A

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-05-72-02-2019]
25 MARCH 2019

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

CRIMINAL PROCEDURE: *Prosecution – Conduct of criminal prosecution – Transfer of charges – Appeal against decision of High Court allowing application by prosecution to withdraw transfer certificates – Accused, former Prime Minister of Malaysia, charged with seven criminal charges – Charges initially filed at Sessions*
E *Court but later transferred to High Court by way of transfer certificates issued by prosecution – Whether there was breach of natural justice – Whether Public Prosecutor's power to withdraw transfer certificate spent when certificate was acted on – Whether Public Prosecutor was functus officio – Whether High Court's reasoning flawed – Whether High Court Judge could transfer case back to himself*
F *– Whether appeal ought to be allowed – Criminal Procedure Code, ss. 417(1), (2) & 418A – Malaysian Anti-Corruption Commission Act 2009, s. 60*

CRIMINAL PROCEDURE: *Public Prosecutor – Powers and functions – Application by prosecution to withdraw transfer certificates – Accused, former Prime Minister of Malaysia, charged with seven criminal charges – Charges initially filed*
G *at Sessions Court but later transferred to High Court by way of transfer certificates issued by prosecution – Powers of Public Prosecutor to institute, conduct or discontinue any proceedings for offence – Whether Public Prosecutor has power to withdraw transfer certificates issued previously – Whether principle of functus officio applied to Public Prosecutor – Federal Constitution, s. 145(3)*

H

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 ('the seven charges'). The seven charges were registered under three
I different suits on two different dates. The first four charges were filed on 4 July 2018 while the remaining three charges were filed on 8 August 2018. On both dates, the charges were initially filed at the Sessions Court before

they were transferred to the High Court, pursuant to the certificates issued by the Public Prosecutor ('PP') under s. 418A of the Criminal Procedure Code ('CPC') and s. 60 of the MACCA. At the High Court, the Attorney General ('AG') filed an application to withdraw the above-mentioned transfer certificates. Allowing the application, the High Court Judge ('HCJ') held that (i) the AG, as the PP, was empowered to effect the withdrawal of the transfer certificates issued under s. 418A of the CPC and s. 60 of the MACCA in respect of the seven charges; (ii) the withdrawal of the transfer certificates would not cause ramifications and an unhealthy precedent in the administration of the courts; (iii) with the withdrawal, the seven charges were reverted to the Sessions Court where they were originally registered; and (iv) the process of the registration *via* the routing system was applicable for transfer applications made by the prosecution or the accused under s. 417(2) of the CPC but such formality was unnecessary when the High Court exercises its discretion to act on its own initiative under s. 417(2) of the CPC, provided the requirements of s. 417 is adhered to, particularly the ground for transfer under s. 417(1)(a) to (e) of the CPC. The HCJ exercised his discretion under s. 417(2) of the CPC, on its own motion, to invoke s. 417(1) of the CPC to order the transfer of the seven charges, registered under the three suits, from the Sessions Court to the High Court in accordance with s. 417(1)(cc) read with s. 417(1)(e) of the CPC. The seven charges were transferred back to the same High Court and to continue from the point of the withdrawal (7 February 2019) with the proceedings prior to the withdrawal remaining valid. Hence, the present appeal. In support of his appeal, the appellant raised the questions of (i) whether there was a breach of natural justice, namely the *audi alteram partem* rule, as (a) the HCJ did not grant the short adjournment sought for full research and argument; and (b) the HCJ provided improved and fresh grounds of decision dated 15 February 2019 ('the impugned second judgment') not raised and argued on 7 February 2019; (ii) whether the PP's power to withdraw a s. 418A certificate was spent when the said certificate was acted on and whether the PP was *functus officio*; (iii) whether the HCJ's reasoning on the powers of the PP was flawed; (iv) whether the PP could attempt to regularise where jurisdiction to issue transfer certificates was doubted; (v) whether the HCJ acted on 'own initiative' under s. 417(2) of the CPC; and (vi) whether the HCJ could transfer the case back to himself.

Held (dismissing appeal; affirming decision of High Court)
Per Lau Bee Lan JCA delivering the judgment of the court:

(1) There were adequate reasons for the HCJ's refusal of the adjournment as the reasons laid in the very considerations under s. 417(1)(e) of the CPC. When the HCJ made the order on its own initiative, under s. 417(2) of the CPC, it was an exercise of discretion to transfer the three cases from the Sessions Court to the High Court, pursuant to s. 417(1)(cc) of the CPC, which entailed a consideration whether such an order is expedient for the ends of justice under s. 417(1)(e). (para 33)

(2) The HCJ merely gave a brief decision orally on 7 February 2019 after hearing the parties. His Lordship did not give any signed written judgment on 7 February 2019; what the HCJ signed as 'Salinan Diakui Sah' was the notes of proceedings of 7 February 2019 and the signature below the said decision was part of the practice of a judicial officer signing or placing his initials on the notes of proceedings to show an event has occurred in the proceedings. This could be seen throughout the notes of proceedings. The second impugned judgment dated 15 February 2019 ought not to be expunged or disregarded and not form part of the record. (para 41)

(3) The concept of *functus officio* applies to a court of law and not acts of the PP under the Federal Constitution ('FC'). The doctrine of *functus officio* is part of the doctrine of *res judicata*. A party could not ask the court to re-visit the same dispute. The appellant's submission that the PP could not be said to have the power to withdraw a s. 418A certificate as the power was spent when the said certificate was acted on and the PP was *functus officio* bore no merit. (para 52)

(4) The relevant provisions in respect of the PP's power to transfer is provided in arts. 145(3) and (3A) of the FC. Statutorily, the relevant provisions in respect of the PP's power to transfer is provided in ss. 417, 418 and 418A of the CPC. In interpreting the constitutional and statutory provisions, the court is required to adopt the purposive approach under s. 17A of the Interpretation Acts 1948 and 1967. The purpose or object of s. 417(1) of the CPC is to ensure that a transfer order is made by the High Court when an application is made by any of the parties entitled to apply under s. 417(2) of the CPC on the basis of the transfer under s. 417(1)(a) to (e) of the CPC and the types of order that may be made under s. 417(1)(aa) to (cc) of the CPC. In issuing the transfer certificates, under s. 418A of the CPC, the AG was acting under arts. 145(3) and (3A) of the FC. (paras 43-47)

(5) The HCJ's reasoning on the powers of the PP was not flawed as His Lordship substantiated his findings that the PP was empowered to effect withdrawal of the transfer certificates. The HCJ's findings were supported by applicable laws or principles gleaned from case laws. (para 53)

(6) There was no jurisdictional challenge as to the right of the PP to issue the transfer certificates under s. 418A of the CPC. This was the finding of the HCJ and it was legally correct. The issuance of the transfer certificates was protected by the presumption of constitutionality. All the PP did was to act in abundance of caution by withdrawing the certificates. (para 54)

(7) The AG was merely highlighting to the HCJ the options and left it entirely for His Lordship to decide under s. 417(2) of the CPC. 'On its own initiative', among others, means 'to initiate is therefore to cause a

process or action to begin'. This was what the HCJ did: acting on the own initiative of the High Court in the exercise of his discretion under s. 417(2) of the CPC, His Lordship decided that the seven charges should continue to be tried by the High Court on the basis that it would be expedient for the ends of justice under s. 417(1)(e) after taking into account several considerations. There was no reason to disturb the HCJ's approach on the exercise of discretion when determining an application for transfer, under s. 417 CPC, by drawing a distinction between an application emanating from the PP and that from an accused person, as opposed to the court acting on its own initiative. (paras 56 & 59)

(8) The HCJ was not transferring the cases to himself but rather to the High Court of which His Lordship was the presiding judge in the exercise of its power under s. 417(2) of the CPC (acting on the own initiative of the High Court) on the basis of the transfer under s. 417(1)(e) to order the three cases pending in the Sessions Court to be transferred to and tried before the High Court under s. 417(1)(cc) of the CPC. Hence, the issue of usurpation of the powers of the Chief Judge of Malaya did not arise. (para 61)

