in the present case which is concerned with whether notes of proceedings in another case can be relied upon in a striking out application in the instant case.

[38] We however, find that section 33 EA is relevant in the present proceedings in the context of the issue mentioned in the previous paragraph. Indeed, even upon a cursory perusal of the grounds of judgment by the HCJ, it becomes apparent that the sole reasoning for setting



aside all the criminal charges against the Respondent was premised entirely on the Notes of Evidence given by Insp Ariff in a separate civil High Court suit.

[39] That section reads:

"33. Relevancy of certain evidence for proving in subsequent proceeding the truth of facts therein stated.

Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which under the circumstances of the case the court considers unreasonable:

Provided that:

- (a) the proceeding was between the same parties or their representatives in interest;*
- (b) the adverse party in the first proceeding had the right and opportunity to cross-examine;*
- (c) the questions in issue were substantially the same in the first as in the second proceeding."*



[40] It is apparent from the section that evidence given by a witness in a judicial proceeding is only relevant provided certain conditions are satisfied, in particular the proviso's to the section.

[41] However, even before the proviso's are considered, it is pertinent to observe that at no point of time was it shown that the said Insp. Ariff was dead, untraceable, incapable of giving evidence, or that his presence could not be secured, as required under section 33 of the Evidence Act 1950.

[42] At the very outset therefore, the attempt to utilise the provisions of section 33 EA fails and on this ground alone, this appeal ought to be allowed. We have nonetheless ventured to examine whether any of the proviso's were applicable.

[43] With regard to the first proviso, the parties in the civil suit and the criminal proceedings are not the same. Whereas the civil suit was instituted by the Respondent's son, Lim Hui Jin against Insp Ariff, Insp Sopawan, the Deputy Public Prosecutor, the Commissioner of Police, and the Government of Malaysia, the criminal proceedings in the Sessions Court involved the Public Prosecutor and the Respondent as the accused.



[44] Therefore, the proviso in section 33(a) of the Evidence Act 1950 that the proceeding must be between the same parties or their representatives in interest is not satisfied in this case.

[45] As far as the second proviso in section 33 (b) is concerned, the Prosecution did not have the right or opportunity to cross-examine any of the witnesses, including Insp Ariff, in the civil suit. By way of contrast in the criminal proceedings, only one witness was called at the Prosecution stage. In these circumstances, the proviso under section 33 (b) that the adverse party had the opportunity to cross-examine the witness in the earlier proceeding was clearly not satisfied.

[46] With regard to the third proviso, the civil suit involved a claim in the tort of misfeasance in public office, whereas the criminal proceedings involved criminal charges under section 409 of the Penal Code and section 4 of the AMLA Act 2001. The issues that arose in the civil suit and the criminal action were therefore distinct and not identical. Under the circumstances, the proviso in section 33(c) is not satisfied.

[47] In any event, the finding of liability by the High Court against Insp Ariff and the Prosecution was subsequently set aside.



[48] Under all the circumstances therefore, the HCJ had erred in setting aside all the criminal charges against the Respondent based on the Notes of Evidence given by Insp Ariff in a separate civil High Court suit.

[49] Although section 33 EA was not referred to as a ground of appeal in the Petition of Appeal, we nonetheless allowed submissions to be made in respect thereof (despite objection by the Respondent), as it is a submission on a provision of law.

iii) Does defect, omission or failure to investigate on the part of the police constitute in law, a valid ground to strike out criminal charges

[50] It is not in dispute that the High Court possesses inherent powers to set aside, quash or stay any criminal charges brought against the Respondent. See **Ahmad Zubair Hj Murshid v PP [2014] 9 CLJ 289** and **PP v Mahiaddin Md Yasin [2024] 6 CLJ 836**.

[51] However, it is also trite law that the court exercises its striking out powers only in exceptional circumstances to prevent undue oppression and abuse of the process of the court.



[52] It is also apposite to make the observation that in both Ahmad Zubair (supra) and Mahiaddin Md Yasin (supra), the application to strike out the charges were made before the commencement of trial, unlike in the instant case.

[53] To place matters in perspective, the HCJ placed reliance on the decision of the Indian Supreme Court in **Babubhai v State of Gujarat and Others (2010) 12 SCC 254** which held that an Investigating Officer cannot be permitted to conduct investigation in a tainted or biased manner. The HCJ took the view that the police had failed to investigate the Respondent's police report, while choosing instead to focus solely on the report lodged by the complainant, Lim Keck Eng. The HCJ held that this selective investigation had resulted in multiple prosecutions that were unjust and legally flawed.

