

A **PP v. DATO' SRI MOHD NAJIB HJ ABDUL RAZAK**
HIGH COURT MALAYA, KUALA LUMPUR
MOHD NAZLAN GHAZALI J
[CRIMINAL APPLICATION NO: WA-45-(2&3)-07-2018
& WA-45-5-08-2018]
B 15 FEBRUARY 2019

C **CRIMINAL LAW:** Charges – Criminal charges – Accused, former Prime Minister of Malaysia, charged with seven criminal charges relating to offences under Penal Code, Malaysian Anti-Corruption Commission Act 2009 and Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 – Charges initially filed at Sessions Court but later transferred to High Court by way of transfer certificates issued by prosecution – Application by prosecution to withdraw transfer certificates – Whether application ought to be allowed

D **CRIMINAL PROCEDURE:** Prosecution – Conduct of criminal prosecution – Transfer of charges – Application by prosecution to withdraw transfer certificates – Accused, former Prime Minister of Malaysia, charged with seven criminal charges – Charges initially filed at Sessions Court but later transferred to High Court by way of transfer certificates issued by prosecution – Whether withdrawal would result in fatal defect – Whether withdrawal could potentially vitiate and nullify entire proceedings – Whether withdrawal would mean proceedings ceased to exist – Criminal Procedure Code, ss. 254, 376(1), 417(1), (2) & 418A – Malaysian Anti-Corruption Commission Act 2009, s. 60
E

F **CRIMINAL PROCEDURE:** Public Prosecutor – Powers and functions – Application by prosecution to withdraw transfer certificates – Accused, former Prime Minister of Malaysia, charged with seven criminal charges – Charges initially filed at Sessions Court but later transferred to High Court by way of transfer certificates issued by prosecution – Powers of Public Prosecutor to institute, conduct or discontinue any proceedings for offence – Whether Public Prosecutor has power to withdraw transfer certificates issued previously – Federal Constitution, s. 145(3) – Criminal Procedure Code, ss. 254 & 376(1)
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H The accused, former Prime Minister of Malaysia, was charged with seven charges relating to offences under the Penal Code, the Malaysian Anti-Corruption Commission Act 2009 ('MACCA') and the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the seven charges'). The seven charges were registered under three different suits on two different dates. The first four charges were filed on 4 July 2018 while the three remaining charges were filed on 8 August 2018. On both dates, the charges were initially filed at the Sessions Court before they were transferred to the High Court, pursuant to the certificates issued by the Public Prosecutor ('PP') under s. 418A of the Criminal Procedure Code ('CPC') and s. 60 of the MACCA. In the present application, the
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Attorney General ('AG') sought to withdraw the above-mentioned transfer certificates on the grounds that (i) the abundance of caution in order to avoid any possible constitutional argument that the transfer effected by the AG, under s. 418A of the CPC and s. 60 of the MACCA, was a nullity in view of the recent decisions of the Federal Court in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat* ('*Semenyih Jaya*') and *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak* ('*Indira Gandhi*'); (ii) upon the withdrawal, the seven charges would revert to the Sessions Court, where they originated from, and the prosecution would seek to have the charges mentioned at the Sessions Court and immediately apply under s. 417 of the CPC to have them transferred to this High Court; (iii) this High Court acted *suo motu* (on its own motion) under s. 417(2) of the CPC to order the transfer of the seven charges from the Sessions Court to this High Court; and (iv) these procedural steps were necessary to prevent any unwarranted postponement of the trial. Resisting the application, the accused argued that (i) the withdrawal would result in a fatal defect which could potentially vitiate and nullify the entire proceeding; (ii) the withdrawal would mean that the proceedings ceased to exist and there was nothing for this High Court to order to transfer and if the validity of s. 418A of the CPC and s. 60 of the MACCA was doubtful, so would the act of withdrawing the certificates; (iii) the whole process of a mention at the Sessions Court and a fresh registration at the High Court Registry to determine the High Court to try the seven charges must be followed; and (iv) the defence reserved the right to object should the seven charges eventually be registered at the same High Court since they should be considered as a new case that would warrant a High Court Judge who would not have adjudicated on the matter previously.

Held (allowing application):

- (1) The court would answer the first question with a resounding 'yes'. It is not denied that s. 418A of the CPC and s. 60 of the MACCA do not specify the power of withdrawal. However, the PP is conferred with wide powers, under art. 145(3) of the Federal Constitution ('FC'), '... to institute, conduct or discontinue any proceedings for an offence ...'. Furthermore, the PP shall have control and direction of all criminal proceedings under ss. 376(1) of the CPC while under s. 254 of the CPC, the PP may discontinue proceedings at any stage of the trial. If the PP could decide to discontinue an actual prosecution, there is no legitimate basis to deny that he has a similar authority to withdraw the certificates under s. 418A of the CPC and s. 60 of the MACCA. (paras 18, 21, 23 & 24)
- (2) Article 145 of the FC gives rise to two important observations. First, it could not be denied that s. 418A of the CPC and s. 60 of the MACCA are well-supported by the express provision of art. 145(3A) of the FC. However, the PP is, at the same time, entitled to take the view that the constitutionality of s. 418A of the CPC and s. 60 of the MACCA may

