**DALAM MAHKAMAH TINGGI MALAYA DI TEMERLOH**

**DALAM NEGERI PAHANG DARUL MAKMUR, MALAYSIA**

**PERMOHONAN JENAYAH NO: CB-44-5-06/2024**

**Dalam Perkara Mahkamah Sesyen di Raub, Perbicaraan Jenayah No. CC-63-3-01/2022, CC-63-4-01/2022, CC-63-5-01/2022 – Pendakwa Raya lwn Shariffa Sabrina binti Syed Akil**

**Dan**

**Dalam Perkara Fasal 5 Perlembagaan Persekutuan**

**Dan**

**Dalam Perkara Seksyen 425(1)(a) dan 428AA Kanun Tanah Negara [Akta 828]**

**Dan**

**Dalam Perkara Bidang Kuasa Mahkamah Yang Mulia Ini Yang Sedia Ada**

**ANTARA**

**SHARIFFA SABRINA BINTI SYED AKIL**
**(NO. K/P: 620611075536) ... PEMOHON**

**DAN**

**PENDAKWA RAYA ... RESPONDEN**

## ALASAN PENGHAKIMAN

### Pendahuluan

[1] Dalam kes ini melalui notis usul Pemohon memohon agar mahkamah ini menggantung secara kekal pertuduhan-pertuduhan yang dikenakan terhadap Pemohon di Mahkamah Sesyen Raub di bawah kes No. CC-63-3-01/2022, CC-63-4-01/2022 dan CC-63-5-01/2022. Secara alternatifnya kes-kes jenayah tersebut hendaklah dibatalkan.

[2] Asas kepada permohonan ini ialah pertuduhan-pertuduhan tersebut adalah sesuatu yang menyebabkan kegagalan keadilan terhadap Pemohon. Ia juga melanggar Perkara 5 Perlembagaan

Persekutuan. Kelewatan dalam memfailkan pertuduhan terhadap Pemohon adalah memprejudiskan hak Pemohon. Pertuduhan-pertuduhan tersebut adalah cacat kerana Pendakwa Raya gagal mematuhi seksyen 452(1)(a) Kanun Tanah Negara (KTN). Pertuduhan-pertuduhan tersebut cacat kerana tidak mematuhi seksyen 428 AA KTN. Ia juga dikatakan suatu pertuduhan yang menunjukkan Responden mempunyai *mala fide*.

[3] Pemohon telah dituduh di Mahkamah Sesyen dengan pertuduhan-pertuduhan seperti berikut:

(a) Kes No. CC-63-3-01/2022

**<u>Pertuduhan Pindaan</u>**

*Bahawa kamu pada 11 Jun 2021 jam lebih kurang 2.00 petang telah melakukan kesalahan tanpa kebenaran yang sah menduduki tanah kerajaan yang terletak di kordinat VK 433046, 377461, VK 433053, 377445 dan VK 433213, 377471 bersebelahan Lot 26148, GM4135 Mukim Bentong iaitu kawasan Tanah Aina Fareena Café & Restaurant, Daerah Bentong, Pahang Darul Makmur. Oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah Seksyen 425(1)(a) Kanun Tanah Negara 1965 (Akta 828) Revised 2020.*

(b) Kes No. CC-63-4-01/2022

**Pertuduhan Pindaan**

*Bahawa kamu pada 10 Jun 2021 jam lebih kurang 2.00 petang telah melakukan kesalahan tanpa kebenaran yang sah menduduki tanah kerajaan yang terletak di kordinat VE 448568, 435501, VE 448595, 435492 dan VE 448620, 435407 bersebelahan Lot 1053, PM0053 Mukim Ulu Dong, dalam Daerah Raub, di dalam Negeri Pahang Darul Makmur iaitu kawasan Tanah Aina Fahad Glamping Resort. Oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 425(1)(a) Kanun Tanah Negara 1965 (Akta 828) Revised 2020.*

(c) Kes No. CC-63-5-01/2022

**Pertuduhan Pindaan**

*Bahawa kamu pada 10 Jun 2021 jam lebih kurang 2.00 petang telah melakukan kesalahan tanpa kebenaran yang sah menduduki tanah kerajaan yang terletak di kordinat VE 425365, 406725, VE 425374, 406687 dan VE 425379, 406683 bersebelahan Lot 10061, GM 1572 Mukim Tras, dalam Daerah Raub, di dalam Negeri Pahang Darul Makmur iaitu kawasan Tanah Aina Farrah Soraya Exclusive Eco Resort. Oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 425(1)(a) Kanun Tanah Negara 1965 (Akta 828) Revised 2020.*

Ia seperti yang dinyatakan dalam affidavit sokongan Shariffa Sabrina binti Syed Akil.

[4] Apa yang jelas daripada pertuduhan-pertuduhan tersebut ialah Pemohon telah dituduh bagi kesalahan di bawah seksyen 425(1)(a) KTN kerana dikatakan menduduki tanah kerajaan tanpa kebenaran yang sah.

[5] Pemohon menyatakan bahawa yang menduduki tanah yang tidak sah tersebut adalah Tanah Aina Sdn Bhd. Oleh itu sepatutnya Tanah Aina Sdn Bhd perlu dituduh. Ini disokong dengan eksibit-eksibit yang dikemukakan oleh Pemohon menunjukkan surat perhubungan di antara Kerajaan Negeri Pahang dengan Tanah Aina Sdn Bhd di eksibit “SS-7”. Adalah tidak dapat dinafikan bahawa Pemohon adalah salah seorang pengarah syarikat tersebut seperti yang dapat dilihat di eksibit “SS-3” dalam affidavit Sharifah Sabrina.

[6] Pemohon menyatakan bahawa syarikat yang sepatutnya dituduh dalam kes ini bersesuaian dengan seksyen 428AA KTN. Sekiranya syarikat dituduh di bawah seksyen 428AA KTN maka Pemohon boleh dituduh sebagai pengarah syarikat tersebut. Ini tidak berlaku dalam kes ini.

[7] Oleh itu Pemohon menyatakan bahawa pertuduhan tersebut adalah cacat kerana tidak mengikut peruntukan Kanun Tanah Negara.

[8] Sebaliknya, Responden menyatakan bahawa tindakan mengemukakan pertuduhan tersebut adalah didalam wewenang dan budi bicara Pendakwa Raya seperti yang dinyatakan di bawah Perkara 145 (3) Perlembagaan Persekutuan yang dibaca bersama dengan seksyen 376 Kanun Prosedur Jenayah (KPJ). Ia membawa maksud Pendakwa Raya mempunyai budi bicara untuk mengemukakan pertuduhan terhadap seseorang berdasarkan kepada keterangan yang ada. Budi bicara tersebut tidak sewajarnya diganggu gugat oleh mana-mana pihak. Ia adalah ternyata dengan jelas dalam Perlembagaan Persekutuan dan tidak wajar dileraikan dengan membenarkan permohonan-permohonan untuk mempertikaikan budi bicara tersebut. Pihak Responden telah merujuk kes **Karpal Singh & Anor v PP [1991] 1 CLJ Reprint 183** dan **Ahmad Zubair @ Ahmad Zubir bin Hj Murshid v PP [2014] 6 MLJ 831**.

[9] Selain daripada itu, Pemohon juga menyatakan bahawa tindakan pendakwaan yang dilakukan ke atasnya adalah suatu tindakan berniat jahat atau *mala fide*. Ini adalah disebabkan Pemohon telah berjaya dalam semakan kehakiman untuk mengenepikan keputusan yang dibuat oleh Pejabat Daerah & Tanah Raub seperti dalam kes **Tanah Aina Sdn Bhd v Pentadbir Tanah, Pejabat Daerah & Tanah Raub dan lain-lain [2023] 10 MLJ 294**. Dalam affidavit Pemohon juga dinyatakan bahawa terdapatnya hubungan surat menyurat di antara Pemohon dengan Pejabat SUK Negeri Pahang dan Pejabat Daerah & Tanah Raub berkenaan dengan kedudukan tanah-tanah tersebut.

