Attorney General of Malaysia v Dato' See Teow Chuan & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-11 OF 2011(W)
SURIYADI, ABU SAMAH NORDIN, RAMLY ALI, AZAHAR MOHAMED AND BALIA YUSOF FCJJ
26 SEPTEMBER 2017

Civil Procedure — Contempt of court — Criticism of judgment of court — Party to appeal before Federal Court requested court to review and set aside its appeal decision on the ground its judgment appeared to be plagiarism and wholesale adoption of opposing party's written submissions — Review application dismissed on ground apparent bias on part of panel of judges who made appeal decision not proven — Party who won in appeal initiated contempt proceedings against review applicants for scandalising Federal Court and subverting administration of justice — Majority of contemnors who attended court admitted their guilt, pleaded for leniency and were fined — Whether same sentence could be imposed on those contemnors who could not attend court on account of ill-health and incapacity but who nevertheless apologised for contempt and sought lenient sentence

The Federal Court was faced with the question whether it had power to proceed to hear contempt proceedings, and to impose sentence, against two individuals in their absence for committing contempt of court. The two persons were the 25th and 22nd respondents, Lim Ah Eng ('Ah Eng') and Doris See Siew Lian ('Doris'), who, together with 20 others and their lawyers were cited for contempt for alleging that the Federal Court had plagiarised its judgment in a proceeding by wholly reproducing and adopting as its judgment the written submissions filed by the court-appointed liquidators of a wound-up company named Kian Joo Holdings Sdn Bhd ('Kian Joo'). All the contemnors were lay persons and contributories of Kian Joo. Initially, the majority contributories had challenged the manner in which the liquidators decided to sell the shares of Kian Joo to another company. When the Court of Appeal decided in favour of the contributories, the liquidators appealed successfully to the Federal Court to have the decision set aside. The contributories applied to the Federal Court to review its decision claiming that its grounds of judgment showed plagiarism and a wholesale adoption of the liquidators' written submissions. The Federal Court dismissed the review application holding that the adoption of the written submissions as the court's grounds of judgment was not in itself sufficient ground for it to review and set aside its earlier decision and that, in any event, there was insufficient evidence to prove apparent bias on the part of the panel of judges who had made the earlier decision. Following that verdict, the liquidators filed contempt proceedings against the contributories and their lawyers for bringing the Federal Court into disrepute

and subverting the administration of justice with their allegations. The liquidators subsequently withdrew from the contempt proceedings but the Attorney General of Malaysia took over its prosecution. Except for Ah Eng, Doris and another contributory, See Siew Hua ('Siew Hua'), all the other contributories had appeared before the Federal Court earlier, admitted and apologised for their contempt and pleaded for leniency. They were each fined RM100,000 or eight months' jail. At the adjourned hearing of the matter against Ah Eng, Doris and Siew Hua, the proceeding against Siew Hua was struck out as she had since died. In their respective affidavits, Ah Eng and Doris, both in their 80s, cited ill health and incapacity for being unable to attend court. They both apologised unreservedly for their contempt and pleaded for leniency saying that as lay persons they had relied upon the advice of their solicitor in making their affidavits in support of the review application.

Held, sentencing Ah Eng and Doris to a fine of RM100,000 or eight months' jail each:

(1) Contempt proceedings were quasi-criminal in nature and generally the court should avoid making a committal order if the contemnor was not given a chance to be present in court to answer the charge against him/her and to raise any plea of mitigation before sentence was passed. However, in the present case, the court exercised its discretion to proceed with the contempt proceedings against both the contemnors in their absence as their counsel had informed the court that their presence could be dispensed with and that he had full instructions to proceed with the matter. Both contemnors had in their affidavits and through their counsel in open court voluntarily requested for such a course of action, knowing the nature and consequences of their request. Based on the mitigating factors and circumstances of the case, it was an appropriate case for the court to accede to the contemnors' requests (see paras 21–22 & 27).

(2) There were 20 other contemnors in the contempt proceedings, all of whom were contributories, many of them of advanced age and unwell, and upon their admission of guilt and expression of unreserved apology and remorse, the court had sentenced each of them to a fine of RM100,000 or eight months jail. The court was of the view the same sentence was an appropriate one against Ah Eng and Doris and sentenced them accordingly (see paras 30 & 32).

