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DATO' SRI MOHD NAJIB HJ ABDUL RAZAK v. PP

COURT OF APPEAL, PUTRAJAYA
ZABARIAH MOHD YUSOF JCA
RHODZARIAH BUJANG JCA
LAU BEE LAN JCA
B [CRIMINAL APPEAL NO: W-05-1-01-2019]
25 MARCH 2019

CRIMINAL LAW: *Charges – Criminal charges – Former Prime Minister of Malaysia charged with seven criminal charges relating to offences under Penal Code,*
C *Malaysian Anti-Corruption Commission Act 2009 and Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 – Appeal against decision of High Court in dismissing pre-trial production, by prosecution, of statements and documents given by potential witnesses to officers of Malaysian Anti-Corruption Commission – Whether appeal ought to be allowed*

D

CRIMINAL PROCEDURE: *Disclosure of information – Statements and documents – Appeal against decision of High Court – High Court dismissed application for pre-trial production of certain documents and statements – Applicant, former Prime Minister of Malaysia, charged with seven criminal charges –*
E *Application for pre-trial production, by prosecution, of statements and documents given by potential witnesses to officers of Malaysian Anti-Corruption Commission – Whether non obstante clauses in s. 30(9) of Malaysian Anti-Corruption Commission Act 2009 and s. 40 of Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 rendered statements recorded and documents collected during investigations automatically admissible as*
F *evidence – Whether arts. 5 and 8 of Federal Constitution demand that copies of documents and statements must be supplied by prosecution to applicant before commencement of trial – Whether applicant established case for delivery of information and documents applied for – Whether appeal ought to be allowed – Criminal Procedure Code, ss. 51 & 51A – Malaysian Anti-Corruption Commission*
G *Act 2009, s. 62*

CRIMINAL PROCEDURE: *Appeal – Appeal against decision of High Court – High Court dismissed application for pre-trial production of certain documents and statements – Applicant, former Prime Minister of Malaysia, charged with seven criminal charges – Application for pre-trial production, by prosecution, of statements*
H *and documents given by potential witnesses to officers of Malaysian Anti-Corruption Commission – Whether court ought to compel prosecution to produce statements or documents sought – Considerations – Whether applicant satisfied requirements of 'necessity' and 'desirability' – Stage when application is made – Whether discovery limited to matters specified in charge – Whether applicant could seek*
I *inspection or discovery of documents seized in police investigation – Whether request directed at specific document – Whether applicant entitled to discovery if documents satisfy test of relevancy and essential for adjudication – Criminal Procedure Code, ss. 51 & 51A*

The appellant, former Prime Minister of Malaysia, was charged with seven charges relating to offences committed 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 ('AMLATFAPUA'). At the High Court, the appellant sought pre-trial production, by the respondent ('the prosecution'), of statements and documents given by potential witnesses to the officers of the Malaysian Anti-Corruption Commission ('MACC') in the course of the investigation. In support of his application, the appellant submitted that (i) the *non obstante* clauses, in s. 30(9) of the MACCA and s. 40 of the AMLATFAPUA, rendered the statements recorded and documents collected during the course of the investigations automatically admissible as evidence, at the behest of either party to the proceedings; (ii) given the automatic admissibility, arts. 5 and 8 of the Federal Constitution ('FC') demand that copies of the said documents and statements must be supplied by the prosecution to the appellant before the commencement of the trial; and (iii) the crux of the appellant's case was supported by s. 51A of the Criminal Procedure Code ('CPC') and s. 62 of the MACCA. The High Court Judge ('HCJ') found that the appellant failed to establish a case for the delivery of the documents and information applied for. In dismissing the appellant's application, the HCJ held that (i) the appellant failed to make out a case as to the extent to which the legislature had intended to give the relevant *non obstante* clauses an overriding effect over all other rules and legal provisions; (ii) as such claim of privilege, public policy and confidentiality would still be applicable to bar the production of the investigation statements and the other documents; (iii) even if the other documents and investigation statements were admissible, in the absence of clear statutory provisions, the appellant had no right of disclosure or production of the same; (iv) section 62 of the MACCA makes reference to s. 51A of the CPC and therefore, the MACCA envisages disclosure of documents/statements under ss. 51 or 51A of the CPC; (v) the appellant did not meet the threshold of the test of 'desirability' and 'necessity' under s. 51 of the CPC to justify the production of other documents and the investigation statements. As the prosecution had duly complied with s. 51A of the CPC, the disclosure obligation of documents, on the part of the prosecution, for pre-trial, had been met. The appellant was not entitled to any further disclosure at this stage; (vi) the case of *Husdi v. PP* barred the disclosure of investigation statements; (vii) the issue of likelihood of witness-tampering was another reason that investigations statements was being prohibited to accused persons; and (viii) s. 124 of the Evidence Act 1950 ('EA') applied to bar the production of the investigation statements which are confidential. Hence, the present appeal.

Held (dismissing appeal; affirming decision of High Court)
Per Zabariah Mohd Yusof JCA delivering the judgment of the court:

(1) The appellant misconstrued the application of the *non obstante* clauses found in s. 30(9) of the MACCA and s. 40 of the AMLATFAPUA, to exclude all other legislations or provisions in force in other legislations, particularly the EA. This could not be the intention of Parliament. The *non obstante* clauses found in the said sections must be read subject to rules of privilege and prohibition on the ground of public policy. The appellant failed to show how he had been discriminated against, as compared to other persons who are similarly under the investigation by the MACC. (paras 27 & 29)

(2) Article 5(1) of the FC states that 'No person shall be deprived of his life or personal liberties save in accordance with law', which implies it is not absolute. Similarly, art. 8 of the FC, which is on the equality principle, is also not absolute. The provisions of the MACCA applies across the board on all persons alike and thus, the issue of discrimination against the appellant did not arise. (paras 32-34)

(3) There is no compelling legal analysis that could support the argument that automatic admissibility gives the automatic right to disclosure and inspection, in the absence of clear legislative prescriptions to that effect. Section 51A of the CPC provides for disclosure at pre-trial stage. It provides access of disclosure, but a limited one, and does not envisage full unlimited disclosure and inspection of the prosecution's case. Section 51A of the CPC lists the documents that are required to be furnished to the accused before trial. However, the prosecution need not supply any facts favourable to the defence of the accused if its disclosure would be contrary to public interest. (paras 39-41)

(4) In exercising its discretion, under s. 51A of the CPC, for the supply of documents before the commencement of trial, the court must have regard to ss. 152, 153 and 154 of the CPC. Hence, the discovery at this stage, namely at the pre-trial stage, as in the present case, is only limited to matters that are specified in the charge, to enable the appellant to prepare his defence. The appellant would not be prejudiced, in any event, as the appellant had been fully informed of the charge against him. Therefore, by virtue of s. 51A of the CPC, as the appellant was at the pre-trial stage, he was only entitled to: (i) a copy of the first information report made under s. 107 of the CPC; (ii) copies of documents which the prosecution intended to tender as part of the evidence for the prosecution; and (iii) written statement of facts favourable to the defence of the accused. (paras 43-44)

(5) The appellant applied for all statements recorded by the MACC, and other documents taken by them in the course of investigation, without specifying the exact documents. The application was of a general nature and not targeted towards any specific document. It is a general rule of law that the request must be directed at a specific document and a general direction to produce all documents relating to the subject matter in dispute will not be enforced. (para 46)

(6) The appellant sought the statements given by potential witnesses to the MACC and other documents obtained by the MACC under the relevant provisions compelling production embodied in the MACCA and AMLATFAPUA in the course of the investigations pertaining to the charges against the appellant. It is trite that an accused person is not entitled to copies of police statements recorded from witnesses in the course of investigations. Firstly, such statement is a privileged document and secondly, as a matter of public policy, it is undesirable for the prosecution to supply the defence with the police statements as there is a danger of tampering with witnesses. This failed the test of 'desirability' and 'necessity' in s. 51A of the CPC. (para 47)

