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DATO' SRI MOHD NAJIB HJ ABDUL RAZAK v. PP

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NAZLAN GHAZALI J
[CRIMINAL APPLICATION NO: WA-44-160-10-2018]
22 JANUARY 2019

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CRIMINAL LAW: *Charges – Criminal charges – Applicant, former Prime Minister of Malaysia, charged with seven criminal charges relating to offences under Penal Code, Malaysian Anti-Corruption Commission Act 2009 and Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 – Applicant sought pre-trial production, by prosecution, of statements and documents given by potential witnesses to officers of Malaysian Anti-Corruption Commission – Whether application ought to be allowed*

C

CRIMINAL PROCEDURE: *Disclosure of information – Statements and documents – Applicant, former Prime Minister of Malaysia, charged with seven criminal charges – Application for pre-trial production, by prosecution, of statements and documents given by potential witnesses to officers of Malaysian Anti-Corruption Commission – Whether non obstante clauses in s. 30(9) of Malaysian Anti-Corruption Commission Act 2009 and s. 40 of Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 rendered statements recorded and documents collected during investigations automatically admissible as evidence – Whether arts. 5 and 8 of Federal Constitution demand that copies of documents and statements must be supplied by prosecution to applicant before commencement of trial – Whether applicant established case for delivery of information and documents applied for – Whether application ought to be allowed – Criminal Procedure Code, ss. 51 & 51A – Malaysian Anti-Corruption Commission Act 2009, s. 62*

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CRIMINAL PROCEDURE: *Disclosure of information – Statements and documents – Applicant, former Prime Minister of Malaysia, charged with seven criminal charges – Application for pre-trial production, by prosecution, of statements and documents given by potential witnesses to officers of Malaysian Anti-Corruption Commission – Whether court ought to compel prosecution to produce statements or documents sought – Considerations – Whether applicant satisfied requirements of 'necessity' and 'desirability' – Stage when application is made – Whether discovery limited to matters specified in charge – Whether applicant could seek inspection or discovery of documents seized in police investigation – Whether request directed at specific document – Whether applicant entitled to discovery if documents satisfy test of relevancy and essential for adjudication – Criminal Procedure Code, ss. 51 & 51A*

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The applicant, former Prime Minister of Malaysia, was charged with seven charges relating to offences under the Penal Code, the Malaysian Anti-Corruption Commission Act 2009 ('MACCA') and the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('AMLATFAPUA'). In the present application, the applicant

sought for pre-trial production, by the respondent ('the prosecution'), of statements and documents given by potential witnesses to the officers of the Malaysian Anti-Corruption Commission ('MACC') in the course of the investigation. In support of his application, the applicant submitted that (i) the *non obstante* clauses, in s. 30(9) of the MACCA and s. 40 of the AMLATFAPUA, rendered the statements recorded and documents collected during the course of investigations automatically admissible as evidence, at the behest of either party to the proceedings in question; (ii) given the automatic admissibility, arts. 5 and 8 of the Federal Constitution ('FC') demand that copies of the said documents and statements must be supplied, by the prosecution, to the applicant before the commencement of the trial; and (iii) the crux of the applicant's case was also supported by s. 51A of the Criminal Procedure Code ('CPC') and s. 62 of the MACCA. Resisting the application, the prosecution argued that (i) the applicant misconstrued the application of the *non obstante* clauses, in s. 30(9) of the MACCA and s. 40 of the AMLATFAPUA, to exclude all other legislations or provisions in force on other statutes, particularly the Evidence Act 1950, as this could not have been the intention of the Legislature; (ii) the *non obstante* clauses must be read subject to the rules of privilege and the prohibition on the grounds of public policy; and (iii) the interpretation of arts. 5 and 8 of the FC by the applicant would mean the automatic admissibility of the documents, pursuant to the *non obstante* clauses, necessarily require disclosure of copies of such documents by either side.

Held (dismissing application):

(1) The applicant had not 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. In any event, the weight of authorities on the subject, particularly in two Federal Court decisions, namely *Suruhanjaya Sekuriti v. Datuk Ishak Ismail* and *Ho Tak Sien & Ors v. Rotta Research Laboratorium SPA*, which required specific identification of the rules to be excluded, provided a valid and compelling basis not to subscribe to the proposition advanced by the applicant that the *non obstante* clauses in the instant case would have effect of, without more, automatically rendering the statements and documents admissible obtained by the MACC as evidence in any proceeding. (para 27)

(2) The fundamental liberties in art. 5 of the FC, by its very words, are not absolute. Neither is the principle of equality in art. 8 of the FC immutably entrenched. Furthermore, the applicant had not demonstrated how he was discriminated against, compared to other persons under investigation by the MACC under the MACCA. As such, despite the wordings in the *non obstante* clauses, such admissibility could

A not mean the applicant was entitled to the statements and documents applied for, and defeat considerations on claims of privilege and public policy against such production of the said documents. (paras 34-35 & 40)

(3) Section 51A of the CPC and s. 62 of the MACCA are not concerned with the issue of admissibility. Failure to adhere to these disclosure B obligations do not affect admissibility simply because they do not form a substantive due process but instead constitute only procedural requirements. Section 62 reinforces the law on s. 51A of the CPC and, in the absence of provisions similar to ss. 51 and 51A of the CPC in the MACCA and the AMLATFAPUA, the jurisprudence on these two C provisions of the CPC would govern rules on production of statements and documents under the MACCA and the AMLATFAPUA. (paras 49 & 55)

(4) As reliance could not be had to the *non obstante* clauses to warrant production of the documents requested for by the applicant, the present D application could only be premised on s. 51 of the CPC, which empowers the court to compel any person to produce any document or thing necessary in a trial of a judicial proceeding. However, s. 51 of the CPC must be construed strictly because its purpose is to provide limited access and its scope is fairly restricted. It could not be invoked to justify E full disclosure of the prosecution's case. (paras 60 & 62)

(5) Leading authorities and cases established and reaffirmed, *inter alia*, the propositions of law that (i) an application under s. 51 of the CPC must satisfy the requirements of necessity and desirability in s. 51 itself and these would, in turn, depend on the stage of proceeding the application F is made; (ii) where the application is made before the commencement of trial, like in the present case, the discovery must be limited to matters that are specified in the charge; (iii) the court is not, and should not put itself, in a position to anticipate how the prosecution intends to conduct its case; (iv) an accused cannot seek the inspection or discovery of G documents seized in the course of police investigation since to do so would tantamount to inspection of the evidence of the prosecution by the defence; (v) the entitlement of the accused, under s. 51 of the CPC, to any document or copies of documents or other materials in the possession of the prosecution is entirely at the discretion of the court, H having regard to the justice of the case; (vi) where an application is made before the commencement of the inquiry or trial, as in the present case, the general rule is that the request must be directed at a specific document. A general direction to produce all papers relating to the subject in dispute would not be enforced; and (vii) if the application is I made during the trial, the accused would be entitled to discovery if the documents satisfy the test of relevancy and is essential for adjudication based on evidence before the court. (paras 66, 68, 73, 75 & 77-80)

(6) The instant application concerned the stage before the commencement of the trial. The applicant sought two principal types of information from the prosecution, namely, (i) statements given by potential witnesses to the MACC; and (ii) other documents obtained by the MACC under the relevant provisions compelling production, embodied in the MACCA and the AMLATFAPUA, in the course of its investigation pertaining to the charges against the applicant. The other prayers in the notice of motion were no longer relevant as they concerned statements and documents taken from the applicant himself which have all been supplied to the applicant, in compliance with s. 51A of the CPC. The law governing the supply of such statements to an accused before trial, as stated in *Husdi v. PP*, is free from ambiguity. An accused is not entitled to copies of police statements recorded from witnesses in the course of investigations. Firstly, a statement taken from a witness is a privileged document. Secondly, as a matter of public policy, it is not desirable for the prosecution to provide the accused with such statement as there is a real danger of tampering with witnesses. The key request of the applicant, for copies of the statements made by other persons to the MACC, could not be sustained. The application absolutely failed the test of 'necessity' and 'desirability' under s. 51 of the CPC. (paras 81-84 & 89)

(7) Section 51A promotes fair trial by compelling the prosecution to deliver to an accused, before the commencement of a trial, all documents that the prosecution intend to tender as part of the evidence for the prosecution. In addition, the prosecution must also provide to the accused, before trial, a written statement of facts favourable to the defence of the accused. The applicant sought to inspect statements and documents procured and obtained by the MACC in the course of investigations which the prosecution did not intend to tender to prove the charges against the applicant. These were unused documents of the prosecution. The prosecution affirmed that s. 51A of the CPC had been adhered to. The potential for a trial by ambush had been much minimised by the said compliance. The prosecution had also affirmed that it had given a written statement that there were no facts favourable to the accused in compliance with s. 51A(1)(c) of the CPC. In other words, the prosecution asserted that the unused documents, or the other documents and statements which were not proposed to be tendered to prove its case but were now required by the applicant, did not disclose any facts that could assist the defence. This further weakened the case for the applicant for discovery of those statements and documents. (paras 102-105)