[10] Pemohon juga menyatakan bahawa tindakan pendakwaan itu adalah sesuatu yang menyalahi prinsip Perlembagaan Persekutuan terutamanya di bawah Perkara 5. Ia menghalang pihak Pemohon mendapat perbicaraan adil seperti yang dijamin di bawah Perlembagaan Persekutuan.

**Analisa**

[11] Sebelum kes ini didengar, mahkamah telah mendapatkan pendirian pihak Pemohon dan Responden sama ada mahkamah ini wajar untuk meneruskan pendengaran notis usul ini. Ini adalah disebabkan mahkamah ini telah mendengar kes semakan kehakiman di dalam kes **Tanah Aina Sdn Bhd** (supra) dan juga telah mendengar permohonan Pemohon untuk suatu perintah larangan bersuara *(gag order)* di dalam kes **PP v Shariffa Sabrina binti Syed Akil [2023] 9 CLJ 793**.

[12] Mahkamah ini berpendapat perkara ini perlu dijelaskan kedudukannya oleh pihak Pemohon dan Responden bagi mengelakkan daripada sebarang tindakan mahkamah yang boleh ditafsirkan sebagai memihak kepada pihak Pemohon atau Responden yang memprejudiskan permohonan ini. Ini adalah disebabkan dalam satu prosiding mahkamah, keadilan perlu dilaksanakan dan dapat dilihat ia dilaksanakan. Pihak Pemohon dan Responden telah menzahirkan kedudukan masing-masing yang tidak membantah untuk mahkamah ini meneruskan pendengaran permohonan ini.

[13] Namun demikian, mahkamah juga perlu mempertimbangkan adakah dengan meneruskan perbicaraan, padahal, mahkamah ini telah pernah mendengar kes yang melibatkan Pemohon dan juga telah membenarkan semakan kehakiman akan memprejudiskan pihak Pemohon dan Responden? Sekiranya mahkamah berpendapat bahawa ia akan berlaku sedemikian maka adalah wajar untuk mahkamah ini mengecualikan daripada mendengar kes ini demi untuk memastikan keadilan kepada Pemohon dan Responden ditegakkan.

[14] Dalam kes ini mahkamah mengambil panduan daripada keputusan **Dato' Sri Mohd Najib bin Hj Abdul Razak v Public Prosecutor [2023] 3 MLJ 40** dan **Mohamad Ezam bin Mohd Nor & Ors v Ketua Polis Negara [2002] 1 MLJ 321.** Dalam kes **Mohamad Ezam** (supra) dinyatakan seperti berikut:

> *"In Malaysia, this court in Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1 followed the 'real danger of bias' test in Gough as 'this will avoid setting aside of judgment upon quite insubstantial grounds and the flimsiest pretexts of bias' (p 70). See also Allied Capital Sdn Bhd v Mohamed Latiff bin Shah Mohd and another application [2001] 2 MLJ 305.*
>
> *Having considered the authorities cited and their reasonings, we would follow Gough which is that the test to be applied in the present case is the 'real danger of bias' test. Hence, the question here is whether having regard to the facts and circumstances, was*

*there a real danger of bias on the part of the learned trial judge when he heard the habeas corpus application involving the appellants?*

*In our view, on the facts submitted by counsel and the reasons given by the learned trial judge in the grounds of judgment (at p 601 appeal record), there is no real likelihood of danger, in the sense of a real possibility, of bias on the part of the learned judge when he heard the habeas corpus application. We concede that the only common factor between the appellants and the 'Black 14' judgment of the learned judge is that the appellants were detained by the respondent for organizing demonstrations, one of which was on 14 April 2001 which became the foundation for the 'Black 14' allegation of the respondent. However, we do not think such circumstances give rise to a real danger of bias on the part of the learned judge. Even if we apply the reasonable apprehension of bias test to the circumstances of this case, we would arrive at the same conclusion."*

[15] Dalam kes ini mahkamah berpendapat notis usul ini adalah disokong dengan affidavit-affidavit pihak-pihak yang akan menjadi asas kepada keputusan mahkamah ini. Ia tidak menyentuh secara khusus perkara-perkara yang telah dibangkitkan di dalam dua kes sebelum ini. Kes ini diputuskan tanpa perlu bergantung dengan apa yang telah berlaku di dalam kedua-dua kes tersebut. Mahkamah ini berpendapat ia tidak akan mewujudkan keadaan kecenderungan berat sebelah yang menimbulkan ketidakadilan kepada pihak-pihak. Malahan mahkamah

ini terikat dengan affidavit-affidavit yang difailkan oleh pihak-pihak dan prinsip undang-undang yang mantap berkenaan pembatalan pertuduhan yang telah diputuskan oleh mahkamah. Oleh itu mahkamah ini akan meneruskan dengan pendengaran notis usul ini.

**Budi bicara mahkamah untuk membatalkan satu pertuduhan jenayah**

[16] Adalah menjadi prinsip undang-undang yang jelas bahawa mahkamah boleh menggunakan budi bicara sedia ada bagi mempertimbangkan permohonan untuk membatalkan pertuduhan. Ini telah dinyatakan oleh Mahkamah Agong dalam kes **Karpal Singh** (supra) seperti berikut:

> *"In matters like criminal law of a purely domestic nature, our view is that the Court will only exercise inherent powers where there is miscarriage of justice. The Courts must be careful that the decision is not in conflict with the intention of the Legislature as indicated in statutory powers. The inherent power apparently cannot be invoked to override an express provision of law or when there is another remedy available. Where the Legislature has provided a particular mode of action or has vested an authority with powers to act in a particular manner and has prescribed the conditions limiting the scope of such action, the Court cannot act outside those powers and conditions."*

[17] Ini turut ditegaskan juga oleh Mahkamah Persekutuan dalam kes **Ahmad Zubair** (supra) seperti berikut:

> ***"[24]*** *The next issue is on the inherent power of the court to strike out charge or charges preferred by the public prosecutor on the application by an accused person. We have to come out strongly on this issue because it is our observation that lately there has been growing trend for accused to apply to the High Court by way of a notice of motion to strike out a charge or charges preferred against them by the public prosecutor at the subordinate court relying on Karpal Singh & Anor v Public Prosecutor as the authority. This has resulted in considerable delay in criminal prosecution before the subordinate courts. To illustrate this point further we will take the present case as an example. The appellant was charged before the sessions court on 17 July 2012. However because of the preliminary issues raised on the legality of the charges, as well as the appeal process, it took nearly two years for the full trial to proceed before the sessions court.*
>
> ***[25]*** *In the present case both the High Court and the Court of Appeal held that the High Court has inherent power to set aside and quash or stay the charges permanently against the appellant. Historically the doctrine of inherent power which allowed the High Court to prevent an oppressive and mala fide prosecution, abuse of process and to do wrong in the administration of justice has its origin in the English common law. Such doctrine can be traced in the following cases:*

*(a) Metropolitan Bank Ltd & Anor v Pooley [1881–1885] All ER Rep 949. where it was held:*

*There is an inherent power in every court of justice to stay a manifestly vexatious suit and to prevent vexatious suit and so protect itself from an abuse of its procedure*

*(b) In Connelly v Director of Public Prosecutions [1964] 2 All ER 401, 409, Lord Morris of Borth-Y-Gest said:*

*There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.*

*……*

*The power (which is inherent in a court's jurisdiction) to prevent abuses of its process and to control its own procedure must in a criminal court include a power to safeguard an accused person from oppression or prejudice.*

*(c) In Mills v Cooper [1967] 2 All ER 100, 104 Lord Parker CJ said:*

*Every Court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the court."*

[18] Penelitian kepada kes **Karpal Singh** (supra) tersebut mendapati bidang kuasa sedia ada untuk membatalkan pertuduhan adalah diambil daripada undang-undang di United Kingdom seperti yang dinyatakan dalam kes **DPP v Humphrys [1976] 2 All ER 497** seperti berikut:

> *"I respectfully agree with my noble and learned friend, Viscount Dilhorne, that a judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene. Fortunately, such prosecutions are hardly ever brought but the power of the court to prevent them is, in my view, of great constitutional importance and should be jealously preserved."*

[19] Namun demikian dalam kes **Karpal Singh** (supra) telah dinyatakan bahawa pemakaian prinsip tersebut adalah terikat dengan peruntukkan Perlembagaan Persekutuan. Yang Amat Arif Abdul Hamid Omar, Ketua Hakim Negara ketika itu menyatakan seperti berikut:

> *"Generally the procedure would appear to be that the defendant should apply by motion to a High Court to quash the indictment and he then has to prove either on the face of indictment or by an affidavit that the charge has been preferred without jurisdiction or*

*has a substantial and apparent defect. We are not aware of any Court acting merely on the oral statement of a Counsel.*

*Perhaps it is appropriate that we now pause to consider the constitutional consequence of relying on the English Common Law concept. Unlike, UK, the Constitution of the Federation which is a written law is specifically declared to be supreme law of the land. Also, it is to be noted that UK has no criminal procedure code as enacted by our Legislature. For our immediate purpose we wish to refer to art. 145(3) of the Constitution which states that the Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before Syariah Court etc. The discretion vested in the Attorney General is unfettered and cannot be challenged and substituted by that of the Court's. The reasoning and logic behind such contention is well illustrated in the cases of PP v. Lee Tin Bau, supra, Long bin Samat v. PP [1974] 2 MLJ 152, PP v. Datuk Harun bin Haji Idris & Ors. [1976] 2 MLJ 116, Poh Cho Ching v. PP [1981] CLJ (Rep) 229. In the circumstances it is superfluous to reiterate the same points."*

[20] Selain daripada itu peruntukan yang terdapat dalam Kanun Prosedur Jenayah juga perlu diberi perhatian. Mahkamah Persekutuan dalam kes **Karpal Singh** (supra) tersebut telah menyatakan seperti berikut:

"*Section 173 of the Criminal Procedure Code stipulates the whole procedure in summary trials in the subordinate Courts including Magistrate's Courts. The opening para. (a) provides that the Court should ensure the proper framing of the charge, which must be explained to and understood by the accused before his plea is taken. The next para. (b) relates to convictions upon a plea of guilty. Then para. (c) directs that when an accused claims trial the Court shall hear "all such evidence" as may be produced in support of the prosecution."*

[21] Namun demikian Mahkamah Persekutuan telah memberikan suatu penghakiman yang penting berkenaan dengan perkara ini dalam kes **Karpal Singh** (supra) dengan menyatakan seperti berikut:

*"In the case of obvious abuses or other forms of material defects, it cannot be said that the High Court does not possess the powers to do right and to undo wrong in the course of administration."*

[22] Hal yang sama juga dinyatakan dalam kes **Ahmad Zubair** (supra) berkenaan dengan pemakaian budi bicara sedia ada berkenaan dengan pembatalan pertuduhan. Adalah wajar untuk mahkamah memperturunkan secara terperinci pandangan Mahkamah Persekutuan dalam kes tersebut bagi memahami dan menghayati pemakaian bidang kuasa sedia ada mahkamah dalam konteks pertuduhan jenayah. Mahkamah Persekutuan menyatakan seperti berikut:

*"**[26]** Although we accept the forgoing principles stated above as the correct statement of the law, we must caution ourselves that the inherent powers of the court must be exercised in exceptional circumstances to prevent undue oppression and abuse of the process of the court. it should also be noted that the inherent jurisdiction of the court springs not from legislation but from the nature and constitution of the court as a dispenser of justice! (see Dato' See Teow Chuan & Ors v Ooi Woon Chee & and other applications [2013] 4 MLJ 351). As such we may hasten to add that the inherent jurisdiction of the court is therefore not as wide as it seems to be. Much depends on the facts and circumstances and clearly the court cannot exercise its inherent jurisdiction in respect of any matter covered by specific provisions of the law or if its exercise would infringe any specific provisions of the law. In this aspect it is apposite that we refer to the decision of the Supreme Court of India in the case of Arun Shankar Shukla v State of UP 1999 Cr LJ 3964. The Supreme Court in addressing the inherent powers of the High Court which is statutorily envisaged under s 482 of the Indian Criminal Procedure Code observed that:*

> *It is true that under s 482 of the Code, the High Court has inherent powers to make such orders as may be necessary to give effect to any order under the Code or to prevent the abuse of process of any Court or otherwise to secure the ends of justice. But the expression 'abuse of the process of law' or 'to secure the ends of justice' do not confer unlimited jurisdiction on the High Court and the alleged abused of the*

*process of law or the ends of justice could only be secured in accordance with law including procedural law and not otherwise. Further, inherent powers are in the nature of extraordinary powers to be used sparingly for achieving the object mentioned in s 482 of the Code in cases where there is no express provisions empowering the High Court to achieve the said object It is well neigh settled that inherent powers is not to be invoked in respect of any matter covered by specific provisions of the Code or if its exercise would infringe any specific provisions of the Code. (Emphasis added.)*

***[27]*** *Closer to home the above English common law doctrine of inherent jurisdiction found its way and adopted by the Malaysian Courts in the landmark case of the then Supreme Court case of Karpal Singh & Anor v Public Prosecutor which as stated earlier prompted the appellant in this case to file the motion before the High Court. The issue now is whether such doctrine of inherent jurisdiction and thus inherent power can be exercised to strike out the charges and to have the appellant acquitted and discharged on those charges.*

***[28]*** *In this regard it is appropriate to recall the reminder by the Supreme Court in Karpal Singh v Public Prosecutor of the constitutional consequences of relying on the English concept of common law (one of which is the concept of inherent jurisdiction of the courts). The Supreme Court cautioned that, unlike UK, the*

*Malaysian Federal Constitution which is a written law, is specifically declared to be the supreme law of the land, and that the UK has no criminal procedure code as that enacted by our legislature. The court also considered the effect of s 5 of the Criminal Code which provides for English law relating to criminal procedure to be applied when there does not exist any special provision on the matter either in the Code or any other existing circumstances. In his speech delivering the judgment of the court, Abdul Hamid Omar LP said at pp 548–549:*

> *Perhaps it is appropriate that we now pause to consider the constitutional consequences of reiving on the English common law concept. Unlike UK, the Constitution of the Federation which is a written law is specifically declared to be the supreme law of the land. Also, it is to be noted that UK has no criminal procedure code as enacted by our legislature. For our immediate purpose we wish to refer to art 145(3) of the Constitution which states that the Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before Syariah Court etc. … The discretion vested in the Attorney General is unfettered and cannot be challenged and substituted by that of the court's. The reasoning and logic behind such contention is well illustrated in the case of Public Prosecutor v Lee Tin Bau [1985] 1 MLJ 388, Long bin Samat & Ors v Public Prosecutor [1974] 2 MLJ 152, Public Prosecutor v Datuk Harun bin Haji Idris and Ors [1976] 2 MLJ 116 and Poh Cho*

*Ching v Public Prosecutor [1982] 1 MLJ 86. In the circumstances, it is superfluous to reiterate the same points. Another relevant consideration is our Criminal Procedure Code and its relationship with present English common law. The Criminal Procedure Code (Amendments and Extension) Act 1976, which came into force on 9 January 1976 is applicable to the whole of Malaysia, amending and codifying the previous separate legislations. The Code, as its name suggests was intended to be an exhaustive pronouncement of the criminal procedure. Section 5 of the Code is indicative of the principles to be applied by local courts. This section provides for English law relating to criminal procedure to be applied when there does not exist any special provision on the matter either in the Code or any other existing law. English law is applicable insofar as it does not 'conflict or be inconsistent with this Code and can be made auxiliary thereto.' The pronouncement and effect of the Code leave no lacuna under normal circumstances.*

*Section 173 of the Code stipulates the whole procedure in summary trials in the subordinate courts including magistrate courts. The opening para (a) provides that the court should ensure the proper framing of the charge, which must be explained to and understood by the accused before his plea is taken. The next para (b) relates to convictions upon a plea of guilty. The para (c) directs that when an accused claims*