- A still be challenged. Secondly, art. 145(3A) of the FC clearly reinforces the existence of the wide powers at the disposal of the PP in deciding on the venue and the court in respect of any criminal prosecution. By necessary implication, this overarching remit of the PP's constitutional authority must include the ability to withdraw the issuance of any
- B transfer certificates. A decision to withdraw is also a form of determination of which court any criminal proceedings should be instituted or transferred to. In other words, a withdrawal of the transfer certificates is also an exercise of the constitutional authority of the PP within the contemplation of art. 145(3) of the FC. Therefore, in respect
- C of the seven charges, the PP is empowered to effect the withdrawal of the transfer certificates. (paras 25, 27-29 & 32)
- (3) On the validity of the concerns expressed by the PP on the risk of s. 418A of the CPC and s. 60 of the MACCA, no view could be held as constitutional in light of developments in constitutional law in Malaysia post *Semenyih Jaya* and *Indira Gandhi*. There was no judicial
- D determination that these statutory provisions were unconstitutional by reason of *Semenyih Jaya* and *Indira Gandhi*. It could not be fairly suggested that the proposed change to the transfer status was being
- E intently pursued by the PP other than in good faith. The wide powers on the exercise of prosecutorial discretion, including in respect of the right to direct the venue or court for prosecution, and particularly mere withdrawal of the transfer certificates issued, would not cause
- F ramifications which the accused implied to be serious and setting an unhealthy precedent to the administration of the courts. (paras 32-35)
- (4) Under s. 418B of the CPC and s. 60(5) of the MACCA, the certificate for transfer under both s. 418A of the CPC and s. 60 of the MACCA could only be validly issued by the PP in cases where the accused has not pleaded guilty and where no evidence against the accused has been adduced. The trial for the three suits containing the seven charges had
- G not commenced when the transfer certificates were issued. Neither had the trial started when the PP now applied to have the same certificates withdrawn. (paras 36-36)
- (5) The power of the High Court to transfer cases is encapsulated in s. 417 of the CPC. There are three key aspects to the application of this provision, namely (i) the parties who could make the application for the transfer, as stated in s. 417(2) ('the first aspect'); (ii) the basis for the transfer, as specified in sub-s. 1(a) to (e) ('the second aspect'); and (iii) the type or order to be made, as set out in sub-s. (1)(aa) to (cc) ('the third aspect'). (para 38)
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- I (6) On the first aspect, it is clear that the power to transfer under s. 417 of the CPC is vested in the High Court. In all cases, the transfer order could only be made by the High Court if it is satisfied that the basis for a transfer has been established. Significantly, the language of s. 417(2) of

the CPC is devoid of any measure of ambiguity. It expressly and specifically confers on the High Court the power to order a transfer, even on its own initiative, without an application made by either the accused or the prosecution. On the second aspect, the seven charges should continue to be tried by this High Court as it would be expedient for the ends of justice under s. 417(1)(e) of the CPC. On the third aspect, the court invoked s. 417(1)(cc) where the order of transfer is for the seven charges to be transferred from the Sessions Court to this High Court. Any assertion that the transfer of the seven charges, from the Sessions Court back to a particular and in fact, the same High Court, which made the same transfer order, to be unlawfully, illegal or irregular, was wholly unjustified and without merit. (paras 40, 41, 44, 52 & 71)

(7) The contention of the defence that when the certificates were withdrawn, there were no proceedings or matter for this High Court to exercise its jurisdiction to transfer, was flawed. The charges remained in existence and were residing at the Sessions Court, it being an automatic consequence of the withdrawal of the certificates. The fact that the case, or the charges, were registered at the High Court did not mean that the High Court had no jurisdiction to hear a transfer application or make a transfer order. Obviously, only upon an order for transfer is made by the High Court would the cases be transferred for registration at the High Court. There was absolutely no basis to contend that the withdrawal of the certificates would destroy entirely the proceedings at the High Court, even going back to since the point of time when they were first transferred. Therefore, the withdrawal of the transfer certificates, under s. 418A of the CPC and s. 60 of the MACCA, was effective only prospectively and had no effect on the proceedings on the seven charges since 4 July 2018, before the withdrawal, which remained valid. (paras 75-77, 81 & 84)

(8) The scenario painted by the accused was unwarranted. It was absolutely irrelevant and out of context for the defence to premise its various contentions on the nullity/constitutionality argument. The AG did not submit that s. 418A of the CPC or s. 60 of the MACCA to be unconstitutional. Emphasis was made on the need to act purely out of an abundance of caution. Neither was the issue of the constitutionality of s. 418A of the CPC or s. 60 of the MACCA before this court. The prosecution merely wanted the risk of challenge, given the latest developments in constitutional law in the country, be removed and the start and progress of this important trial of great public interest to not be unnecessarily interrupted. (paras 88 & 89)

- A (9) In light of the information made known by the AG, this court exercised its direction, on its own motion under s. 417(2) of the CPC, to invoke s. 417(1), and order the transfer of the seven charges from the Sessions Court back to this High Court in accordance with s. 417(1)(cc). The seven charges are to continue from the point of the withdrawal, with the
- B proceedings prior to the withdrawal remaining valid. (paras 99 & 100)

Case(s) referred to:

Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145 FC (*refd*)

PP v. Dato' Yap Peng [1987] 1 LNS 28 HC (*refd*)

- C *PP v. Fan Yew Teng* [1973] 2 MLJ 1 (*refd*)

PP v. Lim Shui Wang & Ors [1979] 1 MLJ 65 (*refd*)

Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC (*refd*)

Legislation referred to:

- D Courts of Judicature Act 1964, s. 25(2), Schedule item 12
Criminal Procedure Code, ss. 51A, 254, 376(1), 417(1)(a), (b), (c), (d), (e), (aa), (bb), (cc), (2), 418A, 418B
Federal Constitution, arts. 121(1), 145(3), (3A)
Interpretation Acts 1948 and 1967, s. 40(1)
Malaysian Anti-Corruption Commission Act 2009, s. 60(5)
- E *For the prosecution - Tommy Thomas, Sithambaram Vairavan, Manoj Kurup, Suhaimi Ibrahim, Donald Joseph Franklin, Muhammad Saifuddin Hashim Musaimi, Budiman Lutfi Mohamed, Mohd Ashrof Adrin Kamarul & Muhammad Izzat Fauzan; DPPs*
For the accused - Muhammad Shafee Abdullah, Harvinderjit Singh, Farhan Read, Wan Aizuddin Wan Mohammed, Rahmat Hazlan dan Shahira Hanafiah; M/s Shafee & Co
- F *Reported by Najib Tamby*

JUDGMENT**Mohd Nazlan Ghazali J:**

- G **Introduction**

[1] This is an oral application by the Attorney General, as the Public Prosecutor to withdraw the certificates issued under s. 418A of the Criminal Procedure Code ("the CPC") and s. 60 of the Malaysian Anti-Corruption Commission Act 2009 ("the MACC Act") that were previously issued by the Public Prosecutor to transfer to the High Court the charges against the accused that had been first filed in the Sessions Court.