[54] According to the Appellant, there is no Malaysian authority which supports the proposition advanced by the HCJ, that a mere failure on the part of the Investigating Officer to investigate the Respondent's report empowers the Court to invoke its inherent jurisdiction to acquit and discharge an accused person from all criminal charges without the need to undergo a full trial.

[55] The Appellant then drew our attention to the position in other jurisdictions quite similar to our own.



Australia

[56] The position in Australia in respect of the duty and power of the police to investigate was stated by the Federal Court of Australia in **Hinchcliffe v CMR of Police of the Australian Federal Police [2001] 118 FCR 308**, as follows:

*"It is customary for Parliament and the courts to describe police powers and duties in only the most general terms...For example , **in the seminal case of Blackburn, the English Court of Appeal held that the duty owed at law by the Commissioner of Police of the Metropolis was a duty "to enforce the law of the land"..The Court of Appeal held that, although mandamus could lie to compel the performance of the duty, the commissioner had a very large discretion as to the manner in which the duty was performed. In an of-cited passage, the Master of the Rolls said at p.g 136:-***

Although the chief officers of police are answerable to the law. There are many fields in which they have a discretion with which the law will not interfere. For instance, it is for the Commissioner of Police of the Metropolis, or the chief constable, as the case may be, to decide in any particular case whether inquiries should be pursued, or whether an arrest



should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction on such a matter...

[35] Australian courts too have accepted that whilst a commissioner of police has a duty to enforce the law, he or she also has a broad discretion as to the manner in which he or she chooses to fulfil the responsibilities of office...The authorities do not support the proposition that the respondents owed a duty of the kind pleaded by Mr. and Mrs Hinchcliffe in their amended statement of claim (i.e a duty to investigate their complaint and to consider whether any person should be prosecuted in consequence of such investigation). As the respondents' counsel noted, there can be no duty to consider prosecution if there is no duty to undertake an investigation" (emphasis added)

[57] Similarly, in *O' Malley v Keelty*, Commissioner of the Australian Federal Police [2005] FCA 861, the Federal Court held as follows:

"[36] Nevertheless, a court cannot and should not compel a police force to investigate every breach of the law. There are many mysteries in this world. Some of them involve possible commissions of



crime. It is not, however, the responsibility of police officers to investigate all of them. Indeed, the role of the police is not to investigate, whether, at large, there has been a breach of the law. Rather their duty is to investigate whether there has been a breach of the law for which an identifiable person might be convicted if prosecuted. The requirement of the AFP Case Categorisation and Prioritisation Model are consistent with this view. I adhere to what I said in Scott at [69]

'...Except in the context of a coronial inquiry, one must allow that, if there appears to be no serious prospect of obtaining a conviction, it may be a quite reasonable decision, even in a very serious case, by the relevant police officer(s) not to expend resources or further resources on an investigation. Among other matters militating against the prospect of obtaining a conviction will often be the lapse of time since the alleged offence.' (emphasis added)

United Kingdom

[58] In both R v Chief Constable of Devon and Cornwall Constabulary, ex parte Central Electricity Generating Board [1981] 3 ALL ER 826 and R v Metropolitan Police Commissioner Ex Parte Blackburn [1968] 1



ALL ER 763, Lord Denning emphasised that it is of the first importance that the police must act on their own responsibility and discretion in deciding what action to take in any particular situation, without interference from the courts.

[59] The Court of Appeal in *R v Chief Constable of Devon and Cornwall Constabulary* (supra) in emphasising that every decision was guided by policy considerations stated as follows:

*“Notwithstanding all that I have said, I would not give any orders to the chief constable or his men. **It is of the first importance that the police should decide on their own responsibility what action should be taken in any particular situation...The decision of the chief constable not to intervene in this case was a policy decision with which I think the courts should not interfere.** All that I have done in this judgment is to give the “definitive legal mandate” which he sought. It should enable him to reconsider their position...”* (emphasis added)



India

[60] In the Indian Supreme Court case of Hema v State Tr Insp Of Police Madras (supra), it was held as follows:

'[10] It is also settled law that for certain defects in investigation, the accused cannot be acquitted. This aspect has been considered in various decision. In C. Muniappan and others vs State of Tamil Nadu, 2010 (9) SCC 567, the following discussion and conclusion are relevant which are as follows:-

*"55. There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the IO and whether due to such lapse any benefit should be given to the accused. **The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal...where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is legal obligation on the part of the court to examine the prosecution evidence deports such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of***



finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal court. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of the investigation.”

[11] In Dayal Singh and Others vs State of Uttaranchal 2012, while reiterating the principles rendered in C Muniappan (supra), this Court held thus:

“18...merely because PW3 and PW6 have failed to perform their duties in accordance with the requirement of law, and there has been some defect in the investigation, it will not be to the benefit of the accused persons to the extent that they would be entitled to an order of acquittal on this ground...

