A

PP v. DATO' SRI MOHD NAJIB HJ ABD RAZAK

FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ
ZAHARAH IBRAHIM CJ (MALAYA)
DAVID WONG DAK WAH CJ (SABAH & SARAWAK)
B
RAMLY ALI FCJ
ROHANA YUSUF FCJ
MOHD ZAWAWI SALLEH FCJ
TENGKU MAIMUN TUAN MAT FCJ
[CRIMINAL APPEAL NO: 05(L)-(72-74)-03-2019(W)]
C
10 APRIL 2019

CRIMINAL LAW: *Charges – Criminal charges – Proceedings – Applicant, former Prime Minister of Malaysia, charged with seven criminal charges relating to offences under Penal Code, Malaysian Anti-Corruption Commission Act 2009 and*
D *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 – Court of Appeal granted order of stay of criminal proceedings – Whether decision of Court of Appeal correct*

CRIMINAL PROCEDURE: *Stay of execution pending appeals – Appeal against decision of Court of Appeal – Applicant, former Prime Minister of Malaysia, charged*
E *with seven criminal charges – Court of Appeal granted order of stay of criminal proceedings – Commencement of trial against applicant at High Court stopped pending disposal of appeals to Federal Court – Whether there were 'proceeding pending' before Federal Court – Whether stay of criminal proceedings same as stay of civil proceedings – Whether there were exceptional circumstances justifying stay*
F *of proceedings – Whether Court of Appeal correct in allowing applicant's application for stay of criminal proceedings – Courts of Judicature Act 1964, ss. 44, 79 & 80*

The respondent, former Prime Minister of Malaysia, was charged with seven charges relating to offences committed under the Penal Code, the Malaysian Anti-Corruption Commission Act 2009 and the Anti-Money Laundering,
G Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001. The present appeals emanated from the decision of the Court of Appeal granting an order of stay of proceedings, pursuant to ss. 44, 79 and 80 of the Courts of Judicature Act 1964 ('CJA'), and consequently, stopping the commencement of a trial against the respondent at the High Court pending
H the disposal of his appeals to the Federal Court. The three appeals pending before the Federal Court, filed by the respondent, were his failure to (i) secure a 'gag order' restraining publication by members of the public on matters pertaining to his prosecution and trial; (ii) secure documents other than those provided under s. 51A of the Criminal Procedure Code ('CPC');
I and (iii) challenge the withdrawal by the Public Prosecutor ('the appellant') of transfer certificate to transfer the case against the respondent to the High Court. In essence, the appellant relied on the following grounds of appeal: (i) staying a criminal trial should be differently treated from staying

a civil trial; (ii) precedents in civil cases relied by the respondent before the Court of Appeal, in particular *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* ('the *Kosma* case'), must be treated with caution in criminal proceedings; (iii) if trials are statutorily required to commence within three months, granting a stay would defeat this objective. Stay of a criminal trial should only be granted on exceptional grounds; that is sparingly so as not to defeat the purposive object of s. 172B(4) of the CPC for trials to start in three months; and (iv) if this court is of the view that special circumstances are the principal consideration in determining an application for stay of proceedings for criminal trials, the facts in this case militated against the granting of a stay because no special circumstances favoured the respondent. On the contrary, these factors indicated that a stay should be refused: (a) the offences for which the respondent was charged with were serious in nature; (b) this case was one of public and national importance as it generated much public interest, locally and internationally; (c) trial dates were fixed eight months ago, as opposed to the three months specified under s. 172B(4) of the CPC; and (d) no prejudice would be caused to the respondent because he would have an early opportunity to vindicate himself. The respondent argued that the appeal by the appellant was incompetent since there was no appeal record and no petition filed, as required by the CJA. The primary issue that arose for adjudication was whether the Court of Appeal was correct in allowing the respondent's application for a stay of the criminal proceedings.

Held (allowing appeal; setting aside stay order by Court of Appeal; and remitting matter to High Court to proceed with criminal trial)
Per Richard Malanjum CJ delivering the judgment of the court:

(1) Sections 44(1) and 80(1) of the CJA speak of 'pending proceedings' as a pre-requisite before an interim order could be made by the relevant court. When the stay application was made by the respondent, the Court of Appeal had already dismissed the three appeals by the respondent. In the circumstances, there was no longer any 'pending proceeding' before the Court of Appeal enabling it to exercise its jurisdiction to grant a stay of proceedings under s. 44(1) of the CJA. Similarly, for the respondent to avail himself of s. 80(1) of the CJA, there must also be a 'proceeding pending' before the Federal Court. When the respondent's appeals were dismissed by the Court of Appeal, there was no pending proceeding before the Federal Court at that stage. There was only an undertaking by the respondent that he would be filing an appeal. As such, s. 79 of the CJA was not relevant. (paras 16 & 17)

(2) Sections 44(1) and 80(1) of the CJA did not empower the Court of Appeal to grant a stay of proceedings. Since the respondent's reliance on ss. 44(1) and 80(1) of the CJA failed, it followed that s. 79 of the CJA was similarly of no assistance to him. The Court of Appeal had no

jurisdiction to entertain the respondent's application for a stay of proceedings upon the dismissal of the three appeals. The grant of the stay was therefore made without jurisdiction and was thus a nullity. (para 17)

(3) The *Kosma* case represented the legal position governing stays of execution for civil appeals. In the *Kosma* case, it was held that the test applicable to the grant of a 'stay of execution' was whether there were special circumstances, the most common of which is whether the appeal would be rendered nugatory if a stay of execution is not granted. The relevant question was whether it applied with equal force to a stay of criminal proceedings at the trial court when there were pending appeals in respect of interlocutory applications before the court. (paras 18 & 19)

(4) In considering an application for stay of criminal proceedings, when commencement of the trial is imminent or continuing in the court of first instance, the determinative principles are (i) there is a strong public interest in the prosecution of crime and in ensuring that those charged with serious criminal offences are tried; (ii) it is undesirable that the criminal process be interrupted or fragmented by interlocutory proceedings. The considerations of public interest are of great weight leaning in favour of expeditious resolution of accusations of crime; (iii) the undesirability of fragmenting the criminal process is not confined to any particular part of the criminal process, but rather to the process as a whole; (iv) a stay of proceedings application would require, especially, compelling justification in a case qualifying for urgent judicial decision. For instance, it is important that anyone charged with serious criminal offences be brought to trial expeditiously. Public interest would not be served by allowing the defence to request for a delay. An accused of serious criminal offences, who is not guilty, should have the opportunity of clearing his name without excessive delay; (v) a stay of proceedings would not normally be granted pending an interlocutory appeal in a criminal trial. It is only in very exceptional or unusual circumstances that a stay order is granted. This is so even if the issuing of the interlocutory appeal is not opposed by the prosecution or in fact supported by both the prosecution and the defence; (vi) the accused's rights over preliminary or interlocutory rulings made by the trial judge are best vindicated by appeal after conviction, if any. It is generally more desirable to consider preliminary or interlocutory rulings made by the trial judge in appeal after conviction upon full trial with the benefit of a concrete factual setting than considering them in the abstract during interlocutory appeal; (vii) the fact that an accused will be put to the expense of a trial is irrelevant and would not qualify as 'exceptional circumstances' to justify a stay of a criminal trial pending resolution of an appeal; and (viii) the courts should exercise great caution in allowing other forms of collateral challenge, in parallel proceedings such as an application for a declaration or other forms of judicial review with similar relief in the nature of *certiorari*, be it

commenced in the same court or another civil or criminal court, which have the net effect of staying the criminal proceedings or would interfere with or impinge directly upon the normal course of proceedings in a criminal trial. (para 32)

