Public Prosecutor v Datuk Hj Wasli bin Mohd Said

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-09–101–04 OF 2014
RAUS SHARIF PCA, TENGKU MAIMUN AND AHMADI ASNAWI JJCA
20 JANUARY 2015

Evidence — Witness — Interested witness — Charge of s 3(b)(ii) of the Prevention of Corruption Act 1961 — Counsel also witness in interrelated criminal case — Application to remove counsel/witness — Whether there was merit in argument

The respondent faced two charges under s 3(b)(ii) of the Prevention of Corruption Act 1961. In the midst of the trial in the High Court at Kuala Lumpur, after seven prosecution witnesses testified, the respondent retained Tan Sri Muhammad Shafee bin Abdullah as his lead counsel. After almost three years of Tan Sri Muhammad Shafee representing the respondent, including making appearances in the Court of Appeal and the Federal Court in respect of the application to strike out the charges against the respondent, the prosecution took out an application vide a notice of motion, for the removal of Tan Sri Muhammad Shafee as counsel for the respondent. The application was premised on the alleged infringement of rr 3, 4 and 5 of the Legal Profession (Practice and Etiquette) Rules 1978 and the court's inherent jurisdiction. The main concern of the prosecution was that 'the issue of perception of society in the said appointment of Tan Sri Muhammad Shafee, as the said counsel had appeared as counsel for Tan Sri Kasitah Gaddam in an interrelated criminal case, wherein, Datuk Haji Wasli bin Mohd Said, was a witness for the prosecution, and was cross-examination at length, by Tan Sri Muhammad Shafee'. In the present criminal action against Datuk Hj Wasli bin Mohd Said, Tan Sri Kasitah Gaddam would be a witness for the prosecution and would invariably be subjected to cross-examination by counsel, Tan Sri Muhammad Shafee. The prosecution's application to remove Tan Sri Muhammad Shafee was dismissed by the High Court. Hence, the present appeal. The respondent raised the argument that the ruling made by the High Court judge in disallowing the prosecution's application to discharge Tan Sri Muhammad Shafee was not appealable as the decision of the judge made in the course of the trial was not a decision within the meaning stipulated in s 3 read with s 50(1) of the Courts of Judicature Act 1964 ('the CJA').

Held, dismissing the appeal:

(1) The appeal filed by the prosecution was an incompetent appeal which was precluded by law (see para 12).

(2) The decision of the High Court judge in dismissing the prosecution's application to remove Tan Sri Muhammad Shafee was a decision made in the course of the trial which did not finally dispose of the rights of the parties. The rights of the parties relate to the charges preferred against the respondent ie whether the respondent will be found guilty or innocent of the charges. The rights do not relate to the notice of motion filed by the prosecution (see para 9).

[Bahasa Malaysia summary

Responden menghadapi dua tuduhan di bawah s 3(b)(ii) Akta Pencegahan Rasuah 1961. Dalam pertengahan perbicaraan di Mahkamah Tinggi Kuala Lumpur, selepas tujuh saksi pendakwaan memberi keterangan, responden mengekalkan Tan Sri Muhammad Shafee bin Abdullah sebagai ketua peguamnya. Selepas lebih kurang tiga tahun Tan Sri Muhammad Shafee mewakili responden, termasuk membuat kemunculan di Mahkamah Rayuan dan Mahkamah Persekutuan berkaitan permohonan untuk mengetepikan tuduhan-tuduhan terhadap responden, pihak pendakwaan memohon permohonan melalui notis usul, untuk menyingkirkan Tan Sri Muhammad Shafee sebagai peguam untuk responden. Permohonan adalah berdasarkan atas dakwaan pelanggaran terhadap k 3, 4 dan 5 Kaedah-Kaedah Profesion Undang-Undang (Amalan dan Kesopanan) 1978 dan bidang kuasa inherens mahkamah. Kepentingan utama pihak pendakwaan adalah bahawa 'the issue of perception of society in the said appointment of Tan Sri Muhammad Shafee, as the said counsel had appeared as counsel for Tan Sri Kasitah Gaddam in an interrelated criminal case, wherein, Datuk Haji Wasli bin Mohd Said, was a witness for the prosecution, and was cross-examination at length, by Tan Sri Muhammad Shafee'. Dalam tindakan jenayah ini terhadap Datuk Hj Wasli bin Mohd Said, Tan Sri Kasitah Gaddam akan menjadi saksi untuk pihak pendakwaan dan akan tertakluk kepada pemeriksaan balas oleh peguam, Tan Sri Muhammad Shafee. Permohonan pihak pendakwaan untuk menyingkirkan Tan Sri Muhammad Shafee ditolak oleh Mahkamah Tinggi. Maka, rayuan ini. Responden membangkitkan hujahan bahawa perintah yang dibuat oleh hakim Mahkamah Tinggi dalam tidak membenarkan permohonan pihak pendakwaan untuk melepaskan Tan Sri Muhammad Shafee tidak dapat dirayu kerana keputusan hakim yang dibuat di dalam perjalanan perbicaraan bukan keputusan dalam maksud yang ditetapkan di dalam s 3 dibaca bersama s 50(1) Akta Mahkamah Kehakiman 1964 ('AMK').