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 ('ASPRM') dan Akta Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001 ('tujuh pertuduhan'). Tujuh pertuduhan ini didaftarkan bawah tiga guaman berbeza pada tarikh berbeza. Empat pertuduhan pertama difailkan pada 4 Julai 2018 manakala tiga lagi difailkan pada 8 Ogos 2018. Pada kedua-dua tarikh, pertuduhan-pertuduhan tersebut asalnya difailkan di Mahkamah Sesyen sebelum kesemuanya dipindahkan ke Mahkamah Tinggi, menurut akuan-akuan yang dikeluarkan oleh Pendakwa Raya ('PR') bawah s. 418A Kanun Tatacara Jenayah ('KTJ') dan s. 60 ASPRM. Di Mahkamah Tinggi, Peguam Negara ('AG') memfailkan permohonan menarik semula akuan-akuan pindah yang dinyatakan di atas. Membenarkan permohonan tersebut, Hakim Mahkamah Tinggi ('HMT') memutuskan (i) AG, sebagai PR, berkuasa menarik semula akuan-akuan pindah yang dikeluarkan bawah s. 418A KTJ dan s. 60 ASPRM untuk tujuh pertuduhan tersebut; (ii) penarikan semula akuan-akuan pindah tidak akan mengakibatkan kesan rumit dan duluan tidak normal dalam pentadbiran mahkamah; (iii) dengan penarikan semula, tujuh pertuduhan tersebut dikembalikan ke Mahkamah Sesyen iaitu tempat asal semuanya didaftarkan; dan (iv) proses pendaftaran melalui sistem penghalaan terpakai dalam permohonan-permohonan pindahan yang dibuat oleh pihak pendakwaan atau tertuduh bawah s. 417(2) KTJ tetapi formaliti sedemikian tidak perlu apabila Mahkamah Tinggi menjalankan budi bicaranya untuk bertindak atas inisiatif

sendiri bawah s. 417(2) KTJ, asalkan kehendak-kehendak s. 417 dipatuhi, khususnya alasan pindahan bawah s. 417(1)(a) hingga (e) KTJ. Hakim Mahkamah Tinggi menjalankan budi bicara beliau bawah s. 417(2) KTJ, atas usulnya, untuk membangkitkan s. 417(1) KTJ, memerintahkan pindahan tujuh pertuduhan tersebut, yang berdaftar bawah tiga guaman, dari Mahkamah Sesyen ke Mahkamah Tinggi, selaras dengan s. 417(1)(cc) dibaca bersekali dengan s. 417(1)(e) KTJ. Tujuh pertuduhan tersebut dipindahkan semula ke Mahkamah Tinggi dan bersambung dari penarikan semula (7 Februari 2019) dan prosiding sebelum penarikan semula kekal sah. Maka timbul rayuan ini. Menyokong rayuan beliau, perayu membangkitkan soalan-soalan (i) sama ada berlaku pencabulan keadilan asasi, khususnya peraturan *audi alteram partem* kerana (a) HMT tidak membenarkan penangguhan singkat untuk penyelidikan dan hujahan penuh; dan (b) HMT memberi alasan penghakiman yang dibaiki dan baharu bertarikh 15 Februari 2019 ('penghakiman kedua yang dipersoal') yang tidak dibangkitkan dan dihujahkan pada 7 Februari 2019; (ii) sama ada kuasa PR menarik semula akuan s. 418A diguna apabila akuan tersebut dikemukakan dan sama ada PR telah *functus officio*; (iii) sama ada alasan HMT tentang kuasa-kuasa PR cacat; (iv) sama ada PR boleh cuba melazimkan jika bidang kuasa mengeluarkan akuan-akuan pindah diragui; (v) sama ada HMT bertindak atas inisiatif beliau sendiri bawah s. 417(2) KTJ; dan (vi) sama ada HMT boleh memindahkan kes tersebut kepada diri beliau.

Diputuskan (menolak rayuan; mengesahkan keputusan Mahkamah Tinggi)

Oleh Lau Bee Lan HMR menyampaikan penghakiman mahkamah:

(1) Terdapat alasan-alasan mencukupi untuk HMT menolak penangguhan kerana alasan-alasan ini terletak dalam pertimbangan-pertimbangan bawah s. 417(1)(e) KTJ sendiri. Apabila HMT membuat perintah atas inisiatif sendiri bawah s. 417(2) KTJ, ini adalah penjalanan budi bicara untuk memindah tiga kes tersebut dari Mahkamah Sesyen ke Mahkamah Tinggi, bawah s. 417(1)(cc) KTJ, yang melibatkan pertimbangan sama ada perintah sedemikian wajar demi mencapai keadilan bawah s. 417(1)(e).

(2) Hakim Mahkamah Tinggi sekadar memberi keputusan ringkas secara lisan pada 7 Februari 2019 selepas mendengar pihak-pihak. Beliau tidak memberi apa-apa penghakiman bertulis yang bertandatangan pada 7 Februari 2019; yang ditandatangani oleh HMT sebagai 'Salinan Diakui Sah' ialah nota prosiding pada 7 Februari 2019 dan tandatangan di bawah keputusan tersebut ialah sebahagian amalan pegawai kehakiman yang menurunkan tandatangan atau meletakkan inisial pada nota prosiding tersebut untuk menunjukkan sesuatu berlaku dalam prosiding. Ini boleh dilihat dalam seluruh nota prosiding. Penghakiman kedua yang dipersoalkan, bertarikh 15 Februari 2019, tidak sepatutnya dipadamkan atau diabaikan mahupun tidak membentuk sebahagian rekod.

(3) Konsep *functus officio* terpakai pada mahkamah perundangan dan bukan tindakan-tindakan PR bawah Perlembagaan Persekutuan ('PP'). Doktrin *functus officio* sebahagian doktrin *res judicata*. Satu pihak tidak boleh memohon mahkamah melihat semula pertikaian yang sama. Hujahan perayu bahawa PR tidak boleh dikatakan mempunyai kuasa untuk menarik balik akuan s. 418A kerana kuasa tersebut diguna semasa akuan tersebut dikemukakan dan PR telah *functus officio* tidak bermerit.

(4) Peruntukan-peruntukan relevan berkaitan kuasa PR untuk memindah diperuntukkan dalam per. 145(3) dan (3A) PP. Bawah statut, peruntukan-peruntukan relevan berkaitan kuasa PR untuk memindah diperuntukkan bawah s. 417, 418 dan 418A KTJ. Dalam mentafsir peruntukan perlembagaan dan statutori, mahkamah perlu mengguna pakai pendekatan tujuan bawah s. 17A Akta Tafsiran 1948 dan 1967. Matlamat atau objektif s. 417(1) KTJ ialah memastikan satu perintah pindahan dibuat oleh Mahkamah Tinggi apabila satu permohonan dibuat oleh mana-mana pihak yang berhak memohon bawah s. 417(2) KTJ atas dasar pindahan tersebut bawah s. 417(1)(a) hingga (e) KTJ dan jenis-jenis perintah yang boleh dibuat bawah s. 417(1)(aa) hingga (cc) KTJ. Dalam mengeluarkan akuan-akuan pindah, bawah s. 418A KTJ, AG bertindak bawah per. 145(3) dan (3A) PP.

(5) Alasan-alasan HMT berkaitan kuasa-kuasa PR tidak cacat kerana beliau menyokong dapatan-dapatan beliau bahawa PR mempunyai kuasa menarik semula akuan-akuan pindah. Dapatan-dapatan HMT disokong dengan undang-undang terpakai atau prinsip-prinsip yang boleh dikutip daripada kes-kes undang-undang.

