

DALAM MAHKAMAH RAYUAN MALAYSIA

**RAYUAN JENAYAH NO: B-06B-42-06/2018**

ANTARA

SUBRAMANIAM A/L MURUGAN ... PERAYU

DAN

PENDAKWA RAYA ... RESPONDEN

[Dalam Perkara Mahkamah Tinggi Shah Alam  
Rayuan Jenayah No: 42S(A)-3-02/2017]

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SUBRAMANIAM A/L MURUGAN ... PERAYU

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PENDAKWA RAYA ... RESPONDEN

CORAM

KAMALUDIN BIN MD SAID, JCA  
VAZEER ALAM BIN MYDIN MEERA, JCA  
AHMAD NASFY BIN HAJI YASIN, JCA

**JUDGMENT OF THE COURT**

**Introduction**

[1] This application raises an important question of law, and that is, whether the widow of a deceased appellant, whose appeal against conviction and

sentence of imprisonment for two offences under section 165 of the Penal Code 1950, was pending disposal in this court at the time of his death, was entitled to substitute the appellant as the personal representative and continue to prosecute the appeal.

### **Background facts**

[3] The appellant was convicted of two charges under section 165 of the Penal Code 1950, and was imposed concurrent sentences of 4 months imprisonment for each offence by the Sessions Court at Shah Alam.

[4] The High Court at Shah Alam dismissed the appellant's appeal, and affirmed the conviction and sentence. The appellant then appealed against both conviction and sentence to the Court of Appeal pursuant to section 50 of the Courts of Judicature Act 1950; and had obtained a stay of execution of the sentence. Whilst awaiting the hearing of the appeal, the appellant passed away.

[5] The appellant's widow, Madam S. Ponnamah a/p Sinnappan, vide Notice of Motion (Enclosure 15) applied for orders:

- (i) that she be appointed the personal representative of the appellant; and
- (ii) for the appeal to be continued in the name of Madam S. Ponnamah a/p Sinnappan, as the personal representative of the deceased appellant.

[6] In support of the application, the applicant, Madam S. Ponnamah a/p Sinnappan, states that she has legal standing and interest to prosecute the appeal on grounds that:

- (i) the appellant was a public servant, i.e. a school principal on the pensionable scheme of service;
- (ii) ordinarily as the appellant's widow, upon the appellant's death she would stand to draw the government pension that the appellant was entitled to;
- (iii) however, if the appeal were to abate and the appellant's conviction and sentence remained, then she would lose her rights to the pension.

Hence, the applicant contended that she had a pecuniary interest in the outcome of the appeal, and that this interest entitled her to substitute the appellant as his personal representative to preserve the appeal.

[7] However, the Public Prosecutor opposed the application on grounds that the appeal had abated upon the appellant's death by virtue of the statutory provisions in section 320 of the Criminal Procedure Code ("CPC").

### **The issues**

[8] There are several issues for determination in this application, and they are:

- (i) whether section 320 of the CPC, where an appeal shall finally abate on the death of the appellant, applies to an appeal filed to the Court of Appeal under section 50 of the Courts of Judicature Act 1950;
- (ii) whether irrespective of section 320 of the CPC, an appeal to the Court of Appeal under section 50 of the CJA against conviction and sentence of imprisonment finally abates on the death of the appellant during the pendency of the appeal; and
- (iii) whether the appellant's widow having a substantial pecuniary interest in the outcome of the appeal is entitled to substitute the appellant as the deceased's personal representative and to prosecute the appeal.

### **Submissions**

[9] The learned deputy public prosecutor Puan Nurul Farhana binti Khalid, who appeared for the respondent, argued that according to section 320 of the CPC, any pending appeal (other than an appeal against a sentence of fine or a composite sentence of fine and imprisonment) shall abate upon the death of the appellant.

[10] Section 320 of the CPC provides:

**320 Death of parties to appeal**

Every appeal under section 306 shall finally abate on the death of the accused, and **every other appeal under this Chapter (except an appeal against a sentence of fine) shall finally abate on the death of the appellant.** [Emphasis added]

There are two limbs to section 320 CPC. The first limb relates to pending appeals filed by the public prosecutor under section 306 of the CPC against acquittals by a Magistrate, which is not applicable here. The second limb relates to any pending appeal under Chapter XXX of the CPC, which is the Chapter in which section 320 CPC is found. The learned deputy public prosecutor contended that pursuant to the second limb of section 320 of the CPC the appeal in this case would have statutorily abated upon the death of the appellant on 17.10.2019. Thus, the respondent submitted that following the death of the appellant, there was no appeal pending or subsisting for the applicant to substitute and prosecute the appeal on his behalf.

[11] Mr M Athimulan, learned counsel for the applicant, argues the contrary and contends that section 320 of the CPC has no application to the present appeal. Learned counsel submits that the appellant's appeal to the Court of Appeal does not come under Chapter XXX of the CPC (alluded to in section 320 as "appeal under this Chapter"), which deals with appeals to the High Court from

the subordinate courts; but were instead lodged pursuant to section 50(1) of the CJA that provides for the Court of Appeal's jurisdiction to hear and determine appeals from the High Court.

[12] Section 50(1) of the CJA reads as follows:

**50 Jurisdiction to hear and determine criminal appeals**

(1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court-

- (a) in the exercise of its original jurisdiction; and
- (b) in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.

