

DATO' SRI MOHD NAJIB BIN HJ ABD RAZAK v PENDAKWA RAYA

[CaseAnalysis](#)

[2019] MLJU 282

[Dato' Sri Mohd Najib bin Hj Abd Razak v Pendakwa Raya \[2019\] MLJU 282](#)

Malayan Law Journal Unreported

FEDERAL COURT (PUTRAJAYA)

RICHARD MALANJUM, CJ, ZAHARAH IBRAHIM, CJM, DAVID WONG DAK WAH, CJSS, RAMLY ALI, TENGKU MAIMUN TUAN MAT, IDRUS HARUN AND NALLINI PATHMANATHAN FCJJ

RAYUAN JENAYAH MAHKAMAH PERSEKUTUAN NO: 05(L)-77-03/2019(W)

10 April 2019

*Muhammad Shafee bin Abdullah, **Al-Firdaus** Shahrul, Wan Aizuddin bin Wan Mohammed, Rahmat bin Mohamed Hazlan, Muhammad Farhan bin Muhammad Shafee, Nur Syahirah binti Haji Hanapiyah & Zahria Eleena binti Ahmad Redza (Shafee & Co.) for the appellant.*
Tommy Thomas, V. Sithambaram, Hj. Sulaiman Abdullah, Donald Joseph Franklin, Budiman Lutfi bin Mohamed & Muhammad Izzat bin Fauzan for the respondent.

Idrus bin Harun FCJJ:**JUDGEMENT OF THE COURTS**

[1] The appellant filed a Notice of Motion in case number WA-44-160- 10/2018 dated 2.10.2018 seeking an order for the pre-trial production by the respondent as Public Prosecutor of certain documents, information and reports, statements of witnesses, books, accounts, computerized data, articles and list of witnesses, the respondent intends to call during the case for the prosecution.

[2] The High Court dismissed the said Notice of Motion on 18.12.2018 and the appellant's appeal to the Court of Appeal was dismissed on 21.3.2019. The appeal before this Court is against the said decision of the Court of Appeal.

[3] Whilst the Notice of Motion was pending hearing in the High Court, the respondent had by then delivered all the documents required to be delivered under [section 51A](#) of the *Criminal Procedure Code* (the Code) in 32 volumes comprising approximately 7000 pages.

[4] The appellant faces 7 criminal charges consisting of 1 charge under [section 23](#) of the [Malaysian Anti-Corruption Commission Act 2009](#) (the MACCA), 3 charges under [section 409](#) of the [Penal Code](#) and 3 charges under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (the AMLATFAPUA).

[5] In view of the prosecution's compliance with section 51A of the Code, the scope of the appellant's application before the High Court is therefore limited only to prayers 1(g), (h), (i), (j) and 2(b)(i) of the Notice of Motion.

[6] The appellant seeks 2 principal types of information from the respondent as described in the Notice of Motion. These are firstly, statements given by witnesses to the Malaysian Anti-Corruption Commission (MACC) and

secondly, other documents obtained by the MACC under the relevant provisions of the MACCA and [section 40](#) of the *AMLATFAPUA*.

[7] The appellant's application is premised on the non-obstante clauses in [section 30\(9\)](#) of the *MACCA* and [section 40](#) of the *AMLATFAPUA*. The argument taken before this Court and the courts below us in summary is that the said non-obstante clauses render the statements and documents collected during the course of investigation under the aforesaid sections automatically admissible in evidence and consequently must be supplied and delivered to the appellant. Learned counsel for the appellant submits that the non-obstante clauses in both sections are unambiguous and excludes all rules of admission and rules of exclusion.

[8] Additionally, in light of these non-obstante clauses as well as the requirements under [section 62](#) of the *MACCA*, production of investigation statements and other documents would be necessary or desirable under [section 51](#) of the Code.

[9] The central question for our determination therefore is whether the respondent is bound to supply documents not provided for under [section 51A](#) of the Code by virtue of the non-obstante clauses in [section 30\(9\)](#) of the *MACCA* and [section 40](#) of the *AMLATFAPUA*.

[10] It is clear to us that the appeal is about delivery of documents by the prosecution to the defence at the pre-trial stage. We are not concerned with admissibility of documents at the trial stage, as contended by the appellant in this appeal. The documents sought are not statutorily provided under [section 51A](#) of the Code. On the contrary, the documents required to be delivered under [section 51A](#) of the Code have already been so delivered by the respondent to the appellant. This submission has no statutory basis from a perusal of [section 51A](#) of the Code itself. The admissibility of the statements and documents is a matter to be determined at the trial and not at the pre-trial stage.