(6) Tiada cabaran terhadap bidang kuasa berkaitan hak PR mengeluarkan akuan-akuan pindah bawah s. 418A KTJ. Ini dapatan HMT dan dapatan tersebut betul bawah undang-undang. Pengeluaran akuan-akuan pindah dilindungi oleh anggapan berperlembagaan. Pendakwa Raya hanya bertindak berdasarkan limpahan amaran dengan menarik semula akuan-akuan.

(7) Peguam Negara sekadar menekankan, pada HMT, pilihan-pilihan sedia ada dan menyerahkan semuanya agar diputuskan oleh HMT bawah s. 417(2) KTJ. 'Atas inisiatifnya', antara lain, bermaksud 'untuk memulakan iaitu menyebabkan satu proses atau tindakan bermula'. Ini yang dilakukan oleh HMT: bertindak atas insiatif Mahkamah Tinggi dalam menjalankan budi bicara beliau bawah s. 417(2) KTJ, HMT memutuskan tujuh pertuduhan tersebut akan disambung-bicara oleh Mahkamah Tinggi atas dasar ini wajar untuk mencapai keadilan bawah s. 417(1)(e) selepas mengambil kira beberapa pertimbangan. Tiada alasan untuk campur tangan dalam pendekatan HMT tentang penjalanan

budi bicara apabila memutuskan satu permohonan pindah, bawah s. 417 KTJ, dengan membuat perbezaan antara permohonan yang timbul daripada PR dan daripada tertuduh, berbanding mahkamah yang bertindak atas inisiatifnya sendiri.

(8) Hakim Mahkamah Tinggi tidak memindahkan kes-kes tersebut kepada diri beliau tetapi ke Mahkamah Tinggi yang beliau sidangi sebagai hakim dalam menjalankan kuasanya bawah s. 417(2) KTJ (bertindak atas inisiatif Mahkamah Tinggi sendiri) atas dasar pindah bawah s. 417(1)(e) untuk memerintahkan ketiga-tiga kes sementara menanti Mahkamah Sesyen agar dipindah dan dibicarakan di Mahkamah Tinggi bawah s. 417(1)(cc) KTJ. Oleh itu, isu rampasan kuasa Hakim Besar Malaya tidak timbul.

Case(s) referred to:

Agudosi Ikenna Emmanuel v. PP [2015] 1 LNS 1062 CA ***(refd)***
Ankur Nath Ganguli v. PP [1956] 1 LNS 9 HC ***(refd)***
Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***
Dato' Tan Chin Woh v. Dato' Yalumallai V Muthusamy [2016] 8 CLJ 293 FC ***(refd)***
Dick v. Piller [1943] All ER 627 ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Habee Bur Rahman v. PP [1970] 1 LNS 32 HC ***(refd)***
Hoe Cheong Products Co Ltd v. Cargill Hong Kong Ltd [1995] 1 WLR 404 ***(refd)***
Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145 FC ***(refd)***
Kieron Stannard v. Crown Prosecution Service [2019] EWHC 84 (Admin)(QBD) ***(refd)***
Lee Ah Tee v. Ong Tiow Pheng & Ors [1984] 1 CLJ 26; [1984] 1 CLJ (Rep) 187 FC ***(refd)***
Ooi Kean Thong & Anor v. PP [2006] 2 CLJ 701 FC ***(refd)***
Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor [2009] 6 CLJ 430 FC ***(refd)***
Pembinaan Batu Jaya Sdn Bhd v. Pengarah Tanah dan Galian, Selangor & Anor [2016] 5 CLJ 250 CA ***(refd)***
PP v. Azilah Hadri & Anor [2015] 1 CLJ 579 FC ***(refd)***
PP v. Dato' Yap Peng [1987] 1 CLJ 550; [1987] CLJ (Rep) 284 SC ***(refd)***
PP v. Datuk Harun Idris & Ors [1976] 1 LNS 180 HC ***(refd)***
PP v. Heng You Nang [1949] 1 LNS 61 HC ***(refd)***
PP v. Lim Shui Wang & Ors [1979] 1 MLJ 65 ***(refd)***
PP v. Phee Boon Poh & Ors [2018] 3 CLJ 784 HC ***(refd)***
PP v. Pung Chen Choon [1994] 1 LNS 208 SC ***(refd)***
R v. Thames Magistrates' Court, ex parte Polemis [1974] 2 All ER 1220 ***(refd)***
Regina v. Bristol City Council, Ex parte Everett [1999] 1 WLR 1170 ***(refd)***
Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC ***(refd)***
State And Another v. Transferees And Another [2015] PGSC 45 ***(refd)***
Sunil Kumar Gnosh v. Ajit Kumar Das & Ors AIR 1969 CAL 492 ***(refd)***
Thitapha Charoenchuea lwn. PP [2017] 1 CLJ 1 FC ***(refd)***
Ting Sieh Chung v. Hock Peng Realty Sdn Bhd [2016] 7 CLJ 527 CA ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 60(1)
Criminal Procedure Code, ss. 51A, 254, 376(1), 417(1)(a), (b), (c), (d), (e), (aa), (bb), (cc), (2), (4), 418, 418A, 418B
Federal Constitution, arts. 121(1), 145(3), (3A)
Interpretation Acts 1948 and 1967, ss. 17A, 40(1)
Malaysian Anti-Corruption Commission Act 2009, s. 60(5)

Anti-social Behaviour, Crime and Policing Act 2014 [UK], s. 43
Prevention of Oil Pollution Act 1971 [UK], s. 2(1)

For the appellant - Muhammad Shafee Abdullah, Harvinderjit Singh, Sarah Abishegam, Al-Firdaus Shahrul Naing, Wan Aizuddin Wan Mohammed, Rahmat Hazlan, Muhammad Farhan Muhammad Shafee, Nur Syahirah Hanapiah & Zahria Eleena Redza; M/s Shafee & Co

For the respondent - Tommy Thomas, 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 392 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Lau Bee Lan JCA:

Salient Background Facts

[1] This appeal by the appellant stems from an oral application by the learned Attorney General ('AG') as the Public Prosecutor ('PP') to withdraw the certificates issued under s. 418A of the Criminal Procedure Code ('the CPC') and s. 60 of the Malaysian Anti-Corruption Commission Act 2009 ('the MACC Act') that were previously issued by the PP to transfer to the High Court the charges against the appellant that had been first filed in the Sessions Court. The learned High Court Judge ('the HCJ') allowed the oral application by the AG and exercised his discretion under s. 417(2) of the CPC to order the transfer of the charges back to the High Court.

[2] The appellant was charged with seven criminal charges for offences under the Penal Code, the MACC Act, and the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLAFTA') which have been registered under three different case nos. ie, WA-45-2-07-2018, WA-45-3-07-2018 and WA-45-5-08-2018.

[3] The seven charges were registered on two different dates: four charges for offences under Penal Code and MACC Act were filed on 4 July 2018 and the remainder three charges under AMLATFA were filed on 8 August 2018. All the seven charges were ordered to be jointly tried. The appellant pleaded not guilty to all the charges. The High Court fixed trial of the seven charges from 12 February 2019 to 29 March 2019.

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

[5] On 28 January 2019, another three new additional charges under AMLATFA were read out to the appellant. The prosecution asked for the three new charges to be jointly tried with the existing seven. Counsel for the appellant asked the court to allow the defence a few days to consider. The court allowed the request and fixed 7 February 2019 for hearing of the submission of parties should there be any objection to the proposed joint trial.

[6] On 7 February 2019, the learned AG informed the court that a ruling on the issue of joinder would not be necessary as he was proposing not to proceed on the three new charges and asked for the appellant to be granted a discharge not amounting to an acquittal ('DNAA') since the prosecution would file these charges before the Sessions Court instead. The appellant did not object. The High Court then ordered the DNAA of the appellant on the three new charges.

[7] The learned AG raised another matter which became contentious. The AG wished to withdraw the transfer certificates that had been previously issued under s. 418A of the CPC and s. 60 of the MACC Act to transfer the seven charges to the High Court.