(8) The fact that the statements were taken by the MACC, and not the police, did not change the position of the law. Matters concerning public policy, privileged documents and witness-tampering are similarly relevant even if investigations are under a different legislation, such as

A the MACCA and the AMLATFAPUA. The investigators of the MACC are also considered public officers under the MACCA, thus attracting the application of s. 124 of the Evidence Act 1950, which means that communication made to the officers of the MACC, in official confidence, could not be compelled to be disclosed if they consider that
B public interest would suffer by such disclosure. (paras 117 & 118)

Case(s) referred to:

Dato' Seri Anwar Ibrahim v. PP [2010] 4 CLJ 265 FC ***(refd)***
Fitt v. United Kingdom [2000] ECHR 29777/96 ***(refd)***
Ho Tack Sien & Ors v. Rotta Research Laboratorium S.p.A & Anor; Registrar Of Trade
C *Marks (Intervener) & Another Appeal [2015] 4 CLJ 20 FC* ***(refd)***
Husdi v. PP [1979] 1 LNS 33 HC ***(refd)***
Husdi v. PP [1980] 1 LNS 29 FC ***(refd)***
Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***
Muzammil Izat Hashim v. PP [2003] 8 CLJ 399 HC ***(refd)***
PP v. Awalluddin Sham Bokhari [2018] 1 CLJ 305 FC ***(refd)***
D *PP v. Dato' Seri Anwar Ibrahim & Another Appeal [2010] 4 CLJ 331 CA* ***(refd)***
PP v. Datuk Harun Hj Idris & Ors [1976] 1 LNS 180 ***(refd)***
PP v. Mohd Fazil Awaludin [2009] 2 CLJ 862 HC ***(refd)***
PP v. Raymond Chia Kim Chwee & Anor And Another Case [1985] 2 CLJ 457; [1985] CLJ (Rep) 260 FC ***(refd)***
PP v. Teoh Choon Teck [1962] 1 LNS 141 HC ***(refd)***
E *Re D (Minors) (Adoption Reports: Confidentiality) [1996] AC 593* ***(refd)***
S Kulasingam & Anor v. Commissioner of Lands, Federal Territory & Ors [1982] CLJ 65; [1982] CLJ (Rep) 314 FC ***(refd)***
Shabalala v. A-G of the Transvaal and Another [1996] 1 LRC 207 ***(refd)***
Suruhanjaya Sekuriti v. Datuk Ishak Ismail [2016] 3 CLJ 19 FC ***(refd)***
Syed Abu Bakar Ahmad v. PP [1981] 1 LNS 127 HC ***(refd)***
F *Tan Soon Geok v. PP & Anor (No 2) [2004] 8 CLJ 668 HC* ***(refd)***

Legislation referred to:

Anti-Money Laundering, Anti-Terrorism Financing And Proceeds of Unlawful Activities Act 2001, ss. 32(8), 40
Criminal Procedure Code, ss. 3, 51, 51A(1)(c), (3), (4), (5), 112, 152, 153, 154
G Evidence Act 1950, ss. 123, 124, 145
Federal Constitution, arts. 5, 8
Malaysian Anti-Corruption Commission Act 2009, ss. 6(2), 30(9), (10), 62, 69
Securities Commission Malaysia Act 1993, s. 134(4)

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I *Reported by Najib Tamby*

JUDGMENT

Mohd Nazlan Ghazali J:

Introduction

[1] This is an application by the defence for the pre-trial production by the prosecution of statements and documents given by potential witnesses to the officers of the Malaysian Anti-Corruption Commission in the course of investigation.

[2] At the conclusion of the hearing, I dismissed the application and highlighted the principal reasons for the same. This judgment sets out the full reasons for the refusal.

Key Background Facts

[3] The applicant is accused of seven criminal charges concerning offences under the Penal Code, the Malaysian Anti-Corruption Commission Act 2009 ("the MACC Act") and the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("the AMLATFA"). On 8 August 2018, all seven charges were ordered by this High Court to be jointly tried. Trial dates have been fixed, to commence on 12 February 2019 and to continue until 29 March 2019.

[4] The applicant then filed a notice of motion, essentially seeking the production by the prosecution of a list of various documents, statements and information. At a subsequent case management, parties agreed to discuss various outstanding matters at a pre-trial conference that parties had not been able to convene much earlier.

[5] At a further case management, parties updated the court that the prosecution had by then delivered all the documents under s. 51A of the Criminal Procedure Code ("the CPC") in 23 volumes in printed hard copy physical version, and properly listed as well as indexed as previously agreed at the earlier case management.

[6] Given the stated compliance with s. 51A, and the parties agreeing to a number of other requests during the pre-trial conference, the scope of the instant application before me is now limited only to prayers 1(g), 1(h), 1(i), 1(j) and 2(b)(i) of the notice of motion, which, for clarity, read as follows:

> 1(g) records of all examinations and/or written statements on oath or affirmations obtained pursuant to Section 30(1)(a) and/or Section 30(8) and/or Section 30(1)(c) of the MACCA 2009 and/or Section 32(2)(a) and/or Section 32(2)(c) of the Anti-Money Laundering, Anti-Terrorism Financing And Proceeds of Unlawful Activities Act 2001 ("AMLAFTA 2001") during the course of investigations which have culminated into the subject matter of the SRC Proceedings;
>
> 1(h) all books, documents, records, accounts or computerised data or articles obtained pursuant to Section 30(1)(b) of the MACCA 2009 or otherwise in the course of examinations under Section 30(1)(a) of the

MACCA 2009 or under written statements on oath or affirmations made pursuant to Section 30(1)(c) of the MACCA 2009 during the course of investigations which have culminated into the subject matter of the SRC Proceedings;

1(i) documents or information obtained pursuant to Section 32(2)(b) AMLAFTA 2001 during the course of investigations which have culminated into the subject matter of the SRC Proceedings;

1(j) alternatively *in lieu* of paragraph 1(g), (h) and (i) above, a complete listing of the following:

(i) the names of all the examinees and dates of recordings of the records of their respective examinations and/or written statements on oath or affirmations obtained pursuant to Section 30(1)(a) and/or Section 30(8) and/or Section 30(1)(c) of the MACCA 2009 and/or Section 32(2)(a) and/or Section 32(2)(c) of the Anti-Money Laundering, Anti-Terrorism Financing And Proceeds of Unlawful Activities Act 2001 ("AMLA 2001") during the course of investigations which have culminated into the subject matter of the SRC Proceedings;

(ii) particulars of all books, documents, records, accounts or computerised data or articles obtained pursuant to Section 30(1)(b) of the MACCA 2009 or otherwise in the course of examinations under Section 30(1)(a) and/or Section 30(8) of the MACCA 2009 or under a written statement on oath or affirmation made pursuant to Section 30(1)(c) of the MACCA 2009 during the course of investigations which have culminated into the subject matter of the SRC Proceedings; and

(iii) particulars of any property, documents or information obtained pursuant to Section 32(2)(b) AMLA 2001 during the course of investigations which have culminated into the subject matter of the Proceedings.

2(b) that the Prosecution do provide to the solicitors for the Applicant the following on or before 11.1.2019 or a date to be fixed by this Honourable Court:

(i) a List of Witnesses the prosecution intend to call during the case for the prosecution in the SRC Proceedings together with the proposed order of witnesses.

[7] Hence the instant application before this court.

Essence Of The Contentions Of The Parties

[8] The thrust of the applicant's case is anchored on the primary contention that the *non-obstante* clauses (Latin for "notwithstanding" clauses) found in s. 30(9) of the MACC Act and s. 40 of the AMLATFA, given the words therein, render the statements recorded and documents collected during the course of investigations automatically admissible as evidence, at the behest of either party to the proceedings in question.

[9] Crucially, the applicant then argued that given the automatic admissibility, the operation of arts. 5 and 8 of the Federal Constitution would demand that copies of the said documents and statements must be supplied by the respondent as the prosecution to the applicant as the accused before the commencement of the trial.

[10] This is essentially the crux of the applicant's case, which learned lead counsel asserted is also supported by the operation of s. 62 of the MACC Act and the very role of this court.

[11] The respondent, in its resistance to the application on the other hand submitted that the applicant has misconstrued the application of the *non-obstante* clauses found in s. 30(9) of the MACC Act and s. 40 of the AMLATFA to exclude all other legislation or provisions in force in other statutes particularly the Evidence Act 1950 which the respondent maintained could not have been the intention of the Legislature. It was instead argued by the respondent that these *non-obstante* clauses must be read subject to the rules of privilege and the prohibition on the grounds of public policy.

