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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-44-194-11-2018]
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 – Application for production of instrument for appointment of advocate and solicitor to conduct criminal prosecution against applicant – Whether application ought to be allowed*

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CRIMINAL PROCEDURE: *Prosecution – Conduct of criminal prosecution – Application for production of instrument for appointment of advocate – Applicant, former Prime Minister of Malaysia, charged with seven criminal charges – Whether there was clarity in application – Whether applicant challenging appointment of advocate and solicitor or merely seeking production of instrument of appointment*

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CRIMINAL PROCEDURE: *Prosecution – Conduct of criminal prosecution – 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 – Applicant sought production of copy of letter of appointment and copies of other authorisation for appointment of advocate and solicitor – Whether written consent or sanction of Public Prosecutor required – Whether application supported by law – Whether application disclosed valid reasons – Whether advocate and solicitor had necessary locus standi to prosecute on behalf of Public Prosecutor – Whether applicant prejudiced by appointment of advocate and solicitor – Whether instrument of appointment had become official secret under Official Secrets Act 1972 thus prohibiting disclosure – Criminal Procedure Code, ss. 51, 129, 377(b)(1) & 379 – Interpretation Acts 1948 and 1967, s. 55*

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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 and the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001. Initially, the prosecution in court was led by the Attorney General ('AG'). However, the office of the AG later issued a media release ('the AG media release') which, *inter alia*, revealed that the prosecution of the criminal proceedings against the applicant would be led by Datuk Hj Sulaiman Abdulah ('DHSA'), an advocate and solicitor, who was appointed by the AG for that purpose under s. 379 of the Criminal Procedure Code ('CPC'). In the present application, by way of a notice of motion, the applicant sought for

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an order that the respondent ('the prosecution') produce a copy of the letter of appointment and copies of other authorisation, in writing, executed by the prosecution in relation to the appointment of DHSA. In support of his application, the applicant submitted that (i) the pre-requisite for DHSA to conduct prosecutions would be the existence of 'authorisation in writing' under s. 377(b)(1) of the CPC or a 'permission in writing' of the Public Prosecutor ('PP') under s. 379 of the CPC; (ii) since there was no letter of appointment, authorisation or *fiat*, the court could not take cognisance of the *locus standi* of DHSA to appear on behalf of the prosecution; (iii) until and unless the issue was resolved, all actions of DHSA, to date, could potentially be rendered a nullity; (iv) by virtue of s. 55 of the Interpretation Acts 1948 and 1967 ('IA'), based on the analogy to the provision relating to the need for the written 'consent' or 'sanction' of the PP in the institution of cases, the courts have declared that the same must be produced. A similar argument was raised in respect of s. 129 of the CPC which, also, does not specify the need to produce the instrument of appointment of the appointee, yet the courts have held that unless the same is produced, the court could not take cognisance of the same; (v) in *AK Koh Enterprise v. PP*, the letter authorising the prosecuting officer under s. 377 of the CPC was regarded as a sanction, which must be produced before the court, in order to vest it with the requisite jurisdiction; and (vi) the prosecution's refusal to produce the instrument, by reason of the classification of the same as an official secret under the Official Secrets Act 1972 ('OSA'), was wholly misconceived. Resisting the application, the prosecution submitted that (i) the application was (a) not supported by law nor did it disclose a valid reason or basis for the order sought; and (b) neither alleged *mala fide* on the part of the prosecution when appointing DHSA nor stated how the applicant was prejudiced by the appointment that would warrant the need to have sight of the letter of appointment; (ii) the applicant did not file an application to challenge the appointment of DHSA. The filing of a notice of motion was, at best, a fishing or fault-finding expedition or a deliberate delay of due process by filing irrelevant and frivolous applications; (iii) the appointment of DHSA had been announced to the general public *via* the AG media release which, without any ambiguity, explained the reasons for the appointment; and (iv) the application was a non-starter since the relevant instrument of appointment had been classified under the OSA that would now be prohibited from disclosure.

