Zakaria bin Abdul Rahman v Ketua Polis Negara Malaysia & Anor

HIGH COURT (ALOR SETAR) — CIVIL SUIT NO 21–04 OF 1997
ARIFIN ZAKARIA J
22 APRIL 2001

Administrative Law *— Exercise of judicial functions — Judicial review — Power of court to interfere with punishment meted out — Police officer dismissed from service — Whether court may judicially review order of dismissal*

Administrative Law *— Rights and liabilities of public servants — Dismissal — Disciplinary proceedings — Application of principle of autrefois convict and acquit to disciplinary proceedings — Whether disciplinary action could be taken against police officer for the second time based on same facts after he had been convicted or acquitted in earlier disciplinary proceedings — Public Officers (Conduct and Discipline) (Chap D) General Orders 1980*

Constitutional Law *— Fundamental liberties — Freedom of religion — Requirement of permission for superior officer prior to second marriage — Whether unconstitutional for disciplinary authority to require member of police force to obtain prior permission from his superior officer before entering into a polygamous marriage*

The plaintiff prior to his dismissal was a police officer with the rank of Chief Inspector. On 1 June 1991, the plaintiff wrote to the first defendant seeking permission to marry one Cik Puziah bte Ariffin as his second wife. The first defendant rejected the said application and by a letter dated 17 August 1991 the plaintiff was strongly advised to terminate his relation with Cik Puziah. In para 3 of the said letter a warning was sounded that, in the event the plaintiff failed to do so, disciplinary action would be taken against him. Subsequently, disciplinary action was taken against him ('the first proceedings') wherein he was charged under general order 4(2)(i) Public Officers (Conduct and Discipline) (Chap D) General Orders 1980 for insubordination. The plaintiff was found guilty and fined and reprimanded. The plaintiff proceeded to marry Cik Puziah on 3 September 1991. This led to further disciplinary action being taken against him ('the second proceedings'). The plaintiff was charged with two breaches of discipline, namely for conducting himself in such a manner as to bring the public service into disrepute under general order 4(2)(d) and for insubordination by committing polygamy under general order 4(2)(i). The plaintiff was found guilty of both charges and was dismissed from the police with effect from 4 May 1993. The plaintiff was dissatisfied with the said disciplinary action in the second proceedings and hence this action for inter alia a declaration that his dismissal was invalid and that he be reinstated to his original position and costs. The issues for determination were: (i) whether disciplinary action could be taken against any one for the second time based on the same facts after he had been convicted or acquitted in the earlier disciplinary proceedings, and whether the holding that one of the

charges in the second proceedings was invalid would not vitiate the punishment imposed on the plaintiff since the punishment was in respect of two separate charges; (ii) whether the second charge in the second proceedings was unsustainable as it goes against the plaintiff's right to practice his religious belief as enshrined in art 11 of the Federal Constitution; and (iii) whether the sentence imposed by the first defendant in the circumstances of the case was excessive.

Held, allowing plaintiff's application in part:

(1) The plaintiff was, in the first and the second proceedings, charged with breaches of discipline under the Public Officers (Conduct and Discipline) (Chap D) General Orders 1980 which is a statutory code of conduct governing public services in Malaysia, a code enacted under cl (2) of art 132 of the Federal Constitution. In the circumstances, the principle sets out in the case of *Harry Lee Wee v Law Society of Singapore* [1985] 1 MLJ 1 which held that the doctrine of autrefois convict and acquit is applicable to disciplinary proceedings under a statutory code by which a profession is governed, was apt to apply to the present case (see pp 394B, 395C–D).

(2) The court agreed with the plaintiff that in substance the two charges, ie the charge brought in the first proceedings and the first charge in the second proceedings, were in respect of the same conduct of the plaintiff in relation to Cik Puziah. Therefore, in all fairness there should have been only one charge as far as that was concerned. To charge the plaintiff twice for the same conduct clearly goes against the principle as stated by the Privy Council in *Harry Lee Wee*'s case. Therefore, on that score the first charge in the second proceedings ought to be set aside (see p 396A–B).