[12] In addition, the respondent also disagreed with the approach to the interpretation of arts. 5 and 8 of the Federal Constitution adopted by the applicant to support the latter's argument that a prismatic interpretation of these two articles would mean that the automatic admissibility of the documents pursuant to the *non-obstante* clauses necessarily require disclosure of copies of such documents by either side.

Evaluation And Findings By This Court

Whether The Non-obstante Clauses Exclude All Others

[13] The starting point must be the two statutory provisions. First, the relevant parts of s. 30 of the MACC Act which read as follows:

> 30. Power to examine persons
>
> (1) An officer of the Commission investigating an offence under this Act may:
>
> (a) order any person to attend before him for the purpose of being examined orally in relation to any matter which may, in his opinion, assist in the investigation into the offence;
>
> (b) order any person, to produce before him, within the time specified by such officer, any book, document, records, accounts or computerised data, or any certified copy thereof, or any other article which may, in his opinion, assist in the investigation into the offence;
>
> (c) by written notice order any person to furnish a statement in writing made on oath or affirmation setting out therein all such information which may be required under the notice, being information which, in such officer's opinion, would be of assistance in the investigation into the offence, within the time specified by such officer; and

A (d) order any person to attend before him for the purpose of having his handwriting or voice sample taken.

...

(9) The record of an examination under paragraph (1)(a), or a written statement on oath or affirmation made pursuant to paragraph 1(c), or any
B book, document, record, account or computerised data, or article produced under paragraph (1)(b) or otherwise in the course of an examination under paragraph (1)(a), or under a written statement on oath or affirmation made pursuant to paragraph (1)(c), or record of examination of sample taken under paragraph (1)(d) **shall, notwithstanding any**
C **written law or rule of law to the contrary, be admissible in evidence in any proceedings in any court**:

(a) for an offence under this Act; or

(b) for the forfeiture of property pursuant to section 40 or 41,

regardless whether such proceedings are against the person who was
D examined, or who produced the book, document, record, account or computerised data, or article, or who made the written statement on oath or affirmation, or against any other person.

(emphasis added)

E **[14]** Secondly, s. 40 of the AMLATFA which provides:

40. Statement to be admissible

The record of an examination under paragraph 32(2)(a), any property, document or information produced under paragraph 32(2)(b) or any statement under paragraph 32(2)(c) **shall, notwithstanding any written**
F **law or rule of law to the contrary, be admissible as evidence in any proceedings in any court** for, or in relation to, an offence or any other matter under this Act or any offence under any other written law, regardless whether such proceedings are against the person who was examined, or who produced the property, document or information, or who made the written statement on oath or affirmation, or against any
G other person. (emphasis added)

[15] It is quite manifest that the operational parts of the aforementioned statutory provisions state that any statements or documents obtained in the course of investigations, notwithstanding any written law or rule of law to the contrary, be admissible as evidence. This renders these clauses to be
H classified as *non-obstante* clauses.

[16] And literally read, as statutes at the first instance should always be, the objective appears to ensure that in respect of the admissibility of documents and statements obtained under the MACC Act or the
I AMLATFA, they shall be admissible as evidence without more; and this also means there is absolutely no necessity to satisfy any conditions precedent in order to render any evidence admissible before a court proceeding.

[17] The first question then is whether these *non-obstante* clauses truly have the effect of excluding the rules on evidence. A literal reading of the provisions suggests the affirmative, in support of the applicant's stance. Which, if true, means the operation of, *inter alia*, the Evidence Act 1950 in respect of the rules on privilege or confidentiality in admitting as evidence documents or statements obtained under s. 30 of the MACC Act and s. 32 of the AMLATFA (on the power to examine persons) would be excluded.

[18] This literal approach found support in some case law authorities, such as by the Federal Court in the case of *PP v. Awaluddin Sham Bokhari* [2018] 1 CLJ 305; [2017] 1 LNS 1701; [2018] 2 MLJ 401 which concerned the *non-obstante* clause in the AMLATFA, where it was ruled that the statements and documents exhibited to the investigating officer's affidavit were admissible, notwithstanding the rules against hearsay.

[19] A useful application of a *non-obstante* clause in the instant case can perhaps be seen in the analysis of s. 134(4) of the Securities Commission Malaysia Act 1993 ("the SCA") which was recently examined by the Federal Court in *Suruhanjaya Sekuriti v. Datuk Ishak Ismail* [2016] 3 CLJ 19; [2016] 1 LNS 35; [2016] 1 MLJ 733. In that case, the accused had applied for discovery of all statements made to and recorded by the investigating officer of the Securities Commission in relation to its investigation against the accused.

[20] The Federal Court reversed the decision of the Court of Appeal and disallowed the request for production of such statements. Section 134(4) of the Securities Commission Malaysia Act 1993 states as follows:

> 134. Power to call for examination
>
> (1) If an Investigating Officer of the Commission carrying out an investigation under any securities law suspects or believes on reasonable grounds that any person can give information relevant to a matter that he is investigating, the Investigating Officer of the Commission may by notice in writing to such person require such person:
>
> (a) to give to the Investigating Officer of the Commission all reasonable assistance in connection with the investigation; and
>
> (b) to appear before a specified Investigating Officer of the Commission or specified Investigating Officers of the Commission to be examined orally.
>
> (1A) An Investigating Officer of the Commission exercising his authority under paragraph (1)(b) shall reduce into writing any statement made by the person examined under subsection (1).
>
> (2) A person referred to in subsection (1) shall be legally bound to answer all questions relating to such case put to him by the Investigating Officer of the Commission and to state the truth, whether or not the statement is made wholly or partly in answer to questions, and shall not refuse to answer any question on the ground that it tends to incriminate him.

A

...

(4) Any statement made and recorded under this section shall be admissible as evidence in any proceeding in any Court.

...

B **[21]** The crux of the Federal Court decision in *Suruhanjaya Sekuriti v. Datuk Ishak Ismail* may be said to be encapsulated in the following passage of the judgment of Ahmad Maarop CJ (Malaya) (as he then was):

[32] In other words, the provision under section 134(4) of the SCA must be read subject to the rules of privilege and prohibition on the grounds
C of public policy. In our view, this applies to civil as well as criminal proceedings. In the context of the present appeal, the relevant and applicable rules for consideration are housed in sections 123 and 124 of the Evidence Act 1950.

[22] Thus even though s. 134(4) makes all such statements taken in the
D course of investigation to be admissible regardless, the Federal Court read into that s. 134(4) the qualification that such admissibility must be subject to ss. 123 and 124 of the Evidence Act 1950 which according to the Federal Court, were held to codify the rules of the law of privilege and public policy against disclosure of investigation statements.

E **[23]** However - and this is crucial - as highlighted by the lead counsel for the applicant, the instant application stands in stark contrast to the situation encountered in *Suruhanjaya Sekuriti v. Datuk Ishak Ismail* in one material respect; probably the most important aspect, which is this - the *non-obstante* clause. Which s. 134(4) of the SCA is strictly however not one. In
F contradistinction, s. 30(9) of the MACC Act and s. 40 of the AMLATFA patently feature the *non-obstante* clause given the language starting from "Notwithstanding ..."

[24] There is on the other hand a line of authorities which suggests that where the *non-obstante* clause refers generally without stating the specific
G provision or statute to be overridden, it is not permissible to exclude *per se* all other legislation or provisions in force in other statutes. In other words, absent very specific words of the exact rules or laws to be excluded, no such automatic displacement can be made effective.

[25] The extent of such intended exclusion must be worked out from a
H further examination of the true objective and remit underlying the provisions where the *non-obstante* clause is adopted. As such, only if there arises a conflict between the specific statutory objective behind that provision and such other law on the same subject, would the other law be held to be excluded from being operative.

