A **MUHAMMAD SAFWAN ANANG v. PP & ANOTHER APPEAL**

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
ZAKARIA SAM JCA
PRASAD SANDOSHAM ABRAHAM JCA
B [CRIMINAL APPEALS NO: W-09-7-2016 & W-9(H)-9-01-2016]
20 DECEMBER 2016

C ***CRIMINAL LAW:*** *Sedition Act 1948 – Section 4(1)(b) – Appellant accused of making seditious comments while giving public speech – Whether statements made had seditious tendency – Whether conviction safe*

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Appellant accused of making seditious comments while giving public speech – Whether statements made had seditious tendency – Whether conviction safe*

D The appellant, being dissatisfied with the results of the general election, gave a public speech which was alleged to incite the public to gather and protest against the Government. Following the event, the appellant was charged at the Sessions Court under s. 4(1)(b) of the Sedition Act 1948 ('Act') punishable under s. 4(1) of the Act. The Sessions Court convicted the E appellant and sentenced the appellant to ten months' imprisonment. On appeal to the High Court, the High Court affirmed the conviction of the appellant but substituted the custodial sentence of ten months' imprisonment with a fine of RM5,000 and should there be failure to pay the fine, a two years' imprisonment would be imposed on the appellant. Dissatisfied with the decision of the Sessions Court and the orders of the High Court, the F appellant appealed to the Court of Appeal. The principle issue that arose for determination was whether the statements made in the public speech was seditious pursuant to s. 4(1)(b) of the Act.

Held (allowing appeal; discharging and acquitting appellant)
G **Per Prasad Sandosham Abraham JCA delivering the judgment of the court:**

(1) All the appellant said in his statement was to go out and protest. Nowhere in the impugned statement was there any element tending to make the Government insecure and the statement does not have a seditious tendency. In the circumstances, a *prima facie* case had not been H made out against the appellant in the Sessions Court. (paras 9 & 11)

(2) An evaluation of the seditious statement must be undertaken by the court and the court must be satisfied beyond a reasonable doubt and must honestly believe that the statement in question is seditious, pursuant to s. 4 of the Act and read together with s. 3 of the Act. The I court must positively assert in its grounds of judgment a specific finding

that the court honestly believes after undertaking that evaluation the statement in question is seditious to justify a conviction of sedition. The failure to do so by the court would amount to a serious misdirection in law which would render a conviction unsafe. (paras 14 & 15)

***Bahasa Malaysia** Headnotes*

Perayu, tidak berpuas hati dengan keputusan pilihan raya umum, telah memberikan ucapan awam yang didakwa menghasut orang ramai untuk berkumpul dan membantah Kerajaan. Berikutan kejadian tersebut, perayu dipertuduh di Mahkamah Sesyen bawah s. 4(1)(b) Akta Hasutan 1948 ('Akta') yang boleh dihukum bawah s. 4(1) Akta. Mahkamah Sesyen mensabitkan perayu dan menjatuhkan hukuman sepuluh bulan penjara terhadap perayu. Atas rayuan kepada Mahkamah Tinggi, Mahkamah Tinggi mengesahkan sabitan perayu tetapi menggantikan hukuman penjara sepuluh bulan kepada denda sebanyak RM5,000 dan sekiranya terdapat kegagalan untuk membayar denda, hukuman penjara dua tahun akan dijatuhkan terhadap perayu. Tidak berpuas hati dengan keputusan Mahkamah Sesyen dan perintah Mahkamah Tinggi, perayu merayu ke Mahkamah Rayuan. Isu utama yang dibangkitkan untuk pertimbangan mahkamah adalah sama ada kenyataan yang dibuat dalam ucapan awam adalah berunsur hasutan menurut s. 4(1)(b) Akta.

Diputuskan (membenarkan rayuan; melepaskan dan membebaskan perayu)
Oleh Prasad Sandosham Abraham HMR menyampaikan penghakiman mahkamah

(1) Apa yang dikatakan oleh perayu dalam penyataannya adalah untuk keluar dan membantah. Tidak ada apa-apa elemen dalam kenyataan yang dipersoalkan yang berunsur menyatakan Kerajaan tidak selamat dan kenyataan tersebut tidak mempunyai kecenderungan menghasut. Dalam keadaan ini, satu kes *prima facie* tidak berjaya dibuktikan terhadap perayu di Mahkamah Sesyen.