[Emphasis added]

[13] Learned counsel for the applicant further submits that there is no provision in the rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, i.e. the Rules of the Court of Appeal, that is similar in effect to section 320 of the CPC; and that which deals with abatement of a criminal appeal upon the death of an appellant during the pendency of an appeal from the decision of the High Court.

[14] Thus, learned counsel contends that there is a lacuna in the law in so far as it concerns the effect of death of an appellant on a pending appeal in the

Court of Appeal against conviction and sentence, be it a fine and/or imprisonment.

### **Analysis of the arguments**

#### **(i) 1<sup>st</sup> Issue – Whether section 320 of the CPC applies?**

[15] We find that there is merit in the submissions of learned counsel for the applicant. In support of their respective contentions, both the learned deputy public prosecutor and counsel for the applicant had referred to the Federal Court's judgment in *Choo Cheng Liew (Representative Of The Estate of Sunny Yap Eu Leong, Deceased) v Public Prosecutor* [1997] 1 MLJ 345; [1997] 1 CLJ 520 FC. In *Choo Cheng Liew* the following questions of law were posed to the Federal Court for its determination under the then section 66(1) of the CJA:

- (1) Whether, by reason of s. 320 of the Criminal Procedure Code an appeal by an accused to the High Court from conviction and a composite sentence of fine and imprisonment passed against him by the Sessions Court, in respect of offences of corruptly accepting and corruptly soliciting a gratification in contravention of ss. 4(a) and 3(a), respectively, of the Prevention of Corruption Act 1961 ('the Act') finally abates on the death of the appellant during the pendency of the appeal?

- (2) Whether, the legality or propriety of such composite sentence of fine and imprisonment necessarily involves an examination of the validity of the conviction itself?

[16] The Federal Court answered the first question in the negative and the second question in the affirmative. Edgar Joseph Jr FCJ in delivering the judgment of the Federal Court in *Choo Cheng Liew* said:

In our view, the effect of s. 320 of our Code may be stated thus:

The following appeals to the High Court abate on the death of the accused during the pendency of the appeal:

- (1) appeals by the Public Prosecutor when an accused person has been acquitted pursuant to s. 306 of our Code, and
- (2) appeals against conviction where the only sentence imposed is that of imprisonment.

The rule of abatement of criminal appeals contained in s. 320 of our Code does not apply to appeals from a sentence of fine or a composite order of sentence combining the substantive imprisonment with fine.

[17] It must be noted that in *Choo Cheng Liew*, the accused (“deceased”) was convicted of an offence under s. 4(a) Prevention of Corruption Act 1961, and was sentenced by the Sessions Court to a day's imprisonment and a fine of RM4,000. He was also ordered to pay a penalty of RM500 to the Government. The deceased paid the fine and the penalty, and thereafter appealed against the conviction. The deceased, however, passed away while the appeal was pending



in the High Court, whereupon his widow sought to prosecute the appeal on his behalf. The High Court Judge ruled that the effect of the appellant's death on the pending appeal was to finally abate the same having regard to s. 320 CPC. According to the learned High Court Judge, the widow had no legal interest in the outcome of the appeal, and therefore lacked locus standi to prosecute the same. Hence, the reference of the two questions of law to the Federal Court.

[18] As such, it is clear that the pronouncement of the Federal Court in *Choo Cheng Liew* was confined to the application of section 320 of the CPC and the abatement of a criminal appeal upon the death of the appellant during an appeal's pendency in the High Court, and not the Court of Appeal. And by no stretch can it be said that the Federal Court's pronouncement could be equally applicable to a pending criminal appeal at the Court of Appeal, when the words of section 320 of the CPC confines it to appeals under Chapter XXX of the CPC to appeals pending at the High Court.

[19] The second limb of section 320 of the CPC in clear and unequivocal terms states that "every other appeal under **this Chapter** (except an appeal against a sentence of fine) shall finally abate on the death of the appellant." The words "this Chapter" in section 320 of the CPC refer to "Chapter XXX Appeal To The High Court". Thus, by its clear words, appeals that abate upon the death of the appellant under section 320 of the CPC are confined to appeals that come under

Chapter XXX of the CPC, which are appeals that emanate from the subordinate courts to High Courts; and not any other appeals, such as the present one that is from the High Court to the Court of Appeal.

[20] To that extent, we agree with submissions of learned counsel for the applicant that under the circumstances of the facts of this case, the reliance by the learned deputy public prosecutor on the provisions of section 320 of the CPC is, with respect, misplaced.

[21] The learned deputy public prosecutor has also referred to the case of *Ealumalai a/l Mottayan Iwn Pendakwa Raya* [2017] 7 CLJ 68; [2017] MLJU 182, where the High Court at Kuala Lumpur had declared that an appeal pending before it had by reason of section 320 of the CPC abated upon the death of the appellant. The learned deputy public prosecutor had informed this court that the Court of Appeal had on 20.4.2018 affirmed the High Court's decision in *Ealumalai* in Criminal Appeal No: W-06B-44-09/2017. Again, it must be pointed out that in the context and circumstances of the facts of *Ealumalai's* case, where the appeal was pending at the High Court when the appellant had died, the reference to and application of section 320 of the CPC was entirely correct and is consistent with the earlier pronouncement of the Federal Court in *Choo Cheng Liew*. However, the decision in *Ealumalai* would not bind this court, nor would

it be persuasive to apply section 320 of the CPC to the abatement of a pending appeal at the Court of Appeal upon the death of an appellant.