I

[26] Thus, in *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, Zulkefli CJ (Malaya) (as he then was), in delivering the judgment of the Federal Court which had examined certain provisions of the Trade Marks Act 1976, held instructively as follows:

> [38] We also noted that one of the grounds relied on by the Court of Appeal to suggest the wrongful exercise of discretion by the High Court was the reliance on s. 40(1)(f) of the Act. The Court of Appeal disagreed with the previous decision of the Court of Appeal in *Sinma Medical Products (M) Sdn Bhd v. Yomeishu Seizo Co Ltd & Ors* [2004] 3 CLJ 815; [2004] 4 MLJ 358 on the application of the said section and instead held it as a further ground on which the registrar should be heard. Section 40(1)(f) of the Act provides as follows:
>
> > Notwithstanding anything contained in this Act, the following acts do not constitute an infringement of a trademark:
> >
> > > (f) the use of a trademark, which is one of two or more registered trademarks which are substantially identical, **in exercise of the right to the use of that trade mark given by registration as provided by this Act**. (emphasis added.)
>
> [39] Although s. 40(1) of the Act begins with the words 'notwithstanding ...'. it is a general principle that a *non-obstante* clause cannot go outside the limits of the Act itself. We are in agreement with the contention of the plaintiff that *non-obstante* clause is subject to the limitations contained in the section and cannot be read as excluding the whole Act and standing by itself. The principle was stated by the Indian Supreme Court in *AG Varadarajulu & Anor v. State of Tamil Nadu & Ors* AIR 1998 SC 1388 at para [16] as follows:
>
> > *It is well settled that while dealing with a non-obstante clause under which the legislature wants to give overriding effect to a section, the Court must try to find out the extent to which the legislature had intended to give one provision overriding effect over another provision*. Such intention of the legislature in this behalf is to be gathered from the enacting part of the section. In *Aswini Kumar v. Arbinda Bose* AIR 1952 SC 369, Patanjali Sastri J observed: The enacting part of a statute must, where it is clear, be taken to control the *non-obstante* clause where both cannot be read harmoniously.' In *Madhav Rao Scindia v. Union of India* [1971] 1 SCC 85 (at 139): (AIR 1971 SC 530 Hidayatullah, CJ observed that the *non-obstante* clause is no doubt a very potent clause intended to exclude every consideration arising from other provisions of the same statute or other statute but for that reason alone we must determine the scope of that provision strictly. *When the section containing the said clause does not refer to any particular provisions which it intends to override but refers to the provisions of the statute generally, it is not permissible to hold that it excludes the whole Act and stands all alone by itself. A search has, therefore, to be made with a view to determining which provisions answers the description and which does not*. (emphasis added.)

A [40] Accordingly, it is our view that s. 40(1)(f) of the Act only applies to a right to use a mark that has been duly registered under the Act. It is therefore tied to s. 35(1) of the Act which governs the rights given by registration. It reads:

> (1) Subject to the provisions of this Act, the registration of a person
B ... as registered proprietor of a trade mark (other than a certification trade mark) in respect of any goods or services shall, **if valid**, give or be deemed to have been given to that person the exclusive right to the use of the trade mark in relation to those goods or services subject to any conditions, amendments, modifications or limitations entered in the Register. (emphasis added.)

C **[27]** The applicant has 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. In any event, in my view, the weight of authorities on the subject, particularly these two fairly recent Federal Court decisions in *Suruhanjaya Sekuriti v. Datuk Ishak*
D *Ismail* - which subject the admissibility to the rules of evidence - and *Ho Tack Sien & Ors v. Rotta Research Laboratorium SPA* - which requires specific identification of the rules to be excluded - provides a valid and compelling basis not to subscribe to the proposition advanced by the applicant that the *non-obstante* clauses in the instant case would have the effect of, without
E more, automatically rendering the statements and documents admissible obtained by MACC as evidence in any proceeding.

In Any Event, Automatic Admissibility Does Not Equate To The Right To Inspect

[28] I would further take the view that even if the construction ascribed to
F the *non-obstante* clauses by the applicant was accurate, where the documents and statements obtained during the investigations are admissible as of right, the applicant has not satisfactorily established whether their pre-trial production to the applicant as the accused must necessarily follow. In this regard, the premise justifying the leap from automatic admissibility of the
G statements and documents to the production of such statements and documents has not been clearly established.

[29] When queried at the hearing, the counsel for the applicant argued more at the theoretical if not conceptual level. In that, admissibility must also be taken to mean that both the prosecution and the defence be given
H equal opportunity in deciding whether to admit the said evidence or otherwise, relying among others on the following observation of Lord Mustill in *Re D (Minors) (Adoption Reports: Confidentiality)* [1996] AC 593:

> (the) first principle of fairness (is) that each party to a judicial process should have an opportunity to answer by evidence and by argument any
I adverse material that the tribunal may take into account when forming its opinion.

[30] The applicant essentially propagates the familiar argument on the equality of arms principle that the applicant as the accused would be at a considerable disadvantage if he is not afforded the opportunity to view those documents and statements in the first place, unlike the situation enjoyed by the prosecution. These arguments are not new. They are even not without merits.

[31] The applicant further augmented his argument by drawing in support the provisions of arts. 5 and 8 of the Federal Constitution which according to the applicant demand that copies of the said documents and statements must be provided to the applicant before the commencement of the trial in order to enable him to prepare his defence effectively.

[32] Article 5(1) states:

> 5. Liberty of the person
>
> (1) No person shall be deprived of his life or personal liberty save in accordance with law.

[33] And art. 8(1) reads:

> 8. Equality
>
> (1) All persons are equal before the law and entitled to the equal protection of the law.

[34] However, as is well-settled, the fundamental liberties embodied in art. 5 by its very words are not absolute (see the High Court case of *S Kulasingam & Anor v. Commissioner of Lands, Federal Territory & Ors* [1982] CLJ 65; [1982] CLJ (Rep) 314; [1982] 1 MLJ 204). Neither is the principle of equality in art. 8 immutably entrenched (see the Federal Court decision in *PP v. Datuk Harun Hj Idris & Ors* [1976] 1 LNS 180; [1976] 2 MLJ 116).

[35] On this latter point, I cannot but agree with the assertion by the respondent that the applicant has not demonstrated how he is discriminated against, compared to other persons who are similarly under investigation by the Malaysian Anti-Corruption Commission under the MACC Act.

[36] It is undeniable that other countries may well have introduced procedures that reflect greater adherence to the equality of arms principle. The applicant has identified a number of case law authorities from other even beyond Commonwealth jurisdictions to support his contention. Just to refer to one such case, is the pronouncement of the European Court of Human Rights in the case of *Fitt v. United Kingdom* [2000] ECHR 29777/96 which held:

> It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be

> given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party (see the *Brandstetter v. Austria* judgment of 28 August 1991, Series A no, 211, paras 66, 67). In addition Article 6(1) requires, as indeed does English law (see para. 18 above), that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused (see the above-mentioned Edwards judgment, para. 36)

[37] The point is well taken. But that is the position in other countries. At best, these are merely of persuasive authority. Neither can it be denied however that Malaysia too has seen a fundamental progress in the promotion of the equality of arms principle by the introduction of s. 51A of the CPC which now reads as follows:

> 51A. Delivery of certain documents
>
> (1) The prosecution shall before the commencement of the trial deliver to the accused the following documents:
>
> (a) a copy of the information made under section 107 relating to the commission of the offence to which the accused is charged, if any;
>
> (b) a copy of any document which would be tendered as part of the evidence for the prosecution; and
>
> (c) a written statement of facts favourable to the defence of the accused signed under the hand of the Public Prosecutor or any person conducting the prosecution.
>
> (2) Notwithstanding paragraph (c), the prosecution may not supply any fact favourable to the accused if its supply would be contrary to public interest.
>
> (3) A document shall not be inadmissible in evidence merely because of non-compliance with subsection (1).
>
> (4) The Court may exclude any document delivered after the commencement of the trial if it is shown that such delivery was so done deliberately and in bad faith.
>
> (5) Where a document is delivered to the accused after the commencement of the trial, the Court shall allow the accused:
>
> (a) a reasonable time to examine the document; and
>
> (b) to recall or re-summon and examine any witness in relation to the document.

[38] However, any further development must await legislative interventions, just as was the case for s. 51A concerning its introduction in the first place and its subsequent amendments (further discussion on s. 51A below). This simply cannot, as suggested by the applicant, be achieved by a mere and purported prismatic construction of the constitutional prescriptions as per *Lee Kwan Who v. PP* [2009] 5 CLJ 631 *vis-à-vis* the relevant *non-obstante* clauses in the MACC Act and AMLATFA.

[39] In fact, as correctly submitted by the respondent, even in the authorities cited by the applicant, some of the judicial observations reflect a certain degree of reservation against unbridled access by the accused. Thus the South Africa Constitutional Court in the case referred to by the counsel for the applicant himself, namely *Shabalala v. A-G of the Transvaal and Another* [1996] 1 LRC 207 actually stated the following:

> [5] The state is entitled to resist a claim by the accused for access to any particular document in the police docket on the grounds that such access is not justified for the purposes of enabling the accused properly to exercise his or her right to a fair trial or on the ground that it has reason to believe that there is a reasonable risk that access to the relevant document would lead to the disclosure of the identity of an informer or state secrets or on the grounds that there was a reasonable risk that such disclosure might lead to the intimidation of witnesses or otherwise prejudice the proper ends of justice.

[40] As such, despite the wordings in these *non-obstante* clauses, such admissibility cannot in my judgment mean that the applicant is entitled to the statements and documents applied for, and defeat considerations on claims of privilege and public policy against such production of the said documents and statements.