(7) It was not in the public interest if statements taken from witnesses and documents obtained during the course of police investigations be furnished to the appellant. Section 124 of the EA provides that a public officer could not be compelled to disclose communications made to him in official confidence if he considers that public interest would suffer by such disclosure. This would also include communications made to the MACC officers in their official confidence. Providing the appellant with the documents sought in the prayer, which were made in official confidence to the MACC, would prejudice further investigations relating to other cases involving the appellant. (para 49)

(8) It is the prerogative of the prosecution as to how to prove their case and it is not for the court to anticipate as to how the prosecution is to proceed with the conduct of proving the charges against the appellant. The application in this case was not for documents which were specified in the charge against the appellant. Therefore, to allow the appellant to go beyond these particulars would be to provide the accused with the knowledge of means by which the prosecution proposed to prove the alleged facts. Save for the documents provided under s. 51A of the CPC, the defence was not entitled to ask for disclosure or inspection of documents/materials in the possession of the prosecution before the commencement of the trial. (para 53)

(9) The appellant was not entitled to be supplied with the documents sought. The HCJ did not err in his findings that the appellant failed to establish a case for the delivery of the information and documents sought. (paras 55 & 56)

Bahasa Malaysia *Headnotes*

Perayu, bekas Perdana Menteri Malaysia, dituduh dengan tujuh pertuduhan pelakuan kesalahan-kesalahan berkaitan Kanun Keseksaan, Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 ('ASPRM') dan Akta Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001 ('AMLATFAPUA'). Di Mahkamah Tinggi, perayu membuat permohonan pra-perbicaraan agar responden ('pihak pendakwaan') mengemukakan kenyataan-kenyataan dan dokumen-dokumen yang diberi oleh saksi-saksi berpotensi kepada pegawai-pegawai Suruhanjaya Pencegahan Rasuah Malaysia ('SPRM') semasa menjalankan siasatan. Menyokong permohonannya, perayu menghujahkan (i) klausa-klausa *non obstante*, dalam s. 30(9) ASPRM dan s. 40 AMLATFAPUA, menjadikan kenyataan-kenyataan yang direkod dan dokumen-dokumen yang diambil semasa menjalankan siasatan, secara automatik, boleh diterima sebagai keterangan, atas perintah salah satu pihak dalam prosiding; (ii) susulan kebolehterimaan automatik ini, per. 5 dan 8 Perlembagaan Persekutuan ('PP') menuntut agar semua salinan dokumen dan kenyataan ini dibekalkan oleh pihak pendakwaan kepada perayu sebelum perbicaraan bermula; dan (iii) teras kes perayu disokong oleh s. 51A Kanun Tatacara Jenayah ('KTJ') dan s. 62 ASPRM. Hakim Mahkamah Tinggi ('HMT') mendapati perayu gagal membuktikan satu kes penyerahan dokumen-dokumen dan maklumat yang dipohon. Menolak permohonan perayu, HMT memutuskan (i) perayu gagal membuktikan satu kes tentang setakat mana badan perundangan meniatkan agar klausa-klausa *non obstante* mempunyai kesan mengatasi semua peraturan dan peruntukan undang-undang; (ii) berkenaan tuntutan keistimewaan, polisi awam dan kerahsiaan masih terpakai dalam menghalang pengemukaan kenyataan-kenyataan siasatan dan dokumen-dokumen lain; (iii) jika pun lain-lain dokumen dan kenyataan-kenyataan siasatan boleh diterima, tanpa peruntukan statutori, perayu tiada hak pendedahan atau pengemukaan; (iv) seksyen 62 ASPRM merujuk pada s. 51A KTJ dan dengan itu, ASPRM membayangkan pendedahan dokumen-dokumen/kenyataan-kenyataan bawah ss. 51 dan 51A KTJ; (v) perayu tidak memenuhi ambang ujian 'kebaikan' dan 'keperluan' bawah s. 51 KTJ untuk mewajarkan pengemukaan lain-lain dokumen dah kenyataan-kenyataan siasatan. Oleh kerana pihak pendakwaan telah mematuhi s. 51A KTJ, kewajipan pendedahan dokumen-dokumen, pra-perbicaraan oleh pihak pendakwaan, sudah dipenuhi. Perayu tidak berhak terhadap pendedahan lanjut di peringkat ini; (vi) kes *Husdi v PP* menghalang pendedahan kenyataan-kenyataan siasatan; (vii) isu kemungkinan gangguan pada saksi ialah satu lagi sebab kenyataan-kenyataan siasatan dilarang diberi kepada tertuduh-tertuduh; dan (viii) s. 124 Akta Keterangan 1950 ('AK') terpakai untuk menghalang pengemukaan kenyataan-kenyataan siasatan yang rahsia. Maka timbul rayuan ini.

Diputuskan (menolak rayuan, mengesahkan keputusan Mahkamah Tinggi)

Oleh Zabariah Mohd Yusof HMR menyampaikan penghakiman mahkamah:

(1) Perayu tersalah tafsir pemakaian klausa-klausa *non obstante* dalam s. 30(9) ASPRM dan s. 40 AMLATFAPUA, agar mengecualikan semua perundangan atau peruntukan yang berkuat kuasa dalam lain-lain perundangan, khususnya AK. Ini tentu bukan niat Parlimen. Klausa-klausa *non obstante* dalam seksyen-seksyen tersebut mesti dibaca tertakluk pada peraturan keistimewaan dan larangan atas sebab polisi awam. Perayu gagal menunjukkan bagaimana beliau didiskriminasi, berbanding lain-lain orang yang turut disiasat oleh SPRM.

(2) Perkara 5(1) PP menyatakan 'Tiada seorang pun boleh diambil nyawanya atau dilucutkan kebebasan dirinya kecuali mengikut undang-undang', yang menandakan ini bukan mutlak. Perkara 8 PP, yang memperuntukkan tentang prinsip kesamarataan, juga bukan mutlak. Peruntukan ASPRM terpakai menyeluruh pada semua orang dan oleh itu, isu diskriminasi terhadap perayu tidak timbul.

(3) Tiada analisis undang-undang, yang mendesak, yang boleh menyokong hujahan bahawa kebolehterimaan automatik memberi hak automatik untuk mendedahkan dan memeriksa, tanpa peruntukan perundangan jelas yang menyatakan sedemikian. Seksyen 51A KTJ memperuntukkan pendedahan semasa peringkat pra-perbicaraan. Seksyen ini memberi akses untuk pendedahan, tetapi terbatas, dan tidak membayangkan pendedahan dan pemeriksaan penuh tidak terhad ke atas kes pendakwaan. Seksyen 51A KTJ menyenaraikan dokumen-dokumen yang perlu dikemukakan kepada tertuduh sebelum perbicaraan. Walau bagaimanapun, pihak pendakwaan tidak perlu membekalkan apa-apa fakta yang menyokong pembelaan tertuduh jika pendedahan sedemikian bertentangan dengan kepentingan awam.

(4) Dalam menjalankan budi bicara, bawah s. 51A KTJ, untuk pembekalan dokumen-dokumen sebelum bermula perbicaraan, mahkamah mesti melihat pada ss. 152, 153 dan 154 KTJ. Oleh itu, penzahiran pada peringkat ini, iaitu peringkat pra-perbicaraan, seperti dalam kes ini, hanya terhad pada hal-hal perkara yang dinyatakan dalam pertuduhan, untuk membolehkan perayu membuat persediaan untuk pembelaan beliau. Perayu tidak akan terprejudis, dalam apa-apa jua keadaan, kerana sedia maklum akan pertuduhan terhadap beliau. Oleh itu, berdasarkan s. 51A KTJ, kerana perayu di peringkat pra-perbicaraan, beliau hanya berhak mendapat: (i) sesalinan laporan maklumat pertama yang dibuat bawah s. 107 KTJ; (ii) salinan semua dokumen yang pihak pendakwaan

ingin kemukakan sebagai sebahagian keterangan untuk pendakwaan; dan (iii) pernyataan bertulis tentang fakta-fakta yang berpihak pada pembelaan tertuduh.