*trial, the court shall hear 'all such evidence' as may be produced in support of the prosecution.*

*In our considered view, the expression 'all such evidence' is not confined to evidence which is available to the prosecution but which could not be produced for unavoidable reason at a specific date of hearing forming part of the trial. The term 'all such evidence' is to be given a broad interpretation and should be produced at the continued hearing of the trial on the future occasion. Paragraph (d) guides the function of the court to issue summons. Paragraph (e) confirms the traditional right of the accused to cross-examine witnesses against him. The criterion for acquittal or conviction is stated in the next para (f).*

*The following para (g) is the crucial one for discussion in this case. The court may discharge the accused (not acquit) if the court considers the charge to be groundless. The magistrate will have to record the reasons for his decision. If he discharges the accused, there is nothing to prevent the prosecution re-charging the accused. The reason for the discharge may be that the magistrate finds he has no jurisdiction or the charge does not disclose any offence known to the Penal Code or other written law. The only circumstances under which an accused can be acquitted are those stated in para (f) and when the prosecution offers no further evidence because it feels that the prosecution case*

*has collapsed prematurely. There is no provision in the Code for striking out proceedings or acquittal without hearing all evidence the prosecution has the capacity to offer, even though postponements are needed. If any party feels that the charge and consequent proceedings are illegal on the face of record, which we feel is rare, his remedy is to take up appropriate proceedings before a High Court to quash the charge and the whole proceedings producing evidence to the satisfaction of the trial judge to adopt such a case. It is absurd and against common sense to believe that the legislature ever expected members of subordinate judiciary to exercise such vast powers, trespassing into the public prosecutor's area."*

[23] Dalam kes ini adakah terdapat sebarang penyalahgunaan proses mahkamah bagi membolehkan mahkamah menggunakan bidang kuasa sedia ada bagi menghapuskan penyalahgunaan proses mahkamah tersebut? Adakah terdapatnya penindasan kepada pihak Pemohon yang memerlukan mahkamah membatalkan pertuduhan ini? Adakah Responden menggunakan budi bicara dengan membuat pertuduhan di bawah seksyen 425(1)(a) KTN dengan tidak mengemukakan pertuduhan kepada Syarikat Tanah Aina Sdn Bhd? Adakah ia adalah sesuatu yang tidak sah di sisi undang-undang?

[24] Oleh itu keputusan dalam kes **Karpal Singh** (supra) dan **Ahmad Zubair** (supra) itu perlu dilihat dalam perspektif keputusan Mahkamah Persekutuan dalam kes **Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors [2021] 5 MLJ 209**. Ini adalah disebabkan

selepas daripada kes **Sundra Rajoo a/l Nadarajah** (supra) tersebut dakwaan bahawa bidang kuasa pihak pendakwaan membuat pertuduhan tidak boleh dipertikaikan seperti dalam kes **Long bin Samat & Ors v PP [1974] 2 MLJ 152** telah berubah disebabkan kini ia boleh dicabar melalui semakan kehakiman.

[25] Kini keputusan Pendakwa Raya mengemukakan suatu pertuduhan adalah tertakluk kepada semakan kehakiman. Ia adalah oleh dilakukan sekiranya terdapat tuduhan yang tidak sah di sisi undang-undang. Pemakaian prinsip dalam **Sundra Rajoo a/l Nadarajah** (supra) ini diperjelaskan oleh Mahkamah Rayuan dalam kes **PP v. Mahiaddin Md Yasin [2024] 6 CLJ 836** seperti berikut:

> ***"[17]*** *In our opinion, Sundra Rajoo 's case is not applicable to the present appeal because that case involved legal immunity from criminal prosecution. This means the prosecution could not charge the appellant. The charges against the appellant were an illegality and an abuse of process. Whereas, in the present appeal, the issues do not pertain to immunity.*
>
> ***[18]*** *At the end of the day, this court will have to decide whether the four charges against the respondent are an abuse of process. We now move to consider the first ground of complaint."*

**Pertuduhan di bawah seksyen 428AA Kanun Tanah Negara atau seksyen 425(1) Kanun Tanah Negara**

[26] Walau bagaimanapun mahkamah tidak boleh mengenepikan hujahan pihak Pemohon yang menyatakan bahawa pertuduhan sepatutnya di bawah seksyen 428AA KTN. Bagi memahami perkara tersebut wajar mahkamah merujuk kepada seksyen 428AA KTN yang telah diperkenalkan melalui *National Land Code (Revised 2020) Act 828* yang berkuat kuasa pada 15 Oktober 2020.

[27] Penelitian kepada *National Land Code (Revised 2020)* dinyatakan bahawa ia dibuat di bawah seksyen 6(1)(xiii) Akta Penyemakan Undang-undang 1968 yang memperuntukkan seperti berikut:

> *"6. (1) Pesuruhjaya mempunyai kuasa seperti yang berikut:*
> *(i) meninggalkan daripada mana-mana undang-undang yang disemak-*
> *(xiii) mengubah bentuk atau susunan peruntukan mana-mana undang-undang dengan menukar tempat perkataan, dengan mencantumkan kesemuanya atau sebahagiannya dengan suatu peruntukan lain atau peruntukan lain atau dengan memecahkannya kepada dua peruntukan atau lebih."*

[28] Mahkamah Persekutuan telah memperjelaskan pemakaian seksyen 6 Akta Penyemakan Undang-Undang 1968 dalam kes **Lai Hen Beng v PP [2024 1 CLJ 681** seperti berikut:

*"**[73]** As stated earlier, it has not been shown that Parliament or the State Legislature had validly amended the pre-Merdeka law in question. The Revision of Laws Act 1968 (Act 1) ("RLA 1968") does not, in our view, qualify as "any amendments made by Federal or State law". This is also clarified beyond doubt by the lengthy provision of s. 6 of the RLA 1968 which although it allows the Commissioner to make 'amendments' to laws, such amendments, by virtue of sub-ss. (2) and (3), cannot affect the substance of the law. The said s. 6(2) and 6(3) of the RLA 1968 read:*

*(2) In subsection (1) "amendment" includes, where it is used in relation to the powers conferred upon the Commissioner, any variation of any law which is necessary for giving effect to any enactment in any other law whereby the scope, effect or construction of any provision of the first mentioned law is varied, modified, enlarged, restricted, qualified or otherwise affected.*

*(3) The powers conferred on the Commissioner by subsection (1) shall not be taken to imply any power in him to make any alteration or amendment in the substance of any law."*

[29] Ini bermakna bahawa selepas daripada semakan tersebut terdapat peruntukan baharu iaitu seksyen 428AA KTN yang pada hemat mahkamah menunjukkan bahawa apabila sesuatu syarikat dituduh di bawah Kanun Tanah Negara ia juga membolehkan tuduhan dikemukakan kepada pengarah-pengarah syarikat. Adalah didapati bahawa sebelum ini tiada peruntukan sedemikian dimasukkan ke dalam

Kanun Tanah Negara. Ia adalah sejajar dengan kebertanggungjawapan jenayah oleh individu apabila syarikat melakukan satu kesalahan jenayah. Ini telah dinyatakan misalnya dalam kes **Yue Sang Cheong Sdn Bhd v PP [1973] 2 MLJ 77** dan **Tesco Supermarkets Ltd. V Nattrass [1972] AC 154** di halaman 199 seperti berikut:

> *"In my view, therefore, the question: what natural persons are to be treated in law as being the company for the purpose of acts done in the course of its business, including the taking of precautions and the exercise or due diligence to avoid the commission of a criminal offence, is to be found by identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company."*

Ia telah diikuti oleh Mahkamah Persekutuan dalam kes **Yue Sang Cheong Sdn Bhd** (supra).