[22] Having said that, we must now consider the pronouncement of the Court of Appeal in *Karpal Singh Ram Singh v PP & Another Appeal (No 2)* [2016] 8 CLJ 65, which was referred to by the learned deputy. In that case, the judgment of which primarily dealt with the issue of sentencing, the Court of Appeal had in passing mentioned the provisions of section 320 CPC in having earlier allowed the application of the widow of the late Karpal Singh to substitute and continue with the prosecution of the appeal after the death of the appellant during the pendency of the appeal at the Court of Appeal. In this regard, it would be worth reproducing the relevant passages of that judgment where section 320 of the CPC was referred to:

[1] The appeals were formerly lodged by the late Karpal Singh a/l Ram Singh (YB Karpal) against both conviction and sentence handed down by the High Court under s. 4(1)(b) of the Sedition Act 1948. YB Karpal was fined RM4,000 in default four months imprisonment for the conviction. The said fine has since been paid.

[2] Before the appeals been finally heard and disposed of by this court, YB Karpal had passed away on 17 April 2014 in a motor vehicle accident. By virtue of s. 320 of the Criminal Procedure Code (CPC), both the appeals should finally be abated on the death of the YB Karpal. Nevertheless, by an order of this court dated 10 November 2014, the appeals were allowed to be proceeded by the widow of YB Karpal as substitutes. Section 320 of the CPC provides:

### 320. Death of parties to appeal

Every appeal under section 306 shall finally abate on the death of the accused, and every other appeal under this Chapter (except an appeal against a sentence of fine) shall finally abate on the death of the appellant.

[23] Whilst the Court of Appeal in that case had alluded to and applied the provisions of section 320 of the CPC in allowing the widow to substitute and prosecute the appeal on behalf of the deceased appellant, we do not have the benefit of the reasoning of the Court of Appeal in applying section 320 of the CPC to a pending appeal at the Court of Appeal, when the words of the said section clearly confines it to pending appeals at the High Court. In any event, the matter of substitution of the appellant by the widow was not a fact in issue at that material time. Hence, when construed in the context of the overall judgment, where the judgment focuses, in the main, on the issue of sentencing, we can only surmise that the comments by the Court of Appeal on section 320 of the CPC in *Karpal Singh's* case is mere obiter.

[24] The Supreme Court in *Dalip Bhagwan Singh v. Public Prosecutor* [1997] 4 CLJ 645, SC, having referred to the decision of the English Court of Appeal in *Young v. Bristol Aeroplane Co. Ltd* [1944] KB 718, and importing the principles enunciated therein into our body of laws by way of section 3 of the Civil Law Act 1965, held that:

The doctrine of stare decisis or the rule of judicial precedent dictates that a court other than the highest court is obliged generally to follow the decisions of the courts at a higher or the same level in the court structure subject to certain exceptions affecting especially the Court of Appeal. ...

... there are 3 exceptions to the general rule that the Court of Appeal is bound by its own decisions ...

The three exceptions are first, a decision of Court of Appeal given per incuriam need not be followed, secondly, when faced with a conflict of past decisions of Court of Appeal, or a court of co-ordinate jurisdiction, it may choose which to follow irrespective of whether either of the conflicting decisions is an earlier case or a later one, thirdly, it ought not to follow its own previous decision when it is expressly or by necessary implication, overruled by the House of Lords, or it cannot stand with a decision of the House of Lords. There are of course further possible exceptions in addition to the three exceptions ...

[25] Hence, we are of the view that the decision in *Karpal Singh Ram Singh v PP & Another Appeal (No 2)* [supra] is not binding on us as that decision was made per incuriam. We find that section 320 of the CPC has no bearing on a pending appeal in the Court of Appeal, and thus the legal implication of the death of the appellant during the pendency of a criminal appeal before the Court of Appeal cannot be determined by applying the provisions of section 320 of the CPC. The application of section 320 of the CPC must be confined to appeals pending at the High Court. The rule of abatement of criminal appeals contained in section 320 of the CPC does not apply to appeals pending at the Court of

Appeal. And in this regard, we agree with learned counsel for the applicant that there is a lacuna in the law.

**(ii) 2<sup>nd</sup> Issue – What is the effect of death of an appellant on a pending criminal appeal before the Court of Appeal?**

[26] If section 320 of the CPC has no application to pending appeals before the Court of Appeal, what then is the effect of the death of an appellant on a pending criminal appeal before the Court of Appeal? A conviction is not final until all rights of appeal are legally exhausted. That is a fundamental principle of our criminal justice system. The appeal before this court is made pursuant to section 50 of the CJA. However, neither the CJA nor the Rules of the Court of Appeal spell out the effect of an appellant's death on the continuity of the appeal pending at the Court of Appeal. There are also no statutory provisions with regards to the abatement of an appeal at the Court of Appeal upon the death of an appellant. To that extent this application is novel.