[Bahasa Malaysia summary

Mahkamah Persekutuan berhadapan dengan persoalan sama ada ia mempunyai kuasa untuk terus mendengar prosiding penghinaan, dan untuk mengenakan hukuman, terhadap dua individu yang tidak hadir kerana melakukan penghinaan mahkamah. Dua orang itu adalah responden-responden ke-25 dan ke-22, Lim Ah Eng ('Ah Eng') dan Doris See

Siew Lian ('Doris'), yang mana, bersama 20 orang lain dan peguam-peguam mereka telah dikatakan melakukan penghinaan kerana mendakwa Mahkamah Persekutuan telah meniru penghakimannya dalam prosiding dengan mengemukakan semula keseluruhan dan mengguna pakai sebagai penghakimannya penghujahan bertulis yang telah difailkan oleh penyelesai-penyelesai yang dilantik mahkamah untuk penggulungan syarikat yang bernama Kian Joo Holdings Sdn Bhd ('Kian Joo'). Kesemua penghina merupakan orang biasa dan penyumbang Kian Joo. Pada mulanya, majoriti penyumbang telah mencabar cara penyelesai-penyeesai memutuskan untuk menjual saham-saham Kian Joo kepada syarikat lain. Apabila Mahkamah Rayuan memutuskan menyebelahi penymbang-penyumbang itu, penyelesai-penyelesai telah merayu kepada Mahkamah Persekutuan agar keputusan itu diketepikan. Penyumbang-penyumbang telah memohon kepada Mahkamah Persekutuan untuk menyemak semula keputusannya dengan mendakwa bahawa alasan penghakimannya menunjukkan peniruan dan penggunaan menyeluruh penghujahan bertulis penyelesai-penyelesai. Mahkamah Persekutuan menolak permohonan semakan semula itu dengan memutuskan bahawa penggunaan penghujahan bertulis itu sebagai alasan penghakiman mahkamah dengan sendirinya alasan yang mencukupi untuknya menyemak semula dan mengetepikan keputusan terdahulunya dan bahawa, dalam apa keadaan, keterangan adalah tidak mencukupi untuk membuktikan berat sebelah jelas di pihak panel hakim yang telah membuat keputusan terdahulu. Berikutan keputusan tersebut, penyelesai-penyelesai telah memfailkan prosiding penghinaan terhadap penyumbang-penyumbang dan peguam-peguam mereka kerana menghina dan mencemar pentadbiran keadilan dengan dakwaan-dakwaan mereka. Penyelesai-penyelesai kemudian telah menarik diri daripada prosiding penghinaan itu tetapi Peguam Negara Malaysia telah mengambil alih pendakwaannya. Kecuali Ah Eng, Doris dan seorang lagi penyumbang, See Siew Hua ('Siew Hua'), kesemua penyumbang lain telah hadir di hadapan Mahkamah Persekutuan dahulu, mengakui dan memohon maaf kerana penghinaan mereka dan merayu untuk kelonggaran. Mereka masing-masing telah didenda RM100,000 atau lapan bulan penjara. Di perbicaraan yang ditangguhkan berhubung perkara terhadap Ah Eng, Doris dan Siew Hua, prosiding terhadap Siew Hua telah dibatalkan kerana dia telah meninggal dunia. Dalam afidavit mereka masing-masingnya, Ah Eng dan Doris, kedua-duanya berumur dalam lingkungan 80an, menyatakan kurang sihat dan tidak berupaya kerana tidak hadir mahkamah. Mereka berdua telah memohon maaf tanpa syarat kerana penghinaan mereka dan merayu kelonggaran dengan mengatakan bahawa sebagai orang biasa mereka bergantung kepada nasihat peguamcara mereka untuk membuat afidavit-afidavit sokongan mereka untuk permohonan semakan semula.

