Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara, Malaysia & Anor

FEDERAL COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05–21 OF 1998(W)
EUSOFF CHIN CHIEF JUSTICE, LAMIN PCA AND ZAKARIA YATIM FCJ
3 MARCH 1999

Criminal Procedure *— Jurisdiction of court — Act commited constitute offences under both Penal Code and Shariah law — Parties involved were Muslims — Whether sessions court has jurisdiction — Whether parties should be charged and tried in Syaraiah Court — Federal Constitution art 121(1) & (1A)*

Statutory Interpretation *— Constitution — Principles of interpretation — Whether clauses should be construed together to avoid grave inconvenience and absurd results — Federal Constitution art 121(1) & (1A)*

The appellant was convicted and sentenced to six months' imprisonment by the Kuala Lumpur Sessions Court, after he pleaded guilty to allowing one Dato' Seri Anwar Ibrahim to sodomise him, an offence under s 377D of the Penal Code ('the offence'). The offence was also an offence under the Syariah Criminal Offences (Federal Territories) Act 1997 ('the Act') and triable by the syariah court. The application on behalf of the appellant for habeas corpus was dismissed by the High Court (see [1998] 4 MLJ 742) and in consequence he appealed to the Court of Appeal. The Court of Appeal in deciding, inter alia, that the offence for which the appellant had been convicted and sentenced of was within the trial and sentencing jurisdiction of the sessions court, dismissed the appeal (see [1999] 1 MLJ 266). The appellant appealed against that decision to the Federal Court. In the Federal Court, the appeal centred on art 121(1) and (1A) of the Federal Constitution. Counsel for the appellant argued that since the offence with which the appellant had been convicted of was also an offence triable by the syariah court and the parties involved being Muslims, the appellant ought to have been charged and tried in the syariah court.

Held, dismissing the appeal:
In interpreting cl (1A) of art 121, it is wrong to examine the clause in isolation. The clause should also not be construed literally since a literal interpretation would give rise to consequences which the legislature could not have possibly intended. Clauses (1) and (1A) of art 121 should therefore be construed together and a construction consistent with the smooth working of the system which art 121 purports to regulate should be adopted (see p 247C–G).

Applying this approach and considering s 59 of the Interpretation Act, it follows that where an offender commits an offence triable by either the civil court or a syariah court, he may be prosecuted in either of those courts. In such cases the offender is not liable to be punished twice for the same offence (see pp 247I–248A).

[**Bahasa Malaysia summary**

Perayu telah disabitkan dan telah dihukum enam bulan penjara oleh Mahkamah Sesyen Kuala Lumpur, selepas dia mengaku salah membenarkan seorang bernama Dato' Seri Anwar Ibrahim meliwatnya, suatu kesalahan di bawah s 377D Kanun Keseksaan ('kesalahan tersebut'). Kesalahan tersebut juga merupakan suatu kesalahan di bawah Akta Kesalahan Jenayah Syariah (Wilayah Persekutuan) 1997 ('Akta tersebut') dan boleh dibicarakan di mahkamah syariah. Permohonan pemohon untuk habeas corpus telah ditolak oleh Mahkamah Tinggi (lihat [1998] 4 MLJ 742) dan dia kemudian telah merayu ke Mahkamah Rayuan. Mahkamah Rayuan dalam memutuskan, antara lainnya, bahawa kesalahan yang perayu telah disabitkan dan dihukum adalah dalam bidang kuasa bicara dan menghukum mahkamah sesyen, menolak rayuan tersebut (lihat [1999] 1 MLJ 266). Perayu telah merayu terhadap keputusan tersebut ke Mahkamah Persekutuan. Di Mahkamah Persekutuan, rayuan telah tertumpu pada perkara 121(1) dan (1A) Perlembagaan Persekutuan. Peguam perayu berhujah bahawa oleh kerana kesalahan yang perayu telah disabitkan juga merupakan suatu kesalahan yang boleh dibicarakan oleh mahkamah syariah dan pihak-pihak berkenaan adalah orang Islam, perayu sepatutnya dituduh dan dibicarakan di mahkamah syariah.

Diputuskan, menolak rayuan:

Dalam mentafsirkan fasal (1A) perkara 121, adalah tidak sesuai untuk meneliti fasal tersebut secara berasingan. Fasal tersebut tidak seharusnya ditafsirkan secara harfiah (construed literally) kerana tafsiran harfiah akan menimbulkan akibat yang tidak diniatkan oleh badan perundangan. Fasal-fasal (1) dan (1A) perkara 121 sepatutnya ditafsirkan bersama dan pentafsiran yang konsisten dengan perjalanan lancar sistem yang dikatakan dikawal oleh perkara 121 haruslah digunakan (lihat ms 247C–G).

