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DATO' SRI MOHD NAJIB HJ ABDUL RAZAK v. PP

FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ
ZAHARAH IBRAHIM CJ (MALAYA)
DAVID WONG DAK WAH CJ (SABAH & SARAWAK)
B
RAMLY ALI FCJ
TENGKU MAIMUN TUAN MAT FCJ
IDRUS HARUN FCJ
NALLINI PATHMANATHAN FCJ
[CRIMINAL APPEAL NO: 05(L)-76-03-2019(W)]
C
10 APRIL 2019

CRIMINAL LAW: *Charges – Criminal charges – Applicant, 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*
D *Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 – High Court dismissed application for prior restraint gag order – Decision of High Court affirmed by Court of Appeal – Whether appeal ought to be allowed*

CRIMINAL PROCEDURE: *Jurisdiction – Pre-emptive order – Prior restraint gag order – Appeal against decision of Court of Appeal – Court of Appeal affirmed High*
E *Court's decision in dismissing application for prior restraint gag order – Applicant, former Prime Minister of Malaysia, charged with seven criminal charges – Criminal charges gained national and international attention and media coverage – Applicant sought prior restraint or pre-emptive gag order to prevent media and public from discussing merits of criminal charges until conclusion of trial – Whether*
F *Malaysian courts have jurisdiction to grant prior restraint or pre-emptive gag order – Whether appeal ought to be allowed – Federal Constitution, art. 126 – Courts of Judicature Act 1964, s. 13*

CRIMINAL PROCEDURE: *Appeal – Appeal against decision of Court of Appeal – Court of Appeal affirmed High Court's decision in dismissing application for prior*
G *restraint gag order – Applicant, former Prime Minister of Malaysia, charged with seven criminal charges – Criminal charges gained national and international attention and media coverage – Applicant sought prior restraint or pre-emptive gag order to prevent media and public from discussing merits of criminal charges until conclusion of trial – Whether Malaysian courts have jurisdiction to grant prior*
H *restraint or pre-emptive order against discussions or publications – Applicable tests – Whether there was real and substantial risk to fairness of trial – Whether there were adequate alternative measures to remedy risk – Whether gag order necessary and proportionate step to protect applicant's right to fair trial – Whether applicant satisfied test – Federal Constitution, art. 126 – Courts of Judicature Act 1964, s. 13*

I

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 and the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001. At the High Court, the appellant sought prior restraint gag order to stop any future publications and discussions on the merits of the criminal charges filed against him until the conclusion of the trial proceedings. Dismissing the application, the High Court Judge ('HCJ') held that (i) pursuant to art. 126 of the Federal Constitution ('FC'), the courts have the powers to make orders, in the nature of prior restraint, against prejudicial discussions or publications affecting a fair trial; (ii) the gag order must be shown to be necessary to prevent an immediate threat of a real and substantial risk of serious prejudice to the administration of justice in the relevant proceedings, in the absence of alternative measures and is proportionate to the competing interests of free speech and risk of prejudice to a fair trial; (iii) since there are no jury trials in Malaysia and cases are tried before a single judge, who is constitutionally duty-bound to consider only the evidence in court and disregard all extraneous matters, the possibility of prejudice from unwarranted publications was remote; (iv) the absence of jury trials meant that the scope for the application of the *sub judice* rule was circumscribed in the Malaysian justice system; (v) some accusatory articles, cited by the appellant, had been in the public sphere since 2014, negating the element of immediacy; (vi) legal remedies were available to the appellant, making the gag order unnecessary as contempt and defamation laws could be resorted to; and (vii) the scope of the application was too wide and was difficult to sustain as it was targeted to the world at large. The decision of the High Court was affirmed by the Court of Appeal. Hence, the present appeal. The issues that arose for the court's adjudication were (i) whether the court has the jurisdiction to issue a prior restraint gag order; (ii) if question (i) is answered in the affirmative, what is the test to be applied; and (iii) whether the appellant satisfied the test.

Held (dismissing appeal; affirming decision of Court of Appeal)
Per Richard Malanjum CJ delivering the judgment of the court:

(1) On the face of it, art. 126 of the FC, read together with s. 13 of the CJA do not expressly empower the court to grant a prior restraint gag order. The Court of Appeal correctly pointed out that there is no specific provision in Malaysian law that authorises the grant of a prior restraint gag order against prejudicial publications. However, a prismatic construction, as expounded in *Lee Kwan Woh v. PP*, should be accorded to art. 126 of the FC. The Court of Appeal was correct in affirming the decision of the HCJ that Malaysian courts have the requisite authority to grant a prior restraint gag order in the exercise of their power to punish for contempt. In other words, art. 126 of the FC is not merely

A an enabling provision to punish for contempt but wide enough to allow the issuance of a prior restraint gag order in appropriate cases. (paras 23, 24 & 27)

(2) In an application for a pre-emptive gag order, the applicant is required to prove that: (i) there is a real and substantial risk to the fairness of the
B trial; (ii) there are no adequate alternative measures to remedy the risk; and (iii) the gag order is a necessary and proportionate step to protect his right to a fair trial. (para 33)