- H [2] At the conclusion of the hearing, I allowed the application and exercise my discretion under s. 417(2) of the CPC to order the transfer of the charges back to this High Court. This judgment sets out the full reasons for my decision.
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Key Background Facts

[3] The prosecution had preferred seven criminal charges against the accused concerning offences under the Penal Code, the MACC Act and the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (“the AMLATFA”) which have been registered under three different suits. For the purposes of this judgment it is sufficient for the subject-matter to be referred to collectively as the seven charges.

[4] The seven charges were registered on two different dates, about one month apart. Four charges for offences under the Penal Code and the Malaysian Anti-Corruption Commission Act 2009 were filed on 4 July 2018, and the remainder three charges, all for offences under the AMLATFA were filed subsequently on 8 August 2018, when all seven charges were ordered to be jointly tried. The accused pleaded not guilty to all the charges and asked to be tried. On 10 August 2018, this court fixed the trial of the seven charges to commence on 12 February 2019 and to continue until 29 March 2019.

[5] On both dates of 4 July 2018 and 8 August 2018, the charges had been initially filed at the Sessions Court; but these were immediately transferred on the same respective dates to the High Court pursuant to the certificates issued by the Public Prosecutor under s. 418A of the CPC and s. 60 of the MACC Act.

[6] By a letter dated 14 January 2019 the prosecution, led by solicitor general III, informed the court that it wished to make amendments to some of the existing seven charges. In another letter of 23 January 2019, the prosecution notified that it intended to prefer additional charges against the accused. On 28 January 2019, this court allowed the amendments which were not objected to by the defence. Three new additional charges under AMLATFA were also read out to the accused who pleaded not guilty and asked to be tried.

[7] When the prosecution asked for these three new charges to be jointly tried with the existing seven, counsel for the accused asked this court to allow the defence a few days to consider whether or not the defence had any objection to the joinder. I allowed the request, and fixed 7 February 2019, just after Chinese New Year holidays, to hear submissions of parties should there be any objection to the proposed joint trial.

[8] On 7 February 2019, the Attorney General, leading the prosecution however informed the court that a ruling on the issue of joinder would not be necessary as he was proposing not to proceed on the three new charges and asked for an order that the accused be granted a discharge not amounting to an acquittal on these three charges, since the prosecution would file these charges before the Sessions Court instead. The defence did not object. I then ordered the DNAA of the accused on these three new charges.

A [9] The Attorney General then raised another matter which immediately became contentious. The Attorney General wished to withdraw the transfer certificates that had been previously issued under s. 418A of the CPC and s. 60 of the MACC Act to transfer the seven charges to the High Court on 4 July 2018 and 8 August 2018.

B [10] In essence, the withdrawal was stated by the Attorney General to be done out of abundance of caution in order to avoid any possible constitutional argument that the transfer effected by the Attorney General under s. 418A of the CPC and s. 60 of the MACC Act is a nullity in view of the recent decisions of the Federal Court in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526 and *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145.

D [11] The Attorney General apprised the court that upon the withdrawal, the cases on the seven charges would revert to the Sessions Court where they originated. The prosecution would seek to have the charges mentioned at the Sessions Court and then immediately apply under s. 417 to have them transferred back to this High Court.

E [12] Alternatively, the Attorney General suggested that this High Court act *suo motu* (Latin for on its own motion) under s. 417(2) of the CPC to order the transfer of the seven charges from the Sessions Court back to this High Court.

F [13] The Attorney General highlighted that these procedural steps would be necessary to prevent any unwarranted postponement of the trial. This is especially since that there has been compliance with s. 51A of the CPC, 26 witness statements had been supplied to the defence, and subpoenas had all been served on the witnesses in preparation for trial that was to commence on 12 February 2019.

The Objection By The Defence

G [14] At the hearing, the defence argued more on the consequences of the withdrawal in that the move by the Attorney General would result in a fatal defect that could potentially vitiate and nullify the entire proceedings. In particular it was submitted that the withdrawal means that the proceedings ceased to exist and there was therefore nothing for this High Court to order to transfer. If the validity of s. 418A and s. 60 is doubtful, so would the act of withdrawing the certificates.

I [15] Further, it was contended that even the status of the proceedings, including the concluded hearings on the applications for the gag order, the appointment letter of the prosecutor and the request for discovery of documents, and indeed the entire proceedings since the transfer to the High Court, all of which proceeded at the High Court on the basis of the previous certificates, could all now be at risk of being vitiated.

[16] The lead counsel pointed out that once withdrawn, the whole process of a mention at the Sessions Court and a fresh registration at the High Court Registry to determine the High Court to try the seven charges must be followed. The defence would also reserve the right to object should the seven charges eventually be registered in the same High Court since these should be considered as a new case that would warrant a High Court Judge who would not have adjudicated on the matter previously.

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Evaluation And Findings Of This Court

[17] The matter on the withdrawal of the transfer certificates, as I mentioned earlier, was raised by the prosecution only on 7 February 2019 itself, without prior notice. The prosecution and the defence submitted orally on the points of contention as I have outlined earlier. There were no written submissions. The lead counsel for the defence did suggest that the court allow more time for parties to research on the matter and to submit on another day. After having considered oral arguments, I chose to decide on the matter, for the reasons that will now follow.