[30] Apa yang berlaku dalam kes ini ialah Pendakwa Raya telah menggunakan budi bicara bagi membuat pertuduhan di bawah seksyen 425(1) KTN terhadap Pemohon. Apabila sesuatu pertuduhan dikemukakan kepada tertuduh adalah menjadi tanggungjawab Pendakwa Raya untuk membuktikan kesnya di mahkamah. Ini telah dinyatakan dalam kes **Rosli bin Yusof v PP [2021] 4 MLJ 479** seperti berikut:

> ***"[45]*** *It is trite law that it is not the duty of the appellant to prove his innocence or to call a particular witness to support his defence (see Tan Foo Su v Public Prosecutor [1967] 2 MLJ 19; Sandra Margaret Birch v Public Prosecutor [1978] 1 MLJ 72). The law places upon the prosecution the burden to prove guilt of the appellant beyond reasonable doubt and not on the appellant to prove his innocence. Well-entrenched in jurisprudence is the rule that the conviction of the appellant must rest not on the weakness of the defence but on the strength of the prosecution. This principle is the corner stone of our criminal law."*

[31] Ini bermakna Pendakwa Raya bertanggung jawab untuk membuktikan kes ini berdasarkan kepada keterangan-keterangan semasa perbicaraan kelak terhadap pertuduhan yang telah dikemukakan kepada Pemohon. Pemohon akan dapat membela dirinya semasa perbicaraan kelak. Sekiranya pihak Pendakwa Raya gagal membuktikan kesnya ia akan menyebabkan Pemohon akan dibebaskan daripada pertuduhan.

[32] Persoalannya ialah adakah keputusan Pendakwa Raya membuat pertuduhan kepada Pemohon adalah suatu penyalahgunaan proses mahkamah yang boleh mengundang mahkamah menggunakan budi bicara sedia ada. Bagi memahami perkara ini adalah wajar untuk mahkamah meneliti apakah yang dimaksudkan dengan bidang kuasa sedia ada dan pemakaiannya dalam kes ini.

**Bidang kuasa sedia ada Mahkamah**

[33] Jika ditinjau sejarah Undang-undang Inggeris di Tanah Melayu bidang kuasa sedia ada telah dinyatakan di dalam *Second Charter of Justice* yang dikeluarkan pada 27 November 1826 yang menyatakan antara lain seperti berikut:

> *"Such jurisdiction and authority as our Court of King's Bench and our Justices thereof, and also as our High Court of Chancery and our Courts of Common Pleas and Exchequer, respectively, and the several judges, justices, and Barons thereof respectively, have and may lawfully exercise within that part of our United Kingdom called England, in all civil and criminal actions and suits..."*

Ia dipetik daripada Artikel oleh Jeffry D. Pinsler di halaman 2 di dalam artikelnya *The Inherent Powers of the Court*, *1997 Singapore of Journal Legal Stud. 1.*

[34] Hakikat bidang kuasa sedia ada *(inherent jurisdiction)* mahkamah telah dinyatakan dalam artikel *Inherent Jurisdiction of the Court* of *I.H Jacobs* di dalam *Current Legal Problem 1970* halaman 23 di mana di halaman 24 yang telah merumuskan hakikat bidang kuasa sedia ada seperti berikut:

> *"Perhaps the true nature of the inherent jurisdiction of the court is not a simple one but is to be found in a complex of a number of features, some of which may be summarised as follows:*

*(1) The inherent jurisdiction of the court is exercisable as part of the process of the administration of justice. It is part of procedural law, both civil and criminal, and not of substantive law; it is invoked in relation to the process of litigation.*

*(2) The distinctive and basic feature of the inherent jurisdiction of the court is that it is exercisable by summary process, i.e, without a plenary trial conducted in the normal or ordinary way, and generally without waiting for the trial or for the outcome of any pending or other proceeding.*

*(3) Because it is part of the machinery of justice, the inherent jurisdiction of the court may be invoked not only in relation to the litigant parties in pending proceedings, but in relation also to any one, whether a party or not, and in respect of matters which are not raised as issues in the litigation between the parties.*

*(4) The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital juridical distinction between jurisdiction and discretion, which must always be observed.*

*(5) The inherent jurisdiction of the court may be exercised in any given case, notwithstanding that there are Rules of Court governing the circumstances of such case. The powers conferred by Rules of Court are, generally speaking, additional to, and not in substitution of, powers arising out of the inherent jurisdiction of the court. The two heads of powers are generally cumulative, and not mutually exclusive, so that in any given case, the court is able to proceed under either or both heads of jurisdiction".”*

[35] Adalah didapati bahawa bidang kuasa sedia ada *(inherent jurisdiction)* ini boleh dikategorikan secara mudah kepada dua bahagian iaitu bidang kuasa sedia ada mahkamah untuk kes-kes penghinaan mahkamah. Ia boleh dilaksanakan apabila terdapat gangguan semasa prosiding perbicaraan yang menjurus kepada penghinaan mahkamah. Ia juga meliputi kuasa mahkamah untuk menghukum pihak yang melakukan penghinaan mahkamah tersebut. Kuasa ini adalah bagi melindungi pihak-pihak yang berguam daripada diganggu oleh mana-mana pihak semasa menjalankan ataupun mengendalikan kes mereka di mahkamah. Kedua, bidang kuasa sedia ada mahkamah yang berkaitan perkara-perkara yang selain daripada penghinaan mahkamah ia hanya boleh dilakukan berkaitan dengan pihak-pihak di dalam suatu prosiding dan isu-isu yang ditimbulkan semasa perbicaraan. Ia bagi membolehkan mahkamah menghalang pihak-pihak daripada menyalahgunakan proses mahkamah. Malahan penggunaan bidang kuasa sedia ada ini tidak boleh dilakukan dengan tidak memberi

peluang kepada pihak yang terlibat didengar oleh mahkamah. Ini telah dinyatakan oleh I.H Jacob dalam artikel yang sama seperti berikut:

> *"On the other hand, if the inherent jurisdiction of the court is invokes in respect of conduct other than a contempt of court as such, the power to proceed summarily is exerciable only in relation to the parties to the litigation and only in respect of the isues or questions raised in the litigation, so that by the exercise of its inherent jurisdiction the court prevents the litigant parties from abusing its process.*
>
> *It means the exercise of the powers of the court to punish or to terminate proceesings without a trial, ie, without hearing the evidence of witnesses examined orally and in open court. It does not mean that the court can be capricious, arbitrary or irregular, or can proceed against the offender or the party affected without his having due opportunity of being heard; but summary process does mean that the court adopts a method of procedure which is different from the ordinary normal trial procedure."*

[36] Selain daripada itu mahkamah juga perlu mengambil perhatian bahawa kuasa sedia ada tidak boleh digunakan dengan sewenang-wenangnya jika terdapat remedi lain yang boleh diperolehi oleh Pemohon. Ini telah ditegaskan oleh Mahkamah Rayuan dalam kes **Mohd Rafizi Ramli v. PP [2014] 4 CLJ 1** seperti berikut:

*"**[17]** For the reasons as explained above, we find that there is no evidence that there was any mala fide on the part of the prosecution in instituting the charges against the appellant. It is also our finding that there is no plausible reason for the High Court to interfere with the prosecution's duty in the said criminal proceedings against the appellant. To our mind, the appellant is not precluded from raising what he is alleging in his application, in his defence at the hearing of the criminal trial against him. From that point of view, we also find that there is no miscarriage of justice to justify any exercise of the inherent jurisdiction of the High Court.* ***Inherent power cannot be invoked when there is another remedy available, namely the right to be heard at the trial proper."***

[37] Dalam kes ini mahkamah berpendapat salah satu remedi yang tersedia kepada pihak Pemohon ialah permohonan untuk pertimbangan mahkamah bicara untuk pertuduhan yang tidak mempunyai asas seperti yang diperuntukkan di bawah seksyen 173(g) KPJ. Ini boleh dilakukan semasa perbicaraan di mahkamah.