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

[9] The learned AG informed the court that upon withdrawal, the cases on the seven charges would revert to the Sessions Court where they originated. He then drew to the court's attention there were two options:

(i) the prosecution can have the charges mentioned at the Sessions Court and then immediately apply under s. 417 to have them transferred back to this High Court; or

(ii) alternatively, the learned AG suggested that the High Court can act *suo moto* (on its own initiative) under s. 417(2) and it is expedient for the ends of justice under s. 417(1)(e) of the CPC to order the transfer of the seven charges from the Sessions Court back to this High Court.

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

[11] At the hearing, the defence submitted the withdrawal means that the proceedings ceased to exist and there was nothing for this High Court to order to transfer. If the validity of s. 418A and s. 60 is doubtful, so would the act of withdrawing the certificates.

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

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

Findings Of The High Court

[14] Summarily, the findings of the learned HCJ based on the decision made on 7 February 2019 and judgment dated 15 February 2019 (the admissibility of the latter will be addressed later) are:

(i) The AG as the PP is empowered to effect the withdrawal of the transfer certificates issued under s. 418A of the CPC and s. 60 of the MACC Act in respect of the seven charges.

(ii) The withdrawal of the transfer certificates would not cause ramifications implied by the lead counsel for the appellant to be serious and setting an unhealthy precedent in the administration of the courts.

(iii) With the withdrawal of the transfer certificates in respect of the seven charges, the seven charges are reverted to the Sessions Court where they had been originally registered.

(iv) The process of the registration *via* the routing system is applicable for transfer applications made by the prosecution or the accused under s. 417(2). However it is unnecessary for such a formality when the High Court exercises its discretion to act on its own initiative under s. 417(2) provided the requirements of s. 417 is adhered, particularly the ground for the transfer under s. 417(1)(a) to (e).

(v) The learned HCJ exercised his discretion under s. 417(2) of the CPC (on its own motion) to invoke s. 417(1) of the CPC to order the transfer of the seven charges registered under the three cases from the Sessions Court to the High Court in accordance with s. 417(1)(cc) read with s. 417(1)(e) of the CPC. In so doing, the learned HCJ gave due regard to information made known to the court by the learned AG ie, the mode by which by the three cases comprising the original seven charges were transferred to the High Court under certificates issued by the AG pursuant to the power conferred on the PP under s. 145(3A), s. 418A of the CPC and s. 60 of the MACC Act; that the defence did not object to this mode of transfer and that this mode of transfer has been regularly used since amendments were made to the Constitution in 1988 and the matters referred in paras [8,] [9] and [10] above.

(vi) The basis of the considerations under s. 417(1)(e) of the CPC that it would be expedient for the ends of justice held by the learned HCJ are:

> First, the 7 charges were registered on 4th of July and since then this High Court has heard 3 contested applications in the course of following months all of which are pending appeal. Secondly, charges in other prosecution against the accused have also been transferred to this High Court under the same Section 417(1)(e) on the application of the accused himself. Thirdly, this case has also generated much public interest locally as well as internationally. **Fourthly, there is no real prejudice or injustice caused to the defence of the accused. In essence and substance, there are no changes to this proceeding other than merely on the basis of the transfer of the case**. Therefore the prosecution has in fact complied with Section 51A on delivery of documents. All applications have been heard and a date of a trial to start 3rd of February was fixed almost 6 months ago. Fifthly, even the original form 418A certificate was not objected to by the accused.
>
> (emphasis added)

(vii) The seven charges are transferred back to the same High Court and to continue from the point of the withdrawal (7 February 2019) with the proceedings prior to the withdrawal remaining valid.

Our Findings

[15] We had considered the written submissions, reply submissions cum oral submissions of the lead counsel and co-counsel for the appellant and the learned AG for the respondent, all of which have been ably argued.

[16] At the forefront of our minds are the following applicable legal principles:

(i) The appellate court will not interfere with the trial judge's decision and may not set it aside on appeal unless it is shown it is "plainly wrong" in that the trial court had arrived at its decision or finding (i) incorrectly

on the basis of the relevant law and/or the established evidence and (ii) without judicial appreciation of the evidence (see *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 (FC) at p. 321 h-i).

(ii) An appeal is a continuation of proceedings by way of rehearing and an appeal court is empowered to review or to re-evaluate all the evidence available to arrive at its decision (see *Agudosi Ikenna Emmanuel v. PP* [2015] 1 LNS 1062; [2016] 2 MLJ 596 (CA) at 607 [27] and *PP v. Azilah Hadri & Anor* [2015] 1 CLJ 579 at 612; [2015] 1 MLJ 617 (FC) at 650 [102] which was referred to in the former case).

Breach Of Natural Justice

[17] The thrust of the appellant's complaint under this head of argument is two-fold:

(i) the learned HCJ did not grant the short adjournment sought for full research and argument; and

(ii) the learned HCJ provided improved and gave fresh grounds of decision dated 15 February 2019 ('impugned second judgment') not raised and argued on 7 February 2019. In this regard, we state at the outset our views on the impugned second judgment is subject to the rider of our ruling on the expungement of the same to be discussed later.

[18] Hence the appellant contends there is a breach of the natural justice, namely the *audi alteram partem* rule. The appellant urges the court to allow the appeal and seeks for an order that the learned HCJ's judgment be set aside and remitted to the High Court for hearing before a different judge pursuant to s. 60(1) of the Courts of Judicature Act 1964 ('CJA') or an order that the proceedings at the High Court have been vitiated and the appellant be granted a DNAA on the seven charges with liberty to the PP to re-charge the appellant in the Sessions Court.

Request For Adjournment

[19] On the issue of the request for adjournment by the appellant, we are guided by the instructive general principles governing the principles in the exercise of discretion of a judge to allow or refuse adjournment propounded in *Dick v. Piller* [1943] All ER 627 which were approved and adopted by the Federal Court in *Lee Ah Tee v. Ong Tiow Pheng & Ors* [1984] 1 CLJ 26; [1984] 1 CLJ (Rep) 187 at p. 189(e) to (h) as discussed below.

[20] Firstly, we start on two premises namely:

(1) Whether or not a party should be granted an adjournment is wholly at the discretion of the Judge. He would exercise the discretion solely upon his view of the facts.

(2) *Prima facie* this discretion is unfettered.

[21] Secondly, we asked ourselves the following:

> (3) [W]hether on the facts [of the instant case] there are adequate or sufficient reasons [for the learned HCJ] to refuse the adjournment.

[22] Thirdly, we remind ourselves that an appellate court refrains from interfering with the learned HCJ's exercise of discretion in regard to the granting of an adjournment:

> 4. [U]nless it appears that such discretion has been exercised in a way which tended to show that all necessary matters were not taken into consideration or the decision was otherwise arbitrarily made.; and

[23] Fourthly, the appellate court is slow to interfere:

> 5. [B]ut if it appears that the result of the order made below would be to defeat the rights of the parties altogether or that there would be an injustice to one or the other of the parties then the appellate Court has power and indeed a duty to review the exercise of the discretion.

[24] We have perused the notes of proceeding held on 7 February 2019 before the learned HCJ (pp. 1-19 nota keterangan jld 2). These are our observations:

(i) In response to the matters raised by the learned AG on 7 February 2019 (see paras 6 to 10 above), whilst the learned lead counsel stated twice he was taken by surprise, he said he required at least ½ an hour adjournment (stated twice) to confer with the appellant and team in relation to especially whether the s. 418A certificate can be withdrawn ending the third time with "Maybe Yang Arif would be so kind to permit us to have it." (pp. 4-5 nota keterangan jld 2).

(ii) The learned HCJ granted the request (p. 5 nota keterangan jld 2).

(iii) Whilst the respondent requested for more time (till Monday or Tuesday) to do research so that any decision that is made is made after careful consideration of mature arguments (pp. 7, 9, 10 & 12 nota keterangan jld 2), the submissions of the lead counsel and the co-counsel proceeded at length (pp. 5-13 nota keterangan jld 2).