(5) Perayu meminta semua kenyataan yang direkodkan oleh SPRM, dan lain-lain dokumen yang diambil oleh mereka semasa menjalankan siasatan, tanpa menyatakan dokumen-dokumen tersebut dengan tepat. Permohonan tersebut bersifat umum dan tidak ditujukan pada dokumen khusus. Menjadi satu peraturan umum undang-undang bahawa permintaan mestilah ditujukan pada dokumen khusus dan satu tujuan umum untuk mengemukakan semua dokumen berkenaan hal perkara yang menjadi pertikaian tidak akan berkuat kuasa.

(6) Perayu meminta kenyataan-kenyataan yang diberi oleh saksi-saksi berpotensi SPRM dan semua dokumen yang diperoleh oleh SPRM, bawah peruntukan-peruntukan relevan ASPRM dan AMLATFAPUA, yang mendesak pengemukaan semasa siasatan terhadap pertuduhan-pertuduhan terhadap perayu. Undang-undang tetap menetapkan seorang tertuduh tidak berhak atas salinan kenyataan-kenyataan polis yang direkodkan daripada saksi-saksi semasa menjalankan siasatan. Pertama, kenyataan sedemikian adalah dokumen istimewa dan kedua, sebagai hal perkara polisi awam, tidak diingini jika pihak pendakwaan membekalkan pihak pembelaan dengan kenyataan-kenyataan polis kerana terdapat risiko gangguan saksi-saksi. Ini gagal ujian 'kebaikan' dan 'keperluan' bawah s. 51A KTJ.

(7) Bukanlah demi kepentingan awam jika kenyataan-kenyataan yang diambil daripada saksi-saksi, dan dokumen-dokumen yang diperoleh semasa siasatan polis dijalankan, dikemukakan kepada perayu. Seksyen 124 AK memperuntukkan bahawa seorang pegawai awam tidak boleh didesak agar mendedahkan komunikasi yang dibuat kepadanya dalam keamanahan rasmi jika dia berpendapat kepentingan awam akan terjejas dengan pendedahan tersebut. Ini termasuk komunikasi yang dibuat kepada pegawai-pegawai SPRM dalam keamanahan rasmi. Menyediakan buat perayu dokumen-dokumen yang dipohon dalam permohonan, yang dibuat dalam keamanahan rasmi kepada SPRM, akan memprejudis siasatan lanjut berkenaan lain-lain kes yang melibatkan perayu.

(8) Menjadi prerogatif pihak pendakwaan bagaimana mereka hendak membuktikan kes mereka dan mahkamah tidak boleh menjangka bagaimana pihak pendakwaan akan meneruskan dengan pembuktian pertuduhan-pertuduhan terhadap perayu. Permohonan dalam kes ini bukan untuk dokumen-dokumen yang dinyatakan dalam pertuduhan terhadap perayu. Oleh itu, membenarkan perayu melangkaui butir-butir ini seolah-olah memberi seorang tertuduh maklumat tentang cara pihak

pendakwaan bercadang membuktikan fakta-fakta yang didakwa. Kecuali dokumen-dokumen yang diperuntukkan bawah s. 51A KTJ, pihak pembelaan tidak berhak memohon pendedahan atau permeriksaan dokumen-dokumen/material-material dalam milikan pihak pendakwaan sebelum perbicaraan bermula.

(9) Perayu tidak berhak dibekalkan dokumen-dokumen yang dipohon. Hakim Mahkamah Tinggi tidak terkhilaf dalam dapatan beliau bahawa perayu gagal membuktikan satu kes untuk penyerahan maklumat dan dokumen-dokumen yang dipohon.

Case(s) referred to:

Dato' Seri Anwar Ibrahim v. PP [2010] 4 CLJ 265 FC ***(refd)***
Fitt v. United Kingdom [2000] ECHR 29777/96 ***(refd)***
Ho Tack Sien & Ors v. Rotta Research Laboratorium S.p.A & Anor; Registrar Of Trade Marks (Intervener) & Another Appeal [2015] 4 CLJ 20 FC ***(refd)***
Husdi v. PP [1979] 1 LNS 33 HC ***(refd)***
Husdi v. PP [1980] 1 LNS 29 FC ***(refd)***
Loh Kooi Choon v. Government of Malaysia [1975] 1 LNS 90 FC ***(refd)***
Methuram Dass v. Jagannath Dath ILR 28 Cal 794 ***(refd)***
Perbadanan Kemajuan Kraftangan Malaysia v. DW Margaret David Wilson [2010] 5 CLJ 899 FC ***(refd)***
Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal [2002] 4 CLJ 105 FC ***(refd)***
PP v. Awalluddin Sham Bokhari [2018] 1 CLJ 305 FC ***(refd)***
PP v. Dato' Seri Anwar Ibrahim & Another Appeal [2010] 4 CLJ 331 CA ***(refd)***
PP v. Datuk Harun Hj Idris & Ors [1976] 1 LNS 180 FC ***(refd)***
PP v. Khong Teng Khen & Anor [1976] 1 LNS 100 FC ***(refd)***
PP v. Raymond Chia Kim Chwee & Anor & Another Case [1985] 2 CLJ 457; [1985] CLJ (Rep) 260 FC ***(refd)***
PP v. Teoh Choon Teck [1962] 1 LNS 141 HC ***(refd)***
Re D (Minors) (Adoption reports: Confidentiality) [1996] AC 593 ***(refd)***
S Kulasingam & Anor v. Commissioner of Lands, Federal Territory & Ors [1982] 1 MLJ 204 ***(refd)***
Shabalala v. AG of the Transvaal and Anor 1995 (12) BCLR 1593 ***(refd)***
Suruhanjaya Sekuriti v. Datuk Ishak Ismail [2016] 3 CLJ 19 FC ***(refd)***
Syed Abu Bakar Ahmad v. PP [1981] 1 LNS 127 ***(refd)***
Varadarajulu & Anor v. The State of Tamil Nadu & Ors AIR 1998 SC 1388 ***(refd)***

Legislation referred to:

Anti-Money Laundering, Anti-Terrorism Financing And Proceeds of Unlawful Activities Act 2001, ss. 32, 40
Criminal Procedure Code, ss. 51, 51A(1)(c), (5), 107, 152, 153, 154
Evidence Act 1950, ss. 123, 124
Federal Constitution, arts. 5(1), 8
Immigration Act 1959/63, s. 59
Malaysian Anti-Corruption Commission Act 2009, ss. 6(2), 30(9), 62
Securities Commission Malaysia Act 1993, s. 134(4)
Trade Marks Act 1976, ss. 35(1), 40(1)(f)

Constitution of the Republic of South Africa [South Africa], s. 35(3)(h)

For the appellant - Muhammad Shafee Abdullah, Harvinder Jit Singh, Sarah Maalini Abishegam, Farhan Read, Alfirdaus Shahrul Naing, Wan Aizuddin Wan Mohammed, Rahmat Hazlan, Muhammad Farhan Shafee, Wee Yeong Kang, Syahirah Hanapiah & Zahria Eleena Redza; M/s Shafee & Co

For the respondent - Tommy Thomas, V Sithambaram, Sulaiman Abdullah, Manoj Kurup, Donald Joseph Franklin & Izzat Fauzan; DPPs

[Editor's note: For the High Court judgment, please see Dato' Sri Mohd Najib Hj Abdul Razak v. PP [2019] 5 CLJ 93 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Zabariah Mohd Yusof JCA:

Background

[1] The appeal before us, is by the appellant against the decision of the learned High Court Judge dismissing his application by way of notice of motion for an order that the prosecution deliver certain documents, statements, information and/or reports, statements of witnesses' books, accounts, computerised data, articles, list of witnesses and copies of witness statements that the prosecution intends to adduce at trial.