**Perkara 5 Perlembagaan Persekutuan**

[38] Selain daripada itu mahkamah juga perlu mempertimbangkan alasan Pemohon yang mendakwa bahawa tindakan Pendakwa Raya mengemukakan pertuduhan sedemikian adalah bercanggah dengan hak Pemohon yang dijamin di bawah Perkara 5 Perlembagaan Persekutuan. Ia disebabkan Pemohon tidak dapat menikmati

perbicaraan yang adil dengan pertuduhan yang dikemukakan. Perkara 5 Perlembagaan Persekutuan memperuntukkan seperti berikut:

***"5 Liberty of the person***

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

*(2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.*

*(3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.*

*(4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority:*

*Provided that this Clause shall not apply to the arrest or detention of any person under the existing law relating to restricted residence, and all the provisions of this Clause shall be deemed to have been an integral part of this Article as from Merdeka Day:*

*Provided further that in its application to a person, other than a citizen, who is arrested or detained under the law relating to immigration, this Clause shall be read as if there were substituted for the words "without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey)" the words "within fourteen days":*

*And provided further that in the case of an arrest for an offence which is triable by a Syariah court, references in this Clause to a magistrate shall be construed as including references to a judge of a Syariah court.*

*(5) Clauses (3) and (4) do not apply to an enemy alien."*

[39] Isu berkenaan dengan pembatalan pertuduhan dan kaitannya dengan Perkara 5 Perlembagaan Persekutuan telah dijelaskan dengan menarik oleh mahkamah dalam kes **Anuar Ghazali v. PP [2021] 2 CLJ 245** yang mengaitkan Perkara 5 Perlembagaan Persekutuan dengan pertuduhan yang cacat. Ini dapat dilihat di perenggan [65] hingga [74]. Apa yang lebih menarik ialah di perenggan [74] seperti berikut:

***"[74]** In the present matter, the applicant has deposed that he has suffered prejudice due to the defective charges, he cannot instruct his counsel and neither can he understand the charges. These facts are uncontroverted, and facts which are no longer in potentia. It is the finding of this court that from the uncontroverted facts deposed by the applicant juxtaposed with the object of s. 154*

*CPC, a breach of procedural failure has occurred which has caused prejudice to the applicant. There can never be any prejudice on the part of the respondent since they ought to know the theory of the case and the evidence to be produced. It can never be prejudicial to them to disclose the contract in order for the applicant to be better prepared in his defence. The High Court is vested with the power and jurisdiction to arrest a wrong at limine. It is of the considered view that the infringement of the applicant's constitutional rights herein is an abuse of process sufficient to trigger the court's inherent power to strike out the proceedings in the Magistrate's Court."*

[40] Penelitian kepada kes **Anuar Ghazali** (supra) menunjukkan bahawa kecacatan dalam pertuduhan telah diputuskan menyebabkan tertuduh tidak dapat mengendalikan kesnya dengan sewajarnya. Ia telah terjumlah kepada ketidakadilan perbicaraan. Ini telah menyebabkan mahkamah telah membenarkan permohonan Pemohon untuk membatalkan pertuduhan tersebut.

[41] Mahkamah ini juga merujuk kepada keputusan Mahkamah Persekutuan dalm kes **Alma Nudo Atenza v. PP & Another Appeal [2019] 5 CLJ 780** bagi melihat bagaimanakah hubungan Perkara 5 Perlembagaan Persekutuan dengan jaminan kepada perbicaraan adil seperti berikut:

*"**[109]** Accordingly, art. 5(1) which guarantees that a person shall not be deprived of his life or personal liberty (read in the widest*

*sense) save in accordance with law envisages a State action that is fair both in point of procedure and substance. In the context of a criminal case, the article enshrines an accused's constitutional right to receive a fair trial by an impartial tribunal and to have a just decision on the facts. (See: Lee Kwan Woh (supra) at para. [18]).”*

[42] Dalam kes tersebut Mahkamah Persekutuan berpandangan bahawa penggunaan anggapan berganda di bawah seksyen 37(d) dan (da) Akta Dadah Berbahaya 1952 adalah tidak sejajar dengan jaminan hak di bawah Perkara 5 Perlembagaan Persekutuan. Ini ditegaskan seperti berikut:

***“[146]*** *The presumptions under sub-ss. 37(d) and (da) relate to the three central and essential elements of the offence of drug trafficking, namely, possession of a drug, knowledge of the drug, and trafficking. We have already discussed this point earlier in this judgment. The actual effect of the presumptions is that an accused does not merely bear an evidential burden to adduce evidence in rebuttal of the presumptions. Once the essential ingredients of the offence are presumed, the accused is placed under a legal burden to rebut the presumptions on a balance of probabilities. In our view, it is a grave erosion to the presumption of innocence housed in art. 5(1) of the FC.*

***[147]*** *But the most severe effect, tantamount to being harsh and oppressive, arising from the application of a "presumption upon a presumption" is that the presumed element of possession under sub-s. 37(d) is used to invoke the presumption of trafficking under sub-s. 37(da) without any consideration that the element of possession in sub-s. 37(da) requires a 'found' possession and not a 'deemed' possession. The phrase 'any person who is found in possession of' entails an affirmative finding of possession based on adduced evidence. (See: Mohammed bin Hassan (supra) ).*

***[148]****Section 37A was legislated to facilitate the invocation of the two presumptions yet there was no amendment to sub-s. 37(da). As such and as discussed earlier on in this judgment, to invoke a presumption of trafficking founded not on proof of possession (which currently the subsection demands) but on presumed possession based on proof of mere custody and control, would constitute a grave departure from the general rule that the prosecution is required to prove the guilt of an accused beyond a reasonable doubt.*

***[149]*** *Further, the application of what may be termed the "double presumptions" under the two subsections gives rise to a real risk that an accused may be convicted of drug trafficking in circumstances where a significant reasonable doubt remains as to the main elements of the offence. In such circumstance, it cannot be said that the responsibility remains primarily on the*

*prosecution to prove the guilt of the accused beyond a reasonable doubt.*

***[150]*** *Based on the factors above - the essential ingredients of the offence, the imposition of a legal burden, the standard of proof required in rebuttal, and the cumulative effect of the two presumptions - we consider that s. 37A constitutes a most substantial departure from the general rule, which cannot be justified and disproportionate to the legislative objective it serves.* ***It is far from clear that the objective cannot be achieved through other means less damaging to the accused's fundamental right under art. 5.*** *In light of the seriousness of the offence and the punishment it entails, we find that the unacceptably severe incursion into the right of the accused under art. 5(1) is disproportionate to the aim of curbing crime, hence fails to satisfy the requirement of proportionality housed under art. 8(1).”*

[43] Sebaliknya dalam kes ini kecacatan pertuduhan pada hemat mahkamah tidak menjadi isu. Apa yang ditimbulkan oleh Pemohon ialah tindakan Pendakwa Raya mengemukakan pertuduhan di bawah seksyen 425(1) KTN dan bukannya seksyen 428AA KTN telah menjejaskan hak Pemohon untuk mendapatkan perbicaraan yang adil. Pada hemat mahkamah pelaksanaan budi bicara Pendakwa Raya untuk mengemukakan satu pertuduhan tidak semestinya *ipso facto* telah menyebabkan pencerobohan kepada hak Pemohon di bawah Perkara 5 Perlembagaan Persekutuan. Ini adalah disebabkan

Pendakwa Raya menjalankan budi bicara tersebut di bawah Perkara 145 Perlembagaan Persekutuan digandingkan dengan seksyen 376 KPJ. Ia adalah tindakan yang dilakukan di bawah payung Perlembagaan Persekutuan. Mahkamah ini berpendapat melainkan dapat ditunjukkan bahawa Pendakwa Raya telah melaksanakan budi bicara dengan pertuduhan yang tidak sah di sisi undang-undang maka adalah sukar untuk menyatakan bahawa tindakan Pendakwa Raya itu telah menjejaskan hak Pemohon yang dijamin oleh Perlembagaan Persekutuan. Dalam kes ini mahkamah mendapati affidavit-affidavit yang difailkan oleh Pemohon tidak menunjukkan hal sedemikian.