[27] The legal principle that a personal right of action, or in this case the personal right of appeal, dies with the person is summed up in the Latin maxim "*action personalis moritur cum persona*". However, in the present case, if the appeal were to finally abate upon his death, it would have legal consequences for the widow. The deceased appellant was a government servant on the

pensionable scheme. As a public servant, the appellant is governed by the General Orders. In the ordinary course of events, the appellant would be interdicted upon being charged for a criminal offence. In fact, as a result of the criminal charge, the appellant was interdicted and suspended from work since 7.10.2016. As a result of the interdiction, he would have lost some of his salary pending the completion of the criminal trial at the Sessions Court, and the exhaustion of the appeal process, both at the High Court and Court of Appeal. If the appellant were to succeed on his appeal, he would be allowed to resume his duties, and shall be entitled to his arrears of salary, and loss of emoluments; and his pension rights would have remained unaffected.

[28] This is provided in Regulation 28(9) of the Public Officers (Conduct and Discipline) Regulations 1993:

“... where criminal proceedings against an officer result in his conviction but on appeal the officer is acquitted, the officer shall be allowed to resume his duties and he shall be entitled to receive any emoluments which had not been paid during the period of his interdiction or suspension or both, as well as the annual leave and other entitlements to which he is entitled during the period of his interdiction or suspension or both”.

See *Shuib bin Abdul Samad @ Zainal v Tan Sri Dato Seri Khalid bin Abu Bakar & Ors* [2017] 4 MLJ 476, where the Court of Appeal allowed the widow of the appellant to substitute and claim arrears in salary, emoluments and other benefits.

[29] Further, Regulation 31(1) of the Public Officers (Conduct and Discipline) Regulations 1993 provides that:

“An officer who is acquitted of a criminal charge in any criminal proceedings shall not be subject to disciplinary action on the same charge.”

Hence, a government servant who has been charged with a criminal offence and acquitted cannot be subjected to further disciplinary action in respect of the same charge. Therefore, it would be in the best interest of such government servant to exhaust the entire criminal trial and appellate process. Thus, the criminal conviction of the appellant, if it were allowed to remain unchallenged, has significant legal consequences to the appellant’s estate, widow and children. To that extent, we find that the appellant’s estate and his widow have sufficient legal interest to protect and pursue the appeal to its finality.

[30] Further, if the appellant’s right of appeal were to abate upon his death the conviction and sentence becomes final. In that event, the appellant would lose all his pension rights. The effect of that in law is that the widow, i.e. the applicant, would be prevented from receiving the pension which would in ordinary circumstance flow to her upon her husband’s death. The applicant is a surviving spouse having sufficient legal interest in the matter.



[31] In *Choo Cheng Liew* [supra] the Federal Court alluded to the reasoning of the High Court judge, where after considering several Indian cases on the issue, held as follows:

These three Indian cases show a singular principle in that **the representative of a deceased convicted person cannot be allowed to appeal unless he could show a legal interest as opposed to a "sentimental interest"**, for example, clearing the name of the convicted person; the exception is in the case of a sentence of fine. In India, where the appeal is against fine, the appeal may be permitted to be continued by the legal representatives of the deceased appellant. In India too, in the case of imprisonment, the sentence does not affect the property of the deceased accused and so the appeal abates upon his death (*Gajapathi Rao* [1964] SC 1645).

Hence, the principle enunciated in these Indian cases, and affirmed by the Federal Court, is that if the conviction and sentence does not affect the property of the deceased, the appeal abates upon the death of the appellant. And if the representative of the deceased convicted person can show sufficient legal interest to be preserved or protected by the continuation of the appeal, then the personal representative may be allowed to substitute for the deceased appellant and continue with the appeal. One such interest was the sentence of a fine, which would save the appeal from abatement, as the fine affects the property that would devolve unto the estate upon the death of the appellant, if the conviction stands. The rationale for that can be gleaned from the judgment of the Indian Supreme Court in *Harnam Singh v The State of HP* 1975 AIR 236; 1975 SCR (2) 823, which was referred to by the Federal Court in *Choo Cheng Liew*

[supra]. Chandrachud J speaking for the Indian Supreme Court in *Harnam Singh* explained the rationale as follows:

The reason of the rule contained in the exception is that a sentence of fine operates directly against the estate of the deceased and therefore the legal representatives are entitled to clear the estate from the liability.

In *Harnam Singh*, Chandrachud J further referred to the case of *Gondada Gajapathy Rao v State of Andhra Pradesh* [1964] 7 S.C.R. 251. In that case, there was an appeal pending at the Supreme Court against conviction and sentence for a charge of murder. The appellant died during the pendency of the appeal, and his son and daughter applied to substitute as his legal representatives contending that the conviction of their father had resulted in his removal from government service, and if the conviction were set aside, the estate will be able to claim the arrears of salary from the date of his conviction till the date of his death. The Indian Supreme Court declined to allow the substitution on grounds that the interest of the legal representatives were contingent and not direct. However, it must be pointed out the interest of the widow in our case is direct, in that she is in the position to draw her late husband's pension if the conviction and sentence are set aside. She has a direct legal interest in the outcome of the appeal.