(iv) After the respondent's reply, the appellant's counsel submitted at length (pp. 15-18 nota keterangan jld 2).

(v) Before the decision of the court, the learned lead counsel said "I don't think I need to add any more unless has got questions" (*sic*) but acknowledging that the respondent and AG have submitted and ending with "[I]t is pregnant with authorities that is crying out to be researched … and that's what we ask" (p. 18 nota keterangan jld 2).

(vi) By conduct, namely by allowing the appellant's counsel's request for ½ an hour adjournment followed by the continuing act of allowing the parties to submit, the learned HCJ has impliedly refused the appellant's

request for adjournment. In this regard in our considered opinion, the appellant's contention that the bullet points on "serious issues" and "evidence that counsel were not making submissions to seek determination of the substantive matters but were instead providing basis to justify their request for a short adjournment." (at para (c) iv pp. 28-29 of the appellant's written submission) is negated.

(a) It is clear the learned HCJ delivered his decision only after hearing the submissions of the parties. This is evident from para. [17] of the impugned second judgment:

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

[25] The appellant in submission stated (i) "the sealed orders dated 7 February 2019 also does not carry any decision on the adjournment." and (ii) the learned HCJ "in the second judgment suddenly viewed the matter as an application by the PP to withdraw the transfer certificates (para [1], second judgment @ p. 24 RRJ1), when in fact this was not the case. This was not the pronouncement made on 7 February 2019 nor was it part of the sealed orders."

[26] We find there is no merit in the appellant's submissions (i) and (ii) above for these reasons:

(i) Having examined the sealed orders dated 7 February 2019 in respect of the three cases which are similar save for the intitulement, we observe that para (c) of the orders states:

> (c) **Permohonan untuk penangguhan perbicaraan** dan penggantungan prosiding bagi **kes no. WA-45-2-07/218, WA-45-3-07/218 dan WA-45-5-08/218 adalah ditolak**.
>
> (emphasis added).

Hence this negates the appellant's submission (i) above.

(ii) The learned HCJ on 7 February 2019 states "**My decision on the application made by the Public Prosecutor. The Public Prosecutor has the power to discontinue or decline to further prosecute at any stage of the trial**." (emphasis added). This is followed by the order for DNAA

for the three additional charges. The learned HCJ then states "In respect of the existing seven charges, in my view the Public Prosecutor is similarly empowered to effect the withdrawal of s. 418A certificate …". It is essential to note the opening statement of the learned HCJ which I have emboldened and underlined.

(a) Then in the impugned second judgment (the admissibility of which is addressed below), the learned HCJ in his introductory remarks said:

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

(1) Then in the sealed orders, among others, state:

> **DAN SETELAH MENDENGAR DAN MENELITI** keterangan dan hujahan 5 kedua-dua pihak di atas **MAKA ADALAH DIPERINTAHKAN** seperti berikut:
>
> (a) …
>
> (b) *Berikutan daripada penarikan balik sijil-sijil di bawah seksyen 418A Kanun Prosedur Jenayah dan seksyen 60(1) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 oleh Pendakwa Raya, ketiga-tiga kes yang didaftarkan di Mahkamah Sesyen Kuala Lumpur no. WA-15 61R-10-07/2018, WA-61K-2-07/2018 DAN WA-61R-11-08/2018 dipindahkan ke Mahkamah Tinggi dan untuk dibicarakan di Mahkamah Tingg Jenayah 3 Kuala Lumpur menurut Seksyen 417(2) dan Seksyen 417(1)(e) Kanun Prosedur Jenayah*.
>
> (emphasis added)

(i) All the above has to be viewed against the backdrop of the learned HCJ's observation in the impugned second judgment that the issue of the AG's withdrawal of the transfer certificates "became contentious" which is substantiated by the notes of evidence of the proceedings on 7 February 2019.

[27] Taking all the matters stated above holistically (para 26(ii) to (i)), we are of the view there is no inconsistency between what the learned HCJ said in the impugned second judgment *vis a vis* his pronouncement made on 7 February 2019 and the sealed orders.

[28] We are satisfied that the learned HCJ was fully conscious of the circumstances of the three cases before him namely, trial dates were fixed in February and March 2019 and s. 51A of the CPC documents were served (23 volumes on 14 November 2018, two volumes on 1 February 2018 and six volumes on 8 March 2019). There is no basis for the appellant's complaint that he received the last set of documents only on 8 March 2019 as the respondent in para. 3 of the letter of even date to the lead counsel's firm notified "the documents served as part of the evidence for the prosecution is not final and the prosecution reserves the right to serve further documents before the commencement of the trial or adduce further documents during trial."

[29] The appellant has cited *Ting Sieh Chung v. Hock Peng Realty Sdn Bhd* [2016] 7 CLJ 527; [2016] 5 MLJ 342], *Sunil Kumar Gnosh v. Ajit Kumar Das & Ors* AIR 1969 CAL 492 (Calcutta High Court) and *R v. Thames Magistrates' Court, ex parte Polemis* [1974] 2 All ER 1220 for the proposition that a breach of natural justice occurs when insufficient time is given to counsel or an adjournment application unjustifiably refused/not considered. The authorities of *Sunil Kumar Gnosh (supra)* and *R v. Thames (supra)* are applicable to the fact pattern of the cases therein. In the former case, the case has a chequered history of many adjournments with judgment deferred until finally about a year later, the judgment of the Magistrate who delivered the decision by acquitting the accused persons of the respective charges was impugned on the sole ground that he had not given the parties an opportunity to advance arguments before the delivery of the judgment, The court considered the issue in the light of natural justice.

[30] Whilst *R v. Thames* concerns a motion for an order for *certiorari* to quash an order of the Thames Magistrates' Court which adjudged the applicant guilty of an offence under s. 2(1) of the Prevention of Oil Pollution Act 1971 which the court said was not trivial. The court granted the *certiorari* because the applicant was not given reasonable opportunity to present his case as he had no time (i) to take samples, (ii) to see a report of the samples taken by the prosecution, (iii) to look for witnesses, (iv) to prepare supporting evidence of his case and (v) he was a foreigner with rudimentary knowledge of the English language.

[31] The pertinent case is *Ting Sieh Chung v. Hock Peng Realty Sdn Bhd* [2016] 7 CLJ 527 (a case common to both parties) where it is crystal clear the Court of Appeal found there was a breach of the *audi alteram partem* rule when the Deputy Registrar refused the defendant's request for a short adjournment for the work permit to be issued to an accountant whom the defendant wished to call to rebut the expert evidence on accounts from the plaintiff's expert witness.

[32] However unlike the three cases above, the facts of the case in this appeal before us are different. We find the evidence showed that having heard the parties' submission coupled with the matters alluded in para 24(i)

to (a) above, the learned HCJ has judiciously exercised his discretion not to allow the adjournment sought by the appellan*t albeit* not expressly stated. We find on the facts of this appeal the rule of *audi alteram partem* has been adhered. This is in accordance with the *ratio* in *Ting Sieh Chung (supra)* at 533 [12] where this court held:

> [12] It **is trite that adjournment is a matter of discretion** of the learned DR but **that discretion must be exercised judiciously. We recognised that not all applications for an adjournment must be granted as a matter of course**. An unwarranted application for an adjournment may indeed be an attempt to unjustly delay the course of justice. But sometimes, an adjournment may well be a way to ensure that justice be done for the case as a whole. … **In dispensing justice, one must always bear in mind the basic principle of natural justice that is *audi alteram partem***, … .
>
> (emphasis added)

[33] On the facts of this appeal before us, we conclude that there are adequate reasons for the learned HCJ's refusal of the adjournment as the reasons for the refusal for the adjournment lie in the very considerations under s. 417(1)(e) (reproduced in para. 14(vii) above) because when the learned HCJ made the order on its own initiative under s. 417(2) of the CPC, it is an exercise of discretion to transfer the three cases from the Sessions Court to the High Court pursuant to s. 417(1)(cc) which entails a consideration whether such an order is expedient for the ends of justice under s. 417(1)(e). Further, for the reasons explained, there is compliance with the fourth and fifth principles mentioned in *Lee Ah Tee (supra)* as all necessary matters have been considered; neither is the decision not to adjourn exercised arbitrarily nor has the refusal to adjourn resulted in injustice to the appellant. Hence we refrain from appellate interference.