Held (dismissing application):

(1) There was lack of clarity in the present application – whether the applicant was challenging the appointment of DHSA. The applicant said he was but the respondent said otherwise. The court was inclined to agree with the respondent on this because the notice of motion merely prayed for the production of the instrument of the appointment of DHSA

A by the PP. A proper challenge to the appointment ought to have been made more definitively and the basis for the same be stated with certainty – be it in a form of impropriety or procedural error in the said appointment. However, the applicant furnished nothing to that effect in the requisite notion, as well as in the accompanying affidavit in support. The applicant should have more properly filed an application for the discovery of the instrument of appointment, which was instead now, the subject of the instant application. (paras 25, 27 & 28)

(2) The present application could be a precursor to the actual challenge of the appointment; but if that was the case, the production application should be dealt with separately. The true legal basis for this pre-trial criminal application, which was not fashioned on the basis of discovery under s. 51 of the CPC for the production of a document, which at the same time had absolutely nothing to do with the preparation of the applicant's defence, could be questioned. It is fairly settled that pre-trial discovery is only permitted for documents mentioned in the charge against the accused. (paras 29-31)

(3) The language of s. 379 of the CPC does not give rise to any ambiguity for it plainly vests in the PP, and no other, the prerogative and authority to authorise the employment of an advocate, by way of a permission in writing, to conduct a prosecution. Neither was there any dispute that DHSA fulfilled the status of an advocate within s. 379 of the CPC. Nowhere in s. 379 or in Chapter XXXVII or in the entire CPC itself, is it stated that the letter of permission on the employment of the advocate chosen by the PP under that provision must be shown to the court where the advocate so appears, let alone produced to the accused. (paras 32 & 33)

(4) The court could not readily subscribe to the contention of the applicant, regarding the arguments on s. 55 of the IA and s. 129 of the CPC, because the provisions were clearly concerned with the requisite authorisation or sanction of the PP in respect of the institution of criminal proceedings. This was entirely different from the authorisation or permission to appoint a qualified person to conduct criminal prosecution under provisions such as ss. 377 and 379 of the CPC. The applicant relied on the case of *AK Koh Enterprise v. PP*, which ruled that the court had no jurisdiction in the absence of the authorisation and also suggested that proof of authorisation would be satisfied by having the same produced in court. A more accurate position in law, on this point, was well-clarified in *PP v. Lew Koy* which clearly held that the instrument of appointment was only required to be shown to the court, and not even the accused, if there was any challenge that the prosecuting officer, having conduct of the prosecution, did not have the requisite

authority in writing of the PP to appear in court and conduct the proceedings. However, the applicant did not clearly state the reasons for the purported challenge. (paras 39-43 & 47)

(5) The fact of the absence of a real or valid challenge was further fortified by another key reason; the AG media release which (i) made public the appointment of DHSA under s. 379 of the CPC to lead the prosecution in this case; and (ii) contained the reasons for the appointment and the choice of the advocate. Furthermore, the AG media release was issued by the AG Chambers and stated to be the statement of the PP, himself. Despite knowing the basis of the appointment, the applicant did not move to set the reasons as to why it was flawed. Instead, the attack was made merely for the production of the instrument. This was wholly insufficient, if not patently untenable. (paras 51, 53, 56 & 64)

(6) Whilst the competing arguments on the effects of classification of documents as official secret under the OSA were usually compelling as they were weighty and deserving of a critical analysis, in view of the other reasons stated earlier, it was unnecessary to consider and determine whether the prosecution could validly rely on the certificate under s. 16A of the OSA, which had classified the instrument of appointment of DHSA under s. 379 of the CPC as an official secret, to produce production of the same. (para 77)

(7) The application was bereft of reasons which were sufficiently cogent to justify production of the instrument of appointment. Nor did it satisfactorily explain how the applicant would be prejudiced by the non-disclosure of the said letter of appointment. The view of the applicant, that there was a risk of the trial being nullified by reason of non-production constituting prejudice, was tenuous and lacking merit. Significantly, the argument that the non-disclosure or non-production meant the absence of *locus* on the part of DHSA which, in turn, would affect the jurisdiction of the court, and risk any proceedings be held to be a nullity, was too speculative and, in any event, flawed. (paras 78 & 79)

Case(s) referred to:
AK Koh Enterprise Sdn Bhd v. PP [2000] 1 LNS 200 HC ***(refd)***
Anuar Abdul Aziz v. PP [2005] 6 CLJ 309 HC ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2010] 4 CLJ 265 FC ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2014] 1 CLJ 289 FC ***(refd)***
Lim Kit Siang v. PP [1979] 1 LNS 47 FC ***(refd)***
Menteri Tenaga, Air dan Komunikasi & Anor v. Malaysian Trade Union Congress & Ors [2012] 9 CLJ 858 CA ***(refd)***
PP v. Lew Koy [2002] 1 CLJ 86 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 51, 129, 377(b)(1), 379
Federal Constitution, art. 132(1), (4)
Interpretation Acts 1948 and 1967, s. 55
Official Secrets Act 1972, ss. 2C, 16A