[32] In *Harnam Singh* [supra] the Indian Supreme Court further noted the unjust and anomalous position of the law, where a mere sentence of a fine would save the appeal from abatement, but not in cases of a sentence of imprisonment where there are far larger property and pecuniary interest at stake. In this regard, the Indian Parliament subsequently amended section 394 of their Criminal Procedure Code, which now reads:

**Section 394(2) in The Code Of Criminal Procedure, 1973**

(2) Every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant: Provided that where the appeal is against a conviction and sentence of death or of imprisonment, and the appellant dies during the pendency of the appeal, any of his near relatives may, within thirty days of the death of the appellant, apply to the Appellate Court for leave to continue the appeal; and if leave is granted, the appeal shall not abate. Explanation.- In this section, "near relative" means a parent, spouse, lineal descendant, brother or sister.  
[Emphasis added]

[33] The main object of the amendment was not only to provide the legal avenue for the surviving spouse or family members of the convicted person who had died during the pendency of the appeal to challenge the conviction and get rid of the odium attaching to the family; but more importantly to allow for the estate or family members to protect and pursue their financial or property interest that would flow from the setting aside of the conviction.

[34] In this regard, it is worth noting that Singapore had also amended its Criminal Procedure Code to similarly allow the widow/widower, personal representative of the deceased or family members with substantial financial interest in the determination of appeal to substitute and prosecute the appeal. Section 393 of their Criminal Procedure Code now reads:

**Death of party to appeal**

393.—(1) Where a person has died —

(a) any relevant appeal which might have been begun by him if he were alive may be begun by a person approved by the High Court; and

(b) where any relevant appeal was begun by him while he was alive or is begun in relation to his case under paragraph (a), any further step which might have been taken by him in connection with the appeal if he were alive may be taken by a person so approved.

(2) The High Court may only give an approval to —

(a) the widow or widower of the deceased;

(b) a person who is the personal representative of the deceased; or

(c) any person appearing to the High Court to have, by reason of a family or similar relationship with the deceased, a substantial financial or other interest in the determination of a relevant appeal relating to him.

Hence, the Singapore position is somewhat similar to India, in that, upon the death of an appellant, a criminal appeal may be continued by a person approved by the court.

[35] The English position on abatement of an appeal upon the death of the appellant can be gleaned from several cases. The first case would be *Hodgson v Lakeman* [1943] 1 KB 15, where the appellant had entered an appeal against conviction and sentence of a fine and died during the pendency of the appeal. Viscount Caldecote CJ held that when an appeal to the High Court against a conviction has been entered but the appellant dies before it has been heard, and it appears that his executors have an interest in the appeal, the Court has jurisdiction to allow the executors to prosecute the appeal. In contrast to that, in *R v Rowe* [1955] 2 All ER 234, in dismissing the application of the widow to substitute the appellant who had died during the pendency of the appeal, Lord Goddard CJ after having referred to *Hodgson v Lakeman*, held that, where the widow of the deceased only wanted to clear his name, neither his widow nor the executors or administrators of the deceased appellant had any legal interest that would justify the Court's allowing them to substitute and continue the appeal. The ground on which the widow's application was supported was that the conviction against her husband affected her chances of employment and her position among her friends. In rejecting that argument, Lord Goddard CJ said that the Court cannot take notice of such a ground for substitution as the interest sought to be exerted by not a pecuniary one and observed:

... we cannot allow a widow or an executor or an administrator of a deceased person to appeal to this court unless they can show a legal interest. ... The basis of intervention, when permitted, is the survival of an interest in the heirs or executors of the deceased. That interest would only be a pecuniary one and where the estate is not affected by the conviction there would be no ground for allowing the intervention of the heir or executor. [Emphasis added]

When deciding whether to allow the intervention of an applicant with sufficient legal interest, the legal maxim "*ubi jus ubi remedium*" (where there is a violation of a right, there must be a remedy) comes into play. And in this regard, Lord Goddard CJ in *R v Rowe* (supra) further observed that the strict application of the principle of abatement can lead to cases where injustice might result if persons having a legal interest in the estate of the deceased were shut out without remedy, and noted that:

In *Hodgson v Lakeman*, to which our attention was called, which was a case before the Divisional Court, but the principle would be the same, the Appellant was dead, and the Court allowed the executors to continue the appeal because there was a pecuniary interest. [Emphasis added]

[36] In the United States of America, some states permit a substitute party to continue the appeal. When considering whether to apply abatement or an alternative doctrine, a myriad of competing interests are taken into account. These, among others, include interest of the defendant's heirs and next of kin. See the illuminating article on the subject by Timothy A. Razel entitled "Dying To Get Away With It: How the Abatement Doctrine Thwarts Justice--And What

Should Be Done Instead” in the Fordham Law Review, 2007 Vol 75 Issue 4 Article 7. In that article, the learned author having discussed the various approaches taken by the state and federal courts in the United States of America in dealing with the issue of abatement, alludes to substitution as one of the option:

D. Option 4: Allow a Substitute Party to Continue the Appeal (Substitution)

An alternative so-called “moderation” approach, followed by some courts, allows a substitute party to continue and resolve the appeal. This is an attempt to balance the conflicting interests at play in the abatement doctrine. It protects the rights of the victims to any restitution, while at the same time, insuring that the late defendant retains his rights to resolve the appeal.