(3) The appellant's affidavit in support of his application did not disclose any obvious or imminent threat to a fair trial. Malaysia had abolished
C trials by jury. Criminal proceedings are now tried by a judge sitting alone. A judge is a legally-trained individual who decides the case on the merits, based on the law, as applied to the facts. A judge could not be compared to a layman juror. In determining the outcome of a matter, he or she is a dispassionate arbiter who takes into account only relevant
D considerations. He or she is not easily swayed by irrelevant information. Furthermore, if a trial judge commits an error of law or fact, that decision is entitled to be impugned and subsequently corrected on appeal. (paras 34 & 35)

E **(4)** The appellant admitted to giving statements to the press to answer the allegations against him. In the circumstances, the finding of the HCJ could not be faulted; since the appellant had the opportunity to present his side of the story, there was a balanced narrative of competing perspectives on the matter. There was no real and substantial risk to the fairness of the trial. That alone would have been sufficient to dispose of
F the appellant's appeal. The refusal of the pre-emptive gag order would not result in the deprivation of the appellant's right to fair trial. He still had recourse to the laws of defamation. It was also open for him to bring committal proceedings for contempt of court in the event any party offends the rule against *sub judice*. Indeed, the courts are well-equipped
G to safeguard the appellant's right to a fair trial even without resorting to the grant of a pre-emptive gag order. (paras 36 & 38)

(5) Prayer 1 of the appellant's notice of motion was directed against 'any person'. Prayer 2 on its part employed the phrase 'no person' in seeking to prohibit the publication of prejudicial statements to the appellant. The
H appellant was evidently attempting to cast a blanket ban on all communications prejudicial to him. It would be impossible for the court to enforce a gag order over foreign media outlets which are beyond the jurisdiction of Malaysian courts. If the appellant's notice of motion is granted, it would create a situation where local news outlets are
I effectively censored while their foreign counterparts enjoy free rein over

what to report. This was plainly untenable. Moreover, the allegations against the appellant have been circulating in the public domain for some time and it would be pointless to regulate the same. The appellant failed to satisfy the criteria of 'necessity' and 'proportionality' in his application for a prior restraint gag order. (paras 41-44)

Bahasa Malaysia *Headnotes*

Perayu, bekas Perdana Menteri Malaysia, dituduh dengan tujuh pertuduhan berkaitan pelakuan kesalahan-kesalahan bawah Kanun Keseksaan, Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 dan Akta Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001. Di Mahkamah Tinggi, perayu memohon perintah awal larangan bersuara untuk menghalang penerbitan dan perbincangan tentang merit-merit pertuduhan-pertuduhan jenayah terhadap beliau hingga selesai prosiding perbicaraan. Menolak permohonan tersebut, Hakim Mahkamah Tinggi ('HMT') memutuskan (i) bawah per. 126 Perlembagaan Persekutuan ('PP'), mahkamah mempunyai kuasa membenarkan perintah, dalam bentuk halangan awal, terhadap perbincangan atau penerbitan memudaratkan, yang menjejaskan perbicaraan adil; (ii) perintah larangan bersuara mesti dibuktikan perlu untuk menghalang ancaman segera risiko prejudis nyata dan besar terhadap pentadbiran keadilan dalam prosiding relevan jika tiada langkah-langkah alternatif dan seimbang dengan kepentingan-kepentingan bersaing, iaitu kebebasan bersuara dan risiko prejudis keadilan perbicaraan; (iii) oleh kerana tiada perbicaraan berjuri di Malaysia dan kes-kes dibicarakan di hadapan seorang hakim, yang mempunyai kewajipan berperlembagaan untuk mempertimbangkan keterangan-keterangan di mahkamah sahaja dan mengabaikan hal-hal perkara yang tidak berkaitan, kemungkinan prejudis akibat penerbitan tidak wajar adalah kecil; (iv) ketiadaan perbicaraan berjuri bermaksud ruang lingkup pemakaian peraturan *sub judice*, dalam sistem keadilan Malaysia, terbatas; (v) beberapa artikel menuduh, yang dipetik oleh perayu, sudah berada dalam lingkungan sosial sejak 2014, menidakkan elemen kesegeraan; (vi) remedi-remedi undang-undang tersedia buat perayu, menjadikan perintah larangan bersuara tidak perlu kerana terdapat jalan keluar dalam undang-undang penghinaan dan fitnah; dan (vii) ruang lingkup permohonan terlalu luas dan sukar untuk diterima kerana permohonan ditujukan pada dunia umumnya. Keputusan Mahkamah Tinggi disahkan oleh Mahkamah Rayuan. Maka timbul rayuan ini. Isu-isu berbangkit untuk diputuskan adalah (i) sama ada mahkamah mempunyai bidang kuasa mengeluarkan perintah awal larangan bersuara; (ii) jika soalan (i) dijawab secara afirmatif, apakah ujian yang terpakai; dan (iii) sama ada perayu memenuhi ujian tersebut.