A *For the applicant - Muhammad Shafee Abdullah, Harvinderjit Singh, Farhan Read, Wan Aizuddin Wan Mohammed, Rahmat Hazlan & Shahira Hanafiah; M/s Shafee & Co*
For the respondent - Sulaiman Abdullah, Suhaimi Ibrahim, Umar Saifuddin Jaafar, Ishak Mohd Yusoff, Donald Joseph Franklin, Sulaiman Kho Kheng Fuei & Muhammad Izzat Fauzan; DPPs
Watching brief for Datin Seri Rosmah Mansor - Dato' K Kumaraendran dan Encik Revin
B *Kumar*

Reported by Najib Tamby

JUDGMENT

Mohd Nazlan Ghazali J:

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Introduction

[1] This is an application by a notice of motion for an order that the respondent produces a copy of the letter of appointment and copies of other authorisation in writing executed by the respondent in relation to the
D appointment of Datuk Haji Sulaiman bin Abdullah as a prosecutor under s. 379 of the Criminal Procedure Code.

[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.

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Key Background Facts

[3] The applicant has been 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-
F Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("the AMLATFA").

[4] 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.

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[5] When the applicant was first charged on 4 July 2018 with the first four charges, the Attorney General led the prosecution in court.

[6] On 31 August 2018, the office of the Attorney General issued a media release which included the statement that the prosecution of this criminal
H proceeding against the applicant would be led by Datuk Haji Sulaiman bin Abdullah ("Datuk Haji Sulaiman"), an advocate and solicitor of the High Court of Malaya, who had been appointed by the Attorney General for that purpose under s. 379 of the Criminal Procedure Code ("the CPC") ("the AG media release").

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[7] Section 379 of the CPC reads as follows:

> **379. Employment of advocate**
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> 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 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".

[8] At a subsequent case management, the lead counsel for the applicant asked that he be given a copy of the letter of the appointment of Datuk Haji Sulaiman by the Attorney General, but this was refused by the respondent. According to the lead counsel for the applicant, a number of other subsequent similar requests, including made in writing, had also been denied by the respondent.

[9] Hence, the present application before me.

[10] At the start of the hearing, the respondent raised a preliminary objection against the application, arguing that it was made too late in the day, only on 26 November 2018 when the AG media release had been issued much earlier on 31 August 2018.

[11] I overruled the objection on the basis that the lead counsel for the applicant had orally raised the request earlier, and had subsequently followed up with the same, but this continued to be refused by the respondent. I also rejected the admission of two affidavits filed by the respondent the evening before the hearing in the absence of any leave of this court.

Summary Of The Contentions Of The Parties

[12] The applicant premised its key argument that the key pre-requisite for an advocate like Datuk Haji Sulaiman to conduct prosecutions would be the existence of an 'authorisation in writing' under s. 377(b)(1) of the CPC or a 'permission in writing' of the Public Prosecutor as provided for in s. 379 of the CPC.

[13] The applicant asserted that its challenge concerned the validity of the appointment of Datuk Haji Sulaiman under s. 379 of the CPC, specifically on what the applicant described as a foundational question as to whether Datuk Haji Sulaiman has, before this court the requisite rights of audience by which to conduct this prosecution.

[14] It was submitted that since no such letter of appointment or authorisation or *fiat* has been produced for the inspection of the court, this court cannot therefore take cognizance of the *locus standi* of Datuk Haji Sulaiman to appear on behalf of the respondent in this court. More crucially, the applicant maintained that until and unless the issue is resolved, all actions of Datuk Haji Sulaiman to date could potentially be rendered a nullity.

[15] The applicant took the stance that given his challenge, the production of the instrument of authority is therefore mandatory.

[16] The applicant further sought to draw support from the provision of s. 55 of the Interpretation Acts 1948 and 1967, on the basis that by analogy to the provision relating to the need for the written 'consent' or 'sanction' of the Public Prosecutor in the institution of cases, the courts have also declared that the same must be produced.

[17] Thus in *AK Koh Enterprise Sdn Bhd v. PP* [2000] 1 LNS 200; [2000] 6 MLJ 184, the letter authorising the prosecuting officer under s. 377 of the CPC was regarded as a sanction which must be produced before the court in order to vest it with the requisite jurisdiction.

[18] The applicant therefore submitted that it was mandatorily incumbent on the respondent to produce before this court the instrument authorising Datuk Haji Sulaiman to appear on behalf of the Public Prosecutor and have conduct of the prosecution.

[19] It is also the position taken by the applicant that the respondent's refusal to produce the instrument by reason of the classification of the same as an "official secret" under the Official Secrets Act 1972 ("the OSA") was wholly misconceived.