Impugned Second Judgment

[34] With respect to the grounds/judgment of 7 February 2019, the appellant states the learned HCJ did not indicate that it was 'brief grounds' or that 'full grounds will follow', it was without qualification and that the grounds were complete to the extent it covered the basis for the orders which were sealed. The appellant contends that the impugned second judgment improves, supplements and adds on the decision of 7 February 2019 by, among others, the inclusion of the HCJ taking the position there was an oral application by the AG to withdraw the certificates which he allowed, HCJ "sets out the full reasons" for his decision and the adding of fresh/new grounds e.g:

> Justifying the transfer to Himself by reference to provisions in 417(1) & (2) CPC, s. 25 and Item 12 of the Courts of Judicature Act 1964, s. 39B Dangerous Drugs Ordinance, Article 145(3) Federal Constitution, further authorities (*Lim Shui Wang* [1979] 1 MLJ 65 and *Fan Yew Teng* [1973] 2 MLJ 1) all of which were never raised during the 7/2/2019 proceedings.

(see para 27(a) to (j) appellant's written submission (withdrawal of s. 418A certificate) without giving the appellant the opportunity to address. The appellant cites the following cases of *Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen-Chih & Anor* [2009] 6 CLJ 430 at pp. 437 & 438; [2009] 6 MLJ 293 (FC) at 302 [14] & [16] and 303 [17], *PP v. Phee Boon Poh & Ors* [2018] 3 CLJ 784 at 798; [2018] 9 MLJ 376 (HC) at 392 [36] & [37], *Dato' Tan Chin Woh v. Dato' Yalumallai V Muthusamy* [2016] 8 CLJ 293 at 304; [2016] 5 MLJ 590 (FC) at 601 [21] & [22] and *Hoe Cheong Products Co Ltd v. Cargill Hong Kong Ltd* [1995] 1 WLR 404 at p. 409 A-E.

[35] All the aforesaid authorities either deal with unpleaded issues or entirely fresh or new issues which would require the parties to be heard before the judge makes a decision. However in the appeal before us, comparing the decision dated 7 February 2019 and the impugned second judgment, the learned HCJ did not with respect decide on new or fresh issues as the appellant contends. We are of the view the issue of 'the oral application' is untenable for the reasons proffered at paras. [25], [26] and [27] above.

[36] The appellant cites *PP v. Heng You Nang* [1949] 1 LNS 61; [1949] 15 MLJ 285, *Ankur Nath Ganguli v. PP* [1956] 1 LNS 9; [1956] MLJ 206 at 207, *Habee Bur Rahman v. PP* [1970] 1 LNS 32; [1971] 2 MLJ 194 D-F right column and *Thitapha Charoenchuea lwn. PP* [2017] 1 CLJ 1; [2016] 6 MLJ 549 wherein the Federal Court approved of the principle in *Ankur Nath Ganguli* and at 562 [39] and [40], held the court is only competent to write a written judgment and cannot supplement earlier grounds with further grounds. Primarily, on the facts, these cases can be distinguished.

[37] In *PP v. Heng You Nang* (*supra*), at p. 288 left column the court held that once a judgment in a criminal case has been pronounced and signed it cannot be altered; "If a written judgment is delivered it is perfected as soon as it is delivered and signed; if an oral judgment is delivered it is perfected, in my opinion, as soon as it is pronounced and the effect thereof has been entered in the judge's note-book and signed."

[38] In *Habee Bur Rahman (supra)*, at 194 D-F right column the court held:

> It is not permissible for a trial court **having signed and delivered its grounds of decision to supplement the grounds of decision or to amplify them in any way**.
>
> It is however not such conduct as can be said to have occasioned a miscarriage of justice or such as can be said to warrant or require or even justify the trial being regarded a nullity and the conviction being quashed.
>
> **The only effect of it was that the appellate court must consider the original judgment as it stood and exclude any consideration of the parts added**.
>
> (emphasis added)

[39] In *Ankur Nath Ganguli* (*supra*), the trial judge gave reasons for convicting the appellant and his judgment was taken by his secretary and was reduced to a written form. The Court of Appeal at p. 207 left column held "an addition to the trial judge's oral judgment cannot form part of the record, and [the court] can have no regard to it".

[40] In *Thitapha Charoenchuea* (*supra*), there were three judgments dated 22 October 2013 and 25 November 2013 and 20 January 2014. The Federal Court at p. 552 held (3) and (4) found the judgments dated 22 October 2013 and 25 November 2013 were complete judgments and should not be deemed as simple grounds and the appellant cannot supplement the two judgments with 25 November 2013 additional judgment which was written after the appeal was filed; the Federal Court held the double judgment did not affect the fairness and did not render the proceedings in the appeal void; rather it was a mere irregularity.

[41] In the present appeal, we find the learned HCJ merely orally gave a brief decision on 7 February 2019 after hearing the parties. He not give any signed written judgment on 7 February 2019 in the manner referred to in the cases at para. [36] above; what the learned HCJ signed as "salinan diakui sah" was the notes of proceedings of 7 February 2019 and the signature below the said decision is part of the practice of a judicial officer signing or initialling his notes of proceedings to show an event has occurred in the proceedings. This can be seen throughout the notes of proceedings (pp. 5, 13, 19 and 24). Thus the second impugned judgment dated 15 February 2019 ought not to be expunged or disregarded and not form part of the record as urged upon us by the appellant.

[42] In the event we err in our decision in that the second impugned judgment ought to be disregarded, following *Thitapha Charoenchuea* and *Habee Bur Rahman*, it is a mere irregularity which does not justify the proceedings being regarded a nullity and the only effect is we must consider the decision delivered on 7 February 2019 and disregard the impugned second judgment. In any event, by way of rehearing this court is entitled to review and re-evaluate all the evidence available and the submissions of the parties before us to arrive at our decision in this appeal. Hence there is no merit in the appellant's suggestion for this court to set aside the second impugned judgment and to remit the case to another High Court for full arguments.

Withdrawal Of Transfer Certificates

Whether PP Is *Functus Officio* Once Transfer Certificates Issued And Acted On.

Whether There Is An Implied Power To Withdraw

[43] The relevant provisions in respect of the PP's power to transfer is provided in the Federal Constitution in art. 145(3) and art. 145(3A) which merits reproduction (material parts):

Article 145. (3) **The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence** ...

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

(emphasis added)

[44] Statutorily, the relevant provisions in respect of the PP's power to transfer is provided in s. 417, s. 418 and s. 418A of the CPC. It is to be noted that these provisions are contained in the CPC titled "Chapter 15 XLII Transfer Of Criminal Cases". The relevant provisions are reproduced:

High Court's power to transfer cases

Section 417. (1) Whenever it is made to appear to the High Court:

(a) …

(b) ...

(c) …

(d) that such an order is expedient for the ends of justice, or …,

it may order -

(aa) …

(bb) …

(cc) that any particular criminal case be transferred to and tried before the High Court

(2) **The High Court may make an order** under subsection (1) either on the report of the lower Court, or on the application of the Public Prosecutor or the accused person, **or on its own initiative**.

Section 418. Application for transfer to be supported by affidavit

418(1). Every application for the exercise of the power conferred by section 417 shall be made by motion which shall, **except when the applicant is the Public Prosecutor**, be supported by affidavit.

Trials by High Court on a certificate by the Public Prosecutor

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

A

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

(3) The certificate of the Public Prosecutor issued under subsection 25 (1) shall be tendered to the subordinate Court before which the case is triable whereupon the Court shall transfer the case to the High Court specified in the certificate and cause the accused person to appear or be brought before such Court as soon as may be practicable.