[11] We agree with the respondent's submission that based on a plain reading of [section 51A](#) of the Code, only those documents listed therein are statutorily required to be delivered to the appellant at the pre-trial stage. The documents listed in [section 51A\(1\)](#) are which the prosecution is required to deliver before the commencement of the trial are –

- a) a copy of information report under [section 107](#) of the Code;
- b) any document that would be tendered as part of the prosecution evidence; and
- c) a written statement of facts favourable to the defence.

[12] It is to be noted that despite the requirement in paragraph 51A(1)(c), under sub-section (2) thereof, the prosecution may not supply any fact favourable to the accused if its supply would be contrary to public interest. The most important point that can be discerned from [section 51A](#) is that the prosecution is bound to present their case by documents supplied under the said section. The prosecution thus cannot tender "non-obstante clause" documents during trial, if it had not delivered in accordance with [section 51A](#) of the Code to the defence. The appellant's contention that the respondent can admit non-obstante provision documents during trial, even if it is not served under [section 51A](#) of the Code is clearly erroneous. The law prohibits tendering such documents that does not comply with [section 51A](#) of the Code.

[13] The respondent as earlier stated has to-date delivered 32 volumes of documents comprising 7000 pages which it intends to use as part of the evidence for the prosecution. These are the only documents that are admissible and the classification of the statements and documents as non-obstante clause statements and documents does not make them automatically admissible if not served under [section 51A](#) of the Code. It is important to emphasize that, as a matter of law, the non-obstante clause statements or documents are not automatically admissible. We agree with the decision of the Court of Appeal in paragraphs 17 to 27 thereof and the decision of the High Court in paragraphs 30 to 34 on this point. We note that the Federal Court in *Suruhanjaya Sekuriti v Datuk Ishak bin Ismail* [2016] 1 MLJ 733 held that evidence is admissible and should be received by the court unless there is legal reason for its exclusion. Evidence of relevant facts becomes inadmissible when its reception offends against public policy (or public interest) or a particular rule of law, an example of which is evidence of matters which are privileged against disclosure.

[14] The appellant in this appeal is seeking documents that the respondent does not intend to use as part of its case and accordingly not required to deliver under [section 51A](#) of the Code. Article 5(1) and Article 8 of the Federal Constitution have no application for pre-trial delivery of documents as the provisions are not absolute and instead it

envisages lawful discrimination. In any event, we agree with the learned judge of the High Court that the appellant failed to demonstrate how he is discriminated against compared to other persons who are similarly under investigation by the MACC.

[15] The appellant in prayers 1(h) and (i) of the Notice of Motion sought to be supplied with all books, documents, records, accounts or computerized data or articles obtained during the course of investigation under [section 51](#) as there is no such right under [section 51A](#) of the Code.

[16] The Federal Court decision in *Dato' Seri Anwar Ibrahim v PP* [2010] 4 CLJ 265 represents the present law on pre-trial discovery of documents after the introduction of [section 51A](#) to the Code, when it held that the court should not change the intent of Parliament and that the court should not re-write [sections 51A](#) and [51](#) of the Code but interpret it literally.

[17] Based on the decision in Dato' Seri Anwar Ibrahim's case, the appellant in this appeal is only entitled to documents provided for under [section 51A](#) and no other documents. To authorize inspection or delivery of "non-obstante clause statements and documents" would mean that the court is not giving a literal or plain and clear meaning to [sections 51A](#) and [51](#) of the Code, but on the contrary reading words into that section. Parliament must be taken to mean what it says and the court is not entitled to read words into [section 51A](#) and [section 51](#) of the Code. [Section 51A](#) and [section 51](#) of the Code are clear and unambiguous therefore we have to give effect to its ordinary meaning and its plain legislative intention.

[18] The decision of this Court in Dato' Seri Anwar Ibrahim's case clearly shows that [sections 51](#) and [51A](#) are two separate and distinct provisions. [Section 51A](#) imposes an obligation upon the prosecution to supply the defence with certain documents and materials whereas [section 51](#) gives the court discretion to allow discovery in specific instances. In relation to [section 51](#), the court has a discretion to supply the documents asked for by the appellant (*Raymond Chia Kim Chwee & Anor* [1985] 2 MLJ 436). As to how this discretion is to be exercised is clearly explained by this Court in Dato' Seri Anwar Ibrahim's case –