[20] The respondent, in its resistance to this application, on the other hand submitted that first, this application was not supported by law nor did it disclose a valid reason or basis for the order sought. The application, so the respondent asserted, did not furnish any valid reasons for the production of the letter of appointment which would serve as a ground for this court to act upon.

[21] This, according to the respondent was especially pertinent as the application neither alleged *mala fide* on the part of the respondent when appointing Datuk Haji Sulaiman nor stated how the applicant was prejudiced by this appointment that would warrant the need to have sight of the letter of appointment.

[22] Secondly, it was highlighted by the respondent that the applicant did not actually file an application to challenge Datuk Haji Sulaiman's appointment but had chosen to instead file a notice of motion for the production of his letter of appointment. This, the respondent argued

suggested that the same was merely a baseless application and served, at best, as a fishing or fault finding expedition or that the applicant was deliberately delaying due process by filing irrelevant and frivolous applications.

[23] Thirdly, the respondent maintained that the appointment of Datuk Haji Sulaiman by the Attorney General (as the Public Prosecutor) pursuant to s. 379 of the CPC had been announced to the general public *via* the Attorney General's media release dated 31 August 2018 which, without any ambiguity, explained the reasons for the appointment.

[24] Fourthly, the respondent also argued that this application was a non-starter since the relevant instrument of appointment had been classified under the OSA that would now be prohibited from disclosure.

Evaluation And Findings Of This Court

Nature And Application

[25] In this case before me, there is a certain lack of clarity in the true nature of this application – whether the applicant is challenging the appointment of Datuk Haji Sulaiman. The applicant said he was. The respondent said otherwise. I am inclined to agree with the respondent on this because the notice of motion merely prays for the production of the instrument of the appointment of Datuk Haji Sulaiman by the Public Prosecutor.

[26] What else to make of the following prayers sought for in the notice of motion filed by the applicant:

(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 Prosecutor;

(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) Prayer 3

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

[27] Notwithstanding the above, the applicant maintained that what was being challenged herein was the *locus standi* of Datuk Hj Sulaiman to appear on behalf of the Public Prosecutor and to have conduct of the prosecution, and that this could only be established by the production of the document sought for.

[28] In my view, a proper challenge to the appointment ought to have been made more definitively and the basis for the same be stated with certainty – be it a form of impropriety or procedural error in the said appointment. But the applicant had furnished nothing to that effect in the requisite notice as well as in the accompanying affidavit in support. The applicant should have more properly filed an application to challenge Datuk Haji Sulaiman's appointment and thereafter, file an application for discovery of the instrument of appointment which was instead now the subject of the instant application.

[29] It may well be that this present application could be a precursor to the actual challenge of the appointment; but if that was the case, then the production application should be dealt with separately in that other proceeding, if any.

[30] As such, the true legal basis for this pre-trial criminal application, which was also not fashioned on the basis of discovery under s. 51 of the CPC for the production of a document which at the same time has absolutely nothing to do with the preparation of the defence of the applicant, can therefore be questioned.

[31] After all, it is fairly settled that pre-trial discovery is only permitted for documents mentioned in the charge against the accused. The Federal Court in *Dato' Seri Anwar Ibrahim v. PP* [2010] 4 CLJ 265; [2010] 2 MLJ 312 held as follows:

> [45] Learned counsel for the appellant then urged us to depart from *Raymond Chia*. We find no justification to do so. We have looked at the authorities presented to us during arguments, including those from India and Singapore and found them united in their holding that s. 51 must necessarily operate within certain inbuilt limitations. Although the language in that section is seemingly wide it should not literally be taken to be capable of allowing for a wide-ranging application as was allowed by the High Court in this case. Its scope, according to all the authorities that we have read, is confined to the production of documents or materials which are 'necessary or desirable' for the purposes of the trial. And these two qualifications depends on which particular stage or point of time the application was made. If, as happened in this case, it was made at the pre-trial stage, then the discovery must, according to the principles we have alluded to earlier, be confined to the matters that are specified in the charge. This is so because the justice of the case would have been met if the appellant had been fully notified of the charge he faces. He cannot then be said to be at any disadvantage to prepare his defence. At this stage, the documents and materials that the court may compel production are confined to those that are necessary and desirable to the trial. And the charge in this case, in our view, is specific and is sufficiently particularised to accord the appellant a fair trial. Put another way, the requirement of justice as envisaged by the Supreme Court in *Raymond Chia* has, in this case, been met, *sans* the discovery of those documents and materials.

> [46] Now, the appellant contends that what he required was essential and relevant to the preparation of his defence. But at this stage, the defence is not yet a relevant consideration for the court hearing this application. The appellant's application should not be turned into a mini-trial to determine his defence on the charge (see *State of Orissa v. Debendra Nath Padhi*).