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The Power Of The AG To Withdraw

[18] The first issue of importance is whether the Public Prosecutor has the power to withdraw the transfer certificates which he had personally as the Public Prosecutor previously issued in respect of the seven charges. I would readily answer this question with a resounding 'Yes'. It is not denied that the two statutory provisions do not specify the power of withdrawal.

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[19] Section 418A of the CPC reads as follows:

418A. Trials by High Court on a certificate by the Public Prosecutor

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(1) Notwithstanding the provisions of section 417 and subject to section 418B, the Public Prosecutor may in any particular case triable by a criminal Court subordinate to the High Court issue a certificate specifying the High Court in which the proceedings are to be instituted or transferred and requiring that the accused person be caused to appear or be produced before such High Court.

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(2) The power of the Public Prosecutor under subsection (1) shall be exercised by him personally.

(3) The certificate of the Public Prosecutor issued under subsection (1) shall be tendered to the subordinate Court before which the case is triable whereupon the Court shall transfer the case to the High Court specified in the certificate and cause the accused person to appear or be brought before such Court as soon as may be practicable.

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(4) When the accused person appears or is brought before the High Court in accordance with subsection (3), the High Court shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX.

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A [20] Section 60 of the MACC Act similarly provides as follows:

60. Trial by High Court on a certificate by the Public Prosecutor

- B (1) Notwithstanding the provision of section 417 of the Criminal Procedure Code and subject to subsection (5), the Public Prosecutor may in any particular case triable in the Sessions Court for an offence under this Act, issue a certificate specifying the High Court in which the proceedings are to be instituted or transferred and requiring that the accused person be caused to appear or be produced before such High Court.
- C (2) The power of the Public Prosecutor under subsection (1) shall be exercised by him personally.
- D (3) The certificate of the Public Prosecutor issued under subsection (1) shall be tendered to the sessions court whereupon the sessions court shall transfer the case to the High Court specified in the certificate and cause the accused person to appear or be brought before such court as soon as may be practicable.
- E (4) When the accused person appears or is brought before the High Court in accordance with subsection (3), the High Court shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX of the Criminal Procedure Code.
- (5) This section shall apply to all cases before the Sessions Court to try offences under this Act, whether the proceedings are instituted before or after the coming into operation of this Act, provided that the accused person has not pleaded guilty and no evidence in respect of the case against him has begun to be adduced.

F [21] However, it is equally clear that if the Public Prosecutor could decide to discontinue an actual prosecution, there is no legitimate basis to deny that he has a similar authority to withdraw the s. 418A/s. 60 certificate.

G [22] In fact, this position was perhaps not surprisingly not seriously challenged by the accused at the hearing, where counsel submitted more on the arguments on the risk, consequential to the withdrawal, of the entire proceedings especially the claim that the trial, if held, would be defective and could be nullified.

H [23] Although not specifically highlighted at the hearing because it is trite, I am not unmindful of the well-entrenched position in our constitutional law of the wide powers conferred on the Public Prosecutor by art. 145(3) of the Federal Constitution which reads:

- I (3) The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.

[24] Further it is no less settled that the Public Prosecutor shall have control and direction of all criminal proceedings under the CPC pursuant to s. 376(1). And under s. 254 of the CPC, the Public Prosecutor may discontinue proceedings at any stage of the trial.

[25] In contrast, in the instant case the Public Prosecutor is only asking for the withdrawal, not of the proceedings, but merely of the certificates of transfer.

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[26] Article 145(3A) of the Federal Constitution makes the position crystal clear. Thus:

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(3A) Federal law may confer on the Attorney General power to determine the courts in which or the venue at which any proceedings which he has power under Clause (3) to institute shall be instituted or to which such proceedings shall be transferred.

[27] For present purposes, the provisions of art. 145 as set out above give rise to two important observations. First, it cannot be denied that s. 418A of the CPC and s. 60 of the MACC Act are well-supported by the express provision of art. 145(3A). However the Public Prosecutor is at the same time entitled to take the view that the constitutionality of s. 418A of the CPC and s. 60 of the MACC Act may still be challenged.

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[28] Secondly, art. 145(3A) clearly reinforces the existence of the wide powers at the disposal of the Public Prosecutor in deciding on the venue and the court in respect of any criminal prosecution. By necessary implication, surely, this overarching remit of the Public Prosecutor's constitutional authority must include the ability to withdraw the issuance of any transfer certificates.

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[29] A decision to withdraw is also a form of a determination of which court any criminal proceedings should be instituted or transferred to. In other words, a withdrawal of the transfer certificates is also an exercise of the constitutional authority of the Public Prosecutor within the contemplation of art. 145(3A) of the Federal Constitution.

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[30] After all, s. 40(1) of the Interpretation Acts 1948 and 1967 further provide:

(1) Where a written law confers a power on any person to do or enforce the doing of any act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.

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[31] As such, s. 418A of the CPC and s. 60 of the MACC Act should also be read to include the authority of the Public Prosecutor to withdraw the certificates previously issued.

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[32] In respect of the existing seven charges, in my view the Public Prosecutor is thus empowered to effect the withdrawal of the transfer certificates. I profess for present purposes no view on the validity of the concerns expressed by the Public Prosecutor on the risk of s. 418A of the CPC and s. 60 of the MACC Act be held as unconstitutional in light of developments in constitutional law in this country post *Semenyih Jaya* and *Indira Gandhi*.

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A [33] There is of course no judicial determination that these statutory provisions are unconstitutional by reason of *Semenyih Jaya* and *Indira Gandhi*. And I do not think it could be fairly suggested that the proposed change to the transfer status is being intently pursued by the Public Prosecutor other than in good faith.