(5) The respondent was a public figure who stood charged with offences, which could not be described as trivial, allegedly committed while he was holding office as the Prime Minister. Public interest, and indeed his personal interest, dictated that the trials against him should be commenced expeditiously without any unreasonable delay as it is at the denouncement of the trial that the court is best-equipped to determine his guilt or otherwise based on factual evidence instead of speculative arguments. Furthermore, the respondent had not satisfactorily established that his application was so unusual or exceptional that it fell within that class of cases which would justify the grant of a stay. A stay of criminal proceedings would only be granted in the rarest of cases and, the fact that the proceedings may be rendered a nullity, is not a special circumstance. In the context of an application for a stay of proceedings, it is also immaterial that the respondent is put to the expense of a trial even if he is subsequently vindicated on appeal. (para 33)

(6) The respondent's assertion that the appeal by the appellant was incompetent, since there was no appeal record and no petition filed, as required by the CJA, was a non-issue because, for criminal proceedings, the record of appeal, including the grounds of judgment of the lower court is prepared by the court below, as provided under r. 91 of the Rules of the Federal Court 1995 ('ROFC'). Without the grounds of judgment, the appellant could not proceed to file the petition of appeal, by virtue of r. 95 of the ROFC. The appellant was not at fault and, in any case, the incomplete appeal papers were no impediment to this court hearing the appeal proper as this court was exercising its revisionary powers. (para 34)

***Bahasa Malaysia** Headnotes*

Responden, bekas Perdana Menteri Malaysia, dituduh dengan tujuh pertuduhan berkaitan pelakuan kesalahan-kesalahan bawah Kanun Keseksaan, Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 dan Akta Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001. Rayuan-rayuan ini timbul susulan keputusan Mahkamah Rayuan membenarkan perintah penggantungan prosiding, bawah ss. 44, 79 dan 80 Akta Mahkamah Kehakiman 1964 ('AMK') dan bersangkutan itu, menghentikan pemulaan perbicaraan terhadap responden di Mahkamah Tinggi sementara menanti pelupusan rayuan-rayuan beliau di Mahkamah Persekutuan. Ketiga-tiga rayuan yang masih belum selesai di Mahkamah Persekutuan, difailkan oleh responden, berkaitan kegagalan beliau (i) memperoleh perintah larangan bersuara menghalang orang awam menerbitkan hal-hal perkara berkaitan pendakwaan dan perbicaraan beliau;

(ii) memperoleh dokumen selain yang diperuntukkan bawah s. 51A Kanun Tatacara Jenayah ('KTJ'); dan (iii) mencabar penarikan balik akuan pindahan oleh Pendakwa Raya ('perayu') untuk memindah kes terhadap responden di Mahkamah Tinggi. Asasnya, perayu bergantung pada alasan-alasan rayuan berikut: (i) penggantungan perbicaraan jenayah mesti dikendalikan secara berbeza berbanding perbicaraan sivil; (ii) duluan-duluan dalam kes-kes sivil yang menjadi sandaran responden di Mahkamah Rayuan, khususnya *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* ('kes *Kosma*'), mesti dikendalikan dengan berhati-hati dalam prosiding jenayah; (iii) jika perbicaraan perlu, secara statutori, bermula dalam tiga bulan, membenarkan penggantungan melumpuhkan objektif ini. Penggantungan perbicaraan jenayah mesti diberi atas alasan-alasan luar biasa sahaja; itu pun secara berkira-kira agar tidak melumpuhkan objektif s. 172B(4) KTJ agar perbicaraan bermula dalam masa tiga bulan; dan (iv) jika mahkamah ini berpendapat hal-hal keadaan istimewa adalah pertimbangan utama dalam memutuskan permohonan penggantungan prosiding perbicaraan jenayah, fakta kes ini menghalang kebenaran penggantungan kerana tiada hal-hal keadaan istimewa yang memihak pada responden. Sebaliknya faktor-faktor berikut menunjukkan penggantungan harus ditolak: (a) kesalahan-kesalahan yang didakwa terhadap responden bersifat serius; (b) kes ini mempunyai kepentingan awam dan antarabangsa kerana menarik minat awam dan antarabangsa; (c) tarikh perbicaraan ditetapkan lapan bulan lalu, berbanding tiga bulan yang diperuntukkan bawah s. 172B(4) KTJ; dan (iv) responden tidak akan terprejudis kerana beliau akan mempunyai peluang awal menyangkal pertuduhan. Responden menghujahkan rayuan perayu tidak kompeten kerana rekod rayuan dan petisyen tidak difailkan, seperti yang dikehendaki bawah AMK. Isu utama yang berbangkit untuk diputuskan adalah sama ada Mahkamah Rayuan bertindak betul dalam membenarkan permohonan responden untuk penggantungan prosiding jenayah.

Diputuskan (membenarkan rayuan; mengetepikan perintah penggantungan oleh Mahkamah Rayuan; dan mengembalikan hal perkara pada Mahkamah Tinggi untuk meneruskan dengan perbicaraan jenayah) Oleh Richard Malanjum KHN menyampaikan penghakiman mahkamah:

(1) Seksyen 44(1) dan 80(1) AMK menyebut tentang 'prosiding yang belum selesai' sebagai pra-syarat sebelum perintah interim boleh dibuat oleh mahkamah yang relevan. Semasa permohonan penggantungan dibuat oleh responden, Mahkamah Rayuan telah menolak ketiga-tiga rayuan oleh responden. Oleh itu, tiada lagi apa-apa 'prosiding yang belum selesai' di Mahkamah Rayuan yang membolehkannya menjalankan budi bicaranya membenarkan penggantungan prosiding bawah s. 44(1) AMK. Begitu juga, agar responden boleh memanfaatkan s. 80(1) AMK, mesti juga terdapat 'prosiding yang belum selesai' di Mahkamah Persekutuan. Semasa rayuan-rayuan responden ditolak oleh Mahkamah Rayuan, tiada prosiding yang belum selesai di Mahkamah Persekutuan pada peringkat itu. Hanya terdapat janji oleh responden bahawa beliau akan memfailkan rayuan. Oleh itu, s. 79 AMK tidak relevan.

(2) Seksyen 44(1) dan 80(1) AMK tidak memberi kuasa kepada Mahkamah Rayuan untuk membenarkan penggantungan prosiding. Oleh kerana sandaran responden pada ss. 44(1) dan 80(1) AMK gagal, diikuti bahawa s. 79 AMK juga tidak membantu beliau. Mahkamah Rayuan tiada bidang kuasa mendengar permohonan responden untuk penggantungan prosiding selepas penolakan ketiga-tiga rayuan. Oleh itu, kebenaran penggantungan dibuat tanpa bidang kuasa dan terbatal.

(3) Kes *Kosma* mewakili kedudukan undang-undang yang menyelia penggantungan pelaksanaan rayuan-rayuan sivil. Dalam kes *Kosma*, diputuskan bahawa ujian yang terpakai dalam kebenaran penggantungan pelaksanaan ialah sama ada terdapat hal-hal keadaan istimewa dan yang paling lazim ialah sama ada rayuan menjadi tidak berguna jika penggantungan pelaksanaan tidak dibenarkan. Soalan yang relevan ialah sama ada keterpakaian ini mempunyai kuasa yang sama dalam penggantungan prosiding jenayah di mahkamah perbicaraan apabila terdapat rayuan-rayuan yang belum selesai berkaitan permohonan interlokutori di mahkamah.