B

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

C

(emphasis added)

D **[45]** In interpreting the abovesaid constitutional and statutory provisions, the court is required to adopt the purposive approach under s. 17A of the Interpretation Acts 1948 and 1967 ie, "**a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred** to a construction that would not promote that purpose or object". (emphasis added)

E

[46] The purpose or object of s. 417(1) of the CPC is to ensure that a transfer order is made by the High Court when an application is made by any of the parties entitled to apply under s. 417(2) on the basis of the transfer under s. 417(1)(a) to (e) and the types of order that may be made under s. 417(1)(aa) to (cc). It is to be noted that the threshold is very low by virtue of the language used in s. 417(1) in that "when it appears to the High Court as opposed to "if the court is satisfied".

F

[47] In issuing the transfer certificates under s. 418 A of the CPC, the learned AG was acting under art. 145(3) and art. 145(3A) of the Federal Constitution. Section 418B of the CPC qualifies the cases to which s. 418A is applicable as follows:

G

Cases to which section 418A is applicable

418B. Section 418A shall apply to all cases triable under this Code by a criminal Court subordinate to the High Court, whether the proceedings are instituted before or after the coming into force of that section, **provided that the accused person has not pleaded guilty and no evidence in respect of the case against him has begun to be adduced**.

H

(emphasis added)

I **[48]** In *PP v. Datuk Harun Idris & Ors* [1976] 1 LNS 180; [1976] 2 MLJ 116, Abdoolcader J (as he then was) declared s. 418A of the CPC as it is worded and as it now stands [pre-amendment] unconstitutional and void and the

certificates for transfer of the cases to the High Court issued therein and the transfer to be of no effect (p. 125 B-C). However at p. 125 D, His Lordship stated:

> Transmission to the High Court under the section 418A channel therefore fails but this is not necessarily the end of the matter, as an application by the Public Prosecutor for transmission under the section 417 channel is still open and available to him if he chooses to apply thereunder, in which event the court will consider the application within the ambit of that statutory provision and on its merits.

[49] Further in *PP v. Lim Shui Wang & Ors* [1979] 1 MLJ 65 the Federal Court was asked to rule whether the High Court Judge had power to transfer the cases under the Dangerous Drugs Ordinance, 1952 to the subordinate court. Suffian LP (as he then was) at p. 66 G-I, left column stated:

> As the cases in question are criminal, in our judgment the learned judge could transfer them only in accordance with sections 417, 418 and 418A of the Criminal Procedure Code. **From subsection (2) of section 417 it is clear that the High Court may transfer a case** on the report of the lower court or on the application of the Attorney-General *or, as happened here, on its own initiative; but this is subject to two restrictions. First, the High Court may do so only for the reasons stated in paragraphs (a) to (e) of subsection (1) of section 417, and secondly, the High Court may transfer a case only from a subordinate court to another subordinate court or to itself, but not from itself to a subordinate court.*
>
> (emphasis added)

[50] In *PP v. Dato' Yap Peng* [1987] 1 CLJ 550; [1987] CLJ (Rep) 284; [1987] 2 MLJ 311 , by a majority decision, the Supreme Court declared s. 418A to be unconstitutional, and void for infringement of art. 121(1) of the Federal Constitution. Abdoolcader SCJ (as he then was) at p. 292 (CLJ); p. 321 E (MLJ) stated:

> All is not lost however, as an application by the Public Prosecutor under section 417 would still be open and available to him if he chooses to apply thereunder, as I said in the *Bank Rakyat* case when such an application was in fact made and allowed after the transfer effected under section 418A was vitiated, in which event the High Court will no doubt consider the application within the ambit of that provision and on its merits.

[51] Further we are of the considered view that the cases of *Kieron Stannard v. Crown Prosecution Service* [2019] EWHC 84 (Admin)(QBD) (online print out) a Community Protection Notice ('CPN') issued under s. 43 of the Anti-social Behaviour, Crime and Policing Act 2014)), *Regina v. Bristol City Council, Ex parte Everett* [1999] 1 WLR 1170 (English CA) (an abatement notice issued under the Environmental Protection Act 1990) and *Pembinaan Batu Jaya Sdn Bhd v. Pengarah Tanah dan Galian, Selangor & Anor* [2016] 5 CLJ 250; [2016] 2 MLJ 495 (CA) (revocation by State Authority of approval for alienation of land) all cited by the respondent are of assistance. Whilst the fact pattern of these three cases differ from the present case, we are of the view that the principle that the courts therein have held there was

an implicit power to withdraw although there is no express statutory power to issue the two documents (two English cases) and no express power of revocation (the local case) can by analogy be applicable.

[52] We agree with the respondent's submission that the concept of *functus officio* applies to a court of law and not acts of the PP under the Federal Constitution. As held by the Court of Appeal in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393 at p. 429 G, the doctrine of *functus officio* is part of the doctrine of *res judicata*; hence a party cannot ask the court to re-visit the same dispute. Therefore the appellant's submission that the PP cannot be said to have the power to withdraw a s. 418A certificate as the power is spent when the said certificate is acted on and the PP is thereafter *functus officio* bears no merit.

Whether Judge's Reasoning On Powers Of PP Flawed

[53] We do not find the learned HCJ's reasoning on the powers of the PP flawed as the appellant contends. The reason being he has substantiated his findings that the PP is empowered to effect withdrawal of the transfer certificates. The following were cited and considered by him:

(i) Article 145(3) of the Federal Constitution - "The [AG] shall have power, exercisable at his discretion to institute, conduct or discontinue any proceedings …".

(ii) Section 376(1) of the CPC – PP shall have control and direction of all criminal proceedings under the CPC.

(iii) Section 254 of the CPC – PP may discontinue proceedings at any stage of the trial.

(iv) Article 145(3A) of the Federal Constitution.

(v) A withdrawal of the transfer certificates is an exercise of constitutional authority of the PP within the contemplation of art. 145(3) of the Federal Constitution citing s. 40(1) of the Interpretation Acts 1948 and 1967.

(vi) Section 418A of the CPC and s. 60 of the MACC Act are the provisions supported by art. 145(3A) of the Federal Constitution which empower the AG "to determine the courts in which or the venue at which the proceedings which he has power under [art. 145(3)] to institute or to which such proceedings shall be transferred.". Be that as it may the PP is entitled to take the view that the constitutionality of s. 418A of the CPC and s. 60 of the MACC Act may still be challenged.

(vii) The learned HCJ was of the view that the withdrawing of the transfer certificates previously issued would not cause ramifications which the lead counsel for the accused implied to be serious and setting an unhealthy precedent to the administration of the courts. His Lordship

noted under s. 418B of the CPC and s. 60(5) of the MACC Act, the certificates of transfer under s. 418A and s. 60 can only validly be issued by the PP in cases where the accused has not pleaded guilty and where no evidence against the accused has been adduced as compared to s. 417(4), where there is no limitation for transfer.

(viii) The trial for the three cases (WA-45-2-07/2018, WA-45-3-07/2018 and WA-45-5-08/2018) in respect of the seven charges have not commenced "with any witness testimony" when the s. 418A and s. 60 transfer certificates were issued and "neither [has] the trial started when the [PP] now applies to have the same certificates withdrawn".

(ix) The power of the High Court to transfer cases is found in s. 417 of the CPC, namely:

(a) parties who can make the application (sub-s. (2);

(b) basis of the transfer (sub-s. (1)(a) to (e); and

(c) type of order that may be made (sub-s. (1) (aa) to (cc).

(x) Section 417(2) confers the power of the High Court to order a transfer on its own initiative which is exercised exceptionally.

We observed that this finding of the learned HCJ is supported by the authority of *PP v. Lim Shui Wang* at p. 67 C left column.

(xi) The learned HCJ likened acting on its initiative to the exercise of revisionary powers of the High Court under the CPC and Courts of Judicature Act 1964 where the High Court may act on its own motion and call for the record of proceedings in the subordinate courts.