[2] The appellant is faced with seven charges relating to offences committed under the Penal Code, the Malaysian Anti-Corruption Commission Act 2009 (MACC Act 2009) and the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (AMLATFA 2001). All charges were ordered to be jointly tried and trial is to commence from 12 February 2019 to 29 March 2019.

[3] The respondent/prosecution had delivered the necessary documents under s. 51A of the Criminal Procedure Code (CPC), mostly covering the documents sought by the appellant in the notice of motion, save for paras. 1(g), (h), (i), (j), and 2(b)(i) which are reproduced herein below:

> 1(g) records of all examinations and/or written statements on oath or affirmations obtained pursuant to Section 30(1)(a) and/or Section 30(8) and/or section 30(1)(c) of the MACC Act 2009 and/or Section 32(2)(a) and/or Section 32(2)(c) of the Anti-Money Laundering, Anti-Terrorism Financing And Proceeds of Unlawful Activities Act 2001 (AMLAFTA 2001) during the course of investigations which have culminated into the subject matter of the SRC Proceedings;
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> 1(h) all books, documents, records, accounts or computerised data or articles obtained pursuant to Section 30(1)(b) of the MACC Act 2009 or otherwise in the course of examinations under Section 30(a) of the MACC Act 2009 or under written statements on oath or affirmations made pursuant to section 30(1)(c) of the MACCA 2009 during the course of investigations which have culminated into the subject matter of the SRC Proceedings;

1(i) documents or information obtained pursuant to Section 32(2)(b) AMLATFA 2001 during the course of investigations which have culminated into the subject matter of the SRC Proceedings;

1(j) alternatively *in lieu* of paragraphs 1(g), (h) and (i) above, a complete listing of the following:

(i) The names of all the examinees and dates of recordings of the records of their respective examinations and/or written statements on oath or affirmations obtained pursuant to Section 30(1)(a) and/or Section 30(8) and/or Section 30(1)(c) of the MACCA 2009 and/or Section 32(2)(a) and/or section 32(2)(c) of the Anti-Money Laundering, Anti-Terrorism Financing And Proceeds of Unlawful Activities Act 2001 ("AMLA2001") during the course of investigations which have culminated into the subject matter of the SRC Proceedings;

(ii) Particulars of all books, documents, records, accounts or computerised data or articles obtained pursuant to Section 30(b) of the MACCA 2009 or otherwise in the course of examinations under Section 30(1)(a) and/or Section 30(8) of the MACCA 2009 or under a written statement on oath or affirmation made pursuant to Section 30(1)(c) of the MACCA 2009 during the course of investigations which have culminated into the subject matter of the SRC Proceedings; and

(iii) Particulars of any property, documents or information obtained pursuant to Section 32(2)(b) AMLA 2001 during the course of investigations which have culminated into the subject matter of the Proceedings.

2(b) that the Prosecution do provide to the solicitors for the Applicant the following on or before 11.1.2019 or a date to be fixed by this Honourable Court:

(i) A List of Witnesses the prosecution intend to call during the case for the prosecution in the SRC Proceedings together with the proposed order of witnesses.

[4] The learned trial judge dismissed the appellant's application for the documents as aforesaid and it is against the dismissal of this application that the appellant is appealing before this court.

Basis Of The Application By The Appellant

[5] The application is premised on the *non-obstante* clauses found in s. 30(9) of the MACC Act 2009 and s. 40 of the AMLATFA 2001, whereby these statements, documents etc, such as those obtained under s. 30(9) of MACC Act 2009 and s. 40 of AMLATFA 2001, are automatically admissible at the behest of either party. The clauses should be given a liberal interpretation, unlike the narrow scope given by the learned judge.

Section 30(9) of the MACC Act 2009 provides:

> The record of an examination under paragraph (1)(a), or a written statement on oath or affirmation made pursuant to paragraph 1(c), or any book, document, record, account or computerised data, or article produced under paragraph (1)(b) or otherwise in the course of an examination under paragraph (1)(a), or under a written statement on oath or affirmation made pursuant to paragraph (1)(c), or record of examination of sample taken under paragraph (1)(d) **shall, notwithstanding any written law or rule of law to the contrary, be admissible in evidence in any proceedings in any court**:
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> (a) **For an offence under this Act; or**
>
> (b) For the forfeiture of property pursuant to section 40 or 41, regardless whether such proceedings are against the persons who was examined, or who produced the book, document, record, account or computerized data, or article, or who made the written statement on oath or affirmation, or against any other person. (emphasis added)

Section 40 of the AMLATFA 2001 provides:

> 40. The record of an examination under paragraph 32(2)(a), any property, record, report or document produced under paragraph 32(2)(b) or any statement under paragraph 32(2)(c) shall, **notwithstanding any written law or rule of law to the contrary, be admissible as evidence in any proceedings in any court** for or in relation to an offence or any other matter under this Act or any offence under any written law, regardless whether such proceedings are against the persons who was examined, or who produced the property, record, report or document, or who made the written statements on oath or affirmation, or against any other person. (emphasis added)

[6] It is the appellant's contention that the operational parts of the said provisions provide that any statements or documents obtained in the course of investigations "Notwithstanding any written law or rule of law to the contrary, be admissible as evidence" thus taking the form of a *non-obstante* clause.

[7] Further, it was argued that, the scope of the *non-obstante* clauses are unambiguous and exclude all rules of admission and rules of exclusion *vis-à-vis*:

(i) All statements recorded from witnesses during the entire investigations into the subject matter of the offences under the Penal Code, MACC Act 2009 and AMLATFA 2001 (investigation statements);

(ii) All other documents received by the authorities in the course of the above investigations (other documents).

[8] Given the automatic admissibility, the operation of arts. 5 and 8 of the Federal Constitution would demand that copies of the said documents and investigation statements must be supplied by the respondent as the prosecutor to the applicant, before the commencement of the trial. It was also asserted by the appellant that the application is also supported by the operation of s. 62 of the MACC Act 2009 which provides:

> 62. Defence Statement
>
> Once delivery of documents by the prosecution pursuant to section 51A of the Criminal Procedure Code has taken place, the accused shall, before commencement of the trial, deliver the following documents to the prosecution:
>
> (a) A defence statement setting out in general terms the nature of the defence and the matters on which the accused takes issue with the prosecution, with reasons; and
>
> (b) A copy of any document which would be tendered as part of the evidence for the defence.

[9] The common law privilege outlined in *Husdi v. PP* [1979] 1 LNS 33; [1979] 2 MLJ 304 has no application.

[10] The public policy on witness tampering has no application in this case and neither is it justified. The reasoning by the learned trial judge in para. 112 of the grounds was completely baseless as there is nothing in any of the respondent's affidavits which alleged any reluctance or possible reluctance by any potential witnesses. Neither is there anything in the affidavits of the respondent which alleged any repercussions to other possible investigations or even the existence of any other pending investigations against the appellant. It is noted that the powers of the investigators under the MACC Act 2009 and AMLATFA 2001 clearly compel witnesses to provide statements to the MACC Act 2009 on penal consequences of non attendance. There is further provisions for witness to seek for witness protection as laid down in the Witness Protection Act 2009.

[11] In light of the circumstances of this case, it was submitted by the appellant that the production of investigation statements and other documents would be necessary or desirable under s. 51 of the CPC.

Respondent's Argument

[12] The respondent's position is that the application ought to be dismissed as the applicant has misconstrued s. 30(9) of MACC Act and s. 40 of AMLATFA to exclude all other legislation/provisions, particularly the Evidence Act 1950. The *non-obstante* clauses must be read subject to the rules of privilege and prohibition on grounds of public policy (See *Husdi v. PP* [1979] 1 LNS 33; [1979] MLJ 304; *PP v. Raymond Chia Kim Chwee & Anor & Another Case* [1985] 2 CLJ 457; [1985] CLJ (Rep) 260; [1985] 2 MLJ 436; *PP v. Dato' Seri Anwar Ibrahim & Another Appeal* [2010] 4 CLJ 331).