Diputuskan, menghukum Ah Eng dan Doris denda RM100,000 atau lapan bulan penjara:

(1) Prosiding penghinaan adalah bersifat quasi-jenayah dan pada amnya mahkamah patut mengelakkan daripada membuat perintah komital jika penghina tidak diberikan peluang untuk hadir di mahkamah untuk menjawab pertuduhan terhadapnya dan untuk menimbulkan apa-apa rayuan mitigasi sebelum hukuman dibuat. Walau bagaimanapun, dalam kes ini, mahkamah telah menggunakan budi bicaranya untuk memulakan prosiding penghinaan terhadap kedua-dua penghina dengan ketiadaan mereka kerana peguam mereka telah memberitahu mahkamah bahawa kehadiran mereka tidak diperlukan dan bahawa kedua-dua mendapat arahan penuh untuk meneruskan dengan perkara itu. Kedua-dua penghina dalam afidavit mereka dan melalui peguam mereka dalam mahkamah terbuka secara sukarela memohon untuk tindakan sebegini, dengan mengetahui sifat dan akibat permohonan mereka. Berdasarkan faktor-faktor mitigasi dan keadaan kes, ia adalah kes yang sesuai untuk mahkamah bersetuju dengan permohonan penghina-penghina tersebut (lihat perenggan 21–22 & 27).

(2) Terdapat 20 penghina yang lain dalam prosiding penghinaan itu, kesemuanya adalah penyumbang, kebanyakan daripada mereka telah lanjut umur dan tidak sihat, dan setelah pengakuan bersalah mereka dan ungkapan permohonan dan penyesalan tanpa syarat, mahkamah telah menghukum setiap daripada mereka denda RM100,000 atau lapan bulan penjara. Mahkamah berpendapat hukuman sama adalah sesuai terhadap Ah Eng dan Doris dan menghukum mereka sewajarnya (lihat perenggan 30 & 32).]

Notes

For cases on criticism of judgment of court, see 2(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2535–2536.

Cases referred to

Chung Onn v Chan Ah Kaw & Anor [1996] MLJU 206, HC (refd)
Ellison (A Bankrupt); Hicken (as Trustee in Bankruptcy of Ellison) v Ellison, Re [2016] EWHC 2791 (Ch), Ch D (refd)
Indira Gandhi a/p Mutho v Patmanathan a/l Krishnan (anyone having and control over Prasana Diksa) [2015] 7 MLJ 153, HC (refd)
JSC BTA Bank v Solodchenko [2011] EWHC 2163 (Ch), Ch D (refd)
JSC BTA Bank v Solodchenko and others (No 2) [2011] 1 WLR 906, Ch D (refd)
Phonographic Performance Ltd v Inch [2002] All ER (D) 253 (May), Ch D (refd)
Regina v Jones (Anthony) [2003] 1 AC 1, HL (refd)
Sanchez v Oboz [2015] EWHC 611 (Fam) (refd)

Legislation referred to

Companies Act 1965 s 218(f), (i)

Appeal from: Civil Appeal No W-02–2041 of 2009 (Court of Appeal, Putrajaya)

Amarjeet Singh (Alice Loke Yee Ching and Shaiful Nizam Shahrin with him) (Senior Federal Counsel, Attorney General's Chambers) for the appellant.
David Gurupatham (Tan Shin Lau with him) (David Gurupatham & Koay) for the two contemnors.

Ramly Ali FCJ (delivering judgment of the court):

[1] On 30 January 1996, by consent, the High Court ordered that Kian Joo Holdings Sdn Bhd ('the company') be wound up pursuant to s 218(f) and (i) of the Companies Act 1965.

[2] At the same time, one Abdul Jabbar bin Abdul Majid and Ng Kim Tuck from KPMG Peat Marwick were appointed as the joint and several liquidators of the company. On 2 October 2007, one Ooi Woon Chee from the same firm was appointed as one of the liquidators to replace Abdul Jabbar bin Abdul Majid.

[3] At the meeting of contributories on 10 July 2008, the majority contributories (representing 52% in value of the company's equity) were in favour of selling of the entire shares of the company, while the remaining contributories (being minority contributories holding 48% in value of the equity) preferred distribution of the shares in specie.

[4] On 23 February 2009, the liquidators entered into a conditional shares sale agreement for the sale of 146,131,500 shares in question to Can-One International Sdn Bhd. The contributories opposed the transaction and had rebuked the liquidators for their acts in breach of fiduciary duties, conflict of interest as well as fraud in regard to the tender process for the sale of the shares.