B [34] I do not think that this wide powers on the exercise of prosecutorial discretion, including in respect of the right to direct the venue or court for prosecution, and particularly merely of withdrawing the certificates previously issued would cause ramifications which the lead counsel for the accused implied to be serious and setting an unhealthy precedent to the administration of the courts.

C [35] For it is important to note that under s. 418B of the CPC and s. 60(5) of the MACC Act, the certificate for transfer under both s. 418A and s. 60 can only validly be issued by the Public Prosecutor in cases where the accused has not pleaded guilty and where no evidence against the accused has been adduced (incidentally there is no such limitation for a transfer under s. 417, as made plain in sub-s. (4)).

D [36] In other words, in respect of the latter, the trial has not commenced with any witness testimony. This is exactly the situation in the instant proceeding before me. The trial for the three suits containing the seven charges have not commenced when the s. 418A and the s. 60 transfer certificates were issued. Neither, crucially for present purposes, has the trial started when the Public Prosecutor now applies to have the same certificates withdrawn.

E [37] The fears that the Public Prosecutor having the power to effect withdrawals of the transfer certificates would potentially unjustifiably lead to interruption or in any fashion interfere with the trial proceedings in the High Court, thus undermining the administration of justice is therefore entirely misconceived.

F [38] *Exercise Of Discretion Under S. 417(2) Of The CPC On The Own Initiative Of The High Court*

G [39] The power of the High Court to transfer cases is encapsulated in s. 417 of the CPC. There are, for present purposes, three key aspects to the application of this provision. The first is the parties who could make the application for the transfer, as stated in s. 417(2). The second is the basis for the transfer, which is specified in sub-s. (1)(a) to (e). The third is the type of order to be made, as set out in sub-s. (1)(aa) to (cc).

H [40] For clarity, it is apposite that s. 417 of the CPC be stated in full, as follows:

I 417. High Court's power to transfer cases

(1) Whenever it is made to appear to the High Court:

- (a) that a fair and impartial trial cannot be had in any criminal Court subordinate to it; A
 - (b) that some question of law of unusual difficulty is likely to arise;
 - (c) that a view of the place in or near which any offence has been committed may be required for the satisfactory trial of the same; B
 - (d) that an order under this section will tend to the general convenience of the parties or witnesses; or
 - (e) that such an order is expedient for the ends of justice, or is required by any provision of this Code, B
- it may order: C
- (aa) that any offence be tried by any Court not empowered under sections 121 to 126 but in other respects competent to try such offence;
 - (bb) that any particular case or class of cases be transferred from a criminal Court subordinate to it to any other such criminal Court of equal or superior jurisdiction; or D
 - (cc) that any particular criminal case be transferred to and tried before the High Court.
- (2) The High Court may make an order under subsection (1) either on the report of the lower Court, or on the application of the Public Prosecutor or the accused person, or on its own initiative. E
- (3) (a) When an order is made under paragraph (1)(cc) the lower Court before which the trial of the offence against the accused person is pending shall cause the accused person to appear or be brought before the High Court on the date specified in the said order or as soon as may be practicable if no such date is specified. F
- (b) When the accused person appears or is brought before the High Court in accordance with paragraph (a), it shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX. G
- (4) The Court to which a case is transferred under this section may act on the evidence already recorded in a trial or partly so recorded and partly recorded by itself, or it may re-summon the witnesses and re-commence the trial:
- Provided that in any case so transferred the Public Prosecutor or the accused person may, when the Court to which the case is transferred commences its proceedings, apply that the witnesses or any of them be re-summoned and re-heard. H
- [40]** On the first aspect concerning the party making the application for transfer, it is clear that the power to transfer under s. 417 of the CPC is vested in the High Court. In all cases, the transfer order can only be made by the High Court, if it is satisfied that the basis for a transfer has been established. I

A And significantly, the language of s. 417(2) is devoid of any measure of ambiguity. It expressly and specifically confers on the High Court the power to order a transfer even on its own initiative, without an application be made by either the accused or the prosecution.

B [41] The question would be under what circumstances should this power by the court to order a transfer on its own initiative be exercised? In my view, exceptionally. For in the great majority of cases the application to transfer would be initiated by the accused or by the prosecution. It would not be common to expect the High Court to initiate a transfer.

C [42] But it is manifest that the law in the CPC confers on the High Court the power to order a transfer under s. 417(1) on the basis of its own motion or initiative. This is not so unlike the revisionary powers of the High Court under the CPC and especially the Courts of Judicature Act 1964, where the High Court may act on its own motion and call for the record of proceedings in the subordinate courts.

D [43] In the instant case before me the matter on the need by the Public Prosecutor to withdraw the certificates on the abundance of caution was brought to my attention by the Public Prosecutor in the instant proceeding. There is therefore no necessity for me to call for any record of background reference on the matter in view of the fact that the seven charges had been transferred to this very court by early August of last year. This was how this High Court got notice of the matter that called for the exercise of its discretion to initiate a transfer on its own motion under s. 417(2).

The Basis For The Transfer

F [44] On the second aspect concerning whether the basis for a transfer has been made out, in my view, the seven charges should continue to be tried by this High Court on the basis that it would be expedient for the ends of justice under s. 417(1)(e) given the following considerations.

G [45] First, the seven charges were registered on 4 July 2018 and 8 August 2018 and since then this High Court has heard three contested applications in the course of the following months, all of which are pending appeal. A number of case management sessions has taken place, and various issues had been raised by parties with a view to their preparation for trial which had been fixed to begin on 12 February 2019. In other words, this High Court had already been assigned to try this case and is the only one with a substantive history *vis-à-vis* the seven charges.

H [46] Secondly, charges in other prosecution against the accused have been transferred to the High Court under the same s. 417(1)(e) on the application of the accused himself. To be clear, I do not think a transfer to the High Court
I *per se* is objectionable to the accused in the instant case either.