Diputuskan, menolak rayuan:

(1) Rayuan yang difailkan oleh pihak pendakwaan adalah rayuan yang tidak kompeten yang mana dihalang oleh undang-undang (lihat perenggan 12).

(2) Keputusan hakim Mahkamah Tinggi dalam menolak permohoan pihak pendakwaan untuk menyingkirkan Tan Sri Muhammad Shafee adalah keputusan yang dibuat dalam perjalanan perbicaraan yang mana tidak pada akhirnya melupuskan hak pihak-pihak. Hak pihak-pihak berkaitan tuduhan-tuduhan yang dikenakan terhadap responden iaitu sama ada responden akan didapati bersalah atau tidak bersalah terhadap tuduhan-tuduhan. Hak-hak tidak berkaitan kepada notis usul yang difailkan oleh pihak pendakwaan (lihat perenggan 9).]

Notes

For cases on interested witness, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3309–3325.

Cases referred to

Karpal Singh a/l Ram Singh v Public Prosecutor [2012] 5 MLJ 293, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 50, 50(1)
Legal Profession (Rules and Etiquette) 1978 rr 3, 4, 5
Prevention of Corruption Act 1961 (Repealed by Anti-Corruption Act 1997) s 3(b)(ii)

Appeal from: Criminal Application No 44–115–10 of 2013 and Criminal Trial No 46–4 of 2006 (High Court, Kuala Lumpur)

Anthony Kevin Morais (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Alfirdaus Shahrul Naing (Syed Ismat Syed Muhamad with him) (Shafee & Co) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] Datuk Hj Wasli bin Mohd Said ('the respondent') faced two charges under s 3(b)(ii) of the Prevention of Corruption Act 1961. In the midst of the trial in the High Court at Kuala Lumpur, after seven prosecution witnesses testified, the respondent retained Tan Sri Muhammad Shafee bin Abdullah as his lead counsel.

[2] After almost three years of Tan Sri Muhammad Shafee representing the respondent, including making appearances in the Court of Appeal and the Federal Court in respect of the application to strike out the charges against the respondent, the prosecution took out an application vide a notice of motion, for the removal of Tan Sri Muhammad Shafee as counsel for the respondent. The application was premised on the alleged infringement of rr 3, 4 and 5 of

the Legal Profession (Rules and Etiquette) 1978 and the court's inherent jurisdiction.

[3] The main concern of the prosecution, as submitted by the learned deputy public prosecutor was 'the issue of *perception of society* in the said appointment of Tan Sri Muhammad Shafee, as the said counsel had appeared as counsel for Tan Sri Kasitah Gaddam in an interrelated criminal case, wherein, Datuk Haji Wasli bin Mohd Said, was a witness for the prosecution, and was cross examination (sic) at length, by Tan Sri Muhammad Shafee. In the present criminal action against Datuk Hj Wasli bin Mohd Said, 46-4-2006, Tan Sri Kasitah Gaddam would be a witness for the prosecution and would invariably be subjected to cross-examination by counsel, Tan Sri Muhammad Shafee'.

[4] The prosecution's application to remove Tan Sri Muhammad Shafee was dismissed by the High Court. Aggrieved with the decision, the prosecution appealed to the Court of Appeal. At the outset, learned counsel for the respondent raised a preliminary objection on the competency of the appeal. Having heard the parties, we upheld the preliminary objection and we struck out the appeal. Our reasons now follow.