Hawaii, in adopting this alternative, posited the interests protected by substitution as follows: “[The defendant's] family seeks 'vindication' of the deceased. The State has an interest in preserving the presumptively valid judgment of the trial court.” Also, the court recognized that it is equally undesirable to assume the conviction would have been overturned as it would be to deprive the dead defendant of his statutory right to appellate review. It relied heavily on a decision of the Ohio Supreme Court, *State v. McGettrick*, which also adopted substitution.

See for example the majority opinion of the State of Washington’s Supreme Court in *State v Webb* 167 Wn.2d 470 for an application of the above “moderation approach”.

[37] In Canada, the Supreme Court in *R v Smith*, 2004 SCC 14 (CanLII), [2004] 1 SCR 385 held that when an appellant in a criminal appeal dies, the court retains

jurisdiction to proceed with the appeal “in the interest of justice”. The Court further held that:

Once the appeal is properly constituted with a live appellant, the court must then consider whether to exercise its jurisdiction to hear the appeal despite it being rendered moot by the death of the accused, or to abate the appeal. The general test is whether there exist special circumstances that make it “in the interests of justice” to proceed. That question may be approached by reference to the following non-exhaustive factors: the presence of a proper adversarial context; the strength of the grounds of appeal; the existence of special circumstances that transcend the death of the individual/respondent, such as a legal issue of general public importance, a systematic issue related to the administration of justice, or collateral consequences to the family of the deceased, to other interest persons, or to the public; the expenditure of limited judicial (or court) resources; and whether continuing the appeal would go beyond the judicial function of resolving concrete disputes and involve the court in free-standing legislative-type pronouncements more properly left to the legislature itself. Those cases in which it will be proper to exercise jurisdiction will be rare and exceptional. [Emphasis added]

[38] Hence, whilst the doctrine of abatement has taken a firm root in most common law jurisdictions for some time, there has been in the recent years a move to relax and loosen the rigidity of its application, and in appropriate cases where justice demands it, the courts have allowed for substitution and the continued prosecution of the appeal. This is especially so when the party applying to substitute shows a legal interest in prosecuting the appeal in his own behalf or on behalf of the deceased appellant’s estate.



[39] This was the approach taken by the Supreme Court of Nigeria in *Re: Abdullah* (2018) LPELR-45202 (SC). In that case, the Court was faced with a novel issue, which is, whether the applicants (widow and son of the deceased appellant) can substitute the deceased appellant, who had a pending criminal appeal in that Court at the time of his death. The facts were that following the conviction of the deceased appellant in the lower court, his property was forfeited to the respondent by an order of forfeiture. Under Nigerian law the general principle was that upon the death of an appellant in a criminal appeal, the proceeding terminates. However, it was argued by the applicants, who were also the administrators of the estate of the deceased, that the blanket application of the general principle would be unjust and inequitable, as under Nigerian law, unlike civil appeals, there is no provision for continuation of a criminal appeal on the death of the appellant. The applicants submitted that whilst there may not be an express provision for the continuation of a criminal appeal upon the appellant's death, the Court had the power to allow them to continue with the appeal within the limited scope of the application and the peculiar circumstances of the case. The English cases of *R v Rowe* (supra), *Hodgson v Lakeman* (supra) and *R v Jefferies* (1968) 3 All ER 238 were cited and relied on by the applicants in support of their contention that in the absence of specific statutory provisions the courts can allow the continuation of an appeal

in a situation such was presented in that case. The applicants were seeking to be allowed to continue with the appeal limited to the extent of the legal interests of the heirs of the estate of the deceased appellant, and to exercise the inherent power of the Court to provide a remedy to redress the same. The Indian case of *Bondada Gajapathy Rao v State of Andhra Pradesh* (1964) AIR 1645 was also referred. The applicants made it abundantly clear that they wish to continue the appeal to protect their rights as successors and administrators of the estate of the deceased appellant, and nothing more.

[40] Amina Adamu Augie JSC, in allowing the application of the wife and son of the deceased appellant to substitute and continue with the prosecution of the appeal, held as follows:

I have weighed every angle of the arguments for and against this Application, and I find myself leaning towards the position advanced by the Applicants. Yes, with regard to criminal cases, prosecution ceases with the death of an accused, which goes without saying, since no sentence can be passed on the accused, who is already dead. To put it in clear perspective, in a civil trial, if the Plaintiff or Defendant dies, their estate would usually continue. So, if the Plaintiff dies, the beneficiaries and heirs to the Plaintiff's estate inherit the lawsuit, and they may choose to continue to press for damages, which becomes their property.

Similarly, when a Defendant dies during a civil lawsuit, his estate may be forced to defend the Suit in order to prevent a Judgment that is detrimental to the case, and the estate is, therefore, substituted for the deceased Defendant.

In a criminal trial, there is no Plaintiff, and that role is taken by the State, which cannot die. If the accused or defendant dies, that is the end of the case. In this case, the deceased Appellant dies after he filed an Appeal in this Court, wherein he raised the complaint in the said Ground 9 of his Grounds of Appeal.