Dengan menggunakan pendekatan ini dan dengan mempertimbangkan s 59 Akta Tafsiran, ini bermakna bahawa di mana seseorang pesalah melakukan kesalahan yang boleh dibicarakan sama ada oleh mahkamah sibil atau mahkamah syariah, dia boleh didakwa di mana-mana satu daripada mahkamah tersebut. Dalam kes sebegitu pesalah tersebut tidak seharusnya dihukum dua kali untuk kesalahan yang sama (lihat ms 247I-248A).]

Notes

For cases on jurisdiction of court generally, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1497–1607.

For cases on principles of interpretation of the Constitution, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1447–1453.

Cases referred to

Becke v Smith (1836) 2 M & W 191
R v Tonbridge Overseers (1884) 13 QBD 339

Legislation referred to

Administration of the Muslim Law Enactment (Selangor) 1952 s 43(6)
Federal Constitution arts 121(1),(1A),
Interpretation Act 1967 s 59
Penal Code (Act 574) ss 2, 3, 377D
Subordinate Courts Act 1948 ss 63, 64
Syariah Criminal Offences (Federal Territories) Act 1997 ss 1(2), 2, 25

Karpal Singh (*Jagdeep Singh Deo*, *Gobind Singh Deo* and *Pawancheek Marican* with him) (*Karpal Singh & Co*) for the appellant.

Ahmad Maarop (Senior Federal Counsel) (*Kamaludin Md Said*, Federal Counsel with him) for the respondent.

Mohd Eusoff Chief Justice (delivering judgment of the court): This appeal was argued before us on 3 March 1999. We confirmed the decision of the Court of Appeal and dismissed the appeal.

The appeal centred on art 121 of the Federal Constitution, in particular cll (1) and (1A). The learned counsel for the appellant contended that the sessions court had no jurisdiction to try the appellant for committing an act of gross indecency, an offence under s 377D of the Penal Code because the offence of 'liwat' is triable by the syariah court. We quote the relevant provisions of the law:

Article 121 of the Federal Constitution states:

> (1) There shall be two High Courts of co-ordinate jurisdiction and status, namely —
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> (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and
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> (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;
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> and such inferior courts as may be provided by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.
>
> (1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

Section 377D of the Penal Code states:

> Any person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, shall be punished with imprisonment for a term which may extend to two years.

'Liwat' is defined under s 2 of the Syariah Criminal Offences (Federal Territories) Act 1997 ('Act 559') as follows: A

> 'liwat' means sexual relations between male persons.

Section 25 of Act 559 provides:

> Any male person who commits 'liwat' shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof. B

Learned counsel for the appellant confined his argument on the interpretation of art 121(1A) only. He argued that since 'liwat' is an offence triable by a syariah court, and the parties involved are persons professing the religion of Islam, the appellant ought to be charged and tried in the syariah court. He cited s 1(2) of Act 559 which states: C

> This Act shall apply only —
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> (a) to the Federal Territories of Kuala Lumpur and Labuan; and
>
> (b) to persons professing the religion of Islam. D

Learned counsel for the respondent cited s 59 of the Interpretation Act 1967 which states:

> Where any act or omission constitutes an offence under two or more written laws or under a written law and at common law, the offender is liable to be prose,cuted and punished under either or any of those laws or at common law, but shall not be liable to be punished twice for the same offence. E

The insertion of cl (1A) into art 121 of the Federal Constitution was done by Parliament vide Act 704/88 which came into force on 10 June 1988. The Court of Appeal dealt with this amendment in its judgment (see [1999] 1 MLJ 266) and stated (at pp 279F–280I): F

> Prior to the introduction of art 121(1A), the ordinary courts had the power to review, and quite regularly reviewed, the decisions of syariah courts by certiorari. That this caused some concern among those entrusted with the task of administering Muslim law is reflected in the speech delivered in the Dewan Rakyat when introducing the Bill that eventually became Act A704/88. We say at once that we are, in the circumstances of the present case, entitled to refer to the proceedings during the debate of the Bill in the Dewan Rakyat. No question of parliamentary privilege arises here. That we are entitled to make such reference is now settled by the decision of the Federal Court in *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345 which followed the majority speeches of the House in *Pepper (Insptector of Taxes) v Hart* [1993] 1 All ER 42. Having examined the Hansard of the Dewan Rakyat, we find support for the conclusion that the limited purpose of Act A704/88 was to prevent the High Court from exercising its powers of judicial review over decisions of a syariah court. G H
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> In our view, art 121(1A) should receive that meaning which advances the purpose for which it was introduced into the Federal Constitution. If it becomes necessary to make an implication, as we think the present case does, then we shall make it. We are satisfied that such an approach would harmonize the article in question with the rest of the Constitution. It would, as contended I

by the respondents, certainly remove the spectre of a conflict between that article and other provisions of the Constitution, in particular the Ninth Schedule, with regard to any question of legislative competence upon the subject of criminal law. Equally, it will ensure that well-established provisions of the Penal Code are not rendered nugatory. In deciding upon this course, we are really following a well-trodden path of constitutional interpretation.