[13] The respondent disagreed with the prismatic approach taken by the applicant in the interpretation of arts. 5 and 8 of the Federal Constitution in support of the applicant's argument that these two articles would mean that the automatic admissibility of the documents pursuant to the *non-obstante* clauses necessarily require disclosure of copies of such documents by either side.

The Issue

[14] The central issue is whether the *non-obstante* clause has the effect of excluding the rules on evidence in respect of rules on privilege or confidentiality.

[15] The learned trial judge dismissed the appellant's application as the appellant failed to establish a case for the delivery of documents and the information applied for.

The High Court Findings

[16] The High Court made the following findings as to the application by the appellant:

(i) The appellant failed to make out a case as to the extent to which the Legislature had intended to give the relevant *non-obstante* clauses an overriding effect over all other rules and legal provisions, premised on the weight of authorities in *Suruhanjaya Sekuriti v. Datuk Ishak Ismail* [2016] 3 CLJ 19; [2016] 1 MLJ 733, which subject the admissibility to the rules of evidence and *Ho Tack Sien & Ors v. Rotta Research Laboratorium S.p.A & Anor; Registrar Of Trade Marks (Intervener) & Another Appeal* [2015] 4 CLJ 20; [2015] 4 MLJ 166 which required specific identification of the rules to be excluded. The learned trial judge was not persuaded by the proposition of the counsel for the appellant that the *non-obstante* clauses had the effect of automatic disclosure of all statements and documents admissible obtained by MACC as evidence in any proceedings;

(ii) As such claims of privilege, public policy and confidentiality would still be applicable to bar the production of the investigation statements and the other documents;

(iii) Even if the other documents and investigation statements are admissible, in the absence of clear statutory provisions, the appellant has no right of disclosure or production of the same. Section 62 of the MACC Act 2009 makes reference to s. 51A of the CPC and therefore the MACC Act 2009 envisages disclosure of documents/statements under ss. 51A or 51 of the CPC.

(iv) The appellant clearly does not meet the threshold of the test of "desirability or necessity" under s. 51 of the CPC justifying the production of the other documents and the investigation statements. As

the prosecution has duly complied with s. 51A of the CPC, the disclosure obligation of documents on the part of the prosecution for pre-trial has been met, and the appellant is not entitled to any further disclosure at this stage;

(v) *Husdi v. PP* [1979] 1 LNS 33; [1979] MLJ 304 bars the disclosure of investigation statements;

(vi) The issue of the likelihood of witness tampering is another reason that investigation statements are prohibited from being disclosed to the accused persons;

(vii) Section 124 of the Evidence Act 1950 applies to bar the production of the investigation statements which are confidential.

Our Decision

Whether The Non-obstante Clauses Exclude All Other Provisions Of The Law

[17] The learned trial judge made reference to *Suruhanjaya Sekuriti v. Datuk Ishak Ismail* which held that where statements taken in the course of investigation are to be automatically admissible, they must be subject to provisions of the Evidence Act 1950, which were made to codify rules pertaining to law of privilege and public policy against disclosure of investigation statements. While the appellant argued that the provisions in *Suruhanjaya Sekuriti v. Datuk Ishak Ismail*'s case do not involve a *non-obstante* clause, the learned trial judge further referred to *Ho Tack Sien & Ors v. Rotta Research Laboratorium S.p.A & Anor; Registrar Of Trade Marks (Intervener) & Another Appeal* and held that the appellant had not clearly made out a case as to the extent to which the Legislature had intended to give the relevant *non-obstante* clauses overriding effect over all other rules and legal provisions.

[18] In *PP v. Awalluddin Sham Bokhari* [2018] 1 CLJ 305; [2018] 2 MLJ 401 which concerned a *non-obstante* clause in AMLATFA, it was ruled by the Federal Court that the statements and documents exhibited to the investigation officer's affidavit were admissible, notwithstanding the rule against hearsay. This is in relation to s. 134(4) of the Securities Commission Malaysia Act 1993 (SCA) which was examined by the Federal Court in *Suruhanjaya Securities v. Dato Ishak Ismail* where the accused had applied for discovery of all statements made to and recorded by the investigation officer of the Securities Commission in relation to investigation against the accused. The Federal Court after reversing the decision of the Court of Appeal dismissed the application for the production of such statements. Section 134(4) of the SCA 1993 provides:

134. Power to call for examination

(1) If an Investigating Officer of the Commission carrying out an investigation under any securities law suspects or believes on reasonable grounds that any person can give information relevant

A to a matter that he is investigating, the Investigating Officer of the Commission may by notice in writing to such person require such person:

(a) To give to the Investigating Officer of the Commission all reasonable assistance in connection with the investigation; and

B (b) To appear before a specified Investigating Officer of the Commission or specified Investigating Officers of the Commission to be examined orally.

(1A) An Investigating Officer of the Commission exercising his authority under paragraph (1)(b) shall reduce into writing any statement made C by the person examined under subsection (1).

(2) A person referred to in subsection (1) shall be legally bound to answer all questions relating to such case put to him by the Investigating Officer of the commission and to state the truth, whether or not the statement is made wholly or partly in answer to D questions, and shall not refuse to answer any question on the ground that it tends to incriminate him.

(3) ...

(4) Any statement made and recorded under this section shall be admissible as evidence in any proceeding in any Court.

E **[19]** The Federal Court ruled that the provision under s. 134(4) of the SCA must be read subject to the rules of privilege and prohibition on grounds of public policy. This equally applies to civil and criminal proceedings. In the context of *Suruhanjaya Securities v. Dato Ishak Ismail*, the relevant and applicable rules for consideration are found in ss. 123 and 124 of the F Evidence Act 1950. Sections 123 and 124 of the Evidence Act 1950 codify the rules of the law of privilege and public policy against the disclosure of investigation statements.

[20] However, the appellant submitted that his application is in "stark contrast" to the application in *Suruhanjaya Securities v. Dato Ishak Ismail* G which was made under s. 134 of the Securities Commission Malaysia Act 1993 (SCA), and does not have the *non-obstante* clauses as in s. 30(9) of the MACC Act 2009 and s. 40 of the AMLATFA 2001. Hence the principle of law as enunciated by the Federal Court in *Suruhanjaya Securities v. Dato Ishak Ismail* that "statements made to and recorded by an investigating officer ... H are not to be disclosed to the defence" and ss. 123 and 124 of the Evidence Act 1950 are superseded by the *non-obstante* clauses contained in the provisions.

[21] The learned trial judge, had considered this point specifically and noted that the *non-obstante* clause was absent in s. 134(4) of the SCA. I However, there are a plethora of authorities which suggest that where the *non-obstante* clause refers generally without stating the specific provision or statute to be overridden, it is not permissible to exclude *per se* all other

legislations or provisions in force in other statutes. In the absence of specific words of the exact rules or laws to be excluded, no such automatic displacement can be made effective.