[47] Thirdly, this case has also generated much public interest locally as well as internationally. A

[48] Fourthly, the issuance of the s. 418A and s. 60 certificates were never objected to by the accused when the accused was first charged.

[49] Fifthly, and this is especially crucial, there is no prejudice or injustice caused to the defence of the accused. In essence and substance, there are no changes to this proceeding at all, other than merely on the basis of the transfer of the case (for example, either s. 417 or s. 418A). B

[50] Sixthly, parties should already be ready for the commencement of trial which ought to have begun less than one week after the instant proceeding. The prosecution has complied with s. 51A on the delivery of documents they intend to tender, all applications have been heard, and date of the trial to start on 12 February 2019 was fixed some seven months ago. C

[51] As such, given the above considerations, which I consider to be more than satisfy the requirement of being “expedient for the ends of justice” under s. 417(1)(e) of the CPC, a transfer to the High Court would be more than justified. It is also because of these same considerations which I find especially and exceptionally compelling that I decided to exercise my discretion on my own initiative in accordance with s. 417(2) to order the transfer of the seven charges as registered under the three cases from the Sessions Court (given the withdrawal of the s. 418A/s. 60 certificates and the reversion of the seven charges to the Sessions Court) back to this High Court under s. 417(1)(cc). D E

Transfer To The High Court, And To A Specific High Court F

[52] The third aspect of the application of s. 417 is in relation to the order to be made. In this case, as mentioned, I invoked s. 417(1)(cc) where the order of transfer is for the seven charges to be transferred from the Sessions Court to this High Court. Section 417(1)(cc) of course plainly states that the order can be on any particular criminal case to be transferred to and tried before the High Court. My order is for the transfer to the High Court. It therefore falls within limb (cc) of s. 417(1). G

[53] Not unexpectedly, the defence argued at the hearing in resisting the withdrawal of the transfer certificates by the Public Prosecutor that upon the reversion of the seven charges to the Sessions Court, any subsequent transfer process back to the High Court cannot be specifically directed to a particular High Court. H

[54] This is because, according to the lead counsel, that any new matter for distribution to the High Court in Kuala Lumpur must be done pursuant to the registration system of the High Court Registry of the relevant divisions in Kuala Lumpur. In other words, it would not be legitimate for me to order I

A the transfer of the seven charges back to the same High Court without going through the registration system since the seven charges could be registered in any one of the four High Courts in the Criminal Division in Kuala Lumpur.

B [55] There is some merit in that argument, in a more general context. But in the instant case, I would consider it unsustainable. I say so for a number of reasons. First, limb (cc) of s. 417(1) of the CPC contains no such restriction. Secondly, whilst it is true that it would not ordinarily be automatic that a High Court could order the transfer from a subordinate court to any particular High Court that is due to the administrative process of registration. There are otherwise no stipulations one way or the other in the CPC.

C [56] I agree any application for transfers from the Sessions Court must follow certain formalities. Any departure does not augur well for the due administration of justice. Thus any application for transfer to the High Court, if allowed by the High Court hearing that transfer application, must be referred back to the Sessions Court where the charges were originally filed, in order to have the transfer from the Sessions Court to the High Court formalised.

D [57] Upon the Sessions Court being apprised of the order of the transfer to the High Court, the suit containing the charges will have to be registered at the High Court Registry which registration system will determine the specific High Court that will try the charges.

E [58] However – and this is the crucial point – such a process would be applicable for transfer applications made by the prosecution or the accused under s. 417(2). It is not automatically applicable to situations like the present where the transfer is moved by the initiative of the High Court itself under the same s. 417(2). When the High Court decides to exercise its discretion to invoke s. 417(2) it is unnecessary that the formalities of going through the registration routing system be followed, provided that the requirements of s. 417 is adhered to, particularly the ground for the transfer as stated under s. 417(1)(a) to (e), bearing in mind that the court would exercise this power on its own motion only exceptionally.

F [59] And this has everything to do with the reasons why the discretion is exercised to order a transfer in the first place. As mentioned earlier, in most cases an application by the prosecution or the accused would be sufficient. But in certain exceptional circumstances it would not necessarily be. The instant case is one such situation, for the compelling considerations I have outlined earlier.

G [60] Furthermore, in the instant case, if the seven charges which reverted to the Sessions Court upon the withdrawal of the certificates be pursued by the prosecution by way of an application by the prosecution for a transfer to

the High Court, the seven charges might end up in a different High Court. This in my view does not accord with the ends of justice under s. 417(1)(e) for the reasons I have earlier set out, as to why this High Court should continue trying the seven charges.

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[61] If I do not exercise my discretion, the seven charges could be registered in any one of the other three High Court, and where new trial dates would have to be fixed by the High Court Judge depending on the available dates of that High Court, despite the original trial dates in February and March 2019 having been fixed several months back in early August 2018. Such state of affairs is plainly unsatisfactory and patently inconsistent with the ends of justice considering the circumstances of the case.

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[62] How can it be when the prosecution have already delivered the s. 51A documents and certain witness statements to the accused, as well as issued summons for witnesses to attend trial as scheduled? More so, crucially, when no prejudice or injustice could be shown to have been occasioned to the accused by this transfer order initiated by the High Court.

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[63] Neither do the case law authorities stipulate that a transfer cannot be done to a specific High Court. If anything, it is quite the reverse and weakens the contention of the defence.