No Legal Requirement To Produce Letter Of Permission Under s. 379 Of The CPC

[32] I do not think the language of s. 379 of the CPC, as set out earlier, gives rise to any ambiguity. For it plainly vests in the Public Prosecutor and no other, the prerogative and authority to authorise the employment of an advocate by way of permission in writing to conduct a prosecution (see the decision of the Federal Court in *Dato' Seri Anwar bin Ibrahim v. Public Prosecutor* [2014] 1 CLJ 289; [2014] 1 MLJ 317). Neither is there any dispute that Datuk Haji Sulaiman fulfilled the status of an advocate within this s. 379.

[33] Nowhere in s. 379 or in Chapter XXXVII or in the entire of the CPC itself for that matter is it stated that the letter of permission on the employment of the advocate chosen by the Public Prosecutor under that provision must be shown to the court where the advocate so authorised appears, let alone produced to the accused.

[34] The applicant said it would be unnecessary for the law to specify production and attempted to rely on s. 55 of the Interpretation Acts 1948 and 1967 ("the IA") to augment its argument on the need for production of the *fiat*. This provision concerns the ability of a person to conduct prosecution.

[35] Section 55 reads as follows:

> **55. Evidence of signature on *fiat*, etc.**
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> 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.

[36] The contention involved the approach of drawing analogy to the provision relating to the need for the written 'consent' or 'sanction' of the Public Prosecutor in the institution of cases. The courts, according to the applicant have also declared that the same must be produced in order for the requirement to be deemed complied with.

[37] A similar argument was raised by the applicant in respect of s. 129 of the CPC which also does not specify the need to produce the instrument of appointment of the appointee. Yet the courts have, as asserted by the applicant held that unless the same is produced, the court cannot take cognisance of the same.

[38] The pertinent parts of s. 129 of the CPC provide as follows:

> 129. Sanction required for prosecution for certain offences
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> (1) Except in the case of complaints laid by the Public Prosecutor no Court shall take cognisance:
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> (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;
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> (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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> (c) of any offence described in section 463 or punishable under section 471, 475 or 476 of the Penal Code except with the previous sanction of the Public Prosecutor, or when the offence has been committed by a party to any proceeding in Court in respect of a document given in evidence in the proceeding 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.
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> (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.
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> ...

[39] However, I cannot readily subscribe to this contention of the applicant because these ss. 55 of the IA and 129 of the CPC are clearly provisions concerning the requisite authorisation or sanction of the Public Prosecutor in respect of the institution of criminal proceedings. This is entirely different from the authorisation or permission to appoint a qualified person to conduct criminal prosecution under provisions such as ss. 377 and 379 of the CPC. The cases referred to by the applicant mainly concern the former scenario.

[40] The applicant nevertheless also referred to a number of cases to support its position *vis-à-vis* the sanction on the choice of person conducting the criminal prosecution. Thus in *AK Koh Enterprise v. PP* [2000] 1 LNS 200; [2000] 6 MLJ 184 the High Court held in the headnotes of the report:

> A prosecuting officer may, under a particular law, institute a criminal proceeding but he must be authorised by the Public Prosecutor. *Such an authorisation or sanction to prosecute is required for each offence, and must be tendered into court before the trial begins so as to confer jurisdiction on the court.* In the present case, the offence committed by the appellant is a seizable offence, thus a sanction or authorisation to prosecute the case from the Public Prosecutor is mandatory. As no authorisation letter was produced or tendered in court when the trial of the appellant began, the practice of presuming that the authorisation had been given to the prosecuting officer adopted by the learned magistrate was *ultra vires* the law. This is because without this authorisation, the court lacks jurisdiction to hear the case and this defect cannot be cured (see pp 186B-E, 188D). (emphasis added)

[41] The case of *AK Koh Enterprise,* decided by Muhammad Kamil J ruled that the court has no jurisdiction in the absence of the authorisation and also suggested in effect that proof of authorisation would be satisfied by having the same produced in court. The applicant also submitted that another High Court decision, which was written by Low Hop Bing J (as he then was) in the case of *Anuar Abdul Aziz v. PP* [2005] 6 CLJ 309; [2006] 1 MLJ 380 also supported his position.