A **Diputuskan (menolak rayuan; mengesahkan keputusan Mahkamah Rayuan)**

Oleh Richard Malanjum KHN menyampaikan penghakiman mahkamah:

(1) Pada dasarnya, per. 126 PP, dibaca bersekali dengan s. 13 AMK tidak, dengan nyata, memberi mahkamah kuasa membenarkan perintah awal
B larangan bersuara. Mahkamah Rayuan, dengan betul, menegaskan tiada peruntukan khusus dalam undang-undang Malaysia yang membenarkan perintah awal larangan bersuara terhadap penerbitan memudaratkan. Walau bagaimanapun, tafsiran berprisma, seperti yang dijelaskan dalam *Lee Kwan Woh v. PP*, harus diberi pada per. 126 PP. Mahkamah Rayuan
C betul dalam mengesahkan keputusan HMT bahawa Mahkamah Malaysia mempunyai kuasa yang diperlukan untuk membenarkan perintah awal larangan bersuara dalam penjalanan kuasa menghukum penghinaan. Dalam erti kata lain, per. 126 PP bukan sekadar peruntukan membolehkan untuk menghukum penghinaan bahkan cukup luas untuk
D membenarkan perintah awal larangan bersuara dalam kes-kes sesuai.

(2) Dalam satu permohonan perintah awal larangan bersuara, pemohon perlu membuktikan (i) terdapat risiko nyata dan besar terhadap keadilan perbicaraan; (ii) tiada langkah-langkah alternatif yang cukup untuk meremedi risiko tersebut; dan (iii) perintah larangan bersuara ialah
E langkah yang perlu dan seimbang dalam melindungi haknya mendapat perbicaraan adil.

(3) Afidavit sokongan permohonan perayu tidak mendedahkan apa-apa ancaman nyata atau ketara terhadap perbicaraan adil. Malaysia telah menghapuskan perbicaraan berjuri. Prosiding jenayah kini dibicarakan
F oleh hakim yang bersidang berseorangan. Seorang hakim ialah individu terlatih dalam guaman yang memutuskan kes berdasarkan merit, berlandaskan undang-undang yang terpakai pada fakta. Seorang hakim tidak boleh dibandingkan dengan juri tidak professional. Dalam membuat keputusan tentang satu-satu hal perkara, beliau pemutus yang
G tidak dipengaruhi perasaan dan hanya mengambil kira pertimbangan-pertimbangan relevan. Beliau tidak mudah terpengaruh dengan maklumat tidak relevan. Tambahan lagi, jika seorang hakim melakukan kekhilafan undang-undang atau fakta, keputusan tersebut layak dipertikai dan seterusnya dibetulkan melalui rayuan.

H **(4)** Perayu mengaku mengeluarkan kenyataan-kenyataan kepada media demi menjawab dakwaan-dakwaan terhadap beliau. Dalam hal keadaan ini, dapatan HMT tiada kekhilafan; oleh kerana perayu mempunyai peluang menceritakan kisahnya, terdapat naratif seimbang antara perspektif-perspektif yang bersaing dalam hal perkara ini. Tiada risiko
I nyata dan besar terhadap keadilan perbicaraan. Ini sahaja cukup untuk melupuskan rayuan perayu. Keengganan membenarkan perintah awal larangan bersuara tidak akan mengakibatkan penafian hak perayu

mendapat perbicaraan adil. Beliau masih mempunyai jalan keluar bawah undang-undang fitnah. Selain itu, beliau boleh memulakan prosiding pengkomitan untuk penghinaan mahkamah jika mana-mana pihak melanggar peraturan *sub judice*. Mahkamah sememangnya lengkap untuk melindungi hak perayu mendapat perbicaraan adil walau tanpa mengambil jalan keluar dengan membenarkan perintah awal larangan bersuara.

(5) Permohonan 1 notis usul perayu ditujukan kepada 'mana-mana orang'. Permohonan 2 pula menggunakan ungkapan 'tiada orang' dalam memohon larangan penerbitan kenyataan-kenyataan memudaratkan terhadap perayu. Perayu jelas cuba mendapatkan larangan menyeluruh terhadap semua komunikasi memudaratkan yang dibuat terhadapnya. Mustahil untuk mahkamah menguatkuasakan perintah larangan bersuara terhadap saluran media asing yang berada luar bidang kuasa mahkamah Malaysia. Jika notis usul perayu dibenarkan, ini akan membentuk situasi ruang saluran media tempatan ditapis dengan efektif manakala media asing bebas melapor apa-apa sahaja. Ini jelas tidak dapat dipertahankan. Tambahan lagi, dakwaan-dakwaan terhadap perayu sudah lama beredar dalam domain awam dan tiada guna mengawalnya. Perayu gagal memenuhi kriteria 'keperluan' dan 'keseimbangan' dalam permohonan beliau untuk perintah awal larangan bersuara.