[64] In *PP v. Lim Shui Wang & Ors* [1979] 1 MLJ 65 which is an authority where the High Court (on its own motion, like presently), invoked its powers under s. 417(2) to order a transfer (from the High Court to the Special Sessions Court), I can do no better than reproducing the passage from the judgment of Suffian LP on behalf of the former Federal Court which was expressed in trademark lucidity as follows:

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From subsection (2) of section 417 it is clear that the High Court may transfer a case on the report of the lower court or on the application of the Attorney-General or, as happened here, on its own initiative; but this is subject to two restrictions. First, the High Court may do so only for the reasons stated in paragraphs (a) to (e) of subsection (1) of section 417, and secondly, the High Court may transfer a case only from a subordinate court to another subordinate court or to itself, but not from itself to a subordinate court.

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[65] In that case the Federal Court held that the transfer of the cases from the High Court to the Special Sessions Court was not proper in the circumstances. In addition it was also decided that the power of a judge of the High Court to transfer a case under s. 25(2) of the Courts of Judicature Act 1964 and item 12 of its Schedule was subject to the discretion of the Attorney-General under art. 145(3) of the Federal Constitution to choose the forum in which persons charged under s. 39B(1)(a) of the Dangerous Drugs Ordinance were to be tried, and that the power conferred under art. 145(3) on the Attorney-General would override the power of the High Court to transfer so that the judge had no power to transfer on his own motion for trial in a subordinate court.

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- A [66] In contradistinction, in the instant case before me, the transfer initiated by this High Court is to be made from the Sessions Court to the High Court. This is clearly within the limits defined in *PP v. Lim Shui Wang & Ors* as stated above.
- B [67] In fact as is manifest from the above passage attributed to Suffian LP, in that case it was said that the High Court could not transfer cases to the subordinate court, but may do so to itself. As such there is absolutely no legal impediment to a transfer to a specific High Court. I do not think, considering the context, it can be said that the Federal Court meant the High Court generally and generically when using the expression “itself”.
- C [68] That is however not all. For there is also a Privy Council authority in respect of an appeal from Malaysia in the case of *PP v. Fan Yew Teng* [1973] 2 MLJ 1 where Lord Salmon ruled that where an order for transfer is made under s. 417 of the CPC, it is not necessary that the case be tried by the judge who made the order of transfer. His Lordship stated thus:
- D Their Lordships agree with the Federal Court that “there is neither rhyme nor reason in holding that the same judge must try the case once he has made the order of transfer”. Indeed, so to hold would lead to unnecessary difficulties should the judge who ordered the transfer be incapacitated, retired or dead when the case came on for trial. Their
- E Lordships entirely agree with the Federal Court in rejecting the respondent’s second point.
- [69] This Privy Council decision therefore envisaged that the case being transferred may be tried by the judge who made the transfer order, like what I have done by invoking s. 417(2) read with s. 417(1)(e), but made it explicit
- F that it would not be necessary that it should be so.
- [70] In that case, the applicant for transfer was the accused himself. In the instant case before me, the court moved for the transfer to itself for the reasons which, as I have stated, would be more than expedient for the ends of justice under s. 417(1)(e) of the CPC.
- G [71] As such, in my view, any assertion that the transfer of the seven charges from the Sessions Court back to a particular and in fact the same High Court (which made the transfer order) to be unlawful, illegal or in any manner irregular is wholly unjustified and without merit.
- H *The Status Of The Seven Charges Upon Withdrawal Of The Transfer Certificates*
- [72] Counsel for the accused argued that upon the withdrawal of the s. 418A/s. 60 certificates, the seven charges would automatically revert to the Sessions Court where they had been originally registered. This much I agree. But I do not share the view of learned counsel for the accused that it
- I follows therefore that the High Court ceases to have any further jurisdiction or authority whatsoever on the subject of the seven charges to enable any transfer orders to be made.

[73] For clarity I should emphasise that the effect of the withdrawal of the certificates, from the point of withdrawal (date of this order) is for the seven charges to revert to the Sessions Court where they had been originally filed and registered. When that happens, the seven charges cease to be registered with the High Court Registry.

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[74] In the instant case, since the background of the matter had been notified to me sitting as a High Court Judge in the instant proceeding, upon the withdrawal, and on the own initiative of this court, I exercised my discretion under s. 417(2) of the CPC on the basis of s. 417(1)(e) to order the transfer of the seven charges (already reverted to the Sessions Court) back to the same High Court, for the reasons I have stated earlier.

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[75] The contention of the defence that when the certificates are withdrawn, there is no proceedings or matter for this High Court to exercise its jurisdiction to transfer in the first place is therefore flawed, because the charges remain in existence and are residing at the Sessions Court, it being an automatic consequence of the withdrawal of the certificates.

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[76] When the High Court considers whether or not to transfer a case from the Sessions Court to the High Court under s. 417, the case is still registered at the Sessions Court. This is the situation in all applications made by either the accused or the prosecution, and that is also the position in the instant case.

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[77] The fact that the case or the charges are registered at the Sessions Court and not registered at the High Court cannot mean that the High Court has no jurisdiction to hear a transfer application or make a transfer order. Obviously only upon an order for transfer is made by the High Court, would the cases be transferred for registration at the High Court.

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[78] Moreover, the process of mentioning the withdrawal of the certificates at the Sessions Court is merely administrative and does not affect the legal consequence of the withdrawal which is the seven charges being automatically reverted to the Sessions Court.

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[79] Importantly, the fact that these seven charges are at the Sessions Court does not and cannot bar the High Court from exercising its transfer powers in accordance with s. 417 of the CPC. At the risk of repetition, the seven charges were originally transferred to the High Court purely by reason of the certificate. Given its withdrawal, the seven charges revert to the Sessions Court.

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[80] I must emphasise the crucial fact that these seven charges have not been withdrawn.

[81] There is accordingly absolutely no basis to contend that the withdrawal of the certificates would destroy entirely the proceedings at the High Court, even going back to since the point of time they were first transferred. No authorities were cited in support. None exists since that cannot be the legal consequence of the withdrawal.