(3) It was not open to speculate as to the likely punishment that the first defendant would impose had there been only one charge before him. Once the first charge was found to be unsustainable in law, then the punishment needs to be set aside. There is no procedure for the court to remit the case to the disciplinary authority nor is there any power vested in the court to substitute its own punishment. It was the court's finding that the order of dismissal made against the plaintiff was wrong in law and accordingly, ordered to be set aside (see p 396D–E).

(4) Polygamous marriage is merely permissible in Islam. A Muslim is therefore not required as a matter of religious obligation to take upon more than one wife. On that premise it is not fundamentally wrong for the disciplinary authority to require any member of the police force to obtain prior permission from his superior officer before entering into a polygamous marriage. Such a condition could not be construed as infringing the constitutional guarantee to profess and practice his religion as contained in art 11(1) of the

Federal Constitution. The plaintiff had clearly acted contrary to good discipline in marrying his second wife after his request for permission to do so was turned down by his superior officer (see p 397A–C).

(5) It is not open to the court to interfere with the punishment imposed by the disciplinary authority as the disciplining of a public officer by his department head is part of the function of the executive branch of the government and any usurpation by a court will be viewed with something very much more than disfavour. A court intervenes only on the nature and manner of accusation against a public officer as distinct from a consequential punishment (see p 397H–398A); *Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 1 MLJ 405 followed.

Obiter dictum:

Article 7(2) of the Federal Constitution, which protects any person from being placed in 'double jeopardy', has no application to disciplinary matter. This is clear from the wordings of the said article (see p 392B–C).

[Bahasa Malaysia summary

Plaintif sebelum pemecatannya merupakan seorang pegawai polis dengan pangkat Ketua Inspektor. Pada 1 Jun 1991, plaintif telah menulis kepada defendan pertama memohon kebenaran untuk mengahwini seorang bernama Cik Puziah bte Ariffin sebagai isteri keduanya. Defendan pertama telah menolak permohonan tersebut dan dengan sepucuk surat bertarikh 17 Ogos 1991, plaintif telah dengan tegasnya dinasihatkan supaya menamatkan perhubungan beliau dengan Cik Puziah. Dalam perenggan 3 surat tersebut, suatu amaran telah diberi bahawa, sekiranya plaintif gagal berbuat sedemikian tindakan tatatertib akan diambil terhadap beliau. Berikutan itu tindakan tatatertib telah diambil terhadap beliau ('prosiding pertama') di mana beliau telah dituduh di bawah perintah am 4(2)(i) Pegawai Awam (Kelakuan dan Disiplin) (Bab D) Perintah-Perintah Am 1980 kerana pengingkaran. Plaintif telah didapati bersalah dan didenda serta ditegur. Plaintif telah meneruskan untuk berkahwin dengan Cik Puziah pada 3 September 1991. Ini telah membawa kepada tindakan tatatertib diambil terhadap beliau ('prosiding kedua'). Plaintif telah dituduh dengan dua kemungkiran disiplin, iaitu kerana berkelakuan sedemikian dengan membawa nama buruk kepada perkhidmatan awam di bawah perintah am 4(2)(d) dan kerana keingkaran dengan melakukan poligami di bawah perintah am 4(2)(i). Plaintif telah didapati bersalah atas kedua-dua pertuduhan dan telah dipecat daripada pasukan polis yang berkuatkuasa pada 4 Mei 1993. Plaintif tidak berpuashati dengan tindakan tatatertib dalam prosiding kedua dan dengan itu