[42] In my view, a more accurate position in law on this point is well clarified in another earlier High Court decision, which both the applicant and the respondent relied on in their respective oral and written submissions. This is the case of *PP v. Lew Koy* [2002] 1 CLJ 86; [2001] 4 MLJ 655, where VT Singham JC (as he then was) instructively held as follows:

> On the issue of the written authority from the Public Prosecutor pursuant to s. 377(b) of the CPC, this court is of the view that the written authority need not be tendered or filed in court but is only required to show to the court if ever there is any challenge that the prosecuting officer who is having conduct of the prosecution did not have the authority in writing of the Public Prosecutor to appear in court and conduct the proceedings. In such a situation, the prosecuting officer is only required to show to the court that he has been issued with the written authority by the Public Prosecutor or the deputy public prosecutor and it need not be tendered as an exhibit or filed in court as it is not a document shown to a witness and referred to by him in his evidence or by an affidavit (see *Stroud's Judicial Dictionary of Words and Phrases* (6th Ed) Vol 1 for definition of 'exhibit').

[43] There is as such no legal requirement that any letter of appointment giving authority for a person to appear and conduct prosecution in court, including under s. 379 of the CPC must be produced to the accused. *Public Prosecutor v. Lew Koy* clearly held that the instrument of appointment such as the one in contention before this court is only required to be shown to the court (and not even the accused) if there is any challenge that the prosecuting officer having conduct of the prosecution does not have the requisite authority in writing of the Public Prosecutor to appear in court and conduct the proceedings.

[44] An authorisation letter from the Public Prosecutor to a prosecuting officer to appear in court and conduct the proceedings need not therefore be tendered or filed in court and is instead only compelled to be shown to the court if there is a challenge to the authority of the prosecuting officer to conduct the criminal prosecution.

[45] *Public Prosecutor v. Lew Koy* provides much clarity to the point in contention herein. In the first place, the statutory provisions such as in ss. 377 and 379 are plain in their language which do not stipulate that non-production in court divests the court of the jurisdiction to hear and try the criminal proceedings. The true source of legal authority is the factual existence of the authorisation or permission granted by the Public Prosecutor. Strictly it cannot be dependent on whether or not the said instrument of authorisation or permission is produced in court.

[46] Secondly, only in a situation where there is a challenge that the instrument of appointment ought to be shown. Even then it is only required to be produced to the court, not the accused. In this case, as stated earlier, despite the notice of motion only praying for the production of the letter of permission, the applicant claimed that he was challenging the *locus* of Datuk Haji Sulaiman in his conduct of the prosecution against the applicant as the accused.

[47] But the applicant did not clearly state the reasons for the purported challenge. There were no allegations for instance of lack of qualification, or non-fulfilment of the statutory requirements of s. 379 on the part of Datuk Haji Sulaiman. In fact, the premise for the alleged challenge was precisely the non-production of the letter of permission.

[48] Herein lies the incoherence arising from the circularity of the argument of the applicant. The import and purport of the application, in truth, in essence and substance sought merely to compel production of the letter only because the respondent had refused to do so. The refusal, in the erroneous view of the applicant, went to the jurisdiction of this court. There was really nothing more than that.

[49] There was otherwise no true challenge. And this would simply not do. The law does not compel production to the court or to the accused of the instrument of appointment of the individual having conduct of the prosecution granted under s. 377 and s. 379 merely because the accused asks for the same. It must be grounded on specifically identified causes which should be averred in the affidavit of the applicant supporting the application. None however has been shown in the instant case.

[50] At the risk of repetition, I therefore hold that the respondent ought to only show to the court (and in appropriate cases if ordered by the court, to the accused as well), the instrument of the letter of permission under s. 379

of the CPC if there is a valid challenge that Datuk Haji Sulaiman did not have the authority in writing of the Public Prosecutor to appear in court and conduct the proceedings.

The Specificity Of The AG Media Release

[51] The fact of the absence of a real or valid challenge is further fortified by another key reason which is this. It was the AG media release which made public the appointment of Datuk Haji Sulaiman under s. 379 of the CPC. The AG media release had already specified the statutory basis for the appointment of Datuk Haji Sulaiman. But the instant application said nothing about any possible defects on the legal basis of the appointment or non-qualification of Datuk Haji Sulaiman under the statutory provision, other than questioning the issue of *locus* arising purely from the non-production.

[52] Furthermore, if the complaint was only to have sight of the instrument of appointment, I fail to appreciate why the AG media release could not be accepted by the applicant as providing the requisite and definitive confirmation of the same.

[53] Crucially, unlike the cases, some of which were referred to earlier, where a challenge was made as to the authority of the person having conduct of the prosecution, in the instant case, the situation was completely different since the Public Prosecutor himself, the one and only person in this country constitutionally empowered to make the decisions on institution and conduct of prosecution and also the one having the authority to make the appointment under s. 379 of the CPC has made it official and public the fact of the appointment of Datuk Haji Sulaiman. The AG media release also contained the reasons for the appointment and the choice of the advocate.