Section 62 Of The MACC Act Does Not Assist The Applicant

[41] The applicant then raises the important argument about that unique provision of s. 62 of the MACC Act. It reads as follows:

> 62. Defence statement
>
> Once delivery of documents by the prosecution pursuant to section 51A of the Criminal Procedure Code has taken place, the accused shall, before commencement of the trial, deliver the following documents to the prosecution:
>
> (a) a defence statement setting out in general terms the nature of the defence and the matters on which the accused takes issue with the prosecution, with reasons; and
>
> (b) a copy of any document which would be tendered as part of the evidence for the defence.

[42] This provision imposes on the applicant, as the accused the obligation to disclose the above matters to the prosecution upon the latter's adherence to s. 51A of the CPC.

[43] The applicant submitted orally and in writing that documents delivered to the defence under s. 51A necessarily are a subset of the documents obtained during the course of investigation, which I cannot disagree. But the applicant further asserted that these are admissible as of right, and which admission, should be at the prerogative of both parties.

[44] This, I think, is quite misconceived. The applicant continued to adopt this line of reasoning which I find unsustainable. This is because, as I have stated earlier, even if these documents are automatically admissible, it does not follow, as night follows day, that they can and should be inspected by or delivered to the applicant as of right. If the applicant's argument were accurate, there is no necessity for Parliament to make MACC Act rely on s. 51A in s. 62 of the MACC Act in the first place.

[45] The law in this country in respect of criminal pre-trial disclosure has seen incremental but significant amendments. Section 51A of CPC was a very significant introduction to the corpus of our law on criminal procedure. Section 62 of the MACC Act is no less important in that context. The applicant in its written submission probably aptly described s. 62 as:

> a unique departure from the general law in its approach to pre-trial disclosure. The only reasonable view to take of Section 62 of the MACCA 2009 is as progressive piece of legislation, a flare in the dark by the legislature, which brings us closer to the equality of arms principle.

[46] I cannot agree more. And at the same time, it reinforces the point that what was submitted by the applicant to be the law demanding disclosure cannot be sustained in the absence of clear legislative prescriptions to such effect. But other than s. 51A of the CPC and s. 62 of the MACC Act, no other provisions exist. Automatic disclosure plainly cannot be founded on the *non-obstante* clauses.

[47] Yet the applicant contended that s. 51A of the CPC is "woefully inadequate to meet the defence halfway, so to speak", and urged this court to instead give full effect to the rule of law in this regard.

[48] This, however, this court cannot do. It is not for the courts to make laws. It is so trite there is no need to mention even an authority to support this fundamental principle. The court will however continue to ensure justice and fair play are strictly upheld throughout the proceedings involving the applicant, as equally it would always for others, within the framework of the existing rules on disclosure.

[49] Furthermore, both s. 51A of the CPC and s. 62 of the MACC Act are not concerned with the issue of admissibility. As such, failure to adhere to these disclosure obligations does not affect admissibility simply because they do not form a substantive due process but instead constitute only procedural requirements. The statutory provision is procedural and not evidential (see the High Court decision in *PP v. Mohd Fazil Awaludin* [2009] 2 CLJ 862).

[50] Indeed, sub-s. (3) of s. 51A (as were sub-ss. (4) and (5)) which was introduced by the Criminal Procedure Code (Amendment) Act 2012 makes it crystal clear that non-compliance with the obligation to deliver the requisite documents stated in sub-s. (1) does not render them inadmissible in evidence.

[51] And as correctly stated by the respondent, these provisions certainly have nothing to do with the duty on the part of the prosecution to prove a *prima facie* case prior to the accused being called to enter his defence; and neither does it remove the need for the prosecution to prove its case beyond a reasonable doubt at the end of the entire case.

[52] The MACC Act for instance, despite the interpretation of ready admissibility ascribed to s. 30 therein by the applicant, expressly in s. 62 refers to s. 51A of the CPC as governing statements under MACC Act as well. Section 62 goes further and compels the production of documents intended to be relied on by the defence to the prosecution.

[53] The point is this. If automatic admissibility is true, such that it would not have been necessary to enact any express provisions on production, in my judgment it would not have been necessary for the MACC Act to enact s. 62 in the first place.

[54] The fact that s. 62 exists supports the view that production does not necessarily follow from the admissibility of all such statements and documents. More crucially the 'production must necessarily result from the admissibility' argument cannot also be sustained because the very s. 62 of the MACC which concerns production makes it crystal clear that the law governing pre-trial production of documents by the prosecution under the MACC Act is s. 51A of the CPC.

[55] Section 62 reinforces the law on s. 51A of the CPC, and in the absence of provisions similar to ss. 51 and 51A of the CPC in the MACC Act or in the AMLATFA, the jurisprudence on these two provisions of the CPC would therefore also govern rules on production of statements and documents under the MACC Act and the AMLATFA.

[56] This is further supported by the provisions of s. 3 of the CPC which states as follows:

> 3. Trial of offences under Penal Code and other laws
>
> All offences under the Penal Code shall be inquired into and tried according to the provisions hereinafter contained, and all offences under any other law shall be inquired into and tried according to the same provisions; subject however to any written law for the time being in force regulating the manner or place of inquiring into and trying such offences.

[57] As such offences under MACC Act and AMLATFA are pursuant to this s. 3 of the CPC to be tried according to the CPC since there are no specific provisions in those two statutes that regulate production of documents as contained in ss. 51 and 51A of the CPC.

[58] The accused said, he must be given the right to review admissible evidence in order to ensure that any exculpatory admissible evidence, whether in the form of recorded statements or documents in the possession of the prosecution is identified, and thus to consider whether to exercise the

right on whether to admit the same at any juncture of the trial. The court, according to the applicant, is compelled to admit the same once a party has moved for the document to be admitted.

[59] This proposition therefore does not reflect the state of the law.

Jurisprudence Of Section 51 Too Does Not Assist The Applicant

[60] As reliance cannot be had to the *non-obstante* clauses to warrant production of the documents requested for by the applicant, this instant application by the applicant can therefore only instead be premised on s. 51 of the CPC which empowers the court to compel any person to produce any document or thing which is necessary in a trial or a judicial proceeding.

[61] Section 51 provides the following:

> 51. Summons to produce document or other things
>
> (1) Whenever any Court or police officer making a police investigation considers that the production of any property or document is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before that Court or officer, such Court may issue a summons or such officer a written order to the person in whose possession or power such property or document is believed to be requiring him to attend and produce it or to produce it at the time and place stated in the summons or order.
>
> (2) Any person required under this section merely to produce any property or document shall be deemed to have complied with the requisition if he causes the property or document to be produced instead of attending personally to produce the same.
>
> (3) Nothing in this section shall be deemed to affect the provisions of any law relating to evidence for the time being in force or to apply to any postal article, telegram or other document in the custody of the postal or telegraph authorities.

[62] The jurisprudence on s. 51 is fairly settled. In the first place, s. 51 should be construed strictly because its purpose is to provide limited access and its scope fairly restricted. It cannot be invoked to justify full disclosure of the prosecution's case.

[63] In the case of *Syed Abu Bakar Ahmad v. PP* [1981] 1 LNS 127; [1982] 2 MLJ 186, the High Court ruled thus:

> In my opinion, this section ought to be construed strictly. It does not allow an accused to ask for discovery of documents or inspection of documents seized by the Police in the course of their investigation or in their possession before the criminal trial. To do so would be tantamount to inspection of the evidence of the prosecution by the defence prior to the trial. I regret I am unable to agree with the learned judge if the order meant that the defence is entitled to inspect the documents seized by the police or in their possession before the criminal trial.

[64] The leading authority on this subject however is the Federal Court decision in *PP v. Raymond Chia Kim Chwee & Anor & Another Case* [1985] 2 CLJ 457; [1985] CLJ (Rep) 260; [1985] 2 MLJ 436. The decision in *Raymond Chia* was followed by the Federal Court in *Dato' Seri Anwar Ibrahim v. PP* [2010] 4 CLJ 265; [2010] 2 MLJ 312.