mengakibatkan tindakan ini untuk antara lainnya, satu pengisytiharan bahawa pemecatan beliau adalah tidak sah dan bahawa beliau hendaklah ditempatkan semula ke jawatan asal beliau dan kos. Isu-isu untuk ditentukan adalah: (i) sama ada tindakan tatatertib seharusnya diambil terhadap sesiapa buat kali keduanya berdasarkan fakta-fakta yang sama selepas beliau telah disabitkan atau dilepaskan dalam prosiding tatatertib yang lebih awal dan sama ada keputusan bahawa salah satu pertuduhan dalam prosiding kedua adalah tidak sah akan tidak menjadikan tidak sah hukuman yang dikenakan ke atas plaintif oleh kerana hukuman tersebut adalah berkenaan dengan dua pertuduhan yang berasingan; (ii) sama ada pertuduhan kedua dalam prosiding kedua tidak boleh dipertahankan kerana ianya bertentangan dengan hak plaintif untuk mengamalkan kepercayaan agamanya seperti yang termaktub di dalam perkara 11 Perlembagaan Persekutuan; dan (iii) sama ada hukuman yang dikenakan oleh defendan pertama dalam keadaan tersebut adalah melampau.

Diputuskan, membenarkan permohonan plaintif sebahagiannya:

(1) Plaintif telah, dalam prosiding pertama dan kedua, dituduh dengan melanggar tatatertib di bawah Perintah-Perintah Am Pegawai Awam (Tingkah Laku dan Tatatertib) (Bab D) 1980 yang mana adalah kanun mengawal tingkah laku pegawai awam statutori di Malaysia, suatu kanun yang digubalkan di bawah fasal (2) perkara 132 Perlembagaan Persekutuan. Dalam keadaan tersebut, prinsip-prinsip yang dibentangkan dalam kes *Harry Lee Wee v Society of Singapore* [1985] 1 MLJ 1 yang memutuskan bahawa doktrin autrefois pensabitan dan pembebasan boleh digunakan pada prosiding tatatertib di bawah sesuatu kanun statutori melalui yang mana sesuatu profesyen itu dikuasai, tepat sekali dipakai kepada kes semasa (lihat ms 394B, 395C–D).

(2) Mahkamah bersetuju dengan plaintif bahawa menurut substans, kedua-dua pertuduhan tersebut iaitu pertuduhan yang dimulakan dalam prosiding semasa dan pertuduhan kedua dalam prosiding kedua, adalah berhubung dengan tingkah laku plaintif berkaitan dengan Cik Puziah. Oleh itu, demi keadilan, haruslah hanya terdapat satu pertuduhan sejauh mana ia berkaitan dengan perkara tersebut. Untuk menuduhkan plaintif dua kali bagi tingkah laku yang sama jelas menunjukkan bahawa ia bertentangan dengan prinsip sepertimana yang dinyatakan oleh Majlis Privi dalam kes *Harry Lee Wee*. Oleh itu, atas perkara itu pertuduhan kedua dalam prosiding kedua haruslah diketepikan (lihat ms 396A–B).

(3) Ia tidak terbuka untuk dispekulasikan berhubung dengan hukuman yang berkemungkinan akan dilaksanakan oleh defendan pertama jika hanya terdapat satu pertuduhan di hadapnya. Sebaik sahaja pertuduhan pertama didapati tidak boleh dipertahankan di sisi undang-undang, maka hukuman

tersebut perlu diketepikan. Tidak terdapat sebarang prosedur untuk mahkamah kemukakan kes tersebut kepada pihak berkuasa tatatertib dan tidak terdapat sebarang kuasa yang diletakhak dalam mahkamah untuk menggantikan hukumannya yang tersendiri. Ianya merupakan keputusan mahkamah bahawa perintah pemecatan yang dibuat terhadap plaintif adalah salah di sisi undang-undang dan sehubungan itu, diperintahkan supaya diketepikan (lihat ms 396D–E).

(4) Perkahwinan berpoligami adalah hanya dibenarkan dalam Islam. Seseorang muslim adalah dengan itu tidak diperlukan demi kewajipan agama untuk berkahwin lebih dari seorang isteri. Atas premis itu, adalah secara asasnya tidak salah bagi pihak berkuasa tatatertib untuk mempersyaratkan mana-mana daripada ahli pasukan polis untuk mendapatkan kebenaran daripada pegawai kanannya sebelum memasuki perkahwinan berpoligami. Keadaan yang sedemikian tidak boleh ditafsirkan sebagai melanggari jaminan perlembagaan untuk menganut dan mengamalkan agamanya sepertimana yang terkandung di dalam perkara 11(1) Perlembagaan Persekutuan. Plaintif telah dengan jelasnya bertindak secara bertentangan dengan tatatertib yang baik dengan mengahwini isteri keduanya selepas permohonan beliau untuk kebenaran ditolak oleh pegawai kanan beliau (lihat ms 397A–C).