Case(s) referred to:

Dagenis v. Canadian Broadcasting Corporation [1994] 3 SCR 835 ***(refd)***
Hodgson and Others v. Imperial Tobacco Ltd [1998] 2 All ER 673 ***(refd)***
Khuja v. Times Newspapers Ltd and Others [2017] 3 WLR 351 ***(refd)***
Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***
R v. Horsham Justices, ex parte Farquharson and Anor [1982] 2 All ER 269 ***(refd)***
R Rajagopal @ RR Gopal @ Nakkheeran Gopal and Another v. Ms J Jayalalitha and Another [2006] 2 Mad LJ 689 ***(refd)***
Sahara India Real Estate Corporation Ltd & Ors v. Securities Exchange Board of India & Anor [2011] CA 981 ***(refd)***
Siemer v. Solicitor General [2013] NZSC 68 ***(refd)***
Syarikat Bekalan Air Selangor Sdn Bhd v. Fadha Nur Ahmad Kamar & Anor [2012] 6 CLJ 93 HC ***(refd)***
Zanzoul v. R [2008] NZSC 38 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 13, 15(1), 25, 60(1)
Federal Constitution, arts. 10(1)(a), 126
Interpretation Acts 1948 and 1967, s. 40(1)

Contempt of Court Act 1981 [UK], s. 4(2)
The Constitution of India [Ind], arts. 129, 215

A *For the appellant - Muhammad Shafee Abdullah, Harvinderjit Singh, Farhan Read, Al-Firdaus Shahrul, Wan Aizuddin Wan Mohammed, Rahmat Hazlan, Muhammad Farhan Shafee, Syahirah Hanapiah, Zahria Ellena Redza; M/s Shafee & Co*

For the respondent - Tommy Thomas, Sithambaram Vairavan, Hj Sulaiman Abdullah, Manoj Kurup, Donald Joseph Franklin, Budiman Lutfi Mohamed & Izzat Fauzan; DPPs

B

[Editor's note: For the Court of Appeal judgment, please see Dato' Sri Mohd Najib Hj Abdul Razak v. PP [2019] 4 CLJ 723 (affirmed)

For the High Court judgment, please see [2019] 4 CLJ 799 (affirmed).]

Reported by Najib Tamby

C

JUDGMENT

Richard Malanjum CJ:

Introduction

D **[1]** This is the appellant's appeal against the judgment of the Court of Appeal delivered on 21 March 2019 which dismissed an appeal by the appellant against a decision of the Kuala Lumpur High Court dismissing the appellant's notice of motion dated 18 July 2018 for a "gag order" to prevent prejudicial statements pertaining to the merits of the charges against him and getting them published in any media pending the disposal of the criminal E proceedings against him.

[2] By way of notice of motion dated 18 July 2018, the appellant applied to the High Court for an order on the following terms:

(a) A direction be hereby issued that pending disposal of the proceedings in F Kuala Lumpur High Court Arrest Case No: WA-45-2-07-2018 and Arrest Case No: WA-45-3-07-2018 ("the proceedings"), any person who shall publish and/or cause to be published in the media, *to wit* any broadcast and/or other communication in whatever form which is addressed to the public at large or any section thereof, any words, G comments, discussions and/or statements, which would suggest, conclude or infer that Dato' Sri Mohd Najib bin Hj Abd Razak has undertaken any of the acts outlined in the four charges in the proceedings, as annexed in Annexure A hereof and/or is guilty of the offences outlined therein, shall be liable to being punished for contempt of this honourable court;

H

(b) An order be hereby granted that pending disposal of the proceedings, no person shall publish and/or cause to be published in the media, *to wit* any broadcast and/or other communication in whatever form which is addressed to the public at large or any section thereof, any words, I comments, discussions and/or statements, which would suggest, conclude or infer that Dato' Sri Mohd Najib bin Hj Abd Razak has

undertaken any of the acts outlined in the four charges in the proceedings, as annexed in Annexure A hereof and/or is guilty of the offences outlined therein;

(c) That the applicant and the respondent be at liberty to apply to enforce the order provided for herein; and

(d) Any further relief or order that this honourable court deems fit and proper to be given in the interest of justice.

Proceedings At The High Court

[3] The High Court allowed an oral application for an interim gag order after the initial four charges were read on 4 July 2018. A subsequent formal application was filed and fixed for hearing on 19 April 2018.

[4] After hearing the submissions of parties, the learned trial judge dismissed the appellant's application on the following grounds:

(a) the scope of the application was plainly wide, and the appellant's intention was to stop future discussion or publication that would prejudice his right to a fair trial, the ramifications of which would result in a contempt of court. According to art. 126 of the Federal Constitution ('FC'), the courts did have the power to make orders in the nature of prior restraint against prejudicial discussions or publications affecting a fair trial. But the test to be applied before such orders are made is to consider whether the risk of prejudice to a fair trial is serious or real or substantial: *Syarikat Bekalan Air Selangor Sdn Bhd v. Fadha Nur Ahmad Kamar & Anor* [2012] 6 CLJ 93; [2012] 7 MLJ 657;

(b) The immediacy of the risk or threat of the prejudice is especially pertinent when one seeks a prohibition which involves a pre-emptive and prior restraint order, as those who are in breach would immediately be in contempt as opposed to situations where in the absence of a gag order an action for contempt is only taken after the actual commissions of the contemptuous act. There is a heavier burden of showing the immediacy of the threat. The gag order must be shown to be necessary to prevent an immediate threat of a real and substantial risk of serious prejudice to the administration of justice in the relevant proceedings, in the absence of alternative measures, and is proportionate in the reference to the competing interests of free speech and risk of prejudice to a fair trial.