(4) Dalam mempertimbangkan permohonan penggantungan prosiding jenayah, apabila pemulaan perbicaraan belum selesai dan berterusan di mahkamah pertama, prinsip-prinsip penentu adalah: (i) terdapat kepentingan awam yang kuat dalam pendakwaan jenayah dan dalam memastikan mereka yang didakwa dengan kesalahan-kesalahan jenayah serius dibicarakan; (ii) proses jenayah yang diganggu atau dicerai-ceraikan oleh prosiding interlokutori tidak diingini. Pertimbangan kepentingan awam berat memihak pada penyelesaian segera pertuduhan-pertuduhan jenayah; (iii) ketidakinginan mencerai-ceraikan proses jenayah tidak terbatas pada mana-mana bahagian proses jenayah tetapi keseluruhan prosesnya; (iv) permohonan penggantungan prosiding mengkehendaki, khususnya, alasan memaksa dalam kes yang melayakkan keputusan segera kehakiman. Contohnya, penting agar siapa-siapa yang dituduh dengan kesalahan jenayah serius dibicarakan dengan segera. Kepentingan awam tidak tercapai dengan membenarkan pihak pembelaan memohon penangguhan. Seorang tertuduh yang melakukan kesalahan jenayah serius, yang tidak bersalah, mesti berpeluang membersihkan namanya tanpa apa-apa penangguhan terlampau; (v) lazimnya, penggantungan prosiding tidak akan dibenarkan sementara menanti rayuan interlokutori dalam perbicaraan jenayah. Hanya dalam hal-hal keadaan luar biasa atau berkelainan barulah perintah penggantungan dibenarkan. Ini keadaannya jika pun kebenaran rayuan interlokutori tidak dibantah oleh pihak pendakwaan atau disokong oleh kedua-dua pihak pendakwaan dan pembelaan; (vi) hak-hak tertuduh atas keputusan awalan atau interlokutori yang dibuat oleh hakim bicara sebaiknya diselesaikan melalui rayuan

A selepas sabitan, jika ada. Amnya, adalah lebih diingini untuk mempertimbangkan keputusan awalan atau interlokutori yang dibuat oleh hakim bicara dalam rayuan selepas sabitan selepas perbicaraan penuh dengan manfaat ketetapan fakta berbanding mempertimbangkannya secara abstrak dalam rayuan interlokutori; B (vii) fakta bahawa perbicaraan tertuduh memakan kos tinggi tidak relevan dan tidak akan melayakkan 'hal-hal keadaan luar biasa' untuk mewajarkan penggantungan perbicaraan jenayah sementara menanti penyelesaian rayuan; dan (viii) mahkamah harus amat berhati-hati dalam membenarkan lain-lain bentuk cabaran kolateral, dalam prosiding selari C seperti permohonan pengisytiharan atau lain-lain bentuk semakan kehakiman dengan relief serupa bersifat *certiorari*, sama ada dimulakan di mahkamah sama atau mahkamah sivil atau jenayah lain, yang mempunyai kesan menggantung prosiding jenayah atau mengganggu atau memberi kesan langsung dalam perjalanan biasa prosiding dalam perbicaraan jenayah.

D

(5) Responden adalah tokoh terkenal yang dituduh dengan kesalahan-kesalahan yang tidak boleh dianggap kecil, yang didakwa dilakukan semasa beliau menyandang jawatan Perdana Menteri. Kepentingan awam, malah kepentingan peribadi beliau sendiri, menetapkan bahawa E perbicaraan-perbicaraan terhadap beliau harus bermula segera tanpa apa-apa kelengahan tidak munasabah kerana semasa perbicaraan pertuduhan mahkamah mempunyai material yang cukup untuk menentukan kebersalahan beliau, atau sebaliknya, berdasarkan keterangan fakta berbanding hujahan-hujahan secara spekulasi. Tambahan lagi, responden tidak membuktikan, dengan memuaskan, F permohonan beliau begitu luar biasa atau lain daripada yang lain hinggakan permohonan tersebut terangkum dalam kelas kes-kes yang mewajarkan kebenaran penggantungan. Penggantungan prosiding jenayah hanya akan diberi dalam kes-kes yang sangat luar biasa dan, fakta prosiding boleh menjadi terbatal, bukan hal keadaan istimewa. G Dalam konteks permohonan penggantungan prosiding, tidak material bahawa responden terpaksa menanggung kos tinggi jika pun dia seterusnya bebas selepas rayuan.

(6) Hujahan responden bahawa rayuan perayu tidak kompeten, kerana rekod rayuan dan petisyen tidak difailkan, seperti yang dikehendaki H bawah AMK, bukan satu isu kerana, dalam prosiding jenayah, rekod rayuan, termasuk alasan penghakiman mahkamah bawahan disediakan oleh mahkamah bawahan, seperti yang diperuntukkan oleh k. 91 Kaedah-kaedah Mahkamah Persekutuan ('KKMP'). Tanpa alasan penghakiman, perayu tidak boleh meneruskan untuk memfailkan I petisyen rayuan, seperti yang diperuntukkan oleh k. 95 KKMP. Perayu tidak boleh disalahkan dan, dalam apa-apa jua keadaan, kertas rayuan yang tidak lengkap bukan halangan buat mahkamah ini mendengar rayuan kerana mahkamah ini menjalankan kuasa semakannya.

Case(s) referred to:

AB (Sudan) v. Secretary of State for the Home Department [2013] EWCA Civ 921 ***(refd)***
Anderson v. Attorney-General of New South Wales (1987) 10 NSWLR 198 ***(refd)***
Atlas v. D.P.P. [2001] VSC 209 ***(refd)***
Attorney General's Reference No. 2 of 2001 [2003] UKHL 68 ***(refd)***
Attorney-General v. Smith (1985) 39 SASR 311 ***(refd)***
Beljajev v. DPP (1991) 173 CLR 28 ***(refd)***
Choong Wooi Leong & Ors v. Lebbey Sdn Bhd [1998] 2 CLJ 509 CA ***(refd)***
Clyne v. The Director of Public Prosecutions for the Commonwealth of Australia (1984) 154 CLR 640 ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2011] 7 CLJ 253 CA ***(refd)***
De Simone v. The Queen [2012] HCATrans 86 ***(refd)***
Edelsten v. Ward (No. 2) (1988) 63 ALJR 346 ***(refd)***
Fuller & Cummings v. Director of Public Prosecutions (Cth) (1994) 68 ALJR 611 ***(refd)***
Gedeon v. Commissioner of New South Wales Crime Commission (2008) 236 CLR 120 ***(refd)***
Hinch v. County Court of Victoria [2009] VSC 548 ***(refd)***
Ho Tack Sien & Ors v. Rotta Research Laboratorium S.p.A & Anor; Registrar Of Trade Marks (Intervener) & Another Appeal [2015] 4 CLJ 20 FC ***(refd)***
Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145 FC ***(refd)***
Jarrett v. Seymour (1993) 119 ALR 46 ***(refd)***
Jennings Constructions Ltd v. Burgundy Royale Investments Pty Ltd (1986) 161 CLR 681 ***(refd)***
Joosse v. Australian Securities and Investment Commission (1999) 73 ALJR 232 ***(refd)***
Khalil v. His Honour, Magistrate Johnson and Anor [2008] NSWSC 1092 ***(refd)***
Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***
McNamara v. R (1978) 20 ALR 98 ***(refd)***
PP v. Dato' Seri Anwar Ibrahim [2014] 5 CLJ 805 FC ***(refd)***
PP v. Dato' Seri Anwar Ibrahim & Another Appeal [2010] 4 CLJ 331 CA ***(refd)***
PP v. Dato' Yap Peng [1987] 1 LNS 28 SC ***(refd)***
PP v. Ishak Hj Shaari & Other Appeals [2003] 3 CLJ 843 CA ***(refd)***
R v. Chardon [2016] QCA 50 ***(refd)***
R v. Christian [2007] 2 AC 400 PC ***(refd)***
R v. Crawley and Others [2014] EWCA Crim 1028 ***(refd)***
R v. Garrett (1988) 49 SASR 435 ***(refd)***
R v. Iorlano (1983) 151 CLR 678 ***(refd)***
Re Wickham [1887] 35 Ch D 272 ***(refd)***
R v. WR [2009] ACTSC 93 ***(refd)***
R (on the application of AO & AM) v. Secretary of State for the Home Department (stay of Proceedings - principles) [2017] UKUT 168 (IAC) ***(refd)***
Re Rozenes; Ex parte Burd (1994) 120 ALR 193 ***(refd)***
Rowstead Systems Sdn Bhd v. Bumicrystal Technology (M) Sdn Bhd [2005] 2 CLJ 465 CA ***(refd)***
Sankey v. Whitlam (1978) 142 CLR 1 ***(refd)***
Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC ***(refd)***
Seymour v. AG (Cth) (1984) 4 FCR 498 ***(refd)***