[22] It is noted that the *non-obstante* clauses contain the word "Notwithstanding ...". The Federal Court in *Perbadanan Kemajuan Kraftangan Malaysia v. DW Margaret David Wilson* [2010] 5 CLJ 899; [2010] 2 MLJ 713 at p. 912 (CLJ); p. 726 (MLJ) had the occasion to explain the term "notwithstanding" which is:

> The term "notwithstanding" means generally "not to stand against it", or "in the way" or overriding.
>
> The words notwithstanding anything contained in the Code of Criminal Procedure Code found at the beginning of s. 5A(1) of the Prevention of Corruption Act 1947 (now s. 17 Prevention of Corruption Act 1988) merely carve out a limited exemption from the provisions of the Code of Criminal Procedure in so far as they limit the class of persons who are competent to investigate offences mentioned in the section and to arrest without warrant. **It does not mean that the whole of the Code of Criminal Procedure ... is made inapplicable - *Union of India v. IC Lala* [1973] 2 SCC 72 at 77**.
>
> (emphasis added)

[23] From the grounds of judgment, the learned trial judge said that the extent of such exclusion must be worked out from a further examination of the true objective or scope or purpose behind the provisions where the *non-obstante* clause is adopted. The learned trial judge agreed that a literal reading appears to support the appellant's stance, which, if true means the operation of, *inter alia*, the Evidence Act 1950 in respect of the rules on privilege and confidentiality in admitting as evidence, documents or statements obtained under s. 30 of the MACCA and s. 32 of the AMLATFA would be excluded.

[24] The learned trial judge also held that if there arises a conflict between the specific statutory objective behind that provision and such other law on the same subject, the other law would be held to be excluded from being operative. He referred to the Federal Court case of *Ho Tack Sien & Ors v. Rotta Research Laboratorium S.p.A & Anor; Registrar Of Trade Marks (Intervener) & Another Appeal* [2015] 4 CLJ 20; [2015] 4 MLJ 166 where it concerns s. 40 of the Trade Marks Act 1976 which begins with the word "notwithstanding ..." and Zulkefli CJ (Malaya) (as he then was) held that it is a general principle that a *non-obstante* clause cannot go outside the limits of the Act itself. *Non-obstante* clause is subject to the limitations contained in the section and cannot be read excluding the whole Act and standing by itself. The Federal Court relied on the principle as stated in *Varadarajulu & Anor v. The State of Tamil Nadu & Ors* AIR 1998 SC 1388 which states:

> It is well settled that while dealing with a *non-obstante* clause under which the legislature wants to give overriding effect to a section, the Court must try to find out the extent to which the legislature had intended to give one provision overriding effect over another provision. Such intention of the legislature in this behalf is to be gathered from the enacting part of the section. In *Aswini Kumar v. Arbinda Bose* AIR 1952 SC 369, Patanjali Sastri J observed: The enacting part of a statute must, where it is clear, be taken to control the *non-obstante* clause where both cannot be read harmoniously. In *Madhav Rao Scindia v. Union of India* [1971] 1 SCC 85 (at p 139) AIR 1971 SC 530 Hidayatullah CJ observed that the *non-obstante* clause is no doubt a very potent clause intended to exclude every consideration arising from other provisions of the same statute or other statute but for that reason alone we must determine the scope of that provision strictly. When the section containing the said clause does not refer to any particular provisions of the statute generally, it is not permissible to hold that it excludes the whole Act and stands all alone by itself. A search has, therefore, to be made with a view to determining which provisions answer the description and which does not.

Therefore as far as *Ho Tack Sien & Ors* is concerned, the Federal Court ruled that s. 40(1)(f) of the Trade Marks Act 1976 "only applies to a right to use a mark that has been duly registered under the Act". It is therefore tied to s. 35(1) of the Act which governs the rights given by registration. It reads:

> (1) Subject to the provisions of this Act, the registration of a person ... as registered proprietor of a trade mark (other than a certification trade mark) in respect of any goods or services shall, if valid, give or be deemed to have been given to that person the exclusive right to the use of the trade mark in relation to those goods or services subject to any conditions, amendments, modifications or limitations entered in the Register.

[25] Premised on the weight of authorities of *Suruhanjaya Sekuriti v. Datuk Ishak Ismail*, which subject the admissibility to the rules on evidence and *Ho Tack Sien & Ors v. Rota Research Laboratorium SPA*, which requires specific reference to the provision/statute to be excluded, the learned trial judge concluded and held that the appellant had not clearly made out a case as to the extent to which the Legislature had intended to give the relevant *non-obstante* clauses overriding effect over all other rules and legal provisions. It is our view that the learned trial judge did not err in his judicial evaluation of the provisions and consideration of the authorities cited.

[26] In any event, the learned trial judge had gone on to consider that, even if the construction ascribed to the *non-obstante* clauses by the appellant is to be taken as correct, that the documents and statements obtained during investigations are admissible as of right, the appellant still failed to establish whether their production to the appellant as the accused must necessarily follow. As rightly pointed out by the learned trial judge that admissibility of these documents does not equate to the right to inspect.

[27] Therefore, it appears that the appellant had misconstrued the application of the *non-obstante* clauses found in s. 30(9) of the MACCA and s. 40 of the AMLATFA 2001 to exclude all other legislation or provisions in force in other legislations particularly the Evidence Act 1950. That cannot be the intention of Parliament. The *non-obstante* clauses found in the aforesaid sections must be read subject to the rules of privilege and prohibition on the grounds of public policy.

[28] Various authorities were cited by the appellant in support of the equality of arms principle by claiming the appellant was being put at a disadvantage if not afforded the opportunity to view the documents etc. It was submitted that the appellant as an accused person should be accorded equal opportunity in deciding whether to admit the said evidence or otherwise premised on the observations by Lord Mustill in *Re D (Minors) (Adoption reports: Confidentiality)* [1996] AC 593 where he said:

> (the) first principle of fairness (is) that each party to a judicial process should have an opportunity to answer by evidence and by argument any adverse material that the tribunal may take into account when forming its opinion.

[29] This was also considered by the learned trial judge and we agree with his view that the appellant failed to show how has he been discriminated against, as compared to other persons who are similarly under investigation by the MACC.

[30] True, other countries have had advancements in adhering to the equal arms principle, as demonstrated by the cases cited by the appellant from the various jurisdiction in the submissions. The authorities cited by the applicant, namely *Fitt v. United Kingdom* [2000] ECHR 29777/96 which held that "it is a fundamental aspect of the right of a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence". The learned trial judge had considered this, at best, to be of persuasive authority. It is also undeniable that some of the authorities cited by the appellant expressed concerns against unfettered access by accused persons to investigations documents and statements as shown in the South Africa Constitutional Court in *Shabalala v. AG of the Transvaal and Anor* 1995 (12) BCLR 1593 which was an authority relied upon by the appellant which ruled:

> [5] The state is entitled to resist a claim by the accused for access to any particular document in the police docket on the grounds that such access is not justified for the purposes of enabling the accused properly to exercise his or her right to a fair trial or on the ground that it has reason to believe that there is reasonable risk that access to the relevant document would lead to the disclosure of the identity of an informer or state secrets or on the grounds that there was a reasonable risk that such disclosure might lead to the intimidation of witnesses or otherwise prejudice the proper end of justice.

[31] The appellant submitted that the operation of arts. 5 and 8 of the Federal Constitution demand that copies of the said documents and statements must be provided to the appellant before the commencement of trial. It was further submitted that in line with art. 5 and the application and ambit of s. 62 of the MACC Act 2009 justifies disclosure of admissible documents and statements to the appellant.

[32] Article 5(1) of the Federal Constitution states that "No person shall be deprived of his life or personal liberties save in accordance with law" which implies that it is not absolute. In *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan* [2002] 4 CLJ 105; [2002] 3 MLJ 72, where the constitutionality of s. 59 of the Immigration Act 1959/63 was challenged on the basis that the exclusion of the right to be heard in that provision, before the cancellation of the respondent's entry permit, was unconstitutional as it was said to have infringed his right to livelihood. It was held that the constitutional rights as guaranteed by art. 5(1) can be deprived in accordance with law. (See also *S Kulasingam & Anor v. Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204).

[33] Similarly, art. 8 of the Federal Constitution, which is the equality principle is also not absolute. The principles on the interpretation of art. 8 of the Federal Constitution was laid down in *Datuk Haji Harun Idris v. PP* [1976] 1 LNS 180; [1976] 2 MLJ 116 which essentially held that the equality provision is not absolute, it is qualified and that it envisages that there may be lawful discrimination based on rational classification (See also *PP v. Khong Teng Khen* [1976] 1 LNS 100; [1976] 2 MLJ 166).