(c) Since there are no jury trials in Malaysia and cases are tried before a single judge who is constitutionally duty-bound to consider only the evidence in court and disregard all extraneous matters, the possibility of prejudice from unwarranted publications is unmistakably remote. This is not to say judges are infallible, but judges in discharging their judicial responsibilities must only consider the facts and the law applicable to the particular case and cannot succumb to public opinion.

(d) The absence of jury trials meant that the scope for the application of the *sub judice* rule is decidedly more circumscribed in the Malaysian justice system. As for the unwarranted publicity influencing witnesses, they would be subject to examination in chief, cross-examination, and re-examination to determine their reliability, credibility or lack thereof. The decisions of the judges would also be subject to appeals.

(e) Some accusatory articles cited by the appellant had been in the public sphere since 2014, negating the element of immediacy. The appellant had also given interviews attempting to answer the allegations, and probably attracted far greater public and media interest than the less-than-current allegations that have surfaced for a number of years. This suggests a balanced reporting of the rival views.

(f) Legal remedies are available to the appellant, making the gag order unnecessary as contempt laws and defamation laws can be resorted to. The gag order is also difficult to sustain as it is targeted to the world at large, and the application proposes a scope significantly wider than what has been affirmed in the accompanying affidavit in support.

Proceedings At The Court Of Appeal

[5] The Court of Appeal concentrated on the following two issues on appeal:

(i) Whether the court has the jurisdiction to issue the prior restraint gag order in the form that the appellant is seeking; and

(ii) Whether the *sub judice* rule applies in Malaysia.

[6] Having referred to the authorities of various jurisdictions such as India, New Zealand, the United States of America, and Canada, the Court of Appeal accepted the learned trial judge's finding that art. 126 of the FC when subjected to a prismatic construction as propounded by *Lee Kwan Woh v. PP* [2009] 5 CLJ 631 empowers the Malaysian courts to issue a prior restraint order against prejudicial publications or discussions which affect a fair trial and subvert the due administration of justice, subject to certain considerations.

[7] The Court of Appeal further held that the learned trial judge had correctly identified the following pre-requisites for the grant of a pre-emptive prior restraint, *to wit*: (i) an immediate threat or a real and substantial risk of serious prejudice to the administration of justice in the relevant proceedings; (ii) an absence of alternative measures; and (iii) the pre-emptive prior restraint must be proportionate in reference to the competing interests of free speech and risk of prejudice to a fair trial.

[8] On the issue of whether the rule of *sub judice* applies here, the Court of Appeal agreed with the trial judge that although jury trials have been abolished in Malaysia, there are publications and statements which can be shown to carry a real and substantive risk of seriously prejudicing and pre-judging the issues at stake and these cannot be tolerated in any jurisdiction. The Court of Appeal thus concurred with the learned trial judge that notwithstanding the absence of jury trials, the *sub judice* rule is applicable to Malaysia.

[9] Although the Court of Appeal was of view that the court has a discretion to grant a pre-emptive prior restraint prohibiting prejudicial publications, it found that the appellant had failed to show that the various publications and reports complained of could be said to present an immediate threat of a real and substantial risk of serious prejudice to the appellant's right to a free trial or the administration of justice. According to the Court of Appeal, the application for the pre-emptive prior restraint was more to protect the appellant's standing and reputation rather than safeguarding the administration of justice. The court noted that there was nothing in the publicity that could be said to adversely affect the administration of justice, and at any rate the appellant still had recourse to the laws of contempt and laws of defamation.

[10] The Court of Appeal saw no reason to disturb the learned High Court Judge's ruling that in balancing the constitutional conflict between achieving a fair trial for the accused on the one hand and upholding freedom of speech and expression on the other, greater emphasis should be given to the principle of freedom of speech and expression and of the open justice system.

[11] Moreover, the Court of Appeal held that the court's power to grant a pre-emptive prior restraint is only exercisable under special circumstances.

[12] In addition, the Court of Appeal remarked that the proposed restraint order was of too wide a scope and highlighted the difficulty in enforcing the proposed restraint order against foreign publications.

[13] The Court of Appeal also pointed out that the scope of the gag order as stated in the notice of motion is inconsistent with the appellant's averments in his affidavit-in-support and that shows that the application is not supported by the affidavit-in-support.

[14] The Court of Appeal explained that while the trial judge's conclusions on the jurisdiction and *sub judice* issues accorded with the appellant's submissions, those conclusions were not determinative of the matter as the appellant had failed to meet the requirements for the grant of a pre-emptive restraint order.

[15] The Court of Appeal did not accept the appellant's suggestion that the observations of the learned trial judge in his judgment could be equated to "directions".

[16] Finally the Court of Appeal declined to invoke s. 60(1) of the Courts of Judicature Act 1964 ("CJA") and prayer 4 in the omnibus prayer to allow for specific directions to be issued for prayer 1 in the notice of motion because the appellant had failed to establish that he is entitled to the grant of a prior restraint gag order.