A *Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd [2002] 4 CLJ 27 CA* ***(refd)***
Subashini Rajasingam v. Saravanan Thangathotray & Other Appeals [2008] 2 CLJ 1 FC ***(refd)***
Suruhanjaya Sekuriti v. Datuk Ishak Ismail [2016] 3 CLJ 19 FC ***(refd)***
Syarikat Bekalan Air Selangor Sdn Bhd v. Fadha Nur Ahmad Kamar & Anor [2012] 6 CLJ 93 HC ***(refd)***
B *Takako Sakao v. Ng Pek Yuen & Anor (No. 3) [2010] 1 CLJ 429 FC* ***(refd)***
The Queen v. AI, AD and JR [2013] ACTCA 16 ***(refd)***
The Queen v. Iorlano (1993) 151 CLR 678 ***(refd)***
Yates v. Wilson (1989) 18 CLR 338 ***(refd)***

Legislation referred to:
C Anti-Money Laundering, Anti-Terrorism Financing And Proceeds of Unlawful Activities Act 2001, ss. 4, 32(2)(a), (b), (c), 40
Courts of Judicature Act 1964, ss. 20, 44(1), 79, 80(1), 86, 87
Criminal Procedure Code, ss. 51A, 172B(4), 311, 417(1)(cc), (2), 418A
Federal Constitution, arts. 126
Malaysian Anti-Corruption Commission Act 2009, ss. 23, 30(1)(a), (b), (c), (8), (9),
D 60, 62
Penal Code, s. 409
Rules of the Federal Court 1995, rr. 91, 95

Other source(s) referred to:
Tan, Kee Heng, *Civil and Criminal Appeals in Malaysia*, 3rd edn, Sweet & Maxwell,
E 2016, Chapter 7.3

For the appellant - Tommy Thomas, Sithambaram Vairavan, Manoj Kurup, Donald Joseph Franklin & Izzat Fauzan; DPPs
For the respondent - Harvinderjit Singh, Farhan Read, Wan Aizuddin Wan Mohamed, Rahmat Hazlan, Farhan Shafee & Shahirah Hanapiah; M/s Shafee & Co

F *[Editor's note: For the Court of Appeal judgment, please see Dato' Sri Mohd Najib Hj Abdul Razak v. PP [2019] 5 CLJ 293, [2019] 5 CLJ 23 & [2019] 4 CLJ 723 (overruled).]*

Reported by Najib Tamby

G **JUDGMENT**

Richard Malanjum CJ:

Introduction

[1] The respondent is the immediate former Prime Minister of Malaysia
H who is currently facing seven charges before the High Court, ie, (i) one charge under s. 23 of the MACC Act; (ii) three charges under s. 409 of the Penal Code and (iii) three charges for offences under s. 4 of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("the AMLATFA proceedings").

I

[2] The present appeals emanate from the decision of the Court of Appeal granting an order of stay of proceedings and consequently stopping the commencement of a trial against the respondent at the High Court pending the disposal of his appeals to this court. Dissatisfied with the decision of the Court of Appeal granting stay, the appellant filed the present appeals.

[3] The three appeals pending before this court filed by the respondent relate to:

(i) his failure to secure a "gag order" restraining publication by members of the public on matters pertaining to his prosecution and trial;

(ii) his failure to secure documents other than those provided under s. 51A of the Criminal Procedure Code ("CPC") prior to the commencement of trial although 32 bundles (7,000 pages) of documents had already been served to him by the prosecution in compliance with its statutory duty under s. 51A of the CPC; and

(iii) his failure to challenge the withdrawal by the Public Prosecutor of a transfer certificate to transfer the case against the respondent to the High Court, which is the agreed forum of both parties for this trial.

[4] In essence, the appellant relies on the following grounds of appeal:

(i) the test for granting a stay should be different for civil and criminal trials. Staying a criminal trial should in law be differently treated from staying a civil trial. The omission of power of the appellate courts in their criminal jurisdiction to grant stay of proceedings was deliberate and the parliamentary draftsperson had good reason to treat the power in civil and criminal stays separately and distinctly.

(ii) precedents in civil cases relied by the respondent before the Court of Appeal like *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1; [2004] 1 MLJ 257 and *Rowstead Systems Sdn Bhd v. Bumicrystal Technology (M) Sdn Bhd* [2005] 2 CLJ 465; [2005] 3 MLJ 132 must be treated with caution in criminal proceedings.

(iii) with the coming into force of s. 172B(4) to the CPC in 2012, the previous practice of delaying criminal trials for many years is a thing of the past. If trials are statutorily required to commence within three months, granting a stay will defeat this objective. Stay of a criminal trial should only be granted on exceptional grounds: that is sparingly so as not to defeat the purposive object of s. 172B(4) of the CPC for trials to start in three months.

(iv) if this court is of the view that special circumstances are the principal consideration in determining an application for stay of proceedings for criminal trials, the facts in this case militate against the granting of a stay because no special circumstances favoring the respondent exist. On the contrary, these factors indicate that a stay should be refused:

A (a) the offences for which the respondent have been charged are serious in nature;

(b) this case is one of public and national importance; it has generated much public interest locally as well as internationally;

B (c) trial dates were fixed eight months ago as opposed to the three months specified under s. 172B(4);

(d) that no prejudice would be caused to the respondent because he will have an early opportunity to vindicate himself.

C **Before The High Court**

[5] Three matters were brought before the High Court for determination:

(Case No: WA-44-115-07-2018)

(i) The respondent had filed a notice of motion to prevent the media and
D the public from discussing the merits of the criminal charges against the respondent until the conclusion of proceedings.

(ii) An interim gag order had been put into effect at the conclusion of an oral application after the initial four charges were read on 4 July 2018. A subsequent formal application was filed and fixed for hearing on
E 19 April 2018.

(iii) While the respondent had no issue with accurate reporting and articles that were fair, factually accurate, and published contemporaneously in good faith, the motion is for an order to prevent the publication of opinions on guilt or innocence and character of the respondent, as well
F as those of the witnesses, and to prevent discussion of the merits predicting or even influencing the outcome of the trial.

(iv) The respondent sought the order to ensure that he would receive a fair trial, and the order would be proportionate and would not unfairly impinge upon the interest of free speech.
G

(v) The appellant took the position that the court did not have jurisdiction to grant such an order and that this was not a proper case for the court to invoke its inherent powers. There was no substantial risk of prejudice to the administration of justice, and that there were many remedies available to the respondent to protect his interests.
H

(vi) The appellant contended that a gag order would infringe art. 10 of the Federal Constitution, and that the order would be in vain as it would potentially not bind the international media. The appellant argued that *sub judice* would be inapplicable due to the absence of jury trials in this
I country.

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

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

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

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

(xi) Some accusatory articles cited by the respondent had been in the public sphere since 2014, negating the element of immediacy. The respondent had also given interviews attempting to answer the

A allegations, and probably attracted far greater public and media interest than the less-than-current allegations that have surfaced for a number of years. This also suggests a balanced reporting of the rival views.

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

C Thus, the learned High Court Judge dismissed the application.

(Case No: WA-44-160-10-2018)

(i) The appellant filed a notice of motion for pre-trial production of statements and documents given by potential witnesses to the Malaysian Anti-Corruption Commission (MACC) in the course of
D investigations.

(ii) The appellant had delivered all documents under s. 51A of the CPC, mostly covering the documents sought by the respondent in this notice of motion, save for paras. 1(g), (h), (i), (j), and 2(b)(i). These mainly pertain to names, statements, information and documents obtained
E under s. 30(1)(a), (b), (c) and 30(8) of the MACC Act and s. 32(2)(a), (b) and (c) of AMLATFA. The respondent also sought for a list of witnesses the appellant intends to call and their proposed order.

