A

DATO' SRI MOHD NAJIB HJ ABDUL RAZAK v. PP

COURT OF APPEAL, PUTRAJAYA
ZABARIAH MOHD YUSOF JCA
RHODZARIAH BUJANG JCA
LAU BEE LAN JCA
B [CRIMINAL APPEAL NO: W-05-2-01-2019]
25 MARCH 2019

CRIMINAL LAW: *Charges – Criminal charges – Applicant, former Prime Minister of Malaysia, charged with seven criminal charges relating to offences under Penal*
C *Code, Malaysian Anti-Corruption Commission Act 2009 and Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 – Appeal against decision of High Court in dismissing application for production of instrument for appointment of advocate and solicitor to conduct criminal prosecution against applicant – Whether appeal ought to be allowed*

D

CRIMINAL PROCEDURE: *Prosecution – Conduct of criminal prosecution – Appeal against decision of High Court – High Court dismissed application for production of instrument for appointment of advocate and solicitor – Applicant, former Prime Minister of Malaysia, charged with seven criminal charges – Attorney*
E *General appointed advocate and solicitor to conduct criminal prosecution against applicant – Whether written consent or sanction of Public Prosecutor required – Whether applicant prejudiced by appointment of advocate and solicitor – Criminal Procedure Code, ss. 51, 129, 333, & 379 – Interpretation Acts 1948 and 1967, s. 55*

CRIMINAL PROCEDURE: *Appeal – Appeal against decision of High Court –*
F *High Court dismissed application for production of instrument for appointment of advocate and solicitor – Applicant, former Prime Minister of Malaysia, charged with seven criminal charges – Attorney General appointed advocate and solicitor to conduct criminal prosecution against applicant – Whether written consent or sanction of Public Prosecutor required – Whether application disclosed valid reasons or basis – Whether announcement of appointment of advocate and solicitor in media*
G *release satisfied Attorney General's duty to applicant – Whether appeal ought to be allowed – Criminal Procedure Code, ss. 51, 129, 333, & 379 – Interpretation Acts 1948 and 1967, s. 55*

EVIDENCE: *Privilege – Solicitor-client privilege – Applicant, former Prime*
H *Minister of Malaysia, charged with seven criminal charges – Attorney General appointed advocate and solicitor to conduct criminal prosecution against applicant – High Court dismissed applicant's application for production of instrument for appointment of advocate and solicitor – Whether sight of letter of appointment warranted – Whether there was solicitor-client privilege between Attorney General and advocate – Evidence Act 1950, s. 126*

I

The appellant, former Prime Minister of Malaysia, was charged with seven charges relating to offences committed under the Penal Code, the Malaysian Anti-Corruption Commission Act 2009 and the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001. Datuk Haji Sulaiman Abdullah ('DHSA'), an advocate and solicitor, was appointed by the Public Prosecutor ('PP') to lead the prosecution against the appellant. At the High Court, the appellant sought for the respondent ('the prosecution') to produce a copy of the letter appointment of DHSA. Dismissing the application, the High Court Judge ('HCJ') held (i) the letter of appointment was not a pre-trial document covered by s. 51 of the Criminal Procedure Code ('CPC') which is only for documents mentioned in the charge; (ii) there is no legal requirement to produce the letter of appointment under the CPC and the appellant's reliance on s. 55 of the Interpretation Acts 1948 and 1967 ('IA') and s. 129 of the CPC were misplaced because these provisions are on the institution of legal proceedings and not on authorisation or permission to appoint a qualified person to conduct prosecution in the CPC, such as ss. 377 and 379; (iii) the appellant failed to specifically state the reasons for the alleged challenge to the appointment of DHSA and the court could not compel its production solely on the ground that the Attorney General ('AG') refused to produce it; (iv) the AG media release had specified not just the law under which the appointment was made but also the reasons for the same. Given that it came from the PP himself, in the person of the AG, there would not be a need to produce the same in court. The application also failed to show how the basis of appointment, as stated in the AG media release, was flawed; and (v) the letter of appointment has been classified as official secret by the issuance of a certificate under s. 16A of the Official Secrets Act 1972 ('OSA'). Hence, the present appeal. The prosecution abandoned their objection on the production of the letter of appointment based on the last ground stated above and their objection on the said production was premised on s. 126 of the Evidence Act 1950 ('EA').