[5] The majority contributories, represented by their solicitors, Messrs VK Lingam & Co, filed an application to the High Court, against the liquidators for leave to proceed with legal proceedings for alleged misconduct in the tender of the company's assets and eventual award to Can-One International Sdn Bhd for the sale of the shares. On 25 September 2009, the High Court dismissed their application.

[6] Being dissatisfied with the dismissal of their application by the High Court, the majority contributories appealed to the Court of Appeal against the

decision. On 26 April 2010, the appeal was allowed by the Court of Appeal, whereupon the High Court's decision was set aside.

[7] The liquidators then filed a motion for leave to appeal to the Federal Court against the decision of the Court of Appeal. Leave was granted on 21 February 2011. On 5 January 2012, the Federal Court allowed the liquidators appeal with costs. All orders made by the Court of Appeal were set aside and consequently all orders made by the High Court were restored. The Federal Court also awarded a sum of RM300,000 (as against the majority contributories) to the liquidators as costs.

[8] Subsequently, all the contributories filed an application to the Federal Court to review its judgment dated 5 January 2012 claiming that the Federal Court's grounds of judgment revealed plagiarism and substantially a reproduction, without any attribution to the liquidators' written submission dated 4 July 2011. The solicitors for the majority contributories, Messrs VK Lingam, filed the review application on the ground of plagiarism. On behalf of the minority contributories, Messrs Nayagam & Partners also filed a similar application using a similar ground.

[9] On 22 May 2013, the review application was dismissed by the Federal Court. The Federal Court was of the view that the adoption of the counsel's submissions as the court's grounds of judgment in itself did not constitute sufficient ground for the court to review and set aside its earlier decision. The Federal Court also held:

> (iii) The court accepted that the respondents did not allege actual bias on the part of the panel of judges who decided the appeals concerned but merely one of apparent bias.
>
> (iv) However, having analysed the judgment in question the court did not find sufficient evidence proving apparent bias.

[10] Pursuant to the decision of the Federal Court in the review application, the liquidators initiated contempt proceedings against all the majority and minority contributories (inclusive of their two lawyers, VK Lingam and Thisinayagam a/l A Somasundram) alleging, inter alia, that the relevant affidavits in support of the said review application affirmed by them on advice of the lawyers contained statements which were in contempt of the Federal Court which would scandalise the Federal Court and subvert the administration of justice. The contempt proceedings papers were filed at the Federal Court on 29 February 2012 and on 3 April 2012 leave was granted.

[11] On 7 August 2014, the liquidators, who initially initiated the contempt proceedings against all the contributories, sought leave to withdraw from the

A proceedings. The application to withdraw was allowed. Later, the Attorney General's Chambers applied and was allowed to be substituted as the applicant in the contempt proceedings.

B **[12]** On 21 November 2016, after being postponed for a number of times for various reasons, all the contributories (excluding three of the minority contributories who were not in court on that day) and the lawyer, Thisinayagam a/l A Somasundram, conceded to the contempt charges against them. The lawyer VK Lingam was not present in court on that day.

C **[13]** With the concession made in their affidavits as well as by learned counsel in open court, the Federal Court proceeded to hear their pleas in mitigation. As for sentence, the court then ordered all the contributories who were present in court to pay fine of RM100,000 each (in default eight months imprisonment). The lawyer, Thisinayagam a/l A Somasundram, was ordered to D pay a fine of RM150,000, in default one year imprisonment. As the three minority contributories and the lawyer VK Lingam, were not present in court on that day, the action against them were postponed thus giving them the opportunity to be present and be heard in court. The three other minority E contributories were See Siew Hua ('Siew Hua'), Lim Ah Eng ('Ah Eng') and Doris See Siew Lian ('Doris').

[14] The matter come up again in open court on 26 September 2017. Again, all the three minority contributories as well as VK Lingam were not present in F court. However, learned counsel Dato' David Gurupatham and Tan Shin Lam appeared on behalf of the minority contributories. They informed the court that, Siew Hua had unfortunately lost her battle with cancer and had passed away on 18 August 2017. A death certificate was tendered in court. Learned counsel them requested that the case against her be discontinued and struck G out, which the court allowed.