(iii) The thrust of the application is on the *non-obstante* clauses (Latin:
F notwithstanding) whereby, these statements, documents etc, such as those obtained under s. 30(9) of the MACC Act and s. 40 of AMLATFA, are automatically admissible at the behest of either party. It is the respondent's contention that due to this very nature, they ought to be supplied to the respondent before commencement of
G trial, and that this is also supported by s. 62 of the MACC Act, as well as the role of the court.

(iv) The appellant's position is that the application ought to be dismissed as the respondent has misconstrued s. 30(9) of the MACC Act and s. 40 of AMLATFA to exclude all other legislation/provisions,
H particularly the Evidence Act 1950. The *non-obstante* clauses must be read subject to the rules of privilege and prohibition on the grounds of public policy.

(v) The learned trial judge made reference to *Suruhanjaya Sekuriti v. Datuk Ishak Ismail* [2016] 3 CLJ 19; [2016] 1 MLJ 733 that held that where
I statements taken in the course of investigations are to be automatically admissible, they must be subject to provisions of the Evidence Act, which were made to codify rules pertaining to law of privilege and

public policy against disclosure of investigation statements. While the respondent argued that the provisions of *Datuk Ishak*'s case did not involve a *non-obstante* clause, the learned trial judge further referred to *Ho Tack Sien & Ors v. Rotta Research Laboratorium S.p.A & Anor; Registrar Of Trade Marks (Intervener) & Another Appeal* [2015] 4 CLJ 20; [2015] 4 MLJ 166 and held that the respondent had not clearly made out a case as to the extent to which the Legislature had intended to give the relevant *non-obstante* clauses overriding effect over all other rules and legal provisions.

(vi) The learned trial judge held that the admissibility of these documents did not equate to the right to inspect. The respondent cited various authorities from Commonwealth jurisdictions, and even beyond, and propagated the equality of arms principle by claiming the respondent was being put at a disadvantage if not afforded the opportunity to view the documents etc. However, the learned trial judge was of the view that the respondent did not demonstrate how he was being discriminated against, as compared to the other persons who are similarly under investigation by the MACC. While other countries have had advancements in adhering to the equal arms principle, Malaysia too has seen fundamental progress with the introduction of s. 51A of the CPC. Any further development must await legislative intervention, and cannot be achieved by mere and purported prismatic construction of constitutional prescriptions.

(vii) The learned trial judge found that other than s. 51A of CPC and s. 62 of the MACC Act, no other law or clear legislative prescriptions exist demanding disclosure, and no automatic disclosure can be founded on *non-obstante* clauses. There has been no compelling legal analysis that could support the quantum leap from automatic admissibility to right to inspection. The learned trial judge made reference to *PP v. Dato' Seri Anwar Ibrahim & Another Appeal* [2010] 4 CLJ 331.

Hence the respondent's application was dismissed as he had failed to establish a case for delivery of the information and documents applied for.

(Case No. W-05-72-02-2019)

(i) The High Court had fixed the trial of the seven charges on 12 February 2019 and to continue on 29 March 2019.

(ii) On both dates of 4 July 2018 and 8 August 2018, the charges were initially filed at the Sessions Court but they were immediately transferred on the same dates to High Court pursuant to the certificate issued by Public Prosecutor under s. 418A of CPC and s. 60 of the MACC Act.

(iii) On 28 January 2019, another three additional charges under AMLATFA were read out to the accused. The prosecution asked for these three new charges to be jointly tried with existing seven charges. Counsel for the respondent asked the High Court to allow the defence a few days to consider. The court allowed the request and fixed hearing for submission of the parties on the proposed joint trial on 7 February 2019.

(iv) On 7 February 2019, the appellant 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 respondent be granted a DNAA (discharge not amounting to acquittal), since the prosecution would file these charges before the Sessions Court instead. The High Court then ordered the DNAA of the respondent on the three new charges.

(v) The appellant also 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.

(vi) The withdrawal was stated by the appellant to be done out of abundance of caution in order to avoid any possible constitutional argument that the transfer effected by the appellant under s. 418A of the CPC and s. 60 of the MACC was a nullity in view of the decisions of this court in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561 and *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145; [2018] 1 MLJ 545.

(vii) The appellant informed the High Court that upon withdrawal, the cases on the seven charges would be reverted to the Sessions Court where they originated. The prosecution then immediately applied under s. 417 to have the cases transferred back to the High Court.

(viii) Alternatively, the appellant suggested the High Court to act *suo moto* (on its own motion) under s. 417(2) of the CPC to order the transfer of the cases from the Sessions Court back to High Court. The appellant highlighted that these procedural steps would be necessary to prevent any unwarranted postponement of the trial.

(ix) The learned trial judge then ordered the transfer of the seven charges from the Sessions Court back to the High Court in accordance with s. 417(1)(cc) of the CPC.

[6] It is to be noted that following the dismissal of these three criminal applications, the respondent made an oral application for a stay of proceedings that were to commence on 12 February 2019 to 29 March 2019, pending the appeals against the dismissal of the same. The learned High

Court Judge dismissed the application for a stay of proceedings on the ground that the mere prospect of the trial being a nullity could not be construed as special circumstances to warrant a stay of proceedings.

Before The Court Of Appeal

[7] Aggrieved by the decision of the High Court, the respondent appealed to the Court of Appeal where all the appeals were heard together. Prior to the hearing to the appeals, the respondent applied for a stay of proceedings under s. 44 of the Courts of Judicature Act 1964 ("CJA"). A stay of proceedings was duly allowed by the Court of Appeal pending the disposal of the appeals proper. On 21 March 2019, the Court of Appeal dismissed the respondent's appeals and on oral application by the respondent granted an order to stay the proceedings pending the disposal of the respondent's appeals to this court.

[8] The Court of Appeal opined that there is no distinction between civil and criminal proceedings and that what is relevant is whether there are special circumstances. From the facts, the Court of Appeal held that the prospect of the charges being declared a nullity was there. Moreover the present appeals involved novel issues namely the withdrawal of the s. 418A certificate, the pre-emptive gag order and discovery of documents based on *non-obstante* clauses. The Court of Appeal also found that there were no delaying tactics by the respondent.

Issues Before This Court

[9] The question before us is whether the Court of Appeal was correct in allowing the respondent's application for a stay of the criminal proceedings.

The Appellant's Submission

[10] It is the appellant's position that in respect of the present appeals, which are all of an interlocutory nature:

(i) concurrent findings by both the courts below have been made against the accused and that the appeals are frivolous and doomed to fail;

(ii) a distinction should be made between a stay of execution that is governed by s. 311 of the CPC and a stay of proceedings, on which the CPC is silent. This difference must be taken to have been a deliberate act by the parliamentary draftsperson to highlight the distinction between the both particularly when read together with s. 172B(4) of the CPC which provides that criminal trials should start no later than three months after an accused has been charged. If trials are statutorily required to commence within three months after an accused has been charged, then granting a stay would defeat this objective.

(iii) Furthermore, under the Courts of Judicature Act 1964 (Act 91), both appellate courts have jurisdiction to grant stay of proceedings and stay of execution in civil matters but in criminal matters the appellate courts only have power to grant a stay post-conviction, that is, at the conclusion of trial. Again this omission by the parliamentary draftsperson must be taken to have been intentional.

(iv) Notwithstanding an absence of statutory power to order the stay of a criminal trial, the court may still exercise power to order a stay of criminal proceedings by way of its inherent jurisdiction. However, this absence of statutory power to stay criminal trials must mean that:

(a) the test for granting a stay should be different for civil and criminal trials;

(b) precedents laid down in civil cases must be treated with caution in criminal matters; and

(c) a stay of a criminal trial should only be granted in exceptional circumstances (as per the Court of Appeal decision in *Dato' Seri Anwar Ibrahim v. PP* [2011] 7 CLJ 253; [2011] 5 MLJ 535).