(xii) There is no necessity to call for any record of background of the matter as the High Court was notified of the fact that the seven charges had been transferred to the same High Court in early August 2018.

(xiii) The learned HCJ relied on *PP v. Lim Shui Wang & Ors* at p. 66 H-I right column as authority that the High Court may transfer on its own initiative under s. 417(2) of the CPC and such exercise of the power to transfer is subject to two restrictions.

(xiv) The withdrawal of the s. 418A and s. 60 certificates is only effective prospectively and has no effect on the proceedings on the seven charges (which have not been withdrawn) since 4 July 2018 before the withdrawal which remain valid.

We find the application by the learned HCJ of the doctrine of prospective overruling is justified as this doctrine is recognised and applied by the Supreme Court in the case of *PP v. Dato' Yap Peng*. At p. 321 B-D of the judgment, after the court (by majority) declared s. 418A to be unconstitutional and void as being an infringement of

A the provisions of art. 121(1), it applied "the doctrine of prospective overruling so as not to give retrospective effect to the declaration made with the result that all proceedings of convictions or acquittals which had taken place under that section prior to the date of our judgment in this matter would remain undisturbed and not be
B affected, and the appeal was dismissed on this basis".

(xv) The learned HCJ stated that the prosecution had already delivered s. 51A documents and certain witness statements to the accused, issued summons to witnesses to attend trial.

C (xvi) The learned HCJ held the appellant has not shown any prejudice or injustice occasioned to him by the transfer order of the High Court acting on its own initiative.

There is no error in the learned HCJ's findings above as points (i) to (xvi) are supported by the applicable law or principles gleaned from
D case law alluded to in paras. [43] to [52] above.

Whether The PP Can Attempt To Regularise Where Jurisdiction To Issue Transfer Certificates Doubted

[54] There was no jurisdictional challenge as to the right of the PP to issue
E the transfer certificates under s. 418A of the CPC. This was the finding of the learned HCJ at paras. [18], [21] and [22] of the impugned second judgment. We are of the view that the aforesaid finding is legally correct. The issuance of the transfer certificates is protected by the presumption of constitutionality. All the PP did was to act in abundance of caution by withdrawing the certificates.

F

In *PP v. Pung Chen Choon* [1994] 1 LNS 208; [1994] 1 MLJ 566 at p. 576 H, the Federal Court held:

> First of all, it is clear law that there is a presumption – perhaps even a strong presumption – of the constitutional validity of the impugned
G section and so the burden of proof lies on the party seeking to establish the contrary. (See *PP v. Datuk Harun bin Haji Idris & Ors*).

See (i) *PP v. Datuk Harun Hj Idris & Ors* [1976] 1 LNS 80; [1976] 2 MLJ 116 (HC) at p. 117 I right column (approved by Federal Court in *PP v. Pung Chen Choon*

H (ii) *Ooi Kean Thong & Anor v. PP* [2006] 2 CLJ 701 at 711; [2006] 3 MLJ 389 at 396 [16] wherein the Federal Court reiterated the same principle.

Transfer under s. 417 CPC

Judge Did Not Act On 'Own Initiative' Under s. 417(2) CPC

I **[55]** We take note the definition of "on its own initiative" to mean "without being prompted by others" in the *Oxford Dictionary of English* 3rd edn p. 1370 which has been similarly adopted by the Supreme Court of

Papua New Guinea in *State And Another v. Transferees And Another* [2015] PGSC 45 at 517 [78] as follows:

> [78] The phrase 'on its own initiative'. What does the phrase really mean? The *Concise Oxford English Dictionary* (10th edn) Judy Pearsall (ed) defines the word 'initiative' as the ability to initiate, the power or opportunity to act before other do, or without being prompted by others. **To initiate is therefore to cause a process or action to begin**.
>
> (emphasis added)

[56] It is our considered view what the learned AG did was merely highlighting to the learned HCJ the options and left it entirely for him to decide under s. 417(2) of the CPC. It is observed the "on its own initiative" among others also means "To initiate is therefore to cause a process or action to begin" (see *State v. Transferees*). This is precisely what the learned HCJ did: acting on the own initiative of the High Court (presided by him as the judge) in the exercise of his discretion under s. 417(2), he decided that the seven charges should continue to be tried by the High Court on the basis that it would be expedient for the ends of justice under s. 417(1)(e) after taking into account several considerations (paras. [45] to [50] of the impugned second judgment)

Whether The Judge Could Exercise Power Under s. 417(2) As There Were No Proceedings Pending At The Sessions Court

[57] The appellant argued that as there were no proceedings pending before the Sessions Court at the time the s. 418A/s. 60 certificates were withdrawn, the notional Sessions Court to which the matters revert could not have given effect to the order of the learned HCJ under s. 417(1)(cc) as it was devoid of jurisdiction to do so, being not cognized of the affected matters.

[58] The learned HCJ has addressed this issue and we find no error in his judgment as to the effect of the withdrawal of the transfer certificates that:

> [F]rom the point of withdrawal (date of this order) is for the 7 charges to revert to the Sessions Court where they had been originally filed and registered. When that happens, the 7 charges cease to be registered with the High Court Registry.
>
> [S]ince the background of the matter had been notified to me sitting as a High Court judge in the instant proceeding, upon the withdrawal, and on the own initiative of this Court, I exercised my discretion under Section 417(2) of the CPC on the basis of Section 417(1)(e) to order the transfer of the 7 charges (already reverted to the Sessions Court) back to the same High Court, for the reasons I have stated earlier.

[59] The learned HCJ stated the process of the registration *via* the routing system is applicable for transfer applications made by the prosecution or the accused under s. 417(2). However it is unnecessary for such a formality when the High Court exercises its discretion to act on its own initiative under

s. 417(2) provided the requirements of s. 417 is adhered, particularly the ground for the transfer under s. 417(1)(a) to (e). The learned HCJ held that if the court did not exercise its discretion under s. 417(2), the seven charges could be registered in any one of the other High Courts and with new trial dates having to be fixed depending on the availability of trial dates despite the original trial dates being fixed in February and March 2019, as far back as August 2018. This state of affairs according to the learned HCJ "does not accord with the ends of justice under s. 417(1)(e)" and "is plainly unsatisfactory and patently inconsistent with the ends of justice considering the circumstances of the case."

We find there is no reason to disturb the learned HCJ's approach on the exercise of discretion when determining an application for transfer under s. 417 of the CPC by drawing a distinction between an application emanating from the PP and that from an accused person as opposed to the court acting on its own initiative.

Whether The Judge Could Transfer Case Back To Himself

[60] Once the certificates were withdrawn, the cases reverted to the Sessions Court where the case was originally registered. We agree with the learned HCJ of the significance that "[t]hese seven charges have not been withdrawn and "the process of mentioning the withdrawal of the certificates in the Sessions Court is merely administrative and does not affect the legal consequence of the withdrawal which is the seven charges being automatically reverted to the Sessions Court" (see paras. [73], [78] and [80] of the second impugned judgment). The learned HCJ has the power to effect transfer of the case subject to the provisions of the CPC (s. 417) as held in paras. [63], [64] and [65] of the impugned second judgment.

[61] We hold that the learned HCJ was not transferring the cases to himself as the appellant contends but rather to the High Court of which he is the presiding judge in the exercise of its power under s. 417(2) (acting on the own initiative of the High Court) on the basis of the transfer under s. 417(1)(e) to order the three cases pending in the Sessions Court to be transferred to and tried before the High Court under s. 417(1)(cc) of the CPC. Hence the issue of usurpation of the powers of the Chief Judge of Malaya does not arise.

Conclusion

[62] The learned HCJ has carefully evaluated and judicially appreciated the facts and law in the instant case. We find there are no appealable errors in his decision which warrant any appellate intervention. Unanimously, we accordingly dismissed the appeal and affirmed the decision of the learned HCJ.