"[45]...Although the language in that section is seemingly wide it should not literally be taken to be capable of allowing for a wide ranging application as was allowed by the High Court in this case. Its scope, according to all the authorities that we have read, is confined to the production of documents or materials which are "necessary or desirable" the for purposes of the trial. And these two qualifications depend on which particular stage or point of time the application was made. If, as happened in this case, it was made at the pre-trial stage, then the discovery must, according to the principles we have alluded to earlier, be confined to the matters that are specified in the charge. This is so because the justice of the case would have been met if the appellant had been fully notified of the charge he faces. He cannot then be said to be at any disadvantage to prepare his defence. At this this stage, the documents and materials that the court may compel production are confined to those that are necessary and desirable to the trial. And the charge in this case, in our view, is specific and is sufficiently particularized to accord the appellant a fair trial. Put another way, the requirement of justice as envisaged by the Supreme Court in *Raymond Chia* has, in this case, been met, sans the discovery of those documents and materials.

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

[47] The appellant cannot say at this stage that his defence is going to be so and so and that he needs to have access to such and such documents and materials to prepare for the defence. One settled principle attached to the application for discovery under [s. 51](#) CPC is that, at this pre-trial stage, a roving and fishing inquiry for evidence is not permissible. A catch all net cannot be cast. The appellant is not entitled to know by what means the prosecution proposes to prove the facts underlying the charge he faces. This remains the prerogative of the prosecution." [our emphasis]

[19] The appellant in effect is asking the court to read into [sections 51A](#) and [51](#) words to the effect that "non-obstante clause statements and documents" must be delivered to the defence at the pre-trial stage, even if the prosecution does not intend to use them as part of its case. This reading of the clear provision of both sections will not be in conformity with the canons of construction. We agree with the decisions of the High Court and the Court of Appeal that except in the case of documents referred to in the charge of which the appellant is not requesting, and those documents, if any, may have been supplied under [section 51A](#), an application under [section 51](#) should be made only after the commencement of the trial. The exercise of the court's discretionary power under [section 51](#), as explained by this Court in *Dato' Seri Anwar Ibrahim* has been limited, and the section construed strictly. Except for

what is required to be provided and has in fact been complied with by the respondent under [section 51A](#), the appellant is not entitled to be given the materials and documents in the possession of the respondent before the commencement of the trial, given the clear absence of any legislative provisions giving authorization to that effect.

[20] On the facts, the accused's application was made before the start of trial. Applying the aforementioned principles, it is incumbent on the appellant to satisfy the twin criteria that the documents requested are "necessary and desirable" for the trial. So long as the prosecution has supplied him with the relevant materials relating to the charge and so long as it has complied with the requirements of [section 51A](#), the prosecution is not obliged to furnish him with materials he is requesting for.

[21] The appellant's reasoning advanced by the appellant before us on [section 62](#) of the [MACCA](#) is also misconceived and wholly unmeritorious. This provision imposes on the appellant the obligation to disclose in general terms the nature of the defence which obligation only arises when the prosecution has fulfilled its obligations pursuant to [section 51A](#) of the Code. [Section 62](#) clearly introduces the application of [section 51A](#) of the Code to the MACCA. Thus, the documents which must be delivered to the appellant by the prosecution are confined to the documents specified in [section 51A](#) of the Code. By virtue of the application of [section 51A](#) of the Code to the MACCA in [section 62](#), the contention by the appellant that admissibility is equated to automatic right to disclosure is untenable in law.

[22] The granting of the order sought by the appellant will effectively mean that the entire Investigation Papers have to be delivered to the appellant as all witness statements and documents obtained by the Investigation Officer under [section 30\(9\)](#) of the [MACCA](#) and [section 40](#) of *AMLATFAPUA Act 613* are obtained pursuant to non-obstante clause statements and documents. The submission if accepted has a far reaching consequences for in the future the entire Investigation Papers have to be delivered to the defence for all cases under these laws. We agree entirely with the Court of Appeal and the High Court that although [section 51A](#) of the Code is a step towards the equality in arms principle, any further development must await future legislative intervention.

[23] Having considered the submissions made by learned counsel for the appellant and Senior Deputy Public Prosecutor on behalf of the prosecution, and for the reasons earlier discussed, the conclusion which emerges is that both the High Court and the Court of Appeal did not err in law and fact when they held that the appellant had failed to establish his case for the delivery of information and documents applied for in paragraphs 1(g), (h), (i), (j) and 2(b)(i) of the Notice of Motion. Accordingly, we dismiss the appeal and affirm the decisions of the High Court and the Court of Appeal.