(2) Satu penilaian terhadap kenyataan hasutan perlu dilaksanakan oleh mahkamah dan mahkamah mesti berpuas hati melampaui keraguan munasabah dan mesti secara jujur percaya bahawa kenyataan tersebut adalah menghasut menurut s. 4 Akta dan dibaca bersama s. 3 Akta. Mahkamah harus secara positif menegaskan dalam alasan penghakimannya suatu dapatan khusus bahawa mahkamah secara jujur percaya selepas menjalankan penilaian bahawa kenyataan tersebut adalah hasutan untuk mewajarkan sabitan bawah hasutan. Kegagalan untuk berbuat demikian oleh mahkamah merupakan kekhilafan yang serius dalam undang-undang yang boleh menyebabkan sabitan tidak selamat.

Case(s) referred to:
Karpal Singh Ram Singh v. PP & Another Appeal [2016] 8 CLJ 15 CA ***(refd)***
Melan Abdullah & Anor v. PP [1971] 1 LNS 77 HC ***(refd)***
PP lwn. Karpal Singh Ram Singh [2012] 5 CLJ 580 CA ***(refd)***
PP v. Oh Keng Seng [1976] 1 LNS 108 FC ***(refd)***
PP v. Ooi Kei Saik & Ors [1971] 1 LNS 113 HC ***(refd)***
PP v. Param Cumaraswamy (No 2) [1986] 1 LNS 88 HC ***(refd)***

Legislation referred to:
Sedition Act 1948, ss. 3(1)(b), 4(1)(b)

For the appellant - Ariff Azami Hussein & Azizzul Shariman; M/s Azizzul & Ariff
For the respondent - Muhammad Azmi Mashud; DPP

[Appeal from High Court, Kuala Lumpur; Criminal Appeals No: 42(S)-115-09-2014 & 42(H)-117-09-2014 (overruled).]

Reported by Sandra Gabriel

JUDGMENT

Prasad Sandosham Abraham JCA:

Introduction

[1] The appellant was charged in the Sessions Court (Criminal) Kuala Lumpur under s. 4(1)(b) of the Sedition Act 1948 (Act 15) punishable under s. 4(1) of the same. The charge brought against the appellant is set out *in toto* including the statement addended to the said charge marked as lampiran A, (see grounds of judgment of the Sessions Court pp. 14 -17 RR). The Sessions Court convicted the appellant and sentenced the appellant to ten months' imprisonment effective from 11 September 2014, (see p. 47 RR). On appeal to the High Court, the High Court affirmed the conviction of the appellant but substituted the custodial sentence of ten months' imprisonment with a fine of RM5,000 and should there be failure to pay the fine, a two years' imprisonment will be imposed on the appellant.

[2] The appellant was dissatisfied with the decision of the Kuala Lumpur Sessions Court and the orders of the High Court and now appeals to the Court of Appeal. The appeal was heard on 18 July 2016 wherein the court reserved judgment and our judgment is accordingly delivered.

Material Facts

[3] The material facts of this case are elucidated from the grounds of the learned Sessions Court Judge. The facts are set out as follows:

(i) Pada tarikh 13 Mei 2013, jam lebih kurang 8.00 malam, Pengadu Inspektor Awang Jaafar Bahagia bin Awang Salihin (SP4) telah menerima arahan daripada Pusat Kawalan Dang Wangi untuk dibuat pemantauan dan kawal selia di Dewan Perhimpunan Cina Jalan Maharaja Lela Kuala Lumpur pada malam itu memandangkan

telah mendapat maklumat akan berlangsung satu ceramah di dewan tersebut dan mendapat arahan untuk dibuat pemantauan kawal selia supaya tidak timbul apa-apa kekecohan yang boleh menggugat keselamatan.