[15] As for Ah Eng, she was unable to attend court due to poor health, illness and incapacity. She is 88 years old and is suffering from kidney failure. She has been on hemodialysis treatment for quite some time and is presently H wheelchair bound. In her affidavit, she averred amongst others that she offered her unreserved, unconditional and unqualified apology to the court for being disrespectful. She also averred that she was advised by her solicitors in dealing with the matter and as a lay person, she had acted on that advice.

I **[16]** As regards Doris, she a pensioner and has been residing in England for years. In para 18 of the affidavit, she averred that she is incapacitated by old age and unable to travel. She also averred that in dealing with the matter she was advised by her solicitors and as a lay person likewise, she had acted on that advice.

[17] Learned counsel Dato' David Gurupatham prayed, on behalf of both Ah Eng and Doris that their personal attendance in court be dispensed with and the matter against them be dealt with in absentia. He also prayed that both of them be discharged and/or let off with a warning. Learned counsel informed the court that both of them are not asserting their right; infact they have waived their right to be present in court and are prepared to be sentenced in absentia.

[18] Learned counsel also submitted that the court has unlimited jurisdiction to deal with the matter which includes the power to impose sentence in absentia, and the court ought to take into consideration the very special facts and mitigating points (as stated in the affidavits as highlighted above) in imposing an appropriate sentence on them.

[19] Learned Senior Federal Counsel supported the application, citing the case of *JSC BTA Bank v Solodchenko* [2011] EWHC 2163 (Ch) as an authority to support the exercise of discretion by the court on the matter.

[20] The issue before us is whether this court has the power to proceed with the trial of the contempt proceedings and to impose sentence against both the contemnors (Ah Eng and Doris) who, as affirmed in their affidavits and through their counsel in open court, had offered their unreserved, unconditional and unqualified apology and had waived their right to be present in court and were prepared to be sentenced in absentia.

[21] We are reminded that contempt proceedings are quasi-criminal in nature. Thus, generally the court should avoid making a committal order without giving the contemnor a chance to be present in court to answer the charge against her and to raise any plea of mitigation before passing sentence on her. The House of Lords in *Phonographic Performance Ltd v Inch* [2002] All ER (D) 253 (May) expressed the view that in criminal cases, where the defendant is absent, and the court has the discretion to proceed with the trial, but it is a discretion to be exercised with great caution and with close regard to the overall fairness of the proceedings. The trial conducted in the absence of the contemnor must be fair as circumstances permit and lead to a just outcome (see also *Regina v Jones (Anthony)* [2003] 1 AC 1).

[22] By analogy, the above position can and should apply for contempt proceedings, as in the present case before us. The court can exercise its discretion to proceed with the contempt proceedings against both the contemnors in the present case in their absence especially when their own counsel had informed the court about their request that their presence in court be dispensed with and that he has full instruction to proceed with the matter as requested.

[23] The decision of the English High Court in *JSC BTA Bank v Solodchenko and others (No 2)* [2011] 1 WLR 906 supports the above proposition. In that case, the court had proceeded to hear committal proceedings in absentia on the basis that the defendant, in that case, has instructed his solicitors and leading counsel to represent him in court.

[24] In *Chung Onn v Chan Ah Kaw & Anor* [1996] MLJU 206 and *Indira Gandhi a/p Mutho v Patmanathan a/l Krishnan (anyone having and control over Prasana Diksa)* [2015] 7 MLJ 153, our High Courts proceeded with the contempt proceedings as the alleged contemnors had persistently failed to attend court on the dates fixed for trial though duly served with the contempt papers.

[25] In *Re Ellison (A Bankrupt); Hicken (as Trustee in Bankruptcy of Ellison) v Ellison* [2016] EWHC 2791 (Ch), Warren J proceeded with the contempt proceedings against an alleged contemnor who was out of the country and was not present in court for the trial. In that case, the learned judge considered the following considerations, namely:

(a) whether the alleged contemnor had been served with the relevant documents, including the notice of the trial;

(b) whether the alleged contemnor had sufficient notice to enable him to prepare for his case;

(c) reason advanced for his non-appearance in court;

(d) whether the contemnor had waived his right to be present in court; and

(e) the extent of disadvantage or prejudice suffered by the contemnor in not being able to be present in court during the trial.