Submissions By The Appellant

[17] The appellant takes the position that:

(i) The court has jurisdiction to issue a prior restraint gag order by virtue of art. 126 of the FC read together with ss. 13 and 25 of the CJA;

(ii) There is risk of substantial risk of prejudice to the appellant;

(iii) The effect of a trial by media on the mind of a judge has been judicially recognised;

(iv) As public opinion has presupposed the appellant's guilt, witnesses who may give evidence exculpatory of the accused may be deterred from testifying for fear of reprisals;

(v) Alternative orders (such as postponing the trial to a later date and changing the venue of the hearing are not sufficient to quell prejudice against the appellant);

(vi) The orders sought are proportionate and do not impinge unfairly upon the interests of free speech, and it would be insufficient to merely weigh the right of freedom of expression by the media against the right of the accused to a fair trial since the latter has far-reaching consequences for the liberty of an individual.

Submissions By The Respondent

[18] The respondent, on the other, hand contends that:

(i) In the absence of an express power conferred by legislation, the court does not have an inherent jurisdiction to hear an application directed against the world at large;

(ii) The appellant failed to satisfy the test of substantial risk of prejudice to the administration of justice to warrant a prior restraint order;

(iii) The rule of *sub judice* does not apply in this instance as it was developed at common law in trials by jury to primarily to prevent the jury from being influenced by media coverage on any case pending before the courts;

(iv) There are other remedies readily available to the appellant such as the laws of defamation and the laws of contempt;

(v) The orders sought by the appellant are an affront to the right of freedom of speech and expression under art. 10(1)(a) of the FC which guarantees every citizen the right to freedom of speech and expression;

(vi) It would be a breach of the open justice system if the appellant's private interest precedes the public interest;

(vii) The appellant's reliefs in his notice of motion are not supported by his affidavit-in-support;

(viii) There is an inconsistency between the appellant's notice of motion and his affidavit-in-support in that the notice of motion is not fully supported by the affidavit-in-support;

(ix) The invocation of s. 60(1) of the CJA 1964 and the omnibus prayer 4 in the notice of motion to allow for specific directions to be issued out for prayer 1 in the appellant's notice of motion was inappropriate as he failed to establish that he was entitled to the prior restraint gag order.

Issues Before This Court

[19] The issue before this court is whether the Court of Appeal has committed any appealable error so as to warrant appellate intervention.

[20] The answer to this primarily turns upon whether the Court of Appeal had reached the correct conclusion with regard to the following:

(i) Whether the court has jurisdiction to issue a prior restraint gag order;

(ii) If the above is answered in the affirmative, what is the test to be applied for the grant of one; and

(iii) Whether the appellant has satisfied the test.

Decision Of This Court

(i) Whether The Court Has Jurisdiction To Issue A Prior Restraint Gag Order

[21] Article 126 of the FC provides that:

> The Federal Court, the Court of Appeal or a High Court shall have power to punish any contempt of itself.

[22] This position is reiterated in s. 13 of the CJA which employs the exact same wording as art. 126.

[23] It is true that on the face of it, art. 126 of the FC read together with s. 13 of the CJA do not expressly empower the court to grant a prior restraint gag order. The Court of Appeal has also correctly pointed out that there is no specific provision in Malaysian law that authorises the grant of a prior restraint gag order against prejudicial publications like s. 4(2) of the United Kingdom Contempt of Court Act 1981.

[24] Be that as it may, we are in agreement with the Court of Appeal and the High Court, that a prismatic construction as expounded by this court in *Lee Kwon Woh (supra)* should be accorded to art. 126 of the FC. Fortifying our view on this is s. 40(1) of the Interpretation Acts 1948 and 1967 which stipulates:

> 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.

[25] We observe that in India, there is also no express power given to the court under their Contempt of Court Act 1971 to issue prior restraint gag orders. Nevertheless, the Indian Supreme Court in *Sahara India Real Estate Corporation Ltd & Ors v. Securities Exchange Board of India & Anor* [2011] CA 981 ruled at para. [21] that the courts there possess the power to issue postponement orders to prevent prejudicial publication in suitable cases on the basis of arts. 129 and 215 of their Constitution, the former of which is in *pari materia* with our art. 126.

[26] A similar view was held by the New Zealand Supreme Court in *Siemer v. Solicitor General* [2013] NZSC 68 at para. [169]:

> Our discussion of the New Zealand cases indicates that, since the 1970s, New Zealand courts have exercised the power to make non-party suppression orders which go beyond anything provided for by statute. We have demonstrated that this power has not been extinguished by either the Criminal Justice Act or by any earlier enactment. Neither section 138 of the Criminal Justice Act nor the provisions in the Criminal Procedure Act purport to provide anything like a code in relation to non-party suppression orders. There is thus a pattern of legislative action and inaction founded on the assumption that the courts have the power to make non-party suppression orders. And the way in which criminal courts deal with pre-trial applications and appeals in part reflects an assumption that non-party suppression orders promote fair trial rights.

[27] We thus hold that the Court of Appeal was correct in affirming the decision of the learned trial judge that our courts have the requisite authority to grant a prior restraint gag order in the exercise of their power to punish for contempt. In other words, art. 126 of the Federal Constitution is not merely an enabling provision to punish for contempt but wide enough to allow the issuance of prior restraint gag order in an appropriate case.