(v) If the civil law test of "special circumstances" is applicable in a criminal law context, it is the possibility of the appeal being rendered nugatory that needs protection, and not the proceedings in the court below. On the facts, the appeals would not be rendered nugatory if a stay of the trial is refused because the accused would still be able to proceed with the hearing of the appeals currently pending before this court.

(vi) In *Dato' Seri Anwar Ibrahim* (*supra*) a stay was refused for a charge of sodomy. For the present appeals, no "special circumstances" favouring the accused exist as:

(a) the offences are serious in nature;

(b) the case is one of public and national importance;

(c) it has generated much public interest locally as well as internationally;

(d) trial dates were fixed eight months ago (as opposed to the three months specified under s. 172B(4); and

(e) no prejudice will be caused to the accused because he will have an early opportunity to vindicate himself.

The Respondent's Submissions

[11] The respondent on the other hand contends that:

(i) The Court of Appeal in issuing the "interim order" was fully empowered under ss. 44, 79 and 80 of the CJA to stay of proceedings;

(ii) Sections 44 and 80 of the CJA fall within the "general" provisions applicable to both the civil and criminal jurisdiction of the Court of Appeal and Federal Court;

(iii) Cases such as *Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd* [2002] 4 CLJ 27; [2002] 4 MLJ 113, *Choong Wooi Leong & Ors v. Lebbey Sdn Bhd (No 2)* [1998] 2 CLJ 509; [1998] 2 MLJ 661, *Takako Sakao v. Ng Pek Yuen & Ano*r *(No. 3)* [2010] 1 CLJ 429; [2010] 2 MLJ 141, and *Rowstead Systems Sdn Bhd v. Bumicrystal Technology (M) Sdn Bhd* [2005] 2 CLJ 465; [2005] 3 MLJ 132 affirm the jurisdiction of the Court of Appeal to make interim orders under ss. 44 or 80 of the CJA in the nature of stay of proceedings in order to "prevent prejudice to the claims of parties" pending the hearing of an appeal and to "preserve the integrity of pending appeals";

(iv) The court retains inherent jurisdiction to make any orders to prevent prejudice to an accused person. The CPC is limited to the procedure to try offences and is not an exhaustive directory of the court's powers. As part of the inherent powers of the court it may do all things reasonably necessary to ensure fair administration of justice and to safeguard an accused person from oppression or prejudice;

(v) The case of *Dato' Seri Anwar Ibrahim* (*supra*) adopted the special circumstances approach and the nugatory approach;

(vi) The court should not consider the merits of the case in an application for stay;

(vii) The prospect that the trial is rendered a nullity amounts to special circumstances. For the present appeals, the potential nullity of proceedings arises from the following:

(a) If the Federal Court agrees with the respondent on the issue of natural justice, the entire proceedings would be nullified (see: *PP v. Ishak Hj Shaari & Other Appeals* [2003] 3 CLJ 843). If the proceedings are subsequently nullified, it would waste the time and effort of all persons involved. Besides, a retrial in the event of nullity would be prejudicial to the respondent as the witnesses who are re-examined may change their evidence and the prosecution may get a second bite of the cherry in the conduct of the trial;

(b) If the Public Prosecutor has no power to withdraw the s. 418A certificate and had acted unconstitutionally when he did so, the proceedings would be vitiated;

(c) If the matter was never "pending" before the Sessions Court as no plea was taken therein, the High Court could not have exercised the powers under s. 417(2) of the CPC (see: *PP v. Dato' Yap Peng* [1987] 1 LNS 28; [1987] 2 MLJ 311 SC and s. 417(2) CPC);

A (d) The High Court Judge had allegedly exercised his powers *suo moto* to transfer the matter back to himself, thereby bypassing the registry and the powers of the Chief Judge of Malaya under s. 20 of the CJA to distribute business;

B (e) The appellant's reliance on *R v. Christian* [2007] 2 AC 400 PC is distinguishable in fact and law because in that case, the application for a stay was a final remedy sought by the accused in the substantive appeal on the grounds of an alleged abuse of process while the present appeals are in respect of an interlocutory application for a stay of proceedings pending appeal;

C (f) The *Dato' Seri Anwar Ibrahim* case (*supra*) which held that "delaying tactics engineered by the appellant should be a factor in refusing to grant the stay" is distinguishable in fact as the Court of Appeal had on two occasions held that there was no evidence of any delay tactics by the respondent; and

D (g) The Court of Appeal's ruling in granting stay of proceedings is consistent with the decision of this court in *Subashini Rajasingam v. Saravanan Thangathotray* [2008] 2 CLJ 1; [2008] 2 MLJ 147 as its purpose is to maintain the *status quo* of an earlier interim order pending an appeal on a matter that has been dismissed.

E **Decision Of This Court**

[12] As alluded to above, the only issue in the present appeals is confined to the decision of the Court of Appeal granting an order to stay the commencement of a criminal trial pending disposal of three appeals brought F by the defence to this court.

[13] During the course of oral submissions before us, the respondent confirmed that the Court of Appeal had allowed a stay of proceedings based on ss. 44, 79 and 80 of the CJA alone.

G Section 44(1) of the CJA reads:

> In any proceeding **pending before the Court of Appeal** any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the H dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Court of Appeal. (emphasis added).

[14] Next, s. 79 of the CJA states that:

> Whenever **application** may be made either to the Court of Appeal or to the Federal Court, it shall be made in the first instance to the Court of I Appeal. (emphasis added).

[15] While s. 80(1) of the CJA provides that:

> In any proceeding **pending before the Federal Court** any direction incidental thereto not involving the decision of the proceeding, **any interim order to prevent prejudice to the claims of parties** pending the hearing of the proceeding, any order for **security for costs**, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time **be made by a Judge of the Federal Court.**
>
> (emphasis added).

[16] We have scrutinised ss. 44(1) and 80(1) of the CJA. It is noteworthy that both speak of "pending proceedings" as a pre-requisite before an interim order can be made by the relevant court. It is to be noted that when the stay application was made by the respondent, the Court of Appeal had already dismissed the three appeals filed by the respondent. In the circumstances, there was no longer any "pending" proceeding before the Court of Appeal enabling it to exercise its jurisdiction to grant a stay of proceedings under s. 44(1) of the CJA.

[17] Similarly, for the respondent to avail himself of s. 80(1) of the CJA, there must also be a "proceeding pending" before the Federal Court. When the respondent's appeals were dismissed by the Court of Appeal, there was no pending proceeding before the Federal Court at that stage. There was only an undertaking by the respondent that they would be filing an appeal. As such s. 79 was not relevant. For those reasons ss. 44(1) and 80(1) of the CJA do not empower the Court of Appeal to grant a stay of proceedings in light of the factual matrix of the present appeals. Since the respondent's reliance on ss. 44(1) and 80(1) fails as alluded to above, it follows that s. 79 of the CJA is similarly of no assistance to him. Going from the above, the Court of Appeal had no jurisdiction to entertain the respondent's application for a stay of proceedings upon the dismissal of the three appeals. The grant of the stay was therefore made without jurisdiction and thus a nullity. It is therefore incumbent on this court to revise such order for being a nullity. The enabling provisions are s. 86 of the CJA read together with s. 87 of the same which confer upon this court a general supervisory and revisionary power identical to the High Court's to correct mistakes committed by courts subordinate to it in respect of any criminal matter (see: *PP v. Dato' Seri Anwar Ibrahim* [2014] 5 CLJ 805 FC (at para. [17]). On this ground alone, this court is seised with the necessary jurisdiction to exercise its revisionary power to rectify the grave error committed by the Court of Appeal.