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A [82] Plain common sense and logic which would readily accord with the ends of justice would also dictate that there is no rhyme or reason to unnecessarily hold that the proceedings at the High Court preceding the withdrawal to be a potential nullity.

B [83] After all, the proceedings at the High Court during the subsistence of the certificates prior to its withdrawal owed its very existence to the certificates. Thus, the withdrawal should not affect the entire period of proceeding prior to its ceasing to have effect.

C [84] In my judgment, the withdrawal of the s. 418A and s. 60 certificates is therefore effective only prospectively and has no effect on the proceedings on the seven charges since 4 July 2018 before the withdrawal which remain valid.

Risk Of Entire Proceedings Being Vitiating

D [85] The defence made much of the risk of the entire proceedings be nullified by reason of the withdrawal of the certificate. I do not see how that can be the consequence of the withdrawal. First, the AG has the authority to withdraw the certificates which this court permits. There cannot be any argument that the withdrawal before the court amounts to an interference with judicial powers of the courts.

E [86] Withdrawal of certificates is within the ambit of art. 145(3A) and like withdrawal of charges being authorised under art. 145(3), they cannot be construed as being unconstitutional or in any manner potentially a nullity. Such a premise is untenable.

F [87] A key thrust of the argument of the accused is that precisely given the doubts expressed by the prosecution on the validity of s. 418A and s. 60 that the Attorney General similarly cannot validly purport to exercise his power to withdraw the certificates. If it is a nullity then everything about it is a nullity. If the Attorney General considers reliance on the transfer certificates to be an issue, the withdrawal would also be an issue and the entire proceedings of this case at this High Court since 4 July 2018 which have taken place because of the transfer certificates would also be in doubt. It was even suggested that the easiest way out would be to withdraw the charges and start all over again.

G [88] I think this scenario painted by the accused is unwarranted. The Attorney General did not submit that s. 418A of the CPC or s. 60 of the MACC Act to be unconstitutional. Emphasis was made on the need to act purely out of an abundance of caution. Neither is the issue of the constitutionality of s. 418A/s. 60 before this court. It is therefore absolutely irrelevant and out of context for the defence to premise its various contentions on the nullity/constitutionality argument.

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[89] The prosecution merely wanted the risk of challenge given the latest developments in constitutional law in the country be removed and the start and progress of this important trial of great public interest not be unnecessarily interrupted. And there is, as I said earlier, in any event no judicial determination to the effect that these provisions are unconstitutional. The law is that s. 418A of the CPC and s. 60 of the MACC Act are valid.

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[90] Secondly if it were defective, and the withdrawal set aside on appeal, there will be no change whatsoever to the trial proceedings. It would mean the trial should continue on the basis of the certificate being fully intact and effective.

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[91] But even with the withdrawal, the trial would still have proceeded, for all intents and purposes, on the same basis. There would be absolutely no difference. The only distinction is the technical issue that the case is at the High Court on account of say, s. 417 instead of s. 418A.

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[92] In any event, if the objection by the defence to the withdrawal is sustained, it means there is no withdrawal. That could also mean that the certificates would still be effective. And the issue of reversion of the seven charges to the Sessions Court and the subsequent transfer to the High Court would not arise. In the absence of any withdrawal, the case should therefore proceed as per normal. And this would be absolutely no different from how the case is being progressed by my invoking s. 417(2) on the basis of s. 417(1)(e) of the CPC.

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[93] However, I accept that if the entire s. 418A/s. 60, including art. 145(3A) are declared unconstitutional, that would be a different matter altogether. But that is not the position of the Attorney General. And in any case, as I have said, that is not the law that binds us all today.

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[94] Thirdly, given all that, what injustice or prejudice can remotely be said to have been caused to the accused? It cannot be attributed to the risk of the trial be ruled a nullity and that a re-trial may be ordered, because that would be a circular argument.

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[95] Fourthly, the risk of nullity would in any event be a disproportionate outcome to what is argued as, essentially, a technical issue. Even if the withdrawal or the transfer were to be struck down, the entire proceedings would not necessarily be held to be vitiated or null and void.

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[96] For example, the principle of prospective overruling could be adopted instead so as not to give retrospective effect to the proceedings of withdrawal and transfer which had taken place prior to the date of appellate judgment and would remain undisturbed and not be affected.

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- A [97] That was the exact essence of the majority decision of the Supreme Court in *PP v. Dato' Yap Peng* [1987] 1 LNS 28; [1987] 2 MLJ 311 where the very s. 418A of the CPC was declared unconstitutional for infringing art. 121(1) of the Federal Constitution (this was before the enactment of art. 145(3A), referred to above). And even if for argument sake the
- B contention of defence were correct, this principle could be readily applied given the circumstances of the instant case.

Conclusion

- C [98] In view of the foregoing reasons it is my judgment that the Attorney General, as the Public Prosecutor is under the law fully empowered at this stage of the proceedings on the seven charges, to withdraw the transfer certificates previously issued under s. 418A of the CPC and s. 60 of the MACC Act.

- D [99] Given the withdrawal of the transfer certificates and following the reversion of the seven charges to the Sessions Court where they had been originally registered, and on the basis of the considerations that I have stated to be more than fully justified as being expedient in the ends of justice under s. 417(1)(e) (with readiness for imminent trial since the first charges of July 2018, absence of prejudice to the accused, and involvement of this court in the adjudication of matters relevant to the seven charges being amongst the
- E overriding reasons), I decided, in light of the information made known to this court by the Attorney General, to exercise the discretion of this High Court, on its own motion under s. 417(2), to invoke s. 417(1) and order the transfer of the seven charges from the Sessions Court back to this High Court in accordance with s. 417(1)(cc), as permitted by case law authorities.

- F [100] The same seven charges are transferred back to the same High Court, and to continue from the point of the withdrawal, with the proceedings prior to the withdrawal remaining valid.

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