(ii) Satu taklimat ringkas untuk penugasan tersebut telah adakan di mana pengadu telah memanggil kesemua anggotanya yang terlibat berkumpul di Balai Polis Tun HS Lee dan nyatakan kepada semua anggota ini bahawa satu maklumat ceramah akan diadakan di Dewan Perhimpunan Cina dan adalah tugasan untuk mengawal selia, menjaga aman supaya tidak timbul apa-apa insiden yang tidak diingini atau kekecohan semasa ceramah tersebut berlangsung.

(iii) Perhimpunan tersebut dianjurkan oleh Solidariti Anak Muda Malaysia dan Solidariti Mahasiswa Malaysia.

(iv) Pada jam 7.50 malam, pengadu bergerak ke Dewan tersebut dengan menggunakan kenderaan pasukan manakala anggota lain pula bertolak menggunakan motosikal masing-masing.

(v) Setibanya di dewan jam 8.00 malam dan mendapati ramai orang mula berpusu ramai yang baru sampai masuk ke dalam dewan, ada yang berada di luar dewan menunggu majlis tersebut bermula.

(vi) Pengadu pecahkan penugasan anggota untuk membuat pemantauan di dalam dan di luar dewan, di mana pengadu membuat pemantauan di luar dan dalam dewan.

(vii) Program ceramah di dewan tersebut bermula lebih kurang jam 8.50 malam dan lebih daripada 10 orang yang dijemput untuk memberi ceramah termasuk tertuduh sekali iaitu Muhammad Safwan bin Awang @ Talib.

(viii) Terdapat pembesar suara iaitu P.A. system dan speaker yang diletakkan di dalam dan di luar dewan. Begitu juga, screen yang menayangkan ceramah yang berlangsung serta suasana di dalam dewan berada di dalam dan di luar dewan juga.

(ix) Pengadu bertugas bersama-sama anggotanya iaitu Inspektor Mohd. Kamal Faridi bin Akmal (SP1), Kasmi bin Luatak (SP2) dan Lans Koperal Thomas Anggit (SP3) untuk membuat pemantauan perhimpunan tersebut dengan membuat rakaman untuk keseluruhan ceramah yang disampaikan oleh para penceramah dan di dalam perhimpunan tersebut.

(x) Keterangan daripada saksi SP1, SP2 dan SP3 juga mengesahkan bahawa tertuduh merupakan salah seorang penceramah di dalam perhimpunan tersebut di mana SP2 telahpun merakam ceramah tertuduh, manakala SP1 pula menyediakan transkip ceramah yang disampaikan oleh tertuduh seperti mana terdapat pada Lampiran A pertuduhan.

[4] The appellant in the arguments presented before us raised several points, ie, whether the impugned statement was intended to be seditious in its effect, and the lack of clarity in the charge of the appellant. All these points are really water under the bridge in light of the decision of the Court of Appeal in *PP lwn. Karpal Singh Ram Singh* [2012] 5 CLJ 580 and the recent Court of Appeal majority decision of His Lordship Mohtarudin Baki JCA in *Karpal Singh Ram Singh v. PP & Another Appeal* [2016] 8 CLJ 15 (Criminal Appeal No: W-05(S)-66-03-2014) wherein His Lordship had dealt *in extensio* with all these points raised.

[5] The only point in this appeal in our view is whether the statement is seditious pursuant to s. 4(1)(b) of Act 15. To determine whether the impugned statement is seditious ie, has a seditious tendency, one must look at s. 3 of the Act and in our particular case s. 3(1)(b) which we now set out.

> Seditious tendency
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> 3. (1) A "seditious tendency" is a tendency:
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> (b) to excite the subjects of any Ruler or the inhabitants of any territory governed by any Government to attempt to procure in the territory of the Ruler or governed by the Government, the alteration, otherwise than by lawful means, of any matter as by law established;

The Court of Appeal in *PP lwn. Karpal Singh Ram Singh (supra)* accepted the reasoning of the court in *Public Prosecutor v. Ooi Kee Saik* [1971] 1 LNS 113 and the definition of the words, "to excite".