[18] More crucially and independently of the above, we shall now address the applicable test in the grant of stay in criminal proceedings. In his application before the Court of Appeal, the respondent relied on the decision of this court in *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbaguna Makmur Bhd* [2003] 4 CLJ 1; [2004] 1 MLJ 257. In *Kosma Palm Oil*, this court held that the test applicable to the grant of a "stay of execution" is

whether there are special circumstances, the most common of which is whether the appeal would be rendered nugatory if a stay of execution is not granted (see paras. [7] - [10]).

[19] *Kosma Palm Oil* represents the legal position governing stays of execution for civil appeals (see: Tan, Kee Heng, *Civil and Criminal Appeals in Malaysia*, 3rd edn, (Sweet & Maxwell, 2016) at Chapter 7.3). The relevant question before us now is whether it applies with equal force to a stay of criminal proceedings at the trial court when there are pending appeals in respect of interlocutory applications before this court.

[20] On this point, we note that there is only one reported decision from the Court of Appeal affirming the proposition that *Kosma* is applicable. In *Dato' Seri Anwar Ibrahim v. PP* [2011] 7 CLJ 253; [2011] 5 MLJ 535, Abdul Malik Ishak JCA expressly endorsed the dual tests of "special circumstances" and "nugatoriness" propounded in *Kosma* (at para. [81]) as being equally relevant in an application to stay a criminal proceeding. His Lordship further held that the background scenario, seriousness of the offence which the accused is currently facing, and the conduct of the defence in the trial (ie, the delaying tactics employed by the defence) are all relevant factors to be considered by the court in deciding whether a stay of proceedings in a criminal trial should be granted (at paras. [88] - [90]).

[21] The position in Australia is that generally jurisdiction of the courts to stay civil or criminal proceedings pending appeal is an exercise of the inherent jurisdiction of the courts (*Jennings Constructions Ltd v. Burgundy Royale Investments Pty Ltd* (1986) 161 CLR 681 at 684; *Fuller & Cummings v. Director of Public Prosecutions* (Cth) (1994) 68 ALJR 611). Being an extraordinary jurisdiction, exceptional circumstances must be shown before its exercise is warranted. Keeping matters in *status quo* until the litigation is finally resolved is not the purpose for which the inherent jurisdiction is invoked. Something quite exceptional must be shown before that jurisdiction is exercised (*Edelsten v. Ward (No. 2)* (1988) 63 ALJR 346).

[22] The courts apply a more stringent test in considering stay of criminal proceedings. It will not normally be granted pending an interlocutory appeal in any criminal trial. It is only in very exceptional or unusual circumstances that a stay order is granted (*McNamara v. R* (1978) 20 ALR 98; *R v. Iorlano* (1983) 151 CLR 678 at 680; *De Simone v. The Queen* [2012] HCATrans 86). In *Beljajev v. Director of Public Prosecutions* (1991) 65 ALJR 400, the accused was committed to prison to await his trial on various counts involving narcotic drugs. He applied for a stay of that order pending appeal. Brennan J held at para. [10] that preservation of a *status quo* alone does not warrant the exercise of the extraordinary jurisdiction to grant a stay. The jurisdiction can be exercised only in extraordinary circumstances, particularly in the case of interlocutory applications in a criminal trial.

[23] The reluctance of the court granting a stay of criminal proceeding is primarily based on policy consideration. It is undesirable that the criminal process be interrupted or fragmented by interlocutory proceedings (*Sankey v. Whitlam* (1978) 142 CLR 1 at 25-26, 82-83; *The Queen v. Iorlano* (1993) 151 CLR 678 at 680; *Clyne v. The Director of Public Prosecutions for the Commonwealth of Australia* (1984) 154 CLR 640 at 643; *Re Rozenes; Ex parte Burd* (1994) 120 ALR 193 at 194; *Joosse v. Australian Securities and Investment Commission* (1999) 73 ALJR 232 at 234; *Gedeon v. Commissioner of New South Wales Crime Commission* (2008) 236 CLR 120 at [23]; *R v. WR* [2009] ACTSC 93 at [21]; *The Queen v. AI, AD and JR* [2013] ACTCA 16 at [19]).

[24] In *Seymour v. AG (Cth)* (1984) 4 FCR 498, Jenkinson J explained the underlying policy consideration having regard to the prominence of public interest in the expeditious resolution of accusations of crime. He said this: 'the longer such an accusation remains unresolved the greater the risk of serious harm to the community. Those risks are multifarious: the fading of witness's recollections, the diminution of public confidence in the administration of the criminal law, the prolonging of fears and hatred which the resolution of criminal charges tends to allay, and uncertainty as to the course which the life of the accused is to take, and not infrequently uncertainty as to the courses of other lives, are perhaps the more obvious and the most common. Those considerations of public interest are of great weight ...' ((1984) 4 FCR 498 at 501).

[25] It has also been reasoned that "Crown appeals could easily lead to oppression and the defendant's rights are best vindicated by appeal after conviction". (See: *R v. Garrett* (1988) 49 SASR 435 at 451; see further Brennan J in *Beljajev v. DPP* (1991) 173 CLR 28 at 32). The caution about the undesirability of fragmentation of criminal process would be more pronounced where a hearing of proceedings has actually commenced (*Khalil v. His Honour, Magistrate Johnson and Anor* [2008] NSWSC 1092 at [117]). Nevertheless, the general position remains that the undesirability of fragmenting the criminal process is not confined to any particular part of the criminal process, but rather to the process as a whole: "it is not the point that in this case the trial had not commenced or had only just commenced at the time the application for an adjournment to pursue a remedy in this court was made. The principle would make little sense if it applied only to the particular phase of the criminal process which was immediately threatened by being interrupted. Any interference with any part of the process for other than reasons as grave as those acknowledged in the cases referred to is antithetical to the proper and just disposition of criminal cases." (*Atlas v. D.P.P.* [2001] VSC 209 at para. [26]).

[26] Besides, the Australian courts have taken the view that even if the matters being complained of in the interlocutory appeal do take place and the accused is convicted, "should the accused reach the stage (after conviction upon full trial) where he wishes to contest on appeal the matters which

he now raises, it would then be possible to consider them in a factual setting - a more desirable course than considering them in the abstract" (see: *Re Rozenes; Ex parte Burd* (1994) 120 ALR 193 at 195). This is so even if the issuing of the interlocutory appeal is not opposed by the prosecution or in fact supported by both the prosecution and the defence, for instance to seek a definitive ruling of the appellate or superior court on certain novel issues: "many questions arise before and in the course of a trial in respect of which a trial judge would be much assisted by a definitive ruling of this court or the Court of Appeal. However, the proper application of the principles of criminal procedure means that trial judges are required to make rulings on evidence or determine points of procedure as and when they arise either prior to or in the course of criminal trials no matter how novel or difficult the points raised might be. The appeal system exists to ensure that an error made by a trial judge which leads to the possibility of a miscarriage of justice in the result can be corrected in the Court of Appeal." (*Atlas v. D.P.P.* [2001] VSC 209 at [23]).

[27] Perhaps most importantly, the Australian courts have taken the stance that the fact that an accused will be put to the expense of a trial is irrelevant in considering whether proceedings should be stayed (*Re Rozenes; Ex parte Burd* (1994) 120 ALR 193 at 195): "it is undeniable that, if the applicants were ultimately to succeed upon appeal on the grounds which they now raise, they would nevertheless have suffered the expense and strain of a criminal trial. That, however, is a circumstance which is always present when it is sought to contest the ruling of a trial judge and is not of itself, in my view, an exceptional circumstance" (followed in *R v. Chardon* [2016] QCA 50 at paras. [27]-[28]).