[44] Oleh itu mahkamah ini berpendapat keputusan Pendakwa Raya untuk membuat pertuduhan di bawah seksyen 425(1)(a) KTN dan bukannya seksyen 428AA KTN adalah tidak dapat ditunjukkan menyalahi Perkara 5 Perlembagaan Persekutuan. Ia adalah dalam budi bicara Pendakwa Raya untuk berbuat demikian seperti yang peruntukan di bawah Perkara 145(3) Perlembagaan Persekutuan. Mahkamah ini berpendapat tiada asas untuk mahkamah ini membatalkan pertuduhan yang dikemukakan kepada Pemohon berdasarkan kepada perlanggaran Perkara 5 Perlembagaan Persekutuan seperti yang dinyatakan oleh Pemohon.

***Mala fide***

[45] Pemohon di dalam affidavit sokongannya di perenggan 59 menyatakan bahawa pertuduhan yang dikemukakan telah dibuat secara *mala fide*. Ini adalah kegagalan Responden menghormati

perintah Mahkamah Tinggi Malaya Temerloh dalam semakan kehakiman. Ia adalah disebabkan Exco Kerajaan Negeri Pahang gagal mempertimbangkan semula permohonan Tanah Aina Sdn Bhd bagi pembaharuan lesen pendudukan sementara.

[46] Apa yang dapat difahami alasan Pemohon bahawa terdapatnya mala fide bagi pertuduhan terhadapnya adalah kaitan yang dikatakan wujud di antara keputusan Exco Kerajaan Negeri Pahang dengan keputusan mengemukakan tertuduh oleh Pendakwa Raya terhadap Pemohon. Adalah menjadi undang-undang yang mantap bahawa dakwaan *mala fide* oleh seseorang hendaklah dibuktikan dan bukan hanya berdasarkan kepada suatu spekulasi yang tidak disokong oleh keterangan. Perkara ini telah dinyatakan oleh Majlis Privy dalam kes **Yeap Seok Pen v Government of the State of Kelantan [1986] 1 MLJ 449** di mana Lord Griffiths menyatakan seperti berikut:

> *"This passage puts his earlier observations in context and shows that the Lord Justice did not intend to cast doubt upon the burden that lay upon him who asserted bad faith to at least establish a prima facie case. This is the correct approach. He who asserts bad faith has the burden of proving it, mere suspicion is not enough. In deciding whether the burden is discharged, the court will consider all the evidence before it, including any explanation given by the Minister and any inference to be drawn from the failure to give an explanation. Their Lordships can see no reason to suppose that this was not the approach adopted in the Federal Court."*

[47] Malahan isu berkenaan dengan *mala fide* yang dikatakan menjadi asas kepada permohonan untuk suatu pertuduhan itu adalah penyalahgunaan proses mahkamah telah dijelaskan oleh Mahkamah Rayuan dalam kes **Mohd Rafizi Ramli** (supra) seperti berikut:

> ***"[17]*** *For the reasons as explained above, we find that there is no evidence that there was any mala fide on the part of the prosecution in instituting the charges against the appellant. It is also our finding that there is no plausible reason for the High Court to interfere with the prosecution's duty in the said criminal proceedings against the appellant. To our mind, the appellant is not precluded from raising what he is alleging in his application, in his defence at the hearing of the criminal trial against him. From that point of view, we also find that there is no miscarriage of justice to justify any exercise of the inherent jurisdiction of the High Court. …"*

[48] Dalam kes ini mahkamah mendapati bahawa affidavit sokongan pihak Pemohon tidak dapat menunjukkan keterangan yang jelas berkenaan tindakan pendakwaan terhadapnya adalah suatu *mala fide*. Ketiadaan keterangan-keterangan tersebut telah menyebabkan mahkamah ini tidak dapat menerima asas permohonan Pemohon untuk membatalkan pertuduhan atas alasan *mala fide* oleh Responden.

**Salah laksana keadilan *(miscarriage of justice)***

[49] Pemohon di dalam affidavit sokongan dan hujahan bertulis menimbulkan isu mengenai pengemukaan pertuduhan ini adalah satu salah laksana keadilan kepada Pemohon. Ini adalah disebabkan Responden pada masa yang matan tahu bahawa Pemohon bukannya individu yang patut dituduh. Ia disebabkan tanah di dalam kordinat yang dinyatakan pada kertas pertuduhan diduduki oleh Tanah Aina Farrah Soraya Exclusive Eco Resort, Tanah Aina Fareena Café & Restaurant dan Tanah Aina Fahad Glaming Resort. Ini dinyatakan di perenggan [54] hingga [55] affidavit Shariffa Sabrina.

[50] Salah laksana keadilan *(miscarriage of justice)* telah ditakrifkan di dalam *Black's Law Dictionary 7th Edition* seperti berikut:

> ***"miscarriage of justice*** *– A grossly unfair outcome in a judicial proceeding, as when a defendant is convicted despite a lack of evidence on an essential element of the crime. – Also termed failure of justice."*

[51] Ia juga telah diberikan takrifan yang menarik oleh Walker dalam *Clive Walker, Miscarriages of Justice in Principle and Practice in Miscarriage of Justice: A Review of Justice in Error, ed, Clive Walker and Keir Starmer (London: Blackstone, 1999)* seperti berikut:

> *"occurs whenever suspects...defendants or convicts are treated by the State in breach of their rights, whether because*

*of deficient process or the laws which are applied to them, or because there is no factual justification for the applied treatment or punishment, or whenever they are treated adversely by the State to a disproportionate extent in comparison with the need to protect the rights of others, or wheneverthe rights of others are not effectively or proportionately protected or vindicated by State action against the wrongdoers or/by the State law itself."*

[52] Definasi ini dipetik dan dinyatakan melalui artikel bertajuk *Miscarriage of Criminal Justice: The Appeal Process and Post-Conviction Review,* 31(S1) 2023 IIUMLJ 111-142 oleh Tang Jia Yearn dan Muhammad Helmi Md. Said.

[53] Adalah juga didapati bahawa keadaan bagaimana salah laksana keadilan *(miscarriage of justice)* boleh digunakan telah dijelaskan oleh mahkamah. Ini dapat dilihat dalam keputusan Mahkamah Agong dalam kes **Kiew Foo Mui & Ors v Public Prosecutor [1995] 3 MLJ 505** di mana Hakim Edgar Joseph Jr menyatakan seperti berikut:

*"The expression 'miscarriage of justice' occurring in s 6(1) of the New South Wales Criminal Appeal Act 1912 (equivalent to our s 422 of the Criminal Procedure Code), was construed by Fullagar J speaking for the High Court of Australia, in Mraz v R (1955) 93 CLR 493 folld at p 514 in the following terms:*

*It is very well established that the proviso to s 6(1) does not mean that a convicted person, on an appeal under the Act,*

*must show that he ought not to have been convicted of anything. It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried.*

*Similarly, the expression 'failure of justice' occurring in s 535(1) of the Indian Criminal Procedure Code (equivalent to our s 422 of the Criminal Procedure Code) was construed by Hegde J in Krishna Murthy v Abdul Subban (1965) 1 Cr LJ 565 folld at p 576, in the following terms:*

*The expression 'a failure of justice has in fact been occasioned thereby' found in s 535(1) Cr PC does not connote that the court should be of the opinion that an innocent person has been convicted or the case against the accused person is not made out beyond reasonable doubt. An accused person is entitled to be acquitted whether there was a fair trial or not if no case is made out against him. For*

*that purpose the Legislature need not have introduced the conception of 'failure of justice' in ss 535 and 537 Cr PC. The 'failure of justice' mentioned therein is that occasioned by the contravention of the provisions in Chap XIX Cr PC. In law the expression 'justice' comprehends not merely a just decision but also a fair trial. Sections 535 and 537 Cr PC have primarily in view a fair trial. For the purpose of those sections a denial of fair trial is denial of justice. One of the contents of natural justice, which is so much valued, is the guarantee of a fair trial to an accused person. A fair trial is as important as a just decision. Neither the one nor the other can be sacrificed. Sacrifice of the one, in the generality of cases, is bound to lead to the sacrifice of the other. The two are closely interlinked.*