[65] In the former, Hashim Yeop A Sani SCJ, for the Federal Court laid down the legal position in the following terms:

> Where the Court is asked to exercise its discretion under section 51 of the Criminal Procedure Code before the commencement of trial the Court must have regard to the provisions of sections 152, 153 and 154 of the Criminal Procedure Code relating to the framing of the charge. There is clearly a specific duty imposed on the prosecution to particularise the charge sufficiently so as to give adequate notice to the accused person. The entitlement of the accused under section 51 of the Criminal Procedure Code to any document or copies of document or other material in the possession of the prosecution is entirely at the discretion of the Court having regard to the justice of the case. The discretion should not however be exercised so as to enable the accused to gain access to materials before the trial as in the case of pre-trial discovery and inspection of documents in a civil proceeding. The accused in a criminal trial should have sufficient notice of what is alleged against him so as to enable him to prepare his defence. So long as that requirement is satisfied the law is satisfied.
>
> ...
>
> Where the application under section 51(i) of the Criminal Procedure Code is made in the course of the trial, the rule of relevancy must be strictly enforced. We feel that this is what *Mallal's Criminal Procedure* meant by saying that "anything which may reasonably be regarded as forming part of the evidence in the case may be ordered to be produced and that is the primary object of these provisions."
>
> If the discretion is to be exercised before the commencement of trial the Court cannot anticipate how the prosecution will proceed. In other words the Court would not be justified to direct the prosecution to deliver to the accused all documents taken from him for that will not be a correct exercise of the discretion under section 51 of the Criminal Procedure Code. In the first place the accused should know what documents had been taken from him and to say that unless such documents were delivered for his inspection he would not be able to adequately prepare his defence cannot be a true proposition. A general demand for unspecified documents should likewise not be entertained. See *Anthony Gomez v. Ketua Polis Daerah, Kuantan* [1977] 2 MLJ 24 and *Khoo Siew Bee & Anor v. Ketua Polis Kuala Lumpur* [1979] 2 MLJ 49 for another basis for the inspection and supply of the first information report and cautioned statement. Under section 51 of the Criminal Procedure Code the accused is most certainly entitled to have copies of documents which are specified in the charge. But the accused cannot be expected to be given access to

A all documents whatsoever taken by the police during investigation. In respect of application made in the course of the trial the materials or documents asked for must be relevant to the issues for adjudication.

[66] These leading authorities and other cases established and reaffirmed, among others, the following clear propositions of law.

B

[67] First, an application under s. 51 of the CPC must satisfy the requirements of necessity and desirability stipulated in the s. 51 itself, and that these would in turn depend on the stage of proceeding the application is made.

C **[68]** Secondly, where the application is made before the commencement of trial, like in this case before me, the discovery must be limited to matters that are specified in the charge. This is so because the justice of the case would have been met if the applicant had been fully notified of the charge against him. He cannot then be said to be at any disadvantage to prepare his defence since at this stage, the defence is not yet a relevant consideration for the court hearing the application.

D

[69] In *Raymond Chia,* the Federal Court held that where the court is asked to exercise its discretion under s. 51 of the CPC for the supply of documents and materials before the commencement of trial, just like in this case, the court must have regard to the provisions of ss. 152, 153 and 154 of the CPC relating to the framing of the charges.

E

[70] The prosecution therefore has a specific duty to ensure that the charges are sufficiently particularised in order to give adequate notice to the accused. Sufficient notice of the allegation fairly enables the accused to prepare his defence.

F

[71] Where documents are referred to in the charge, the court will allow copies of the documents be supplied to the accused. As such, I repeat that regard should always be had to ss. 152, 153 and 154 of the CPC to ensure the charges preferred against the accused are sufficiently particularised. To permit the accused go beyond these particulars would be to provide the accused with knowledge of the means by which the prosecution proposed to prove the alleged facts. That is not allowed.

G

[72] I reiterate that the applicant is not requesting for documents which are specified in any of the charges against him. I venture to add that those documents, if any, may have been supplied under s. 51A of the CPC. In this instant case before me, there is, at least thus far, no complaint about the framing of the charges.

H

[73] Thirdly, the court is not and should not put itself in a position to anticipate how the prosecution intends to conduct its case. In our criminal justice system, that is fully within the prerogative of the prosecution. Discovery before trial is therefore only permitted in respect of documents specified in and related to the charge itself (see the High Court decision in *Tan Soon Geok v. PP & Anor (No 2)* [2004] 8 CLJ 668).

I

[74] This at the same time means that at this pre-trial stage, the applicant should not therefore be heard to complain that his defence is going to be this or that and that he requires access to such and such documents to prepare for the defence. This is because at this stage, a roving and fishing inquiry for evidence is manifestly not permitted. A catch-all net cannot be cast. The applicant is simply not entitled to know by what means the prosecution proposes to prove the facts underlying the charge against him. He should not, because that firmly remains the prerogative of the prosecution.

[75] Fourthly, an accused cannot seek for the inspection or discovery of documents or inspection of documents seized in the course of police investigation since to do so would be tantamount to inspection of the evidence of the prosecution by the defence. Section 51 simply cannot authorise discovery to an accused of documents obtained in the course of investigation. The applicant seems to be applying for precisely this type of documents, for others under s. 51A have already, according to the respondent, been delivered to him and his counsel.

[76] In *Muzammil Izat Hashim v. PP* [2003] 8 CLJ 399; [2003] 6 MLJ 590 it was reiterated by the High Court as follows:

> Section 51 enables accused persons to apply for the production of documents (see *Public Prosecutor v. Teoh Choon Teck, Haji Abdul Ghani bin Ishak v. Public Prosecutor* [1980] 2 MLJ 196). It merely gives the applicant the right of inspection and he has to make copies of the documents himself (see *Haji Abdul Ghani bin Ishak v. Public Prosecutor*). In *Syed Abu Bakar bin Ahmad v. Public Prosecutor* [1982] 2 MLJ 186 it was held that s. 51 does not allow an accused to ask for discovery of documents or inspection of documents seized by the police in the course of their investigation since to do so would be tantamount to inspection of the evidence of the prosecution by the defence prior to the trial. In *Public Prosecutor v. Raymond Chia Kim Chwee & Anor; Zainal bin Hj Ali v. Public Prosecutor* [1985] 2 MLJ 436 it was held that in exercising the discretion under s. 51 the court will have to consider the justice of the case and the stage of the proceedings the application is made.

[77] Fifthly, it is worthy of emphasis that the entitlement of the accused under s. 51 of the CPC to any document or copies of documents or other material in the possession of the prosecution is entirely at the discretion of the court having regard to the justice of the case. The discretion should not however be exercised so as to enable the accused to gain access to materials before the trial as in the case of pre-trial discovery and inspection of documents in a civil proceeding.

[78] Sixthly, like presently, where an application is made before commencement of the inquiry or trial, the general rule is that the request must be directed at a specific document. A general direction to produce all papers relating to the subject in dispute will not be enforced (see *PP v. Teoh Choon Teck* [1962] 1 LNS 141; [1963] 1 MLJ 34).

[79] In the instant case, the applicant is asking for all statements recorded by the MACC and other documents taken by them in the course of investigation. The type of document is identified, but the exact document is not specified. This further weakens the case of the applicant.

[80] Seventhly, the Federal Court in *Raymond Chia* also held that if the application is made during the trial, the accused would be entitled to discovery if the documents satisfy the test of relevancy and essential for adjudication based on the evidence before the court. However, the instant application before this court concerns the stage before commencement of trial.

[81] In the present application before me, the applicant seeks two principal types of information from the respondent as described in prayer 1(g), (h), (i), (j) and prayer 2(i) of his notice of motion. First, statements given by potential witnesses to the MACC and secondly, other documents obtained by the MACC under the relevant provisions compelling production embodied in the MACC Act and the AMLATFA in the course of its investigation pertaining to the charges against the applicant.

[82] It is observed that the other prayers in the notice of motion are no longer relevant as they concerned statements and documents taken from the applicant himself, which according to the respondent, as affirmed in the relevant affidavit have thus far all been supplied to the applicant in compliance with s. 51A of the CPC.

[83] The law governing the supply of such statements to an accused before trial, as stated in *Husdi v. PP* [1980] 1 LNS 33; [1979] 2 MLJ 304 is free from ambiguity. An accused is not entitled to copies of police statements recorded from witnesses in the course of investigations. First, a statement taken from a witness is a privileged document. Secondly as a matter of public policy, it is not desirable for the prosecution to provide the accused with such statements as there is a real danger of tampering with witnesses.

[84] In that case, the accused applied for copies of the cautioned statement made by the accused and of statements made by prosecution witnesses during investigations. Syed Othman FJ, sitting in the High Court, allowed a copy of the cautioned statement to be supplied to the accused but not the statements of prosecution witnesses, holding that there might be tampering of witnesses.

[85] The High Court held thus:

> Considering the provisions in the Criminal Procedure Code and the Evidence Act, I can find no provision which is construable as giving a right to inspect a police statement.
>
> To go further, there is *Bryant and Dickson* (1946) 31 Cr App 146 151. Towards the end of his judgment in *Khoo Siew Bee & Anor v. Ketua Polis, Kuala Lumpur supra*, Suffian L.P. said:

> Be it noted that my ruling only applies to statements recorded from the accused, not from others who are potential witnesses against or for them - as to which the prosecution is under no duty to supply to the defence, *Bryant and Dickson*.

...

So far as applicable to the present case, the principle that appears to be laid down in this case is that it is the function of the prosecution and the defence to prepare their own case; but the defence is not entitled to the police statement, as they themselves may record a statement from a prosecution witness if they so desire. The last part is merely a reiteration of the principle that there is no property to a witness - not to a document generally, as attempted to be extended by the petitioner's side.