(ii) The Test For The Grant Of A Prior Restraint Gag Order

[28] In *Sahara (supra)* the Indian Supreme Court explained at para. [30]:

> In passing such orders of postponement, *courts have to keep in mind the principle of proportionality and the test of necessity. The applicant who seeks order of postponement of publicity must displace the presumption of Open Justice and only in such cases the higher courts shall pass the orders of postponement under Article 129/Article 215 of the Constitution.* Such orders of postponement of publicity

shall be passed for a limited period and subject to the courts evaluating in each case the necessity to pass such orders not only in the context of administration of justice but also in the context of the rights of the individuals to be protected from prejudicial publicity or misinformation, in other words, where the court is satisfied that Article 21 rights of a person are offended. *There is no general law for courts to postpone publicity, either prior to adjudication or during adjudication as it would depend on facts of each case. The necessity for any such order would depend on extent of prejudice, the effect on individuals involved in the case, the over-riding necessity to curb the right to report judicial proceedings conferred on the media under Article 19(1)(a) and the right of the media to challenge the order of postponement.* (emphasis added).

[29] What is open justice? In *Khuja v. Times Newspapers Ltd and Others* [2017] 3 WLR 351, Lord Sumption said at para. [16] that:

… It has been recognised for many years that press reporting of legal proceedings is an extension of the concept of open justice, and is inseparable from it. In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public which would be absolutely entitled to attend but for purely practical reasons cannot do so.

[30] The overarching theme here is that as far as is possible, court proceedings should be open and accessible to the public in the interests of transparency. Statutory support for the open justice concept is embodied in s. 15(1) of the CJA which states that:

The place in which any Court is held for the purpose of trying any cause or matter, civil or criminal, shall be deemed an open and public court to which the public generally may have access:

Provided that the Court shall have power to hear any cause or matter or any part thereof in camera if the Court is satisfied that it is expedient in the interests of justice, public safety, public security or propriety, or for other sufficient reason so to do.

[31] Open justice is fundamental to a functioning democracy and promotes good governance. Cognizant of this, the English Court of Appeal in *Hodgson and Others v. Imperial Tobacco Ltd* [1998] 2 All ER 673 remarked at p. 689 that:

The best way of avoiding ill-informed comments in the media in the case of this nature when the interest of the public is high, is for the court to be as open as is possible and practicable, not only in relation to the trial but also in relation to the interlocutory proceedings which have to take place prior to that trial. *The other action which can be taken to reduce the risk of trial by media and the absence of co-operation between the parties affecting the conduct of the proceedings is to ensure that as soon as is practical a timetable is laid down for bringing the case to trial as early as possible* and giving any directions to the parties which are necessary in order to require them to co-operate in achieving this. The longer the trial is delayed the greater the opportunity for both sides to engage in tactical manoeuvres which have nothing to do with achieving a fair trial. (emphasis added).

[32] Of course, no one is disputing here that open justice is not absolute. Under the common law, publication bans which are in substance similar to the relief being sought by the appellant are justifiable if there is a real and substantial risk of interference to the right to a fair trial. In *Dagenis v. Canadian Broadcasting Corporation* [1994] 3 SCR 835 the Canadian Supreme Court had occasion to examine the requirements to be fulfilled in a successful application for a publication ban:

> The party claiming under the common law rule that a publication ban is necessary to avoid a real and serious risk to the fairness of the trial bears the burden of justifying the limitation on freedom of expression. *He must prove that the proposed ban is necessary, in that it relates to an important objective that cannot be achieved by a reasonably available and effective alternative measure, that the proposed ban is as limited as possible, and that there is a proportionality between the salutary and deleterious effects of the ban.* The fact that the party seeking the ban may be attempting to safeguard a constitutional right must be borne in mind when determining whether the proportionality test has been satisfied. The judge should, where possible, review the publication ban at issue. He must consider all other options besides the ban and find that there is no reasonable and effective alternative available. He must also limit the ban as much as possible. Lastly, the judge must weigh the importance of the objectives of the particular ban and its probable effects against the importance of the particular expression that will be limited to ensure that the positive and negative effects of the ban are proportionate. (emphasis added).

[33] From the above authorities, it can be gleaned that in an application for a pre-emptive gag order, the applicant is required to prove that:

(a) there is a real and substantial risk to the fairness of the trial;

(b) there are no adequate alternative measures to remedy the risk; and

(c) the gag order is a necessary and proportionate step to protect the accused's right to a fair trial.

(iii) Whether The Appellant Has Satisfied The Test

[34] We have perused the appellant's affidavit-in-support of his application and concur with the courts below and the respondent that it does not disclose any obvious or imminent threat to a fair trial. Our country has abolished trials by jury. Now criminal proceedings are tried by a judge sitting alone. In this connection, it is worthwhile to note what Lord Denning in *R v. Horsham Justices, ex parte Farquharson and Anor* [1982] 2 All ER 269 said at p. 286 in respect of applications restricting publications that:

> … the sole consideration is the risk of prejudice to the administration of justice. Whoever has to consider it should remember that at a trial judges are not influenced by what they may have read in the newspapers. Nor are the ordinary folk who sit on juries. They are good, sensible people. They go by the evidence that is adduced before them and not by what they may have read in the newspapers. The risk of their being influenced is so slight that it can usually be disregarded as insubstantial, …

[35] A judge is a legally-trained individual who decides the case on the merits based on the law as applied to the facts. In determining the outcome of a matter, he or she is a dispassionate arbiter who takes into account only relevant considerations. A judge cannot be compared to a layman juror. He or she is not easily swayed by irrelevant information. Also, if a trial judge commits an error of law of fact that decision is entitled to be impugned and subsequently corrected on appeal.