[54] The relevant paragraph of the AG media release states the following:

> 3. Accordingly, in the exercise of my discretion under Section 379 of the Criminal Procedure Code ("CPC"), I have appointed Datuk Haji Sulaiman bin Abdullah to lead the prosecution in *PP v. Najib Razak.* Datuk Sulaiman is one of the nation's leading barristers, having substantial experience in criminal law, including white-collar crime. His eloquence is unmatched, and his intellect second to none. Datuk Sulaiman has impeccable integrity, and is a principled lawyer.

[55] In my view, there can therefore be no valid basis to challenge that a person having conduct of the prosecution does not have the authority or permission in writing of the Public Prosecutor because particularly in this instant case, the AG media release dated 31 August 2018 had made it crystal clear that the Public Prosecutor has appointed Datuk Haji Sulaiman under s. 379 of the CPC to lead the prosecution in this case.

[56] I must also mention that the AG media release was issued by the Attorney General's Chambers and stated in the AG media release to be the statement of the Public Prosecutor himself. A copy of the AG media release was introduced in this proceedings by way of an exhibit to the very affidavit of the applicant himself which was affirmed on 23 November 2018 in support of this application. There are no averments in any of the affidavits of the applicant that could be construed as challenging the authenticity or even the contents of the AG media release. Any protest expressed at the hearing by the lead counsel for the applicant against reliance on the AG media release cannot therefore be characterised by any other than being somewhat spurious.

[57] The AG media release does not of course constitute the requisite *fiat* under s. 379 of the CPC. The instrument of the letter of permission is undoubtedly the one, but crucially, no less than the appointing authority, namely the Public Prosecutor has made it publicly known by way of an official public announcement in the AG media release that he had made the appointment for the purpose and under the legal provision as stated in the AG media release.

[58] In contrast, in the cases referred to by the applicant where the production of the instrument of appointment was ordered by the court, the challenge was made given the suspicion on the lack of authority of the person having conduct of the prosecution in the sense that there were doubts whether the persons who appeared to prosecute (other than Deputy Public Prosecutors) actually were authorised by the Public Prosecutor.

[59] But in the instant case, the Public Prosecutor had pre-empted any possible doubts by stating in the AG media release that the person in question had been appointed by him under the law as specified. This alone, unlike the other cases, would have been more than sufficient to notify everyone, the applicant included, that the person in question did have the authorisation granted by the Public Prosecutor.

[60] Why then would the letter still need to be produced in that situation? This is befuddling. In fact, the Attorney General himself as the Public Prosecutor had in the instant case appeared in person to conduct the prosecution of this case when the first four charges were registered, a few weeks before the issuance of the AG media release.

[61] Indeed, if similar press release were to be issued in situations where non-DPPs appeared in court, there would be absolutely no basis for an accused or his counsel to doubt the existence of the requisite authorisation. Most if not all of these other cases are obviously without the benefit of any official public announcement by the Public Prosecutor as to the status of the appointments.

[62] Of course this is not to say that the appointment in that situation is therefore immune from challenge. The point is that the complaint can no longer, because of the AG media release, be formulated by reason of whether the person was actually authorised in terms of whether a written permission was in his possession. Instead the challenge should more properly be on whether the authorisation said to have been made was effected in accordance with the law.

[63] But as I have stated earlier, it would have been open for the applicant to mount a challenge on the appointment of Datuk Haji Sulaiman on the ground of, say, that it had not been correctly made pursuant to the provisions of s. 379 of the CPC, being the law invoked by the Public Prosecutor as had been made plain to all and sundry in the AG media release. Again however, I stress that there was no such challenge raised by the applicant in the instant case.

[64] Despite knowing the basis of the appointment as stated in the AG media release, the applicant did not move to set out the reasons why it was flawed. Instead the attack made was merely for the production of the instrument. This, as has been stated more than once earlier in this judgment, is wholly insufficient, if not patently untenable. In the instant case, there was no such challenge.

Official Secrets?

[65] The respondent further resisted production on another ground. That the instrument of appointment had been classified as official secret under the Official Secrets Act 1972.

[66] Thus, the applicant would not be entitled to be given a copy of Datuk Haji Sulaiman's letter of appointment as an advocate to lead the prosecution under s. 379 of the Criminal Procedure Code.

[67] The contents of the letter could also not therefore be reviewed until and unless it is declassified. The respondent also produced a certificate under s. 16A of the Official Secrets Act 1972 ("the OSA") which certified in effect that Datuk Haji Sulaiman's letter of appointment had been classified as an official secret.