*The expression 'failure of justice' is, therefore, synonymous with the expression 'miscarriage of justice'.*

*In our view, therefore,* ***the effect of the breaches of their respective duties imposed by law on the prosecution, the defence and the learned judge, to which we have referred, was to sever an important artery of evidence from the consideration of the assessors, so far as the defence were concerned, thereby occasioning a failure of justice****, within the meaning of s 422 of the Criminal Procedure Code and the authorities to which we have referred and, on this ground alone, the convictions were unsustainable."*

[54] Mahkamah juga meneliti keputusan Mahkamah Agong dalam kes **Ti Chuee Hiang v Public Prosecutor [1995] 3 CLJ 1** apabila isu berkenaan dengan kegagalan pihak pendakwaan memanggil saksi iaitu pemberi maklumat telah dikatakan sebagai suatu salah laksana keadilan. Ini dapat dilihat seperti berikut:

> *"We also observed that although Counsel for the appellant did, in the course of his address in the Court below, criticize the prosecution for failing to call the informer, nowhere in his judgment did the Judge direct his attention to this point. This, in our view, was a serious misdirection by way of non-direction which had occasioned a grave miscarriage of justice.*
>
> *Before us, no suggestion was made by the Deputy Prosecutor that this was a case for the application of the proviso to s. 60 of the Courts of Judicature Act, 1960. In our view, he was right in not advancing any such suggestion because it would have been impossible for us to come to the conclusion that there was no miscarriage of justice, as we would be in no position to predict what the informer or his friend would have said had they been called by the prosecution, how they would have responded to cross-examination by the defence and what the effect of their testimony would have been on the mind of the trial Judge."*

[55] Malahan Mahkamah Persekutuan juga berpandangan bahawa penggunaan duluan kehakiman yang telah dimansuhkan oleh keputusan yang terkini juga boleh tergolong di dalam salah laksana undang-undang. Ini dinyatakan dalam kes **Setiakon Engineering Sdn Bhd v Mak Yan Tai & Anor [2024] CLJU 1625** seperti berikut:

> ***"[54]*** *Without imputing any element of dishonesty on anyone and certainly not on learned counsel for the appellant whom I consider to be an advocate of unquestionable integrity, I am taking the liberty to remind lawyers to make sure that the cases that they cite in support of their arguments are not cases that have been overruled and which no longer represent the law or worse unfavourable to them. A serious miscarriage of justice may potentially be occasioned if the court were to unwittingly rely on the overruled cases in arriving at its decision on crucial aspects of the case. While it is true that the court must be vigilant, it is not expected to know every case that has been overruled."*

[56] Oleh itu bagi menentukan wujudnya salah laksana keadilan mahkamah perlu meneliti keadaan-keadaan yang boleh disimpulkan sebagai salah laksana keadilan. Misalnya kegagalan memberi arahan yang sewajarnya kepada juri dalam perbicaraan yang kini tidak lagi diamalkan, kegagalan mematuhi prinsip undang-undang keterangan dengan menerima masuk keterangan-keterangan yang tidak sewajarnya, kegagalan untuk memberi peluang kepada pihak-pihak mengemukakan bantahan atau hujahan di mahkamah dan pengemukaan autoriti-autoriti yang telah dibatalkan. Apa yang

dinyatakan di atas bukanlah suatu yang tuntas bagi menentukan salah laksana keadilan. Ia bergantung kepada fakta dan perjalanan sesuatu kes sehingga menjejaskan keadilan.

[57] Dalam ke sini mahkamah mendapati bahawa keputusan untuk mengemukakan pertuduhan tersebut tidak ditunjukkan oleh Pemohon dibuat dengan tujuan untuk memprejudiskan Pemohon. Apa yang mahkamah dapati ia hanyalah merupakan satu persepsi yang difahami oleh Pemohon bahawa tindakan Pendakwa Raya mengemukakan tuduhan sedemikian adalah kesan langsung daripada keputusan mahkamah di dalam semakan kehakiman yang telah dikemukakan oleh Pemohon. Mahkamah berpendapat sangkaan yang tidak disokong dengan apa-apa keterangan adalah suatu yang tidak dapat membantu mahkamah ini untuk membuat dapatan bahawa pertuduhan ini perlu dibatalkan atau asas ianya sesuatu salah laksana keadilan.

[58] Sebaliknya mahkamah berpendapat bahawa tindakan yang dilakukan oleh Responden dalam kes ini adalah tidak tergolong dalam salah laksana keadilan bagi dijadikan asas untuk pembatalan pertuduhan terhadap Pemohon di Mahkamah Sesyen.

**Nota Hujung**

[59] Adalah wajar untuk mahkamah ini menegaskan bahawa dalam satu prosiding di mahkamah setiap dakwaan hendaklah dibuktikan dengan keterangan. Sebarang spekulasi yang tidak disokong oleh keterangan tidak dapat melunaskan tanggungjawab pembuktian pihak-

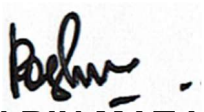
pihak dalam satu prosiding mahkamah. Mahkamah juga tidak wajar memutuskan satu kes berdasarkan kepada spekulasi semata-mata. Ia hendaklah dibuktikan melalui keterangan seperti yang diperuntukkan di bawah Akta Keterangan 1950 dan sekiranya keterangan-keterangan tersebut adalah melalui affidavit maka peruntukan berkenaan keterangan affidavit di bawah Kaedah-kaedah Mahkamah 2012 terpakai. Begitu juga undang-undang berkaitan dengan affidavit juga perlu dipatuhi. Jika ini dilakukan maka pihak-pihak dan mahkamah akan memutuskan sesuatu pertikaian berdasarkan kepada keterangan dan undang-undang semata-mata. Ia tidak akan dipengaruhi oleh faktor-faktor luaran yang tidak dapat dibuktikan melalui keterangan atau bercanggah dengan prinsip undang-undang. Sesungguhnya perkara ini amat penting difahami dan dihayati oleh para peguam, pendakwa raya dan mahkamah bagi menjamin kelestarian dan keyakinan kepada sistem keadilan.

[60] Selain daripada itu adalah tidak dapat disangkal bahawa hak individu yang dijamin di bawah Perlembagaan Persekutuan adalah wajib dipertahankan. Sebarang perlanggaran kepada jaminan Perlembagaan Persekutuan tidak boleh dibenarkan. Walau bagaimanapun semasa mengutarakan perlanggaran hak di bawah Perlembagaan Persekutuan tersebut ia perlu dikemukakan mengikut undang-undang dan hendaklah disokong dengan keterangan-keterangan. Sesungguhnya hak yang dijamin di bawah Perlembagaan Persekutuan bukannya satu fatamorgana yang boleh diungkapkan di bibir semata-mata. Ia hendaklah disokong dengan keterangan di mahkamah.

**Perintah Akhir**

[61] Setelah meneliti affidavit-affidavit, hujahan-hujahan dan autoriti-autoriti yang dikemukakan, mahkamah berpendapat bahawa notis usul ini adalah ditolak.

Bertarikh: 08 hb. Ogos 2024



**(ROSLAN BIN MAT NOR)**
**HAKIM**
**MAHKAMAH TINGGI MALAYA**
**TEMERLOH, PAHANG DARUL MAKMUR**

**PIHAK-PIHAK:**

Bagi Pihak Pemohon
Rajesh Nagarajan, Sachpreetraj Singh Sohanpal dan Ambbi Balakrishnan
Tetuan Raj & Sach
Petaling Jaya, Selangor Darul Ehsan

Bagi Pihak Responden

Shahrizat bin Ismail, Ain-Nur ‘Amiyerra Awod binti Abdullah, Lee Wai Yi dan Syed Ahmad Khabir bin Abdul Rahman

Timbalan Pendakwa Raya

Temerloh, Pahang Darul Makmur