Held (allowing appeal; setting aside order of High Court)
Per Rhodzariah Bujang JCA delivering the judgment of the court:

(1) Section 126 of the EA provides three instances when solicitor-client privilege arises, except where the provisos apply, and they are (i) communications made by the client to his advocate; (ii) contents of documents which the advocate has sighted; and (iii) advice given by the advocate to his client. The qualification is that the three instances must have occurred in the course of, or for the purpose of, the advocate's appointment. (para 10)

(2) Section 126 of the EA applied to the AG and DHSA because, in appointing the latter to conduct the prosecution against the appellant, the AG, in his capacity as the PP, was in no different or worst position that a litigant, be it in a criminal or civil case, who appoints an advocate or

A solicitor to advice or represent him in court in the legal dispute involving him. However, in order to seek refuge under s. 126 of the EA, the prosecution must show that the letter of appointment comes under privileged communication which the AG failed to do. Based on the illustrations to s. 126 of the EA, it is clear that what is protected is B information given by the client to his advocate or solicitor. (para 10)

(3) Since a legal practitioner has been appointed to conduct the prosecution against the appellant, not a Deputy Public Prosecutor in the employment of the AG Chambers who is a public servant, the appellant had a legitimate interest or expectation to have sight of the letter C appointing him to conduct the prosecution, for the criminal justice system in Malaysia is an adversarial one, and the duty of a prosecutor to act fairly is paramount. Therefore, it was the bounden duty of the AG to produce the letter of appointment when such a request has been made and not only when a specific challenge to that appointment has been D mounted by the appellant, or an accused who is similarly circumstanced, for he has the right to know, from the start of the proceedings, that his prosecutor is the one who has been validly appointed under s. 379 of the CPC. (para 15)

(4) By the clear provision of s. 55 of the IA, the letter of appointment came E within the said section as it was *prima facie* evidence which is required, in the words of the section '… for any other purpose in connection with any legal proceedings …'. The scope of s. 55 of the IA is wider than, and is not merely confined to, the institution of a criminal proceeding. In other words, there is no difference between the need to produce a F sanction to prosecute before the commencement of a trial and the production of a letter of appointment made under s. 379 of the CPC for the conduct of a criminal proceeding in court. This consideration is a sufficient answer to the point raised by the HCJ that a letter of appointment is not a pre-trial document required to be produced under s. 51A of the CPC. (para 15)

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(5) The announcement of the appointment of DHSA, during the AG media release, could not take away the legitimate interest of the appellant to have sight of the letter of appointment. The AG media release did not satisfy the AG's duty as such a document addressed to the world at-large H could not be equated with a formal letter of appointment. (para 18)

Bahasa Malaysia *Headnotes*

Perayu, bekas Perdana Menteri Malaysia, dituduh dengan tujuh pertuduhan pelakuan kesalahan-kesalahan berkaitan Kanun Keseksaan, Akta I Suruhanjaya Pencegahan Rasuah Malaysia 2009 dan Akta Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti

Haram 2001. Datuk Haji Sulaiman Abdullah ('DHSA'), seorang peguam bela dan peguam cara, dilantik oleh Pendakwa Raya ('PR') untuk mengetuai pendakwaan terhadap perayu. Di Mahkamah Tinggi, perayu memohon agar responden ('pihak pendakwaan') mengemukakan sesalinan surat pelantikan DHSA. Menolak permohonan tersebut, Hakim Mahkamah Tinggi ('HMT') memutuskan (i) surat pelantikan bukan dokumen pra-perbicaraan yang termasuk dalam rangkuman s. 51 Kanun Tatacara Jenayah ('KTJ') yang hanya untuk dokumen-dokumen yang dinyatakan dalam pertuduhan; (ii) tiada kehendak undang-undang agar mengemukakan surat pelantikan bawah KTJ dan sandaran perayu pada s. 55 Akta Tafsiran 1948 dan 1967 ('AT') dan s. 128 KTJ tidak tepat kerana peruntukan-peruntukan ini adalah tentang pemulaan prosiding undang-undang dan bukan tentang kuasa atau kebenaran melantik orang yang berkelayakan untuk mengendalikan pendakwaan dalam KTJ, seperti ss. 377 dan 379; (iii) perayu gagal menyatakan, dengan khusus, alasan-alasan cabaran terhadap pelantikan DHSA dan mahkamah tidak boleh mendesak pengemukaannya hanya kerana Peguam Negara ('AG') enggan mengemukakannya; (iv) hebahan berita AG, dengan khusus, menyatakan bukan sahaja undang-undang yang bawahnya pelantikan dibuat tetapi juga alasan-alasannya. Oleh kerana ini dibuat oleh PP sendiri, iaitu AG, alasan-alasan tersebut tidak perlu dikemukakan di mahkamah. Permohonan gagal menunjukkan asas pelantikan, seperti yang dinyatakan dalam hebahan berita AG, cacat; dan (v) surat pelantikan diklasifikasikan sebagai rahsia rasmi melalui pengeluaran perakuan bawah s. 16A Akta Rahsia Rasmi 1972. Maka timbul rayuan ini. Pihak pendakwaan mengabaikan bantahan mereka terhadap pengeluaran surat pelantikan berdasarkan alasan terakhir yang dinyatakan di atas dan bantahan mereka terhadap pengeluaran tersebut kini berasaskan s. 126 Akta Keterangan 1950 ('AK').

Diputuskan (membenarkan rayuan; mengetepikan perintah Mahkamah Tinggi)

Oleh Rhodzariah Bujang HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 126 AK memperuntukkan tiga keadaan apabila keistimewaan peguam cara - anak guam timbul, kecuali yang mana-mana proviso terpakai, dan keadaan-keadaan ini adalah (i) komunikasi yang dibuat oleh anak guam kepada peguam belanya; (ii) kandungan dokumen-dokumen yang peguam bela telah lihat; dan (iii) nasihat yang diberi oleh peguam bela kepada anak guamnya. Kelayakan ini ialah ketiga-tiga keadaan ini mesti berlaku semasa, atau untuk tujuan, pelantikan peguam bela.

(2) Seksyen 126 AK terpakai pada AG dan DHSA kerana, dalam melantik DHSA untuk mengendalikan pendakwaan terhadap perayu, AG, dalam kapasiti beliau sebagai PR, tidak berbeza kedudukannya berbanding seorang pelitigasi, sama ada dalam kes jenayah atau sivil, yang melantik peguam bela atau peguam cara untuk menasihati atau mewakilinya di mahkamah dalam pertikaian undang-undang melibatkan dirinya. Walau bagaimanapun, untuk berlindung bawah s. 126 AK, pihak pendakwaan

mesti menunjukkan bahawa surat pelantikan adalah komunikasi istimewa dan ini gagal dilakukan oleh AG. Berdasarkan ilustrasi-ilustrasi s. 126 AK, jelas bahawa yang dilindungi ialah maklumat yang diberi oleh anak guam kepada peguam bela atau peguam caranya.