[68] In accordance with s. 16A of the OSA, one Encik Noor Mohd Huzaila bin Abdul Majid who is the Director of Management Division, Attorney General's Chambers, and who is charged with the responsibility relating to the administrative affairs of the Attorney General's Chambers issued a certificate that the official document relating to the appointment of Datuk Haji Sulaiman, to lead the prosecution in this case is classified as an official secret under the OSA.

[69] The respondent submitted that the Government has the right to decide and direct what information is to be classified as official secrets and be kept away from public knowledge, drawing in support the decision of the Federal Court in *Lim Kit Siang v. Public Prosecutor* [1979] 1 LNS 47; [1980] 1 MLJ 293, in particular from the following passage:

> The defence accepted that the details of any tender exercise and of the successful outcome constitute secret official information caught by the Act. It did not contend otherwise at the appeal before us. The secret nature of the information is obvious. No issue lies as to the nature of such information. In any event, Government must surely have the undoubted right to decide what information it would keep from the public. Such information would be official secrets and would be caught by the Act.

[70] The respondent also argued that the power to declassify official secrets lie with the person authorised to do so under s. 2C of the OSA and any other party including the court cannot usurp this power (see the Court of Appeal decision in *Menteri Tenaga, Air dan Komunikasi & Anor v. Malaysian Trade Union Congress & Ors* [2012] 9 CLJ 858).

[71] The respondent is therefore strongly resisting production of the letter of appointment on the basis of a certificate issued on 6 December 2018 by the Director of Administration Department of the AGC under s. 16A of the OSA which sought to classify documents relating to the appointment of Datuk Haji Sulaiman as official secrets. Section 16A reads:

> **16A. Certificate by a public officer to be conclusive evidence**
>
> A certificate by a Minister or a public officer charged with any responsibility in respect of any Ministry, department or any public service or the Menteri Besar or the Chief Minister of a State or by the principal officer in charge of the administrative affairs of a State certifying to an official document, information or material that it is an official secret shall be conclusive evidence that the document, information or material is an official secret and shall not be questioned in any court on any ground whatsoever.

[72] Section 16A of the OSA is thus clear in providing that upon the issuance of the certificate, the documents so classified cannot be questioned in any court on any ground whatsoever.

[73] The applicant on the other hand maintained that mere and bare assertion of secrecy would not be sufficient. The respondent must substantiate the claim of secrecy with evidence in support.

[74] In this case, reliance on the certificate issued under s. 16A of the OSA which sought to classify documents relating to the appointment of Datuk Haji Sulaiman could be questioned because the affidavit by the respondent did not clearly demonstrate the exact ambit of the said director's office, authority or accountability to qualify the Director of the Administration Department of the AGC to be deemed as a public officer within the meaning of the OSA to entitle him to issue the s. 16A certificate in the first place.

[75] Further, it was submitted that by the very purpose of the letter of appointment or the authorisation in writing under s. 377(b)(1) of the CPC or permission in writing under s. 379 of the CPC, the instrument in question could not fall within the ambit of "national security, defence and international relations" or "relating to the public service", within the meanings ascribed to those phrases in the OSA.

[76] This, added the applicant, was especially a concern since even the AGC is not listed as being part of the public services in art. 132(1) of the Federal Constitution. Article 132(4) of the Federal Constitution further excludes the Attorney General (being the Public Prosecutor) from being an officer or member of the public services.

[77] Whilst the competing arguments on the effects of classification of documents as official secret under the OSA are usually compelling as they are weighty and deserving of a critical analysis, in this case, in my view, it is unnecessary for me to consider and determine whether the respondent could also validly rely on this s. 16A certificate (which had classified the instrument of appointment of Datuk Haji Sulaiman under s. 379 of the CPC as an official secret) to refuse production of the same, in view of the other reasons that I have stated earlier.

Conclusion

[78] This application is bereft of reasons which are sufficiently cogent to justify production of the instrument of appointment. Nor did it satisfactorily explain how the applicant would be prejudiced by the non-disclosure of the said letter of appointment. The view of the applicant that the risk of the trial being nullified by reason of non-production constitutes the prejudice is tenuous and lacking in merit.

[79] Significantly, the argument that the non-disclosure or non-production meant the absence of *locus* on the part of Datuk Haji Sulaiman which in turn would affect the jurisdiction of this court, and risk any proceedings be held to be a nullity, is too speculative, and in any event has been shown earlier in this judgment to be flawed.

[80] In view of the foregoing reasons, I found the application to be clearly less than meritorious. The notice of motion was accordingly dismissed.