[34] The provisions of the MACC Act 2009 applies across the board on all persons alike, and thus the issue of discrimination against the appellant does not arise.

[35] The reference of the appellant to the provisions on fundamental liberties of Constitutions of South Africa is misconceived as the provision in their Constitution is different from our art. 8 and s. 35(3)(h) of the Constitution of South Africa provides that "Every accused person shall have the right to a fair trial, which shall include the right to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial." In this regard, the judgment of Raja Azan Shah J (as he then was) in *Loh Kooi Choon v. Government of Malaysia* [1975] 1 LNS 90; [1977] 2 MLJ 187 is relevant where His Lordship said:

> Whatever may be said of other Constitutions, they are ultimately of little assistance to us because our Constitution now stands in its own right and it is in the end the wording of our Constitution itself that is to be interpreted and applied, and this wording 'can never be overridden by extraneous principles of other Constitutions' ... Each country frames its constitution according to its genius and for the good of its own society.

We look at other Constitution to learn from their experiences, and from a desire to see how their progress and well-being is ensured by their fundamental law.

[36] Section 51A of the CPC is a step towards the equality in arms principle. As stated by the learned trial judge, any further development must await legislative interventions, and not by a mere prismatic construction of constitutional provisions.

[37] In the context of s. 62 of the MACC Act 2009, the appellant argued that these investigation statements and other documents are admissible as of right, and which admissions, should be the prerogative of both parties.

[38] The learned trial judge found that the reasoning advanced by the appellant in regard to s. 62 of the MACC Act 2009 is rather misconceived and unsustainable. Such arguments defeat the purpose of Parliament legislating the MACC Act 2009 to rely on s. 51A in s. 62 of the MACC Act 2009. The learned trial judge found that other than s. 51A of CPC and s. 62 of the MACC Act 2009, there is no other law that exists demanding disclosure, and no automatic disclosure can be founded on *non-obstante* clause. Further, if automatic disclosure is correct, without any express provisions on production, it would not have been necessary for the MACC Act 2009 to enact s. 62 of the MACC Act 2009 at all. We do not see how is the judge wrong in such reasoning. It is trite that Parliament does not legislate in vain.

[39] Section 51A of the CPC is a significant amendment with regards to disclosure at pre-trial stage. So is s. 62 of the MACC Act 2009. There is no compelling legal analysis that could support the argument that automatic admissibility gives the automatic right to disclosure and inspection, in the absence of clear legislative prescriptions to that effect.

[40] Section 51A of the CPC provides for disclosure at pre-trial stage. It provides access of disclosure, but a limited one and does not envisage full unlimited disclosure and inspection of the prosecution's case. Section 51A of the CPC provides:

51A(1) The prosecution shall **before the commencement of the trial** deliver to the accused the following documents:

(a) A copy of the information made under section 107 relating to the commission of the offence to which the accused is charged, if any;

(b) A copy of any document which would be tendered as part of the evidence for the prosecution; and

(c) A written statement of facts favourable to the defence of the accused signed under the hand of the Public Prosecutor or any person conducting the prosecution.

(2) Notwithstanding paragraph (c), the prosecution may not supply any fact favourable to the accused if its supply would be contrary to public interest.

A (3) A document shall not be inadmissible in evidence merely because of non-compliance with subsection (1).

(4) The Court may exclude any document delivered after the commencement of the trial if it is shown that such delivery was done deliberately and in bad faith.

B (5) Where a document is delivered to the accused after the commencement of the trial, the Court shall allow the accused:

(a) A reasonable time to examine the document; and

(b) To recall or re-summon and examine any witness in relation to the document.

C (emphasis added)

[41] Section 51A lists the documents that are required to be furnished to the accused before trial. But as for fact that is favourable to the defence ie, s. 51A(1)(c), the prosecution need not supply any fact favourable to the D defence of the accused, if its disclosure would be contrary to public interests. Further, s. 51A(5) of the CPC provides that where the document is delivered to the accused after the trial had commenced, the court shall give to the accused reasonable time to examine the document and to recall and examine any witness in relation to the document. However, notwithstanding the aforesaid, the court may exclude the document to be delivered after the trial E had commenced if it is shown that such delivery was done deliberately and in bad faith.

[42] There are leading authorities and case laws which have established this clear proposition of law on the scope of s. 51A of the CPC (Refer to: *Syed F Abu Bakar Ahmad v. PP* [1981] 1 LNS 127; [1982] 2 MLJ 186; *PP v. Raymond Chia Kim Chwee & Anor & Another Case* [1985] 2 CLJ 457; [1985] CLJ (Rep) 260; [1985] 2 MLJ 436.) The decision of *Raymond Chia Kim Chwee* was followed in *PP v. Dato' Seri Anwar Ibrahim & Another Appeal* [2010] 4 CLJ 331).

G **[43]** In *PP v. Dato' Seri Anwar Ibrahim & Another* [2010] 4 CLJ 331, the accused applied for the production of witness statements of various witnesses and all documents not used by the prosecution and a list of prosecution witnesses at the pre-trial stage, similar as in our present case (refer to pp. 273-274 of the report). At the High Court, the application was allowed. H However, the Court of Appeal set aside the order of the High Court which was affirmed by the Federal Court. *PP v. Dato' Seri Anwar Ibrahim And Another* referred to *Raymond Chia Kim Chwee*. It is pertinent to quote what was said by Hashim Yeop Sani SCJ in *Raymond Chia Kim Chwee* at pp. 264 & 264 (CLJ); p. 439 (MLJ), the legal position in the following terms:

I The entitlement of the accused under section 51 of the CPC to any document or copies of document or other material in the possession of the prosecution is entirely at the discretion of the Court having regard to the justice of the case. The discretion should not however be exercised

> so as to enable the accused to gain access to materials before the trial as in the case of pre-trial discovery and inspection of documents in a civil proceeding. The accused in a criminal trial should have sufficient notice of what is alleged against him so as to enable him to prepare his defence. So long as that requirement is satisfied the law is satisfied ...
>
> ... If the discretion is to be exercised before the commencement of the trial the Court cannot anticipate how the prosecution will proceed. In other words the court would not be justified to direct the prosecution to deliver to the accused all documents taken from him for that will not be a correct exercise of the discretion under section 51 of the Criminal procedure Code ...
>
> Under section 51A of the CPC the accused is most certainly entitled to have copies of documents which are specified in the charge. But the accused cannot be expected to be given access to all documents whatsoever taken by the police during investigation ... .

In exercising its discretion under s. 51A for the supply of documents before the commencement of trial, the court must have regard to ss. 152, 153 and 154 of the CPC. Hence the discovery at this stage, namely at the pre-trial stage, as in our present case (where trial has not commenced) is only limited to matters that are specified in the charge, to enable the appellant to prepare his defence. The appellant would not be prejudiced in any event as the appellant had been fully informed of the charge against him. How can it be said that the appellant would be put at a disadvantage in preparing his defence as that is not a relevant consideration at this stage. The Federal Court in *Dato' Seri Anwar Ibrahim v. PP* [2010] 4 CLJ 265 held that:

> [4] Sections 51 and 51A are two separate and distinct provisions. Section 51A imposes an obligation upon the prosecution to supply the accused with certain documents and materials. It has no connection to s. 51 which gives the court discretion to allow for discovery in specific instances. Section 51 could not be modified with the aid of the supposed philosophy underlying the new s. 51A, even if such philosophy existed. It was thus wrong for the judge to conclude that s. 51A, had changed the mode of prosecution in a criminal trial, and in the process ignore past precedents on interpretation. It was also wrong for the judge to say that earlier cases decided on s. 51 were no longer applicable.
>
> [5] In the instant case, the application for discovery by the Appellant was made at a pre-trial stage and not made "in the course of the trial". At the pre-trial stage the appellant would only be entitled to those documents and materials pertaining to the charge, to enable him to understand the charge and prepare his defence. The phrase "in the course of trial" means that the trial proper has commenced in that evidence has been led by the calling of witnesses. The phrase does not mean the stage where the charge is only read to the accused. *PP v. Raymond Chia Kim Chwee & Anor* (foll) ...
>
> [6] Although s. 51 appears couched in rather wide terms, it should not literally be taken to be capable of allowing for a wide ranging application, as in the instant case. Its scope is confined to the production of

documents or materials "necessary or desirable" for the purposes of trial. These 2 qualifications depend on which particular stage or point of time the application is made. If, as in this case, it is made at the pre-trial stage, then the discovery must be confined to the matters specified in the charge. In the instant case, the charge was specific and was sufficiently particularised to accord the appellant a fair trial. The requirement of justice had been met, even without the documents and materials sought. *PP v. Raymond Chia Kim Chwee & Anor* (foll) ...