28. Dealing with cases of omission and commission, the Court in Paras Yadav v State of Bihar enunciated the principle, in conformity with the previous judgment, that if the lapse or omission is committed by the investigating agency, negligently or otherwise, the prosecution evidence is required to be examined de hors such omissions to find out whether the said evidence is reliable or not. The contaminated conduct of officials should not stand in the way of evaluating the evidence by the courts, otherwise the designed



mischief would be perpetuated and justice would be denied to the complainant party....

[13] It is clear that merely because of some defect in the investigation, lapse on the part of the I.O., it cannot be a ground for acquittal. Further, even if there had been negligence on the part of the investigating agency or omission etc, it is the obligation on the part of the Court to scrutinize the prosecution evidence de hors such lapses to find out whether the said evidence is reliable or not and whether such lapses affect the object of finding out the trial." (emphasis added)

[61] It is clear that the position across three jurisdictions other than our own is that the decision whether to investigate or not to investigate a police report falls squarely within the discretion of the police and that the Court ought to exercise judicial restraint and refrain from interfering with such discretionary decisions.

[62] The reason is also grounded in public policy considerations as much as anything else, since it would open the floodgates for every complainant or the Accused himself to approach the Court to compel the police to act in a particular manner.



[63] The Indian position as reflected in Hema (supra) is that a defective, incomplete or even biased investigation, does not ipso facto, justify an acquittal of the accused and the trial must proceed on the basis of admissible and cogent evidence adduced in court.

[64] It is also clear that allegations of investigative defects are matters to be raised and ventilated during the trial, the truth or otherwise of which will be elicited by way of examination in chief and cross-examination of the Investigating Officer and not by way of a preliminary application to strike out charges at the High Court.

[65] There is therefore a legal obligation upon the Trial Judge to assess the totality of the prosecution's evidence including the testimony of the Investigating Officer in order to determine whether such evidence is reliable or not.

Malaysia

[66] Closer to home, the Federal Court in Ahmad Zubair @ Ahmad Zubir Bin Hj Murshid v Public Prosecutor (supra) in quoting from the case of **Karpal Singh and Anor v PP [1991] 2 MLJ 544** said as follows:



*"[18] The then Supreme Court held that **by virtue of s 173 of CPC the Subordinate Courts has no power to strike out proceeding or acquit an accused person without hearing evidence for the prosecution.** However, it was further held that if any party feels that the charge and consequent proceedings are illegal on the face of the record, his remedy is to take up appropriate proceedings before the High Court to quash the charge."* (emphasis added)

[67] The Federal Court in Ahmad Zubair while accepting the position that the High Court has inherent power to set aside and quash or stay the charges permanently against the Appellant, nevertheless held as follows:

*"[26] Although we accept the forgoing principles stated above as the correct statement of the law, we must caution ourselves that **the inherent powers of the Court must be exercised in exceptional circumstances to prevent undue oppression and abuse of the process of the Court.** It should also be noted that **the inherent jurisdiction of the Court springs not from legislation but from the nature and constitution of the Court as a dispenser of justice!** (see: Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors [2013] 4 MLJ 35). As such we may hasten to add that **the inherent jurisdiction of the Court is***



therefore not as wide as it seems to be. Much depends on the facts and circumstances and clearly the Court cannot exercise its inherent jurisdiction in respect of any matter covered by specific provisions of the law or if its exercise would infringe any specific provisions of the law.” (emphasis added)

[68] In **PP v Datuk Wira SM Faisal SM Nasimuddin Kamal** [2019] 8 CLJ 827, it was held:

*“Section 173 of the CPC lays out the manner in which a summary trial should proceed commencing with the institution of the charges until its conclusion. **Paragraph (g) of s. 173 of the CPC cannot be read in isolation; it must be read together with the rest of the section, in particular para. (f) which outlines the duty of the court at the conclusion of the prosecution's case. A reading of the section, as a whole, envisages that when a charge is instituted, the process of a trial, if an accused pleads not guilty, is for evidence to be led in order to enable the court to evaluate the evidence in coming to a conclusion as to whether there is sufficient evidence to call for defence or to evaluate whether the prosecution has proved its case beyond reasonable doubt at the conclusion of the trial as the case may be. Therefore, the act of discharging an accused person charged by reason***



that the charge is groundless, could only be made after evidence is led and this necessitates that the trial commences first. The act of the Magistrate, in entertaining the application to strike out the charge pursuant to the NOA without hearing evidence from the prosecution, was misconceived in law.” (emphasis added)

[69] I would hasten to add that the only way perhaps that charges can be struck out after the commencement of a trial is by way of a letter of representation to the Attorney General’s Chamber’s (“AGC”) and the reply from the AGC which agrees that the charges be withdrawn.