[41] Ground 9 of the Grounds of Appeal, referred to by Amina Adamu Augie JSC, was on the legality and validity of the forfeiture order made by the lower courts. The effect of that forfeiture order if left unchallenged by the abatement of the appeal would have dire consequences for the estate. In this regard, the learned judge went on to consider the English and Indian cases referred to earlier in this judgment, and surmised as follows:

As I said earlier, I am walking a tightrope in considering this Application; I cannot say that the estate of the deceased Appellant suffered a wrong at the hands of the Respondents; that is a substantive issue best left for the Appeal. However, I can say that the Applicants are entitled to be heard on the matter.

The reason is simple: there is nowhere else for the Applicants to go since the Court of Appeal already made a pronouncement on the merits of the Appeal filed by the deceased Appellant in that Court. The deceased Appellant died after filing the Appeal against the decision of the Court of Appeal in this Court. Yes, the Appeal died with the deceased Appellant, but his estate survived him, and being Administrators of the deceased Appellant's estate, the Applicants have an interest in his estate that lives on, and which cannot be left hanging. Hanging, in the sense that the Court of Appeal is functus officio, and they cannot go to any lower Court to complain about the wrong done to the estate. The Applicants are, therefore, between a rock and a hard place. It is the duty of this Court, which is placed above the Court of Appeal, to provide a remedy, and that it is to allow them air their grievance, and let this Court decide its merit. Obviously, with the arguments raised by the Parties, this is the only way to go. [Emphasis added]

[42] The other four Supreme Court judges in that Nigerian case concurred with the main judgment of Amina Adamu Augie JSC. Kumai Bayang Aka'ahs JSC added:

The interest which will support an application for leave to appeal as interested party must be genuine and legally recognizable interest in respect of a decision which prejudicially affects such a person. And for a person to qualify as a person interested, the applicant must show not only that he is a person having an interest in the matter but also that the order of judgment of the Court below which he is seeking leave to appeal against prejudicially affects his interest. In other words, to succeed in the application, the applicants must show that they are persons who are aggrieved or persons against whom decisions have been produced which have wrongfully refused them something or wrongly affected their title to something. [Emphasis added]

Another of the judges, Kudirat Motonmori Olatokunbo Kekere-Ekun JSC, noted in his judgment that, in addition to the reasons contained in the main judgment of the Court, he too would allow the application for the following reason:

In the Indian and English cases cited by learned counsel for the applicants, I am persuaded that having regard to the fact that the decision of the lower Court affects the pecuniary interest of the applicants in the estate of the deceased ... the justice of the case requires that they be permitted to challenge the decision ...

[43] In the overall, the Nigerian Supreme Court unanimously held that the applicants, being heirs and administrators of the estate of the deceased appellant had a genuine and legally recognizable interest in the estate of the deceased to challenge the forfeiture order, and thus allowed the substitution. The estate's interest was apparent, as a successful prosecution of the appeal

would result in the reversal of the forfeiture order, and hence there was a clear pecuniary and/or property interest, which the estate was entitled to claim.

[44] The Nigerian Supreme Court had also referred to *Bondada Gajapathy Rao v State of Andhra Pradesh* (supra), where the Indian Supreme Court had held:

The principle on which the hearing of a proceeding may be continued after the death of an accused would appear to be the effect of the sentence on his property in the hands of his legal representatives. If the sentence affects that property, the legal representatives can be said to be interested in the proceeding and allow to continue it. A sentence of fine no doubt affects the property. In the present case, however, the sentence was not of fine but of imprisonment which on the death of the accused has become infructuous. There is no one now who can be imprisoned. It is, however, said that though that sentence can no longer be executed, it still affects the property of the deceased and the legal representatives are, therefore, interested in the appeal and should be permitted to continue it.

In *Gajapathy's* case, the Supreme Court did not find such a legal interest to have been demonstrated for the exercise of discretion to allow the substitution. However, that does not detract from the fact that in appropriate cases, where sufficient legal interest is shown, the court does have the power to allow the appeal to continue by the substitution of party with that requisite legal interest.

[45] Similarly, the Federal Court in *Choo Chong Liew* (supra) had held that the “representative of a deceased convicted person cannot be allowed to appeal unless he could show a legal interest as opposed to a ‘sentimental interest’”. Hence, recognizing the principle that in appropriate cases substitution may be

allowed. The applicant for substitution must show it was an exceptional case in which the discretion should be exercised in favour of continuation of the appeal. In the present case, the applicant/widow has shown a genuine and legally recognizable pecuniary interest in pursuing the appeal. In fact, the right to receive derivative pension, if the appeal were to be successful, would be a right to livelihood, to live out her golden years without hardship and with dignity. And the constitutional right to life, as embodied in Article 5(1) of the Federal Constitution, has been interpreted broadly to include the right to livelihood. See: *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771, CA.

[46] In the present case, the applicant is premising her application on her prospective derivative pension rights as a widow of a civil servant who was on the pensionable scheme of service. Pension rights are constitutionally protected under Article 147 of the Federal Constitution and relevant statutes. Whilst section 3(1) of the Pensions Act 1980 says that an officer shall not “have an absolute right to compensation for past service or to any pension, gratuity or other benefit” under the Act, the right to receive pension is statutorily regulated. And once a person comes under the pension scheme, the law would treat all officers under the scheme equally. A civil servant who has not misconducted himself has legitimate expectation to receive pension on his

retirement in accordance to the terms of service, and in the event of his untimely death during service, his widow would be entitled to derivative pension. Section 14(1) of the Pensions Act 1980 provides:

**14 A derivative pension or gratuity where an officer dies in service**

(1) Subject to section 16, where a pensionable officer dies in service, the Yang di-Pertuan Agong may grant to the person prescribed in the regulations a derivative pension of not less than one-fifth of the deceased officer's last drawn salary and a derivative gratuity or a derivative gratuity only.