[44] Therefore, by virtue of s. 51A of the CPC, as we are now at the pre-trial stage, the appellant is only entitled to the following documents:

(i) A copy of the first information report made under s. 107 of the CPC;

(ii) Copies of documents which the prosecution intends to tender as part of the evidence for the prosecution; and

(iii) Written statement of facts favourable to the defence of the accused.

What the appellant sought in his notice of motion in prayer (1)(g) are for examination and written statements on oath or affirmations recorded by MACC under MACC Act 2009 or AMLATFA 2001. Essentially, the appellant is asking for him to be supplied with all statements recorded from witnesses other than the appellant/accused.

[45] In prayer 1(h), the appellant is asking for inspection of documents seized in the course of investigation which is not within the ambit of s. 51A.

[46] The appellant is applying for all statements recorded by the MACC and other documents taken by them in the course of investigation without specifying the exact documents. The application is of a general nature and not targeted towards any specific document. It is a general rule of law that the request must be directed at a specific document and a general direction to produce all documents relating to the subject matter in dispute will not be enforced (Refer to *PP v. Teoh Choon Teck* [1962] 1 LNS 141; [1963] 1 MLJ 34.)

[47] The application is also for statements given by potential witness to the MACC and other documents obtained by the MACC under the relevant provisions compelling production embodied in the MACC Act 2009 and AMLATFA 2001 in the course of investigation pertaining to the charges against the appellant. It is trite that an accused person is not entitled to copies of police statements recorded from witnesses recorded in the course of investigations. Firstly, such statement is a privileged document (see *Methuram Dass v. Jagannath Dath* ILR 28 Cal 794) and secondly, as a matter of public policy, it is undesirable for the prosecution to supply the defence with the police statements as there is a danger of tampering with witnesses (Refer to *Husdi v. PP* [1980] 1 LNS 29; [1980] 2 MLJ 80). This fails the test of desirability and necessity in s. 51A of the CPC.

[48] It has been submitted by the appellant that the respondent's affidavits did not aver on any reluctance or possible reluctance by any potential witnesses. Neither is there any averments by the respondent in any of the affidavits which alleged any repercussions to other possible investigations or even the existence of any other pending investigations against the appellant. It is also to be noted that the powers of the investigators under the MACC Act 2009 and AMLATFA 2001 clearly compel witnesses to provide statements to the MACC Act 2009 and the penal consequences of non attendance. On this, we refer to what was said by the Federal Court in *Husdi v. PP* [1980] 1 LNS 29; [1980] MLJ 80 at p. 82:

> We do not think that the prosecution should supply copies of the police statement direct to the defence without the intervention of the court-because of the peculiar circumstances prevailing in this country. Malaysia is a small country, with a small population, and Malaysians are easily scared; they are reluctant to be involved. If a crime is committed under their nose they look the other way, see, hear and say nothing, do little or nothing to help identify - let alone - arrest an offender, and yet complain that the police do not catch criminals and that courts are bedazzled by technicalities. If the prosecution is obliged to supply copies of police statements to the defence without the intervention of the court, the defence may be tempted to ask for, and the prosecution will be obliged to supply copies of every statement in the police investigation file, and Malaysians will be more reluctant to come forward with evidence to incriminate their fellows.

Thus, regardless of the absence of any averments by the respondent in the affidavits as to the possibility of witness tampering, the risk is substantive and real.

[49] Further, it is not in the public interest if statements taken from witnesses and documents obtained during the course of police investigations be furnished to the appellant. Section 124 of the Evidence Act 1950 provides that a public officer cannot be compelled to disclose communications made to him in official confidence if he considers that public interest would suffer by such disclosure. This will also include communications made to MACC officers in their official confidence (See s. 6(2) of the MACCA 2009). Providing the appellant with the documents sought for in the prayers which were made in official confidence to the MACC would prejudice further investigations relating to other cases involving the appellant (See *Suruhanjaya Sekuriti v. Datuk Ishak Ismail*).

[50] The learned trial judge based his findings on the *ratio* in the case of Federal Court case of *Suruhanjaya Sekuriti v. Datuk Ishak Ismail* which held that the provision of s. 134(4) of the SCA must be read subject to the rules of privilege and prohibition on grounds of public policy.

[51] The learned trial judge held that the statements of witnesses made to MACC officers are privileged documents under s. 124 of the Evidence Act 1950. Therefore, it is his findings that as investigators are public officers under s. 6(2) of the MACCA thus attracting s. 124 of the Evidence Act 1950 which means communications made to such officers of MACC in official confidence cannot be compelled to be disclosed.

[52] It is the prerogative of the prosecution as to how to prove their case and it is not for the court to anticipate as to how the prosecution is to proceed with the conduct of proving the charge against the appellant.

[53] The application in this case is not for documents which are specified in the charge which is against the accused. Therefore, to allow the appellant to go beyond these particulars would be to provide the accused with knowledge of the means by which the prosecution proposed to prove the alleged facts. That is not what s. 51A envisaged. *Syed Abu Bakar Ahmad v. PP* [1981] 1 LNS 127 is a case which illustrates this point. The accused applied for an order to inspect and make copies of all documents in the possession of the prosecution. The accused contended that he would be gravely impaired in preparing his defence without giving him an opportunity to have sight of the documents. His application was dismissed by Seah J, who was of the view that s. 51 of the CPC should be construed strictly and it does not allow an accused to ask for discovery of documents or inspection of documents seized by the police in the course of their investigation or in their possession before the criminal trial because to do so would mean an inspection of the evidence of the prosecution by the defence prior to the trial. Therefore, save for the documents as provided under s. 51A of the CPC, the defence is not entitled to ask for the disclosure or inspection of documents/materials in the possession of the prosecution before the commencement of the trial.

[54] It is submitted by the respondent in the submission before us that the application by the appellant does amount to a fishing expedition, thus the generality of the documents applied for. This has been specifically addressed by the Federal Court in *Dato' Seri Anwar Ibrahim v. PP* where the Federal Court said that:

> [47] The appellant cannot say at this stage that his defence is going to be so and so and that he needs to have access to such and such documents and materials to prepare for his defence. One settled principle attached to the application for discovery under s. 51 CPC is that, at this pre trial stage, a roving and fishing inquiry for evidence is not permissible. A catch all net cannot be cast. The appellant is not entitled to know by what means the prosecution proposes to prove the facts underlying the charge he faces. This remains the prerogative of the prosecution.

Conclusion

[55] Therefore, based on the aforesaid, the appellant is not entitled to be supplied with the documents stipulated in paras. (1)(g), (h), (i), (j) and 2(i) in the notice of motion.

[56] We find that the learned trial judge did not err in his findings that the applicant has failed to establish a case for delivery of the information and documents applied for. We unanimously dismissed the appeal by the appellant and affirmed the decision of the learned High Court Judge.