In India, the law relating to the powers of the police in investigation is about the same as ours. But it should be noted that in the Indian Criminal Procedure Code there is no provision equivalent to our section 112(iii) which in effect says that a person making a police statement shall be legally bound to state the truth. *Sohoni's the Code of Criminal Procedure* (16th Edition) Volume 1, at page 796 reads:

> 'A refusal to answer questions asked by a police officer under this section' (section 161) 'is not punishable under section 176, section 179 or section 187, I.P.C., as under the present Code' (1898) 'there is no obligation to speak the truth as there was under the 1882 Code'.

It was decided there in *Methuram Dass v. Jagannath Dass* ILR 28 Cal 794 that a statement made in the course of police investigation was absolutely privileged. At page 797 the court said:

> 'In the Present case the investigation was required by law; it was conducted under the provisions of the law, it was ancillary to the administration of justice. The defendant was bound by law to answer all questions put to him by the police officer conducting the investigation, and was punishable if he answered untruly and what was said by him had reference to the matter under investigation. Virtually the only distinction between his position and that of an ordinary witness arises from the fact that his statement was not made in a court of justice, and we see no reason accordingly, to use the language of the Lord Chief Baron cited above,' - that was in the case of *Dawkins v. Lord Rokeby* (1875) LR 7 HL 744 - 'why public policy should not equally prevent an action being brought against him as against a witness in an ordinary court of justice'.

What should be noted in the above passage is that part of the first sentence which says that the investigation was required by law, i.e. written law. This covers the act of recording a police statement. But it should be observed that the statement that it was punishable if a person making a police statement answered untruly, appears to be in conflict with the provisions of the Indian Criminal Procedure Code in force at the time. This case was decided in 1901, when under the 1898 Indian Code there

A is no obligation to speak the truth to the police as indicated by Sohoni and cited above. But, for the purpose of the present case, we are only concerned with the ruling that a police statement is a privileged document. The Court of Appeal here has followed the Indian decision. In *Martin Rhienus v. Sher Singh* [1949] MLJ 201 Willan C.J. after citing the above passage at page 203 said:

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> I agree with that decision and the reasoning for it.
>
> The question was raised by the court whether the provisions of section 113 of the Criminal Procedure Code prevent a statement made under section 112 from being given in evidence at all, even in civil proceedings, but having decided that statements made under section 112 are absolutely privileged it is not necessary for me to decide this further question. Nor, having found that the statement in this case was made under section 112 it is necessary to decide whether information to the police under section 107 is, or is not, absolutely privileged.

C

D These two cases involve actions for defamation. But I am of the view that once a police statement is held to be absolutely privileged for one judicial purpose, it is privileged for other purposes. There can be no right to inspect. Further, as a matter of public policy, I am of the view that it is undesirable for the prosecution to supply the defence with police statements, as there is a real danger of tampering with the witnesses.

E

[86] The Federal Court, in the judgment of Suffian LP in *Husdi v. PP* [1980] 1 LNS 29; [1980] 2 MLJ 80, affirmed this decision which also primarily ruled that during trial, the accused is entitled to a copy of the statement by a prosecution witness for purposes of impeachment.

F **[87]** It was authoritatively thus held:

> We do not think that the prosecution should supply copies of the police statement direct to the defence without the intervention of the court - because of the peculiar circumstances prevailing in this country. Malaysia is a small country, with a small population, and Malaysians are easily
>
> G scared; they are reluctant to be involved. If a crime is committed under their nose they look the other way, see, hear and say nothing, do little or nothing to help identify - let alone - arrest the offender, and yet complain that the police do not catch criminals and that courts are bedazzled by technicalities. If the prosecution is obliged to supply copies of police statements to the defence without the intervention of the court,
>
> H the defence may be tempted to ask for, and the prosecution will be obliged to supply, copies of every statement in the police investigation file, and Malaysians will be more reluctant to come forward with evidence to incriminate their fellows.
>
> To sum up, the answer to the two questions as limited during the course
>
> I of arguments is this - when a prosecution witness is being cross-examined, and the defence proposes to impeach his credit, the court, should, on the request of the defence, refer to his police statement and may then, if the court thinks it expedient in the interest of justice, direct the defence to be supplied with a copy.

> Our conclusion is not inconsistent with judgment of Syed Othman F.J. in *Husdi v. Public Prosecutor* [1979] 2 MLJ 304 out of which arises this reference, which dealt with the wider question whether or not the defence is entitled in advance of the trial to copies of police statements of prosecution witnesses, and which he answered in the negative, which answer was not challenged before us.

[88] Thus the key request of the applicant herein for copies of the statements made by other persons to the MACC cannot be sustained. The application absolutely fails the test of necessity and desirability in s. 51 of the CPC.

[89] As for the other documents secured by the MACC in its investigation, the decision of the High Court in *Syed Abu Bakar Ahmad v. PP* [1981] 1 LNS 127; [1982] 2 MLJ 186 is no less instructive, where the application by the accused to inspect and make copies of all documents in the possession of the prosecution by reason that the defence would not otherwise be able to prepare the defence adequately was refused by Seah J (as he then was) who also ruled that s. 51 of the CPC should be construed strictly and that it did not allow discovery of documents seized by police before the trial.

[90] In the event the document tendered as evidence is complicated in nature, His Lordship ruled that it would be open to the accused to ask for time to stand down before cross-examination.

[91] Again, in the case before me, the applicant too is asking to be supplied with other documents obtained by the exercise of the coercive powers of the MACC under the MACC Act and the AMLATFA. This, however, cannot succeed as it would amount to discovery of the documents seized by the investigation team of the MACC in the course of its investigation. Thus, again, given the clear position in law, the proposed supply of such documents similarly can be neither necessary nor desirable within the context of s. 51 of the CPC. The application cannot succeed.

[92] The applicant makes the argument that *Husdi v. PP* does not apply because it was based on statement recorded under s. 112 of the CPC, not pursuant to MACC Act or the AMLATFA. Also s. 112 then rendered statements made by a person to a police officer inadmissible. In contrast, the investigation in the instant case relied heavily on the MACC Act and AMLATFA.

[93] And that by virtue of the *non-obstante* clauses in s. 30(9) of the MACC Act and s. 40 of AMLATFA which plainly and expressly supersede any 'rule of law the contrary' as stated therein, it should, at the risk of repetition, follow that the application of the privileged document principle derived from authorities such as *Husdi v. PP* would be a non-starter.

[94] In other words, the statements recorded under s. 30 of the MACC Act and s. 40 of AMLATFA are admissible regardless of any rule of law relating to privilege.

[95] Separately, s. 124 of the Evidence Act 1950 also provides that a public officer shall not be compelled to disclose 'communications' made to 'him' in 'official confidence', when he considers that the public interest would suffer by the disclosure. These *non-obstante* clauses which render the recorded statements admissible in evidence in this case, expressly supersede 'any written law ... to the contrary'.

[96] This, according to the applicant, must therefore supersede s. 124 of the Evidence Act 1950. As such, no public officer, such as an officer involved in the investigations under MACC Act and the AMLATFA can claim any privilege under s. 124 if asked to testify on the contents of any oral examination or produce recorded statement or a written statement on oath signed by a witness.

[97] Any arguments concerning privilege under the Evidence Act 1950 would be an exercise in futility. Further, statements recorded by the investigators of the MACC under s. 30 of the MACC Act are not "communications" made in "official confidence". The applicant further argued that in any event, the respondent did not in its affidavit resisting this application aver that the recorded statements were given to a public officer in "official confidence", or that disclosure of such statements would affect the public interest, or even that any privilege applied.

[98] Significantly, the applicant also contended that the 'threat' or 'risk' of witness tampering is raised for the first time by the respondent in its submissions. There is, according to the applicant, absolutely no credible affidavit evidence showing such a risk or threat.

[99] In essence, the decisions of the Federal Court and High Court in *Husdi v. PP*, and subsequent decided cases on the matter, are, according to the applicant, not applicable to the present criminal application and as such. there should be no bars to disclosure of documents, and that public policy justifying non-disclosure of the documents and statements based on a risk of witness tampering is similarly not applicable to the present criminal application.

[100] This contention of the applicant is not unattractive. But it is misconceived for the reasons I have stated earlier. That is even if the *non-obstante* clauses in question had the effect of rendering those statements and documents automatically admissible regardless of the rules of evidence and public policy, it does not follow that the applicant as the accused is entitled to those in the possession of the prosecution before trial, given the clear absence of any legislative provisions giving authorisation to such effect.