The decision in Sundra Rajoo Nadarajah v Menteri Luar Negeri, Malaysia [2021] 6 CLJ 199 (“Sundra Rajoo”)

[70] The HCJ also relied substantially on the Federal Court case of Sundra Rajoo in which he held that that the apex court had emphasised that the Judiciary has a constitutional duty to review unlawful actions or inactions of the Executive and Legislative branches to ensure justice and fairness within the legal system.

[71] Having read that case we are of the view that the HCJ’s reliance upon Sundra Rajoo was misplaced. The issue in



Sundra Rajoo was whether the High Court in Judicial Review proceedings was seized with the jurisdiction and power to grant relief including to quash criminal proceedings.

[72] It also concerned the status of the legal immunity of Sundra Rajoo and the issue of waiver of that immunity.

[73] With the greatest of respect, we find that the HCJ relied solely on the Federal Court's findings in Sundra Rajoo that the exercise of the Public Prosecutor's discretionary powers under Article 145(3) of the Federal Constitution and section 376 of the Criminal Procedure Code may be subject to challenge by way of Judicial Review.

[74] We are of the view that the HCJ had failed to appreciate the full scope of the Federal Court's reasoning in Sundra Rajoo, in particular that prosecutorial discretion may only be challenged in a rare and exceptional cases. It is apparent that Sundra Rajoo establishes a two-step threshold that must be satisfied before the legality of a prosecution may even be questioned.

[75] It is apposite to reproduce the relevant excerpt from that case as follows:



*“[114] Based on the foregoing authorities, it can be surmised that **any challenge must therefore pass a two-step threshold which must be satisfied at the leave stage of any application for judicial review.***

*[115] Firstly, the burden of proof lies on the applicant. The applicant will have to show that he has a legal basis to challenge the decision of the AG/PP. This refers to the traditional grounds of judicial review and other bases implicitly recognised by the earlier judgments on this subject, **including but not limited to:-***

- (i) **illegality;***
- (ii) **procedural impropriety (eg, breach of the rules of natural justice)***
- (iii) **irrationality (considering irrelevant considerations or ignoring relevant and material considerations); and***
- (iv) **mala fides.***

*[116] Once the above legal grounds or any of them are clearly set out, **the applicant will then have to adduce compelling and prima facie proof that the decision or omission of the AG/PP falls within those grounds***



or any one of them...It is only after that threshold is crossed that the AG/PP bears the burden to justify his actions or inactions to the court.."

(emphasis added)

[76] As can be appreciated, the instant case does not concern any form of legal immunity, which was the central issue in Sundra Rajoo, nor did the Respondent's striking out application arise from a judicial review proceeding.

[77] We are therefore of the view that Sundra Rajoo can be distinguished and inapplicable to the matter at hand.

Other matters

[78] Quite apart from the above, we have also considered and deliberated on the other points and matters raised by the Respondent during the course of submissions and we have found no merit in them.

Decision

[79] In the premises and for the reasons advanced earlier, we hold that the provisions of section 33 Evidence Act operate to bar the admission of the notes of proceedings



in the civil trial as they do not fall under any of the exceptions (proviso's) stated.

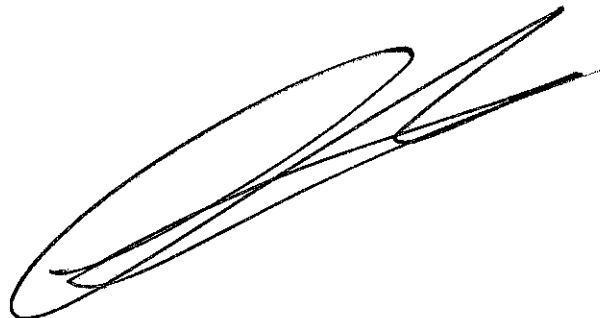
[80] Accordingly, we are of the unanimous view that the HCJ had erred in striking off the charges based upon the notes of proceedings in the civil case.

[81] In any event, we are of the view that the issue of bias and unfair investigation cannot be summarily determined via affidavit evidence and ought to have been subject to the rigours of examination of witnesses at a full trial.

[82] Since the trial had already commenced, we are of the view that the HCJ ought to have allowed the trial to proceed to its conclusion and not to strike out the charge or charges summarily.

[83] We therefore unanimously allow the appeal.

Dated : 3 August 2026



(COLLIN LAWRENCE SEQUERAH)

Judge
Court of Appeal, Malaysia



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