[6] We are of the view whether or not the impugned statement attracts seditious tendencies is a matter to be evaluated by the court on an objective basis taking into account the natural meaning of the words or the words in the statement used (see *PP v. Ooi Kei Saik & Ors* [1971] 1 LNS 113; [1971] 2 MLJ 108). To transcend into being a seditious statement, the court must find that it has crossed the boundaries of acceptable political comment permissible under the law and transcended into the realm of sedition. The *decidendi* in the aforesaid *Karpal Singh*'s case *(supra)* very clearly sets out this requirement that a court should undertake and we quote from para. 73 of the case which adopts the principles in *PP v. Ooi Kee Saik (supra)* ie, the judgment of His Lordship Ahmad Maarop JCA (as he then was):

> [73] Seperti yang telah kami nyatakan, mahkamahlah yang mesti memutuskan sama ada perkataan-perkataan responden itu menghasut atau tidak (lihat *PP v. Mark Koding*). Mahkamahlah yang mesti membuat garis yang memisahkan pandangan atau komen politik yang dibenarkan oleh undang-undang dari perkataan-perkataan yang menghasut. Hal ini dijelaskan oleh mahkamah dalam *PP v. Ooi Kee Saik*:
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> > A line must therefore be drawn between the right to freedom of speech and sedition. In this country the court draws the line. The question arises: where is the line to be drawn; when does free

political criticism end and sedition begin? In my view, the right to free speech ceases at the point where it comes within the mischief of section 3 of the Sedition Act. The dividing line between lawful criticism of Government and sedition is this - if upon reading the impugned speech as a whole the court finds that it was intended to be a criticism of Government policy or administration with a view to obtain its change or reform, the speech is safe. But if the court comes to the conclusion that the speech used naturally, clearly and indubitably, has the tendency of stirring up hatred, contempt or disaffection against the Government, then it is caught within the ban of paragraph (a) of section 3(1) of the Act. In other contexts the word "disaffection" might have a different meaning, but in the context of the Sedition Act it means more than political criticism; it means the absence of affection, disloyalty, enmity and hostility. To 'excite disaffection' in relation to a Government refers to the implanting or arousing or stimulating in the minds of people a feeling of antagonism, enmity and disloyalty tending to make government insecure. If the natural consequences of the impugned speech is apt to produce conflict and discord amongst the people or to create race hatred, the speech transgresses paragraphs (d) and (e) of section 3(1). Again paragraph (f) of section 3(1) comes into play if the impugned speech has reference to question any of the four sensitive issues - citizenship, national language, special rights of the Malays and the sovereignty of the Rulers.

[7] In paras. 4-9 of the learned Sessions Court's grounds of judgment (pp. 44-47); the learned judge undertakes what purports to be an evaluation of the impugned statement.

[8] In para. 4 at p. 44 the learned Sessions Judge finds that the lanes of political comment had been crossed and that there was an intention to commit sedition. The learned Sessions Judge further found the appellant being dissatisfied with the results of the general election was now inciting the public to gather and protest against the Government to cause a change of the Government by unlawful means.

[9] The learned Sessions Judge failed to address her mind or in the alternative apply the test set out in *Karpal Singh*'s case *(supra)*. All the appellant said in his statement was to go out and protest. To register dissatisfaction and lack of confidence in the ruling Government of the day, but nowhere in the impugned statement was there any element tending to make the Government insecure. At any rate, there were sufficient laws in place to ensure that these demonstrations were carried out in accordance with law.

[10] To our mind, it is clear that since this is possibly the only plausible defence to a charge of sedition, after it has been established that the statement has been made by the appellant and the statement remains unchallenged, the

court must in our view make a positive assertion in its grounds of judgment to say that the court honestly believes that the words uttered were seditious or not. In our particular case, we can find no such assertion in the grounds of judgment of the learned Sessions Judge.