[26] In another case, *Sanchez v Oboz* [2015] EWHC 611 (Fam), the trial to determine whether an act of contempt had been committed by an alleged contemnor, the court proceeded with the trial and sentenced him to 12 months imprisonment. In that case, the court found that the alleged contemnor, who had remained in Poland, had been properly served with the notice of the proceeding; had been afforded adequate notice of the application and had offered no explanation for his absence. The court concluded that it was fair and just to proceed with the trial in his absence.

[27] Based on the above authorities, we agree with both learned counsel and learned senior federal counsel, that this court has the power to proceed with the trial to determine their guilt of contempt as charged and consequently to proceed sentencing them. Both the contemnors had in their affidavits and through their counsel in open court voluntarily requested for such course of action. They knew the nature and consequence of their request. Such course of

action did not cause any prejudice to both of them. Based on the mitigating factors and circumstances of the case, as narrated above, we are satisfied that this is an appropriate case for this court to accede to their request and to impose the appropriate sentence against them.

[28] As for sentence, learned counsel for both the contemnors in their mitigation repeated the same facts as narrated above for our consideration. Learned counsel prayed that 'this court to be magnanimous and compassionate and to discharge them and/or let them off with a warning'. Learned counsel also stressed that Ah Eng, now 88 years old, is suffering from kidney failure and is presently wheelchair bound and is on hemodialysis treatment thrice a week. In her affidavit, she affirmed that she has extreme anguish, anxiety and mental torture since the leave to issue contempt was made on 3 April 2012.

[29] The other contemnors, Doris, is also in her 80's. In her affidavit, she affirmed that she is incapacitated, of old age pensioner and has been residing in England for years. She also affirmed that she has extreme anguish, anxiety and mental torture since the leave to issue contempt was made on 3 April 2012. Both of them stated that they were advised by their solicitors and as lay persons, acted on the advice in preparing the legal documentations for the purpose of the review action. They had admitted guilt before this court and expressed remorse and put forward their unqualified and unreserved apology. Learned senior federal counsel indicated that both the contemnors in the present case can be found guilty of the charge and should be sentenced to a fine of RM100,000 in default eight months imprisonment.

[30] We took note that there were 20 other contemnors in this contempt proceedings (comprising of the majority and minority contributories) who had earlier conceded to the contempt charges against them, admitted their guilt and expressed their unreserved apology and remorse to this court without putting up a defence. Many of them were also of advanced age and unwell. With that concession which was accepted by this court, they were sentenced to a fine of RM100,000 in default eight months imprisonment against each of them. The lawyer, Thisinayagam a/l A Somasundraman was fined RM150,000 in default one year imprisonment.

[31] In passing the above sentence on them, this court (in a judgment written by Suriyadi Halim Omar FCJ) had expressed the following views:

> The saving grace for the respondents was the concession made by the learned senior federal counsel that she was not pressing for a custodial sentence though did suggest fining them. This was not unreasonable bearing in mind that many of the respondents were of advanced age and unwell. Regardless, despite the profuse apology, and the respondents' medical condition, the gravity of the offence is not lessened.

A It is undeniable that the allegations made against the Federal Court is very serious and has besmirched the good name of the judiciary as a whole. They have subverted the course of the administration of justice and undermined the public confidence in the judiciary, ridicule, scandalised and offend the dignity, integrity and impartiality of the Judiciary. We hold the view that the above sentence is adequate and sufficiently reflects that seriousness of the offence committed by them against the court. As said earlier, as most of them are of advanced age and unwell, to imprison them might be too excessive a sentence.

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[32] We adopt the same view and consideration in dealing with the two contemnors (Ah Eng and Doris) presently before us. We therefore, held that the appropriate sentence against both of them, was a fine of RM100,000 in default eight months imprisonment each. We ordered accordingly.

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Ah Eng and Doris sentenced to a fine of RM100,000 or eight months' jail each.

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Reported by Ashok Kumar

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