[5] It was the submission of learned counsel for the respondent that the ruling made by the learned High Court judge in disallowing the prosecution's application to discharge Tan Sri Muhammad Shafee was not appealable as the decision of the learned judge made in the course of the trial was not a decision within the meaning stipulated in s 3 read with s 50(1) of the Courts of Judicature Act 1964 ('the CJA').

[6] In response to the preliminary objection, the learned deputy submitted that the decision of the learned High Court judge was in respect of the notice of motion and that the decision in respect of the notice of motion was final.

[7] It is trite that an appeal is a creature of statute and the jurisdiction of the Court of Appeal to hear and determine criminal appeal is provided for under s 50 of the CJA which states:

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

[8] Section 3 defines decision as 'decision' means any judgment, sentence or

order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties'.

[9] We agreed with learned counsel that the decision of the learned High Court judge in dismissing the prosecution's application to remove Tan Sri Muhammad Shafee was a decision made in the course of the trial which did not finally dispose of the rights of the parties. The rights of the parties relate to the charges preferred against the respondent, ie whether the respondent will be found guilty or innocent of the charges. The rights do not relate to the notice of motion filed by the prosecution.

[10] In *Karpal Singh a/l Ram Singh v Public Prosecutor* [2012] 5 MLJ 293 where at p 300 Suriyadi FCJ speaking for the Federal Court said:

> [16]Section 3 of the CJA defines 'decision' to mean judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties. It is not disputed here that the appeal relates to a criminal matter, as witnessed by the procedure adhered to, and in the event of a conviction, may be sentenced to imprisonment or fined (*Seaman v Burley* [1896] 2 QB 344; *Armand v Home Secretary and Minister of Defence of Royal Netherlands Government* [1943] AC 147; *Hamid's on Criminal Procedure*).
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> [17] The rationale for non-final decisions being non-appealable is primarily geared towards the speedy disposal of cases; such a policy prejudices nobody in light of the many complaints of ageing cases before. The explanatory notes, clarifying the amendment of s 3 of the CJA introduced by the Amendment Act A1031 of 1998 reads:
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> > Pada masa ini, semasa pendengaran kes, jika mahkamah membuat keputusan tentang kebolehterimaan apa-apa keterangan atau dokumen, pihak yang tidak berpuas hati boleh memfailkan rayuan. Jika rayuan sedemikian difailkan, mahkamah terpaksa memberhentikan pendengaran kes itu sementara menanti keputusan rayuan ini oleh mahkamah atasan. Ini menyebabkan pendengaran itu lambat selesai, lebih-lebih lagi apabila rayuan difailkan terhadap tiap-tiap keputusan yang dibuat oleh mahkamah bicara. Pindaan ini dicadangkan untuk membantu mempercepat pendengaran kes di mahkamah bicara.
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> [18] From the above explanation it is obvious that Parliament is not oblivious to mid-stream appeals that tend to stall proceedings and delay speedy completion of cases. With justice not being served by unnecessary delays, what with the amended meaning of 'decision' being crystal clear, such technical appeals that have the effect of stalling hearings, are now things of the past (see *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2010] 6 MLJ 585; *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2011] 2 CLJ 845) ...
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> [19] In order for a decision to be final, the defence must first be heard, and after a maximum evaluation of the total evidence a decision eventually be made. It is at that

conclusive stage, when the fate of the appellant is known, the right of appeal is triggered (*Saad bin Abas & Anor v Public Prosecutor* [1999] 1 MLJ 129; *Maleb bin Su v Public Prosecutor; Cheak Yoke Thong* [1984] 1 MLJ 311; [1984] 2 CLJ (Rep) 232). ...

[11] And at p 302, Suriyadi FCJ further stated that:

[21] A dissatisfied party is never deprived either of his right to appeal after the conclusion of a trial, in the event he feels aggrieved with the ruling made in the course of the trial, as that supposed error could be raised in the appeal proper. Again Arifin Zakaria CJ in *Dato' Seri Anwar Ibrahim v Public Prosecutor* opined:

> The right of a party who is aggrieved by a ruling, after all, is not being compromised, as the party can always raise the issue during the appeal, if any, to be filed after the trial process is brought to its conclusion.

[12] Given all the above, we unanimously found that the appeal filed by the prosecution was an incompetent appeal which was precluded by law. The appeal was accordingly struck out.

Appeal dismissed.

Reported by Afiq Mohamad Noor