[11] Having perused through the statement ourselves, we are satisfied that the statement does not have a seditious tendency. It would follow therefore that the prosecution failed to prove a *prima facie* case against the appellant in the Sessions Court and therefore the appellant should have been acquitted. We refer to the judgment of Court of Appeal in *PP lwn. Karpal Singh Ram Singh (supra)*, para. 101 at p. 649 which illustrates the approach that the court must take in considering the impugned seditious statement and we quote:

> [101] Kami menyedari dan sentiasa akur bahawa di peringkat ini pun dalam menimbangkan sama ada pihak pendakwaan telah membuktikan satu kes *prima facie* terhadap responden, kami mesti mempertimbangkan sama ada terdapat keraguan yang munasabah dalam kes pihak pendakwaan. Jika terdapat keraguan yang munasabah kes *prima facie* tidak terbukti (lihat *Balachandran v. PP* [2005] 1 CLJ 85). Setelah menimbangkan dengan teliti perkataan-perkataan responden seperti dalam P3 ayat demi ayat dan menimbangkan perkataan-perkataan tersebut secara keseluruhannya serta konteks dalam mana perkataan-perkataan tersebut disebut, dan setelah memberikan latitude sebanyak yang wajar kepada responden untuk memberikan komen politik dan pandangan undang-undang sebagai Ahli Parlimen dan peguam kanan yang terkemuka, tiada keraguan di fikiran kami bahawa berdasarkan kepada undang-undang yang berkuatkuasa kini dan keterangan yang dikemukakan di mahkamah di peringkat ini, responden telah melepasi garis yang memisahkan pernyataan perkataan-perkataan yang dibenarkan oleh undang-undang dengan pernyataan perkataan-perkataan menghasut. Tiada keraguan di fikiran kami bahawa perkataan-perkataan responden itu bukan perkataan-perkataan yang mempunyai kecenderungan untuk menunjukkan bahawa DYMM Sultan Perak telah terkeliru atau tersilap. Oleh itu di peringkat ini pembelaan di bawah s. 3(2)(a) Akta 15 adalah tidak terpakai. Kami berpuas hati bahawa perkataan-perkataan responden mempunyai kecenderungan:
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> (a) bagi mendatangkan kebencian atau penghinaan atau membangkitkan perasaan tidak setia terhadap DYMM Sultan Perak seperti yang diperuntukkan di bawah s. 3(1)(a) Akta 15;
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> dan
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> (b) bagi menimbulkan perasaan tidak puas hati atau tidak setia di kalangan rakyat DYMM Sultan Perak seperti yang diperuntukkan di bawah s. 3(1)(d) Akta 15.

[12] We suggest that the "tooth comb" approach of His Lordship Ahmad Maarop JCA (as he then was) must be the cornerstone of the approach the courts should take in deciding whether the impugned word has a seditious tendency. We note that is glaringly absent in this case (see grounds of judgment of Sessions Court Judge at p. 47 RR Jilid 2).

We also quote para. 71 of the same judgment which quoted the Federal Court decision of *PP v. Oh Keng Seng* [1976] 1 LNS 108:

> [71] Apa yang dimaksudkan dengan pertimbangan tentang keseluruhan perkataan-perkataan yang didakwa menghasut telah dijelaskan oleh Mahkamah Persekutuan dalam *PP v. Oh Keng Seng (supra)*:
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> > We are only in partial agreement with what the learned trial judge considered to be the proper approach to the question as to whether those parts of the speech now alleged by Mr. Mahalingam to be seditious are indeed so. We agree that particular words or sentences taken out of context "may sound obnoxious or innocuous and that this might convey an altogether wrong impression". However to say that to determine whether particular passages are seditious the speech in which such words are uttered should be read as a whole is, with respect going too far if by that is meant that in a long speech two passages (or for that matter four) cannot be seditious if numerous other topics discussed are not seditious. At most one could say that the speech as a whole would assist in giving the court a proper perspective of, and so assist it to decide whether the passage giving offence were mere episodes of over exuberance in a speech coming fairly under the exceptions envisaged in section 3(2) or something more than that.