Section 51A Too Does Not Support The Case Of The Applicant

[101] It cannot be emphasised enough that s. 51A of the CPC which first came into force in 2007 is a very significant provision which seeks to promote fair trial. Abdull Hamid Embong FCJ, delivering the judgment of the Federal Court in *Dato' Seri Anwar Ibrahim v. PP* [2010] 4 CLJ 265; [2010] 2 MLJ 312 said this of s. 51A of the CPC:

> In our view, this new provision strengthens the guarantee of a fair trial in providing the adequate facilities as purported in the general remarks document of the Human Rights Committee that was read to us. Section 51A of the CPC has, in our opinion, made the battlefield move level, to preserve the 'equality of arms principle', ensure the fairness of a trial and ultimately uphold the very integrity of the courts in its administration of criminal justice. This should also be considered in the light of our criminal justice system where the burden of proof lies throughout on the prosecution, which, together with the common law principle of presumption of innocence, safeguard that fairness.

[102] Section 51A promotes fair trial by compelling the prosecution to deliver to an accused before commencement of trial all documents that the prosecution intend to tender as part of the evidence for the prosecution. In addition, the prosecution must also provide to the accused before trial a written statement of facts favourable to the defence of the accused. This too, according to the respondent has been complied with by the prosecution in this case.

[103] Now the applicant seeks to be supplied with statements and documents which are not taken from the applicant. In other words, the applicant is seeking to inspect statements and documents procured and obtained by the MACC in the course of investigation which the prosecution does not intend to tender to prove the charges against the applicant. These are the unused documents of the prosecution.

[104] Under present law, therefore, all documents intended to be tendered by the prosecution must be given to the accused before trial. And in this case before me, as stated earlier, the respondent has affirmed that s. 51A has been adhered to. The potential for a trial by ambush has been much minimised by the said compliance more so in criminal trials involving commercial crimes like the charges now faced by the applicant where evidence would most likely be largely documents-based.

[105] Furthermore, the respondent has also affirmed that it has given a written statement that there are no facts favourable to the accused in compliance with s. 51A(1)(c). In other words, the prosecution is also asserting that the unused documents, or the other documents and statements which are not proposed to be tendered to prove its case but now required by the applicant, do not disclose any facts that can assist the defence. This further weakens the case for the applicant for discovery of those statements and documents.

[106] In any event it was also held by the Court of Appeal in *PP v. Dato' Seri Anwar Ibrahim & Another Appeal* [2010] 4 CLJ 331 that the accuracy of the prosecution's specific assertion under s. 51A on this absence of facts favourable to the accused would only be an issue after the commencement of trial where the matter could be determined by the court after evidence has been given by the relevant witnesses. Again, this is but a manifestation of the rule that the court cannot anticipate how the prosecution would prove its case.

[107] In that appeal, Hasan Lah JCA (as he then was) held as follows:

> [66] With regard to the learned judge's observation that the defence be supplied with the witnesses' statements so that the defence could find out whether what was said by the prosecution pursuant to s. 51A(1)(c) was right or not we were of the view that the issue could only be determined by the court after the commencement of the trial and after the relevant witnesses have given evidence in court. The court could not anticipate how the prosecution would prove its case.

[108] This Court of Appeal decision on ss. 51 and 51A of the CPC was affirmed by the Federal Court in *Dato' Seri Anwar Ibrahim v. PP* [2010] 4 CLJ 265; [2010] 2 MLJ 312, referred to earlier.

[109] It is important to note that the leading authority of *Raymond Chia* was decided before s. 51A was introduced in 2007. In fact many of the case law authorities on the subject, which restricted the right of the accused to discovery of documents before trial, pre-date the introduction of s. 51A.

[110] With the introduction of s. 51A, which compels the prosecution to deliver before trial all documents intended to be tendered, the rationale for further pre-trial discovery under s. 51 has thus been made even more tenuous, if not entirely untenable apart from those referred to in the charges, as mentioned earlier.

[111] It is worthy of emphasis that although these statutory provisions in s. 30(9) of the MACC Act and s. 40 of the anti-money laundering legislation or these *non-obstante* clauses arguably render statements recorded from persons and documents produced in the course of investigation admissible in evidence in any proceedings in court notwithstanding any written law or rule of law to the contrary, as stated, in my view the admissibility of these statements and documents do not further translate into an accused person having a right to be supplied with or to inspect the same.

[112] Admissibility, in other words, does not equate to the entitlement to these documents and statements, what more prior to the commencement of trial. No statutory provisions have been shown to this court that seek to have that effect, because it is manifest that no such provisions exist. They do not exist because that is not the law.

[113] The risk of witness tampering or intimidation aside, potential witnesses may also be reluctant to come forward to give statement to the authorities if the assurance of confidentiality is compromised. There may also be repercussions which are prejudicial to other possible investigations against the same accused.

[114] I do appreciate the argument of the applicant that witnesses are compelled under the relevant provisions of the MACC Act and AMLATFA to appear before the investigating officers to have their statements recorded. It is not like in the context of s. 112 where there is no specific law making non-attendance itself an offence.

[115] For example, it is noted that under s. 30(10) of the MACC Act, contravention of s. 30 which includes a failure to attend upon being notified to appear to give a statement is an offence punishable with jail terms upon conviction under s. 69 of the same Act. A similar provision exists in s. 32(8) of the AMLATFA which makes such failure or refusal an offence.

[116] However the point about threat of witness tampering is in my view still relevant as it is legitimate. One who has given statements against the accused would naturally not want his statement be given to the accused, especially before trial even starts for obvious reasons. If the accused gets to know of the details divulged by certain witnesses against the accused, there is every reason to suspect that the accused would prefer the witness not to repeat such statement in court if called as a witness. Surely, public policy should protect against the risk of tampering in such not unlikely circumstances.

[117] The fact that the statements are taken by the MACC and not the police does not change the position in law. Matters concerning public policy, privileged documents and witness tampering are similarly relevant even if investigations are under a different legislation such as MACC Act and AMLATFA. In that sense, these considerations are essentially immutable in this context.

[118] Furthermore, there is basis to contend that the investigators of the MACC are considered as public officers under s. 6(2) of the MACC Act, thus attracting the application of s. 124 of the Evidence Act 1950 which means that communication made to officers of MACC in official confidence cannot be compelled to be disclosed if they consider that public interest would suffer by such disclosure (see also the Federal Court decision in *Suruhanjaya Sekuriti v. Datuk Ishak Ismail* [2016] 3 CLJ 19; [2016] 1 MLJ 733).

[119] The only circumstances when the defence may be given access to statements of prosecution witnesses, is when the defence seeks to impeach the credit of a witness, during trial under s. 145 of the Evidence Act 1950.

[120] It bears repetition that the key premise of the applicant's request is that the relevant documents which were procured under s. 30(9) of the MACC Act and s. 40 of the AMLATFA, are according to the counsel for the applicant, based on the words of the provisions, automatically admissible, and that the issue of their relevancy is already assumed.

[121] However, in my judgment, any significant change in the law governing our criminal justice system should only be effected by express legislative amendments. Despite the fundamental change as asserted by the applicant on the position of the issue of ready admissibility or such statements and documents, as said to have been introduced by the MACC Act and the AMLATFA, these same pieces of legislation fall short of enacting any provisions to also permit let alone compel the production of such documents.

[122] If the consequences highlighted by the applicant are to be properly appreciated, it would be expected that the legislation would contain provisions permitting or compelling production of the documents, in order to further give meaningful effect to s. 30(9) of the MACC Act and s. 40 of the AMLATFA. But this is patently not the case. This is quite unlike the position in the CPC which enacted ss. 51 and 51A for such purpose.

[123] The applicant gave much emphasis on the argument that s. 112 of the CPC, unlike s. 30 of the MACC Act and s. 40 of the AMLATFA does not provide for the admissibility of statements taken by the police. In my view, whilst such assertion is not inaccurate, it still does not help establish the case for the applicant for the production of the statements and documents requested for under the MACC Act and the AMLATFA.

[124] I have already shown that it is also arguable whether the *non-obstante* clauses have the legal effect as contended by the applicant. The aspects on privileged documents, clients' confidentiality, and threat of witness tampering are not subordinate to these *non-obstante* clauses. Quite the reverse, the *non-obstante* clauses operate subject to these three considerations. There is crucially, additionally no compelling legal analysis that could support the quantum leap from automatic admissibility to right to inspection. The present law governing disclosure of statements and documents before commencement of trial would as such extend to criminal proceedings based on investigations undertaken under the MACC Act and the AMLATFA.

[125] For completeness, for the same reasons justifying refusal of the supply of the statements and documents under s. 51 of the CPC given the weight of the case law authorities, the applicant's request for a witness list be furnished to him before the commencement of trial too cannot be acceded to (see also the Court of Appeal decision on the same refusal in *PP v. Dato' Seri Anwar Ibrahim And Another Appeal* [2010] 4 CLJ 331).

Conclusion

[126] In view of the reasons set out in the foregoing, in my judgment the applicant has failed to establish his case for the delivery of the information and documents applied for in the notice of motion, as amended. As such the application is dismissed.