(3) Oleh kerana seorang pengamal undang-undang dilantik untuk mengendalikan pendakwaan terhadap perayu, bukan Timbalan Pendakwa Raya yang berkhidmat di Jabatan Peguam Negara, iaitu seorang penjawat awam, perayu mempunyai kepentingan atau jangkaan sah untuk melihat surat pelantikan yang melantik pengamal undang-undang tersebut untuk mengendalikan pendakwaan kerana sistem keadilan jenayah di Malaysia bersifat adversarial dan kewajipan paling utama pendakwa ialah untuk bertindak adil. Oleh itu, AG berkewajipan mengemukakan surat pelantikan apabila permohonan sedemikian dibuat dan bukan hanya apabila cabaran khusus terhadap pelantikan tersebut dibuat oleh perayu, atau tertuduh dalam keadaan sama, kerana beliau mempunyai hak untuk tahu, dari permulaan prosiding, bahawa pendakwanya ialah orang yang sah dilantik bawah s. 379 KTJ.

(4) Berdasarkan peruntukan jelas s. 55 AT, surat pelantikan terangkum dalam seksyen tersebut kerana ini keterangan *prima facie* yang diperlukan, dalam perkataan-perkataan seksyen tersebut '… untuk apa-apa tujuan lain berkaitan mana-mana prosiding undang-undang …'. Skop s. 55 AT lebih luas daripada, dan tidak terbatas pada, permulaan prosiding jenayah. Dalam erti kata lain, tiada beza antara keperluan mengemukakan kebenaran mendakwa sebelum pemulaan perbicaraan dan pengemukaan surat pelantikan yang dibuat bawah s. 379 KTJ untuk pengendalian prosiding jenayah di mahkamah. Pertimbangan ini cukup dalam menjawab hujahan yang dibangkitkan oleh HMT bahawa surat pelantikan bukan dokumen pra-perbicaraan yang perlu dikemukakan bawah s. 51A KTJ.

(5) Pengumuman pelantikan DHSA, semasa hebahan berita AG, tidak boleh melucutkan kepentingan sah perayu untuk melihat surat pelantikan tersebut. Hebahan berita AG tidak memenuhi kewajipan kerana dokumen ini ditujukan pada dunia umumnya dan tidak boleh disamakan dengan surat pelantikan rasmi.

Case(s) referred to:

AK Koh Enterprise Sdn Bhd v. PP [2000] 1 LNS 200 HC ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2014] 3 CLJ 441 CA ***(refd)***
Dato' Seri Anwar Ibrahim v. PP & Another Appeal [2015] 2 CLJ 145 FC ***(refd)***
Food Corporation of India v. Kamdhenu Cattle Feed Industries AIR 1993 SC 1601 ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC ***(refd)***
PP v. Dato' Seri Anwar Ibrahim [2014] 4 CLJ 162 CA ***(refd)***
PP v. Dato' Seri Anwar Ibrahim [2014] 1 CLJ 354 CA ***(refd)***
PP v. Lew Koy [2002] 1 CLJ 86 HC ***(refd)***
Rex v. Chhoa Mui Sai [1937] 1 LNS 68 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 51, 51A, 129, 333, 377(b), 379
Evidence Act 1950, s. 126
Interpretation Acts 1948 and 1967, s. 55
Official Secrets Act 1972, s. 16A

Other source(s) referred to:
Augustine Paul, *Evidence Practice and Procedure,* 4th edn, p 1055

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

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

[Editor's note: For the High Court judgment, please see Dato' Sri Mohd Najib Hj Abdul Razak v. PP [2019] 5 CLJ 217 (overruled).]

Reported by Najib Tamby

JUDGMENT

Rhodzariah Bujang JCA:

[1] Datuk Hj Sulaiman Abdullah ("Datuk Hj Sulaiman"), an advocate and solicitor of the High Court of Malaya was appointed by the Public Prosecutor to lead the prosecution of the appellant in respect of seven charges preferred against him under three different legislations, *to wit*, the Penal Code, the Malaysian Anti-Corruption Commission Act 2009 and the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001. A joint trial of all seven charges have been ordered by the High Court and dates for the hearing had been fixed from 12 February 2019 to 29 March 2019. However, the trial has been stayed by this court on application by the appellant pending the disposal of the appeals in respect of four interlocutory decisions made by the learned High Court Judge, one of which is His Lordship's dismissal of the appellant's notice of motion that the Public Prosecutor produced to him a copy of Datuk Hj Sulaiman's letter of appointment or *fiat*. This judgment is in respect of the appeal against the decision on the dismissal of the aforesaid notice of motion.