[36] Furthermore, the appellant has admitted giving statements to the press to answer the allegations against him. In the circumstances, we cannot fault the finding of the learned trial judge that since the appellant has had opportunity to present his side of the story, so to speak, there is a balanced narrative of competing perspectives on the matter. In the circumstances, we therefore conclude that there is no real and substantial risk to the fairness of the trial. That alone would have been sufficient to dispose of the appellant's appeal.

[37] Be that as it may, even if the appellant had made out a case that his right to a fair trial would have been adversely affected, it is pertinent at this juncture to refer to *R. Rajagopal @ RR Gopal @ Nakkheeran Gopal and Another v Ms. J. Jayalalitha and Another* [2006] 2 Mad LJ 689. There the court said at para. [29] that:

> In a free democratic society those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind. As observed in *Kartar Singh*'s Case *(supra)* the persons holding public offices must not be thin-skinned with reference to the comments made on them and even where they know that the observations are undeserved and unjust, they must bear with them and submit to be misunderstood for a time. At times public figures have to ignore vulgar criticisms and abuses hurled against them and they must restrain themselves from giving importance to the same by prosecuting the person responsible for the same. In the instant case, the respondents have already chosen to claim damages and their claim is yet to be adjudicated upon. **They will have remedy if the statements are held to be defamatory or false and actuated by malice or personal animosity.** (emphasis added).

[38] Would the refusal of the pre-emptive gag order result in the deprivation of the appellant's right to fair trial? We think not. In the circumstances, he still has recourse to the laws of defamation. It is also open for him to bring committal proceedings for contempt of court in the event any party offends the rule against *sub judice*. Indeed the courts are well-equipped to safeguard the appellant's right to a fair trial even without resort to the grant of a pre-emptive gag order.

A *Whether It Is "Necessary" And "Proportionate" To Grant A Gag Order*

[39] As alluded to earlier, one of the contentions of the respondent was that the order being prayed for by the appellant was too widely couched and therefore incapable of enforcement.

B **[40]** It cannot be overstated that it is not the function of law or the court to act in vain or participate in a futile exercise, thereby bringing its own authority and processes into disrepute (see: *Zanzoul v. R* [2008] NZSC 38 at para. [2]).

[41] Prayer 1 of the appellant's notice of motion is directed against "any
C person". Prayer 2 on its part employs the phrase "no person" in seeking to prohibit the publication of prejudicial statements to the appellant.

[42] Evidently, the appellant is attempting to cast a blanket ban on all communications prejudicial to him. We are in agreement with the respondent that it would be impossible for us to enforce a gag order over
D foreign media outlets which are beyond the jurisdiction of our courts.

[43] If we grant an order in terms of the appellant's notice of motion, it would create a situation where local news outlets are effectively censored while their foreign counterparts enjoy free rein over what to report. This is
E plainly untenable.

[44] Moreover, the allegations against the appellant have been circulating in the public domain for some time and it would be pointless for us to attempt to regulate the same.

[45] Based on the above, we conclude that the appellant has failed to satisfy
F the criteria of "necessity" and "proportionality" in his application for a prior restraint gag order. We accordingly uphold the findings of both lower courts on this point.

[46] We have also examined the Court of Appeal's findings on the scope of the gag order as stated in the notice of motion. We are in agreement with
G the Court of Appeal that the notice of motion does not correspond to the appellant's averments in his affidavit-in-support. The notice of motion proposes the prohibition of prejudicial material while the affidavit-in-support seeks to restrain material favourable to the accused as well.

H **[47]** The Court of Appeal was therefore correct to say that the appellant's application was not supported by his affidavit-in-support.

[48] We also concur with the Court of Appeal that while the trial judge's conclusions on the jurisdiction and *sub judice* issues accorded with the appellant's submissions, those conclusions were not determinative of the
I matter as the appellant had failed to meet the requirements for the grant of a pre-emptive restraint order.

[49] We find no error too in the Court of Appeal's rejection of the appellant's suggestion that the observations of the learned trial judge in his judgment could be equated to "directions".

[50] Finally, the Court of Appeal was not wrong when it declined to invoke s. 60(1) of the CJA and prayer 4 in the omnibus prayer to allow for specific directions to be issued for prayer 1 in the notice of motion because, as we have concluded above, the appellant had failed to satisfy the criteria for the grant of a prior restraint gag order.

[51] In the upshot, there was no misdirection of law and fact by the Court of Appeal warranting appellate intervention.

[52] Consequently, we dismiss the appellant's appeal. The decision of the Court of Appeal is hereby affirmed.