[28] Likewise, the courts in Australia generally show disinclination to allow other forms of collateral challenge in parallel proceedings such as an application for a declaration or other form of judicial review with similar relief in the nature of *certiorari*, be it commenced in the same court or another civil or criminal court, which has the net effect of staying the criminal proceedings or would interfere with or impinge directly upon the normal course of proceedings in a criminal trial (*Sankey v. Whitlam* (1978) 142 CLR 1 at [14]; *R v. Iorlano* (1983) 151 CLR 678 at 680; *Yates v. Wilson* (1989) 18 CLR 338 at 339; *Attorney-General v. Smith* (1985) 39 SASR 311 at 313; *Jarrett v. Seymour* (1993) 119 ALR 46). In those cases, an important consideration is the need to observe and not fragment the ordinary, and orderly, process of a trial. That consideration would apply with particular force "where proceedings are in charge of a judge who at this very moment is beginning the trial": *Anderson v. Attorney-General of New South Wales* (1987) 10 NSWLR 198 at p. 200 (followed in *Hinch v. County Court of Victori*a [2009] VSC 548 at para. [46]).

[29] In the UK, the power of the court to stay a criminal proceeding is inherent in nature. (See: *Re Wickham* [1887] 35 Ch D 272 at p. 280). Historically, a stay of proceedings "had the draconian effect of bringing proceedings to a conclusion, unless it was of the conditional variety. This has, however, been superseded by contemporary practice". (See: *R (on the application of AO & AM) v. Secretary of State for the Home Department (stay of Proceedings - principles)* [2017] UKUT 168 (IAC) at para. [20]). A stay of proceedings is different from a stay of execution (*AB (Sudan) v. Secretary of State for the Home Department* [2013] EWCA Civ 921 at para. [25]). In the case of a stay of proceeding, the governing principles formulated by the Court of Appeal in *AB (Sudan)* (at para. [26]), *albeit* discussed in the immigration and asylum context, are that:

> A stay on proceedings may be associated with the grant of interim relief, but it is essentially different. In determining whether proceedings should be stayed, the concerns of the court itself have to be taken into the balance. Decisions as to listing, and decisions as to which cases are to be heard at any particular time are matters for the court itself and no party to a claim can demand that it be heard before or after any other claim. The court will want to deal with claims before it as expeditiously as is consistent with justice. But, on the other hand, it is unlikely to want to waste time and other valuable resources on an exercise that may well be pointless if conducted too soon. If, therefore, the court is shown that there will be, or there is likely to be, some event in the foreseeable future that may have an impact on the way a claim is decided, it may decide to stay proceedings in the claim until after that event. It may be more inclined to grant a stay if there is agreement between the parties. It may not need to grant a stay if the pattern of work shows that the matter will not come on for trial before the event in question. The starting point must, however, be that a claimant seeks expeditious determination of his claim and that delay will be ordered only if good reason is shown.
>
> In cases where a request for a stay on proceedings is coupled, expressly or by necessary implication, with a request for interim relief, the court will need to take into account the factors relevant to both types of decision, and may need to take into account a third: that by securing interim relief and a stay, the applicant may be asking the court to use its powers to give him, for as long as he can secure it, a benefit that he may not obtain at the trial.

[30] In short, the principles distilled from the English Court of Appeal decision in *AB (Sudan)* are these:

(i) every claimant is entitled to expect expeditious judicial adjudication. The strength of this expectation will be calibrated according to the individual litigation equation;

(ii) the judicially imposed delay flowing from a stay order requires good reason;

(iii) judicial choreography whereby one case is frozen awaiting the outcome of another is justified for example where the assessment is that the latter will have a critical impact upon the former;

(iv) great caution is to be exercised where a stay application is founded on the contention that the outcome of another case will significantly influence the outcome of the instant case. (See: *R (on the application of AO & AM)* at para. [23]); and

(v) a stay application will require especially compelling justification in a case qualifying for urgent judicial decision. (See: *R (on the application of AO & AM)* at para. [24]).

[31] While it is true that the above criteria were discussed in the context of immigration and asylum cases, we do not find any reason to decline adopting and applying the same to criminal proceedings.

Determinative Principles

[32] In summary, in considering an application for stay of criminal proceedings when commencement of the trial is imminent or continuing in the court of first instance, the determinative principles to be derived from the above cases are as follows:

(i) There is a strong public interest in the prosecution of crime and in ensuring that those charged with serious criminal offences are tried (*R v. Crawley and Others* [2014] EWCA Crim 1028 at para. [18]).

(ii) It is undesirable that the criminal process be interrupted or fragmented by interlocutory proceedings. The considerations of public interest are of great weight leaning in favour of expeditious resolution of accusations of crime.

(iii) The undesirability of fragmenting the criminal process is not confined to any particular part of the criminal process, but rather to the process as a whole. Any interference with any part of the process is antithetical to the proper and just disposition of criminal cases. The caution about the undesirability of fragmentation of criminal process would be more pronounced where a hearing of proceedings has actually commenced.

(iv) A stay of proceedings application will require especially compelling justification in a case qualifying for urgent judicial decision. For instance, it is important that anyone charged with serious criminal offences be brought to trial expeditiously. Public interest would not be served by allowing the defence to request for a delay. An accused of serious criminal offences who is not guilty should have the opportunity of clearing his name without excessive delay (*Attorney General's Reference No. 2 of 2001* [2003] UKHL 68 at [16]).

(v) A stay of proceedings will not normally be granted pending an interlocutory appeal in a criminal trial. It is only in very exceptional or unusual circumstances that a stay order is granted. This is so even if the issuing of the interlocutory appeal is not opposed by the prosecution or in fact supported by both the prosecution and the defence.

(vi) The accused's rights over preliminary or interlocutory rulings made by the trial judge are best vindicated by appeal after conviction, if any. It is generally more desirable to consider preliminary or interlocutory rulings made by the trial judge in appeal after conviction upon full trial with the benefit of a concrete factual setting than considering them in the abstract during interlocutory appeal.

(vii) The fact that an accused will be put to the expense of a trial is irrelevant and would not qualify as "exceptional circumstances" to justify a stay of a criminal trial pending resolution of an appeal.

(viii) The courts should exercise great caution in allowing other forms of collateral challenge, in parallel proceedings such as an application for a declaration or other form of judicial review with similar relief in the nature of *certiorari*, be it commenced in the same court or another civil or criminal court, which have the net effect of staying the criminal proceedings or would interfere with or impinge directly upon the normal course of proceedings in a criminal trial.

[33] Now, the accused is a public figure who stands charged with offences which cannot by any means be described as trivial, allegedly committed while he was holding office as Prime Minister. Public interest, and indeed his personal interest, dictate that the trials against him should be commenced expeditiously without any unreasonable delay as it is at the denouement of the trial that the court is best-equipped to determine his guilt or otherwise based on factual evidence instead of speculative arguments. Furthermore, he has not established to our satisfaction that his application is so unusual or exceptional that it falls within that class of cases which would justify the grant of a stay. As stated above, a stay of criminal proceedings will only be granted in the rarest of cases and the fact that the proceedings may be rendered a nullity is not a special circumstance. In the context of an application for a stay of proceedings, it is also immaterial that the accused is put to the expense of a trial even if he is subsequently vindicated on appeal.

[34] We have not overlooked the respondent's assertion that the appeal by the appellant was incompetent since there was no appeal record and no petition filed as required by the CJA. This is a non-issue because for criminal proceedings, the record of appeal including the grounds of judgment of the lower court is prepared by the court below (see: r. 91 of the Rules of the

A Federal Court 1995). And without the grounds of judgment, the appellant cannot proceed to file the petition of appeal (see: r. 95 of the Rules of the Federal Court 1995). Accordingly, we do not think that the appellant is at fault and in any case the incomplete appeal papers are no impediment to us hearing the appeal proper as we are exercising our revisionary powers. At
B any rate, the stay order granted by the Court of Appeal cannot be sustained in the face of our elucidation on the correct test to be applied for a stay of criminal proceedings.

[35] For the foregoing reasons we set aside the stay order of the criminal trial granted by the Court of Appeal. Similarly the respondent's oral
C application for a stay of proceedings before us is dismissed in the absence of any "exceptional or unusual circumstances". The matter was therefore remitted forthwith to the High Court to proceed with the criminal trial.

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