The Application

[2] Prayer 1 of the notice of motion is worded wider than what we have just mentioned above and which the learned High Court Judge had helpfully translated in English in His Lordship's judgment although His Lordship had omitted to include the time frame stated in the said prayer, which is three days from the date of the order. The said prayer (1) but with the time frame is reproduced below, together with prayers (2) and (3):

A (a) Prayer 1

The Applicant seeks an order from this Honourable Court to compel the Respondent to produce Datuk Haji Sulaiman bin Abdullah's letter of appointment and copies of any other authorisation in writing executed by the Respondent in relation to his appointment as a Deputy Public
B Prosecutor within 3 days from the date of the order;

(b) Prayer 2

The Applicant be provided with copies of the letter of appointment and documents produced by the Respondent pursuant to Prayer 1; and

C (c) Prayer 3

The Applicant seek any further and/or other order, relief or direction which this Honourable Court may deem fit and proper in the circumstances.

[3] However, at the hearing of the appeal before us, the argument was
D centered on the production of only that letter of appointment and no other related documents pertaining to the same were identified for our consideration. Therefore, we would in this judgment concentrate on the production of that letter of appointment only.

[4] It is not disputed that Datuk Hj Sulaiman's appointment was made
E pursuant to s. 379 of the Criminal Procedure Code and that despite a number of out of court requests to have sight of his letter of appointment made by the appellant's counsel, the requests were turned down which then led to the filing of this formal application in court. The said section provides as follows:

F 379. Employment of advocate

With the permission in writing of the Public Prosecutor an advocate may be employed on behalf of the Government to conduct any criminal prosecution or inquiry, or to appear on any criminal appeal or point of law reserved on behalf of the Public Prosecutor. The advocate shall be paid
G out of the public funds such remuneration as may be sanctioned by the Minister of Finance and while conducting such prosecution or inquiry, or appearing on such criminal appeal or point of law reserved, shall be deemed to be a "public servant".

[5] Before proceeding with the points canvassed in the appeal, it would be
H best if we first summarised the grounds for the rejection of the said application by the learned High Court Judge.

The High Court Judgment

[6] His Lordship first need to grapple with the issue of whether the
I application was to challenge the validity of the appointment of Datuk Hj Sulaiman or if it was just for production of the said letter of appointment and His Lordship opined, based on the wordings in the notice of motion and from the affidavits filed in support of the same, that it was only for production of

the said letter. We would have to agree with His Lordship on this score from the clear and express words used in the notice of motion itself as reproduced above and we would further fortify our stand by the statement made by Mr Harvenderjit Singh, one of the appellant's counsel, at the hearing before us that the defence would be happy if the said letter be produced for their inspection in our court. The said offer was of course not taken up by the learned Attorney-General ("AG").

[7] Coming back to His Lordship's reasonings, we would summarise them as follows:

(i) The letter of appointment is not a pre-trial document covered by s. 51 of the Criminal Procedure Code which is only for documents mentioned in the charge against the appellant.

(ii) There is no legal requirement to produce the letter of appointment under the Criminal Procedure Code and reliance on s. 55 of the Interpretation Acts 1948 and 1967 and s. 129 of the Criminal Procedure Code by the appellant are misplaced because these provisions are on the institution of legal proceedings and not on authorisation or permission to appoint a qualified person to conduct prosecution in the Criminal Procedure Code such as ss. 333 and 379 thereof. The earlier mentioned provisions read:

> **55. Evidence of signature on *fiat*, etc.**
>
> Any written law providing that the *fiat*, consent or authority of any person is necessary before any prosecution or other legal proceedings are begun, **or for any other purpose in connection with any legal proceedings,** shall be deemed also to provide that any document purporting to be or to bear the signed *fiat*, consent or authority of that person shall be received as *prima facie* evidence in any proceedings without proof being given that the signature is what it purports to be. (emphasis added)
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> **129. Sanction required for prosecution for certain offences**
>
> (1) Except in the case of complaints laid by the Public Prosecutor no Court shall take cognisance:
>
> (a) of any offence punishable under sections 172 to 188 of the Penal Code except with the previous sanction of the Public Prosecutor or on the complaint of the public servant concerned or of some public servant to whom he is subordinate;
>
> (b) of any offence punishable under section 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211 or 228 of the Penal Code except with the previous sanction of the Public Prosecutor or when the offence is committed in or in relation to any proceeding in any Court on the complaint of such Court.

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(2) The provisions of subsection (1) with reference to the offences named in it apply also to the abetment of those offences and attempts to commit them.

(3) The sanction referred to in this section shall be in writing and may be expressed in general terms and need not name the accused person, but it shall so far as practicable specify the Court or other place in which and the occasion on which the offence was committed.

B

Drawing analogy from the authority of *PP v. Lew Koy* [2002] 1 CLJ 86; [2001] 4 MLJ 655 on a written authority to prosecute from the Public Prosecutor under s. 377(b) of the Criminal Procedure Code, His Lordship held that the Public Prosecutor is only required to produce the letter of appointment if there had been a challenge to the appointment of Datuk Hj Sulaiman. His Lordship declined to follow the High Court decision in *AK Koh Enterprise v. PP Sdn Bhd* [2000] 1 LNS 200; [2000] 6 MLJ 184 which held that such an authorisation or sanction to prosecute must be tendered in court before trial begins in order to confer jurisdiction on the court.

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(iii) The appellant has failed to state specifically the reasons for the alleged challenge to the appointment of Datuk Hj Sulaiman and the court cannot compel its production solely on the ground that the Attorney-General had refused to produce it.

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(iv) The media release by the Public Prosecutor which was exhibited to the affidavit in support of the application affirmed on 23 November 2018 had specified not just the law (s. 379 of Criminal Procedure Code) under which the appointment was made but also the reasons for it, which was the credentials of Datuk Hj Sulaiman as our nation's leading barrister. Given that it came from the Public Prosecutor himself, in the person of the learned Attorney-General, there would not be a need to produce the same in court. The application had also failed to show how the basis of that appointment as stated in the media release was flawed.

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(v) The letter of appointment has been classified as official secret by the issuance of a certificate under s. 16A of the Official Secrets Act 1972.

The Appeal

[8] We need to state at the outset that the learned Attorney-General at the hearing of the appeal has informed us that the respondent is abandoning their objection on the production of the letter of appointment based on the last ground stated above and that their objection on the said production is premised on s. 126 of the Evidence Act 1950. The said section reads:

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Professional communications

126(1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure:

(a) Any such communication made in furtherance of any illegal purpose;

(b) Any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.

(2) It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.

Explanation - The obligation stated in this section continues after the employment has ceased.

ILLUSTRATIONS

(a) A, a client, says to B, an advocate: "I have committed forgery and I wish you to defend me."

As the defence of a man known to be guilty is not a criminal purpose this communication is protected from disclosure.

(b) A, a client says to B, an advocate: "I wish to obtain possession of property by the use of a forged deed on which I request you to sue."

This communication being made in furtherance of a criminal purpose is not protected from disclosure.

(c) A, being charged with embezzlement, retains B, an advocate, to defend him. In the course of the proceedings B observes that an entry has been made in A's account book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

[9] In view of that stand adopted by the respondent, we would focus our attention on that ground of objection now.

Legal Professional Privilege

[10] That is the essence of this s. 126 which is also known as solicitor-client privilege. The section provides three instances when the privilege arises (except where the provisos apply) and, that is:

A (i) Communication made by the client to his advocate;

(ii) Contents of documents which the advocate has sighted; and

(iii) Advice given by the advocate to his client.