Further, Regulation 15 of the Pensions Regulations 1980 provides:

(1) A derivative pension or a derivative retiring allowance may be granted to-

(a) the widow or the widower;

...

[47] The fact that the applicant would be entitled to receive derivative pension as the widow of the appellant, if his conviction is quashed, is not in dispute. In this regard, section 21 of the Pensions Act 1980 is instructive, and it reads:

**21 Pension, etc. to cease on conviction**

(1) Subject to subsection (2), where any person to whom a pension or other benefit has been granted under this Act is sentenced to death or to any term of imprisonment by a Court, such pension or other benefit shall cease forthwith.

(2) The pension or other benefit under subsection (1) shall be restored with retrospective effect in the case of a person who after conviction receives a free pardon.

(3) Where a pension or other benefit ceases under subsection (1), the Yang di-Pertuan Agong may grant an alimentary allowance equivalent to the whole or any part of such moneys to which the pensioner would have been entitled by way of pension or other benefit as he thinks proper to the pensioners wife or children for their maintenance and benefit and, after the expiration of his sentence, to such pensioner himself.

Hence, the outcome of the pending appeal will affect the pecuniary rights and interest of the applicant as the widow of the appellant.

[48] It is well settled that an appeal is a continuation of proceedings by way of a rehearing, and an appeal court may subject the evidence to a critical re-examination and the Court of Appeal is free to determine whether or not the findings of the Sessions Court and the High Court are correct. See *PP v. Azilah Hadri & Anor* [2015] 1 CLJ 579, FC; *Ahmad Najib Aris v PP* [2009] CLJ 800, FC. Hence, the finding of guilt and conviction by the trial court, and the High Court on appeal, cannot be construed as being final, when there is a pending appeal at the Court of Appeal, which is a continuation of proceedings. Therefore, there is legitimate expectation for anyone with a legal interest in the outcome of the appeal to exhaust the entire appeal process. Thus, to allow the doctrine of abatement on death to bring an appeal to an abrupt end, and hence, leaving the conviction standing without anything more, could cause injustice to persons with such a legal interest or right.



[49] In the overall, considering the law as it stands, and the development of the law in respect of abatement in other jurisdictions, as well as the justification presented by the applicant to substitute and continue with the appeal, we find that the time has come to loosen the rigid application of the doctrine of abatement, so that justice may be done to parties with sufficient legal interest.

[50] We believe that the time has come for us to move in tandem with developments in this area of the law. As observed by Denning MR in *Parker v Parker* (1954) 15 All ER 22 - “if we never do anything that has not been done before, the law will stand still, while the rest of the world moves on”. This is an area of the law that is ripe for reform. In this regard, it may be appropriate for the Attorney General’s Chambers to consider and propose amendment to section 320 of the CPC, as had been done in other jurisdictions as regards their equivalent statutory provisions.

[51] In the premise of the foregoing, in so far as it concerns pending criminal appeals before the Court of Appeal, we find that in circumstances where the appellant dies during the pendency of the appeal, the appeal does not automatically abate. In appropriate cases where sufficient legal interest is shown, the court does have the power to allow the appeal to continue by the substitution of party with that requisite legal interest. Such legal interest is manifest where there is clear pecuniary and/or property interest, which the

estate, or the applicant, was entitled to claim upon successful prosecution of the pending appeal. We find that, for the reasons discussed above, the applicant as widow of the appellant, has demonstrated sufficient legal interest in the outcome of the appeal to substitute the appellant and continue to prosecute the appeal. The applicant's interest is genuine and legally recognized, and the decision of the Court in respect of the pending appeal would potentially affect her rights to derivative pension. Now, if a sentence of fine, or a composite sentence of fine and imprisonment, could save an appeal from abatement merely by reason of the pecuniary interest of the state and the appellant's estate in the fine, however paltry a sum it may be, then surely a far greater pecuniary interest to derivative pension rights must be accorded equal, if not higher, importance.

[52] Wherefore, we allowed the application in the Notice of Motion (enclosure 15), and made the following orders:

- (a) that the applicant, S. Ponnamah a/p Sinnappan, who is the widow of the appellant is appointed as the personal representative of the deceased appellant;

- (b) that the applicant, S. Ponnamah a/p Sinnappan, as personal representative of the deceased appellant, be allowed to substitute the appellant and continue to prosecute the appeal;
- (c) that the applicant, S. Ponnamah a/p Sinnappan, as personal representative of the deceased appellant, be named as the appellant in place of the deceased appellant in all cause papers filed and to be filed in the proceedings; and
- (d) there shall be no order as to costs.

Dated this 18<sup>th</sup> day of December 2020.

sgd  
Vazeer Alam Mydin Meera  
Judge  
Court of Appeal  
Putrajaya

Counsel for Applicant:  
Mr M Athimulan & Mr R Vikraman

Counsel for Respondent:  
TPR Nurul Farhana binti Khalid