Accordingly, in the light of the authorities we have referred to earlier in this judgment, we have come to the conclusion that the expression 'jurisdiction of the syariah courts' refers to 'the *exclusive* jurisdiction' of those courts. In other words, if a person professing the religion of Islam does a proscribed act which is an offence both under the Penal Code and the [Syariah Criminal Offences (Federal Territories) Act 1997], then the courts referred to in art 121(1) will have jurisdiction to try such an offence. It is only in respect of offences under the Act that a syariah court may have exclusive jurisdiction. For example, the offence of adultery which is prescribed as an offence under the Act has no equivalent in the Penal Code or other federal criminal statute. So if a person professing the religion of Islam commits adultery, then he or she may be tried only in a syariah court.

We therefore find ourselves unable to agree with the submission of En Karpal Singh of counsel for the appellant that the interpretation we have placed upon art 121(1A) has the effect of negating the provisions of the Act. For, it is clear that 'where the law provides, either in the same or different enactments, for different penalties for the same offence that both or all of the provisions as to punishments are intended to stand side by side and that it is left to the proper authorities to decide under which of the different provisions the offender shall be prosecuted and punished ' (per Spenser Wilkinson J, in *PP v Viran* [1947] MLJ 62 at p 64). The appellant's concern, voiced through his counsel, that he may be open to prosecution twice over, once under the Penal Code and later under the Act, is really without basis by reason of the express provisions of art 7(2) of the Federal Constitution. That article reads:

> A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted.

We also note that the offence defined by s 377D of the Penal Code is much wider than the offence of 'liwat' under the Act. This reinforces the view we take in regard to the interpretation that art 121(1A) should receive. It is no doubt true that the prosecution used the term 'meliwat' to describe the actus reus committed by the appellant in the statement of facts in support of the charge. But the use of that expression did not take the case out of the jurisdiction of the session court. For it must be borne in mind that the sessions court was not dealing with an offence of 'liwat' under the Act. It was merely dealing with an offence of gross indecency under s 377D of the Penal Code.

We agree with the views expressed by the Court of Appeal on the necessity of cl (1A) being introduced into art 121 of the Federal Constitution. It was to stop the practice of aggrieved parties coming to the High Court to get the High Court to review decisions made by syariah courts. Decisions of syariah court should rightly be reviewed by their own appellate courts. They have their own court procedure where decisions of a court of a kathi or kathi besar are appealable to their Court of Appeal.

Since the syariah courts have their own system, their own rules of evidence and procedure which in some respects are different from those applicable to the civil courts, it is only appropriate that the civil court should refrain from interfering with what goes on in the syariah courts. This policy on non-interference is reciprocated by the syariah courts. The Administration of the Muslim Law Enactment 1952 (Selangor) ('the Selangor Enactment') had originally been adopted with modifications and applied to the Federal Territories of Kuala Lumpur and Labuan by Act A206, PU(A) 49/1974 and PU(A) 352/1985. Section 43(b) of the Selangor Enactment entrenches this policy and it states:

> Nothing in this Enactment contained shall affect the jurisdiction of any Civil Court and, in the event of any difference or conflict arising between the decision of a court of the Kathi Besar or a Kathi and the decision of a Civil Court acting within its jurisdiction, the decision of the Civil Court shall prevail.

While agreeing with the opinion expressed by the Court of Appeal, we are of the view that in interpreting cl (1A) of art 121, it is wrong to confine ourselves to examining this clause in isolation.

Article 121 deals with the judicial power of the Federation. This article established the two High Courts and 'such inferior courts as may be provided by federal law, and the High Courts and inferior Courts shall have such jurisdiction and powers as may be conferred by or under federal law'.

The inferior courts ie the sessions courts, the magistrates' courts and the penghulu's courts were established under s 3 of the Subordinate Courts Act 1948.