[11] The qualification, of course is that the three instances must have
B occurred in the course of or for the purpose of the advocate's appointment. On the facts in this appeal, we would be confining ourselves to the first instance only.

[12] We accept, firstly that the said section applies to the learned Attorney-
C General and Datuk Hj Sulaiman because in appointing the latter to conduct the prosecution against the appellant, the learned Attorney-General in his capacity as the Public Prosecutor is in no different or worst position than a litigant, be it in a criminal or civil case, who appoints an advocate or solicitor to advise him or represents him in court in the legal dispute involving him. However, in order to seek refuge under that section, the respondent must
D show that the letter of appointment comes under privilege communication which, with respect, the learned Attorney-General has failed to convince us that it is so. This is because, if one were to look at the Illustrations to the said section, which had been produced earlier, it is clear that what is protected (or not as expressly stated in the section) is information given by
E the client to his advocate or solicitor and this is exemplified in the judgment of Augustine Paul J in *PP v. Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 CLJ 215; [1999] 2 MLJ 1 where His Lordship said as follows in respect of the said section:

> This rule is established for the protection of the client, not of the
> F advocate, and is founded on the impossibility of conducting legal business without professional assistance, and on the necessities, in order to render that assistance effectual, of securing full and unreserved intercourse between the two (see *Jones v. Great Central Railway Company* [1910] AC 4; *Lyell Kennedy (No 2)* [1883] 9 App Cas 81; *Wheeler v. Le Merchant* [1881] 17 Ch D 675). As Jessel MR said in *Anderson v. Bank of British Columbia* [1876]
> G 2 Ch D 644 at p. 649L
>
> > … It is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase,
> > H that he should be able to make a clean breast of it to the gentleman and whom he consults with a view to the prosecution of his claim, or substantiating his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his
> > I privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. That is the meaning of the rule.
> >
> > …

It is not every communication made by a client to an advocate that is privileged from disclosure. However, whatever a man says to his legal adviser about his private affairs with a view to obtaining professional advice is presumed to have been said in confidence and the object is to protect all such confidential communications (see Sarkar on Evidence (15th Ed), Vol II page 2034). The privilege also extends to acts of the client observed by the advocate (see Robson v. Kemp 5 Esp 52). As the privilege is that of the client, he may expressly waive it under section 126 or impliedly under section 128 of the Evidence Act 1950 by calling the advocate as his witness. (emphasis added)

[13] Applying what is stated above to the facts of this case, we do not think that the scope of that section should be stretched to include the formal letter of appointment for it is not in the nature of such information as we said earlier given by the learned Attorney-General to Datuk Hj Sulaiman. Clearly, its production is not the mischief which the said section seeks to overcome. We would, in this regard, draw an analogy which was rightly made by the appellant's counsel, between a letter of appointment or *fiat* and a warrant to act which the court can demand production of and that of a sanction to prosecute under s. 129 of the Criminal Procedure Code which must be produced at the commencement of the trial where such a sanction is required.

[14] In Augustine Paul's book, *Evidence Practice and Procedure* (4th edn) at p. 1055 under the heading "Limit of Communication" an old case of *Rex v. Chhoa Mui Sai* [1937] 1 LNS 68; [1937] MLJ 236 was cited and which is relevant to this appeal where it was held that evidence of payment of $80 by the client to the solicitor is not 'communication' within the meaning of s. 126 of the Evidence Ordinance. So there is in fact limits to what constitute 'communication' in the said section as highlighted above and this further fortifies our view on its scope.