[13] We refer to the case of *PP v. Param Cumaraswamy (No 2)* [1986] 1 LNS 88; [1986] 1 MLJ 518 and the judgment of His Lordship NH Chan (as he then was) firstly on the question of disaffection found at p. 524 para. D-G and further at para. B-D p. 525 and we now quote:

> "Disaffection": I shall start with "disaffection". Disaffection, in the context of sedition, does not mean the absence of affection and regard, it means disloyalty, enmity and hostility: See per Latham C.J. in *Burns v. Ransley* at p. 109. See also Dixon J. in the same case, at p. 115:
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> > Disaffection is a traditional expression but it is not very precise. It means an estrangement upon the part of the subject in his allegiance which has not necessarily gone as far as an overt act of a treasonable nature or an overt breach of duty. It supposes that the loyalty and attachment to Authority, upon which obedience may be considered to depend, is replaced by an antagonism, enmity and disloyalty tending to make government insecure.
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> I can say at once that the statement did not have the tendency to incite or to raise disaffection among the people. In my judgment, the statement did not contain words which were capable of advocating or encouraging the people to disloyalty. There was no tendency in the words which could create antagonism, enmity and disloyalty among the people to make the government insecure.

At p. 525 paras. B-D:

> Where there is no jury, a judge has to ask himself if it is in his honest judgment that the statement was likely to create dissatisfaction among the people. If it is likely to do that then the statement is seditious. If in his

> honest judgment he does not think that the words were likely to create dissatisfaction among the people, then he has to find that the words are not seditious. In my judgment, I do not think that words which were used to point out to the Pardons Board that the people should not be made to feel that the Board was discriminating between Mokthar Hashim and Sim Kie Chon are words which were likely to create discontent or dissatisfaction among the people.

[14] We have perused through the grounds of judgment of the Sessions Judge and we do not find any assertion by the Sessions Judge to that effect. It is further our view in light of the fact that a statement carrying the presumption of seditious tendency is almost akin to an offence of strict liability, the court must scrutinise and independently evaluate the impugned statement to see whether the language used comes within the bounds of sedition rather than free speech; and failure to do so, by the court in our view amounts to a serious misdirection in law which would render a conviction unsafe.

[15] We therefore find that there must be in cases of sedition an evaluation of the seditious statement that must be undertaken by the court and the court must be satisfied beyond reasonable doubt and must honestly believe that the statement in question is seditious, pursuant to s. 4 of the Act and read together with s. 3 of the same and must positively assert in its grounds of judgment a specific finding that the court honestly believes after undertaking that evaluation the statement in question is seditious to justify a conviction of sedition as the prosecution would be deemed to have proved its case as required by the law.

[16] We also refer to the decision of Ong CJ in the case of *Melan Abdullah & Anor v. PP* [1971] 1 LNS 77; [1971] 2 MLJ 280 at para. I which illustrates this point and we quote:

> To sum up on the law, once the conclusion is reached that the sub-heading offends against the absolute prohibition imposed by paragraph (c) of sub-section (2) on any matter specified in paragraph (f) of sub-section (1) the prosecution would have proved their case to the hilt. The sub-heading clearly violated what is laid down in proviso (a) to article 152(1) of the Federal Constitution. It therefore comes squarely within the definition of "seditious tendency" as extended by paragraph (f). On this point I think a few words may be usefully be added by way of explanation. By virtue of the 1970 amendment of the Sedition Act, "sedition" no longer requires the same judicial approach as the misdemeanour at common law. The amendment was ad hoc legislation, passed to meet the special needs and circumstances of the times. The duty of the court is to interpret and uphold the law as passed by Parliament. Whether or not paragraph (f) fits into the common law concept of sedition is wholly beside the point. It does give, however, a new and, perhaps, highly artificial meaning to what used to be considered "seditious tendencies". English

and Indian authorities are, therefore, of little relevance and are not referred to herein. In my view paragraph (f) is unique in that it raises a presumption of law that anything falling squarely within the terms thereof has a seditious tendency, irrespective of whether or not such thing sows any seeds of disaffection.

[17] On the upshot in the present case, we find that a *prima facie* case had not been made out against the appellant in the Sessions Court as the statement in question was not seditious and therefore the conviction of the appellant in Sessions Court upheld by the High Court should be set aside and the instant appeal be allowed. The appellant is acquitted and discharged and the appeal by the prosecution in W-09(H)-9-01-2016 is consequently dismissed.