The sessions courts are conferred criminal jurisdiction by s 63 and 64 of the Subordinate Courts Act 1948 which provide:

> 63 A sessions court shall have jurisdiction to try all offences other than offences punishable with death.
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> 64 A sessions court may pass any sentence allowed by law other than the sentence of death.

It is pertinent to note that while Act 559 applies only to the Federal Territories of Kuala Lumpur and Labuan, and to people professing the religion of Islam, the Penal Code applies throughout and beyond Malaysia. It applies to every person irrespective of race, sex or religion. Sections 2 and 3 of the Penal Code state:

> 2 Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within Malaysia.
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> 3 Any person liable by law to be tried for an offence committed beyond the limits of Malaysia, shall be dealt with according to the provisions of this Code for any act committed beyond Malaysia, in the same manner as if such act had been committed within Malaysia.

Having examined these provisions of the relevant laws, it is clear that the session court has the jurisdiction to try offences committed under the Penal Code except those punishable with death.

Section 25 of Act 559 and s 377D of the Penal Code are not in pari materia. While s 25 of Act 559 deals only with sexual relations between male persons, s 377D of the Penal Code deals with any act of gross indecency involving any person, and it can be between male persons, between female persons, or between male and female persons. As to what act constitutes indecency or gross indecency, the legislature itself has seen it fit not to give it a definition, but has left it entirely to the court to determine. It is not possible to define what is an indecent or grossly indecent act. As the High Court judge in this case had stated in his judgment: 'Every person may have a different view of what is indecent. Our individual perception of what is indecent depends upon our upbringing, which includes religious, cultural and family values.' Gross indecency certainly includes sexual relations between male persons.

We are of the view that cl (1A) of art 121 should not be construed literally because a literal interpretation would give rise to consequences which the legislature could not possibly have intended. Parke B in *Becke v Smith* (1836) 2 M & W 191 at p 195 stated:

> It is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the words used and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience but no further.

Brett MR in *R v Tonbridge Overseers* (1884) 13 QBD 339 at p 342 said:

> ... if the inconvenience is not only great, but what I may call an absurd inconvenience, by reading an enactment in its ordinary sense, whereas if you read it in a manner in which it is capable, though not its ordinary sense, there would not be any inconvenience at all, there would be reason why you should *not* read it according to its ordinary grammatical meaning. (Emphasis added.)

We would, therefore prefer to construe both cll (1) and (1A) of art 121 together and choose a construction which will be consistent with the smooth working of the system which this article purports to regulate, and reject an interpretation that will lead to uncertainty and confusion into the working of the system. Since cl (1) of art 121 and the provisions of federal law referred to earlier confer jurisdiction on a sessions court to try offences in the Penal Code (other than those punishable with death) and has been doing so for a very long time, it would lead to grave inconvenience and absurd results to now say that the sessions court should not try an offence under s 377D because the accused is a person professing the religion of Islam.

To ensure the smooth running of the system, we would apply the provisions of s 59 of the Interpretation Act so that where an act or omission is an offence under two or more written laws the offender may be prosecuted and punished under any of those laws, so long as he is not prosecuted and punished twice for the same offence. It follows that where an offender commits an offence triable by either the civil court or a syariah court, he may be prosecuted in either of those courts.

In the early fifties, syariah courts depended on the civil courts for enforcements of their judgments due to lack of proper staff. But today, the syariah courts in each State and in the Federal Territories have their own officers to investigate and prosecute cases in their own courts. Their court system is similar to and running parallel with the civil court system. It has its own syariah subordinate courts, the Syariah High Courts and Syariah Appeal Court. The decisions of the syariah subordinate court are appealable to the Syariah High Court, and the Syariah Court of Appeal hears appeals from their High Courts. The Chief Syariah Judge is the head of the syariah courts, and the Chief Syariah Prosecutor has the power to institute, conduct or discontinue any proceeding for an offence before a syariah court.

It follows that the syariah officers would only investigate offences triable by the syariah court where all the parties including witnesses are of the Islamic religion. This is so because the syariah courts have jurisdiction only over persons professing the religion of Islam. Therefore, where a Muslim male and non-Muslim male commit 'liwat' on each other which is an offence both under s 25 of Act 559 and s 377D of the Penal Code, the offenders will have to be charged under the Penal Code and triable in the sessions court.

To hold that because cl (1A) of art 121 of the Federal Constitution forbids the sessions court to try such a case since it is also an offence under Act 559, cannot be the intention of Parliament, as it will lead to undesirable consequences where both the offenders will escape prosecution, a situation which must be avoided.

We therefore agree with and confirm the decision of the Court of Appeal, and dismiss this appeal.

Appeal dismissed.

Reported by Andrew Christopher Simon