[15] Further, it is our view that since a private legal practitioner has been appointed to conduct the prosecution against the appellant, not a Deputy Public Prosecutor in the employment of the Attorney-General's Chambers who is a public servant, the appellant has a legitimate interest or expectation to have sight of the letter appointing him to conduct the prosecution for it must be remembered that our criminal justice system is an adversarial one and the duty of a prosecutor to act fairly is paramount. As stated by the Supreme Court of India in *Food Corporation of India v. Kamdhenu Cattle Feed Industries* AIR 1993 SC 1601:

A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fairplay in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. *To satisfy this requirement of non-*

A *arbitrariness in a State action, it is necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case.* (emphasis added)

B **[16]** Therefore, in our view it is the bounden duty of the learned Attorney-General to produce the letter of appointment when such a request has been made and not only when a specific challenge to that appointment has been mounted by the appellant, or an accused who is similarly circumstanced, for he has the right to know from the start of the proceedings that his prosecutor is one who has been validly appointed under the said s. 379.

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[17] Further, by the clear provision of s. 55 of the Evidence Act 1950 which we had reproduced earlier, the letter of appointment comes within the said section as it is *prima facie* evidence which is required, in the words of the section, "… for any other purpose in connection with any legal proceedings …". The scope of s. 55 is wider and is not merely confined to the institution of a criminal proceeding as submitted by the learned Attorney-General, which submission was made in order to justify the production of a sanction before the trial commences under the said s. 129 of the Criminal Procedure Code. In other words, there is no difference between the need to produce a sanction to prosecute before the commencement of a trial and the production of a letter of appointment made under s. 379 of the Criminal Procedure Code for the conduct of a criminal proceeding in court. This consideration in our view is a sufficient answer to the point raised by the learned High Court Judge that letter of appointment is not a pre-trial document required to be produced under s. 51A of the Criminal Procedure Code.

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[18] As for the justification raised by the learned High Court Judge not to order the said production on account of the media release, granted that it was exhibited to the appellant's own affidavit in support, but what it serves to prove is there was an announcement by the learned Attorney-General on Datuk Hj Sulaiman's appointment but such an announcement cannot take away that legitimate interest of the appellant to have sight of the letter of appointment. That media release is also in our view, not a satisfaction of the Attorney-General's duty as stated above for such a document addressed to the world at large cannot be equated with a formal letter of appointment.

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[19] Learned counsel for the appellant also submitted before us that the production of the letter of appointment should be allowed as there was case precedent in which the same was produced. That was the case involving Dato' Seri Anwar bin Ibrahim with regards to the sodomy charge preferred against him where Tan Sri Muhammad Shafee bin Md Abdullah ("Tan Sri Shafee") who is now the appellant's lead counsel was similarly appointed by

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the then Attorney-General as a Deputy Public Prosecutor to conduct the appeal in the Court of Appeal and subsequently in the further appeal to the Federal Court (see *PP v. Dato' Seri Anwar Ibrahim* [2014] 4 CLJ 162 and *Dato' Seri Anwar Ibrahim v. PP and Another Appeal* [2015] 2 CLJ 145, respectively). We noted that there were two attempts made to disqualify Tan Sri Shafee's appointment by way of a notice of motion filed in this court pending the hearing of the appeal against the acquittal of Dato' Seri Anwar bin Ibrahim of the sodomy charge. The judgment of this court in respect of the first application is reported in *PP v. Dato' Seri Anwar Ibrahim* [2014] 1 CLJ 354; [2014] 1 MLJ 633 and the second one is reported in *Dato' Seri Anwar Ibrahim v. PP* [2014] 3 CLJ 441; [2014] 3 MLJ 882. We also noted that in the second application but not the first, the learned Attorney-General was acting for Dato' Seri Anwar Ibrahim. In other words, their present roles now are in the reverse. Tan Sri Shafee submitted to us that his letter of appointment was produced and exhibited before this court. We have no doubt that it was so but without concrete evidence to say otherwise, we cannot rule out the probability that the production of the said letter of appointment was on account of the applications to disqualify him, and not out of a request made before the commencement of a trial as in this case. Therefore, in actual fact, there is no precedent for us to follow.

[20] However, for the reasons given earlier, the appeal is allowed and the order of the learned High Court Judge set aside. In its place, we make an order in terms of prayer (1) of the notice of motion but only in respect of the letter of appointment, not the other documents sought for in it and in prayer (2).