(5) Tidak terletak kepada mahkamah untuk menggangu hukuman yang dikenakan oleh pihak berkuasa-tatatertib kerana mendisiplinkan seseorang pegawai awam oleh ketua jabatannya adalah merupakan sebahagian daripada fungsi bahagian eksekutif kerajaan dan sebarang rampasan fungsi ini oleh mahkamah akan dipandang dengan serong. Mahkamah akan mencelah hanya atas sifat dan cara tuduhan terhadap seseorang pegawai awam dan bukannya atas hukuman yang diakibatkan (lihat ms 397H–398A); *Ng Hock Cheng v Pengarah Am Penjara & yang lain* [1998] 1 MLJ 405 diikut.

Obiter diktum:

Atrikel 7(2) Perlembagaan Persekutuan, yang melindungi sebarang orang daripada diletakkan dalam 'double jeopardy', tidak terpakai kepada perkara-perkara tatatertib. Ini jelas daripada perkataan artikel tersebut (lihat ms 392B–C).]

Notes

For cases on judicial review, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 76–83.

For cases on dismissal, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 519–543.

For cases on freedom of religion, see 3(1) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1536–1544.

Cases referred to

Connelly v DPP [1964] AC 1254 (refd)
Ekambaram a/l Savarimuthu v Ketua Polis Daerah Melaka Tengah [1997] 2 MLJ 454 (refd)
Harry Lee Wee v Law Society of Singapore [1985] 1 MLJ 1 (folld)
Mohamed Yusoff bin Samadi v Attorney General [1975] 1 MLJ 1 (refd)
Ng Hock Cheng v Pengarah Am Penjara & Ors [1998] 1 MLJ 405 (folld)
R v Hogan; R v Tompkins [1960] 2 QB 513 (refd)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261 (refd)

Legislation referred to

Federal Constitution arts 7(2), 11(1), 132(2)
Penal Code s 213
Prison Rules 1949 rr 42(13), 44
Public Officers (Conduct and Discipline) (Chap 'D') General Orders 1980 general orders 4(2)(d), (i)
Public Service (Disciplinary Proceeding) Regulations 1970 reg 11

Mohd Ismail bin Mohamed (*Ismail Khoo & Associates*) for the plaintiff.
Azman bin Abdullah (Senior Federal Counsel, Attorney General's Chambers) for the defendant.

Arifin Zakaria J. : The plaintiff prior to his dismissal was a police officer with the rank of Chief Inspector. On 4 May 1993, he was dismissed from the police force as a result of disciplinary action taken against him. The plaintiff is dissatisfied with the said disciplinary action and hence this action. The plaintiff is seeking the following reliefs, namely:

(a) a declaration that his dismissal was invalid;

(b) a declaration that, the plaintiff as a police officer of the Islamic faith, could not lawfully be dismissed from the police force on the ground that he had entered into a polygamous marriage;

(c) a court order that the plaintiff be reinstated to his original position and be paid all the salaries and emoluments that he is entitled to;

(d) costs;

(e) further and other reliefs as the court deems fit and proper.

At the commencement of the trial, the parties agreed that the matter be decided base on the agreed facts (bundle 'C') submitted to the court. According to the agreed facts, on 1 June 1991 the plaintiff wrote to the first defendant seeking permission to marry one Cik Puziah bte Ariffin as his second wife. The first defendant rejected the said application and by letter dated 17 August 1991 (bundle 'D' p 3), the plaintiff was strongly advised to terminate his relation with Cik Puziah. In para 3 of the said letter, a warning was sounded that, in the event the plaintiff fail to do so, disciplinary action will be taken against him. Apparently, the plaintiff ignored the

warning. Thus, disciplinary action was taken against him ('the first proceedings') on the following charge:

> Bahawa anda, seorang Pegawai Awam iaitu Inspektor dalam Pasukan Polis Diraja Malaysia, bertugas sebagai PT D10, Jabatan Siasatan Jenayah, Ibu Pejabat Polis Kontinjen Kedah, didapati ingkar perintah, kerana anda tidak memutuskan hubungan intim dengan Cik Pauziah bte Ariffin PF/11930 sepertimana arahan surat Ibu Pejabat bilangan (PR)I/6375 bertarikh 5 April 1991 yang telah pun anda akui terima pada 3 Mei 1991, oleh yang demikian anda telah melakukan satu kesalahan tatatertib di bawah perintah am 4(2)(i) Perintah-Perintah Am Pegawai Awam kelakuan dan Tatatertib) (Bab 'D') 1980.

The plaintiff was found guilty as charged. The plaintiff was fined three days salary and was also reprimanded. The plaintiff accepted the decision of the disciplinary authority and the punishment imposed on him.

The relationship between the plaintiff and Cik Puziah however did not end there, as the plaintiff, despite failing to obtain the necessary permission from the first defendant, proceeded to marry Cik Puziah on 3 September 1991. This led to further disciplinary action being taken against him. This time, the plaintiff was charged with two breaches of discipline. The charges were as follows:

> 1.1 Alasan pertama
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> Bahawa anda, seorang Pegawai Awam, iaitu Inspektor di dalam Pasukan Polis DiRaja Malaysia dan ketika itu berkhidmat sebagai Pegawai Penyelaras Ibu Pejabat Daerah Polis Raub, dalam Negeri Pahang, telah menjalinkan perhubungan sulit dengan Puziah bte Ariffin (KP: 5147002) yang bukan isteri anda dalam tempoh di antara Mac 1988 hingga 3 September 1991 sehingga menyebabkan rumahtangga dengan suaminya En Burhanuddin bin Abu Bakar (KP: 0246180) mengalami keruntuhan dan kehancuran yang mana perbuatan anda ini telah menjatuhkan reputasi perkhidmatan awam dan oleh yang demikian anda telah melakukan satu kesalahan tatatertib di bawah perintah am 4(2)(d), Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D') 1980.
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> 1.2 Alasan kedua
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> Bahawa anda, seorang Pegawai Awam, iaitu Inspektor di dalam Pasukan Polis DiRaja Malaysia dan ketika itu berkhidmat sebagai Pegawai Pencegah Jenayah, Jabatan Siasatan Jenayah di Ibu Pejabat Polis Kontinjen Kedah, telah didapati ingkar perintah kerana telah melakukan poligami dengan mengahwini Puan Puziah bte Ariffin (KP: 5147002) pada 3 September 1991, jam 9.00 malam di alamat No 12, Rumah Murah Dong, Raub, Pahang tanpa terlebih dahulu mendapat kebenaran daripada Y Bhg Tan Sri Ketua Polis Negara seperti kehendak arahannya dalam Bil KPN 39/33 bertarikh 18 Ogos 1981 dan oleh yang demikian, anda telah melakukan satu kesalahan tatatertib di bawah perintah am 4(2)(i), Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D') 1980.

The plaintiff was found guilty of both charges and was accordingly dismissed from the police with effect from 4 May 1993. The plaintiff is

dissatisfied with the decision of the first defendant on several grounds and I shall consider each of these grounds in the order they were raised before me.

Double jeopardy

The learned counsel for the plaintiff submitted that the second disciplinary action against the plaintiff was based on the same facts in respect of which the plaintiff had already been charged, found guilty and punished. He contended that by charging the plaintiff the second time, the first defendant had acted contrary to art 7(2) of the Federal Constitution ('the Constitution') which seeks to protect any person from being placed in 'double jeopardy' and be punished twice for the same offence. For ease of reference, the said article is set out below:

> 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.

The learned senior federal counsel who appeared for both the defendants contended that art 7(2) of the Constitution by its wording is only applicable to criminal offences and not to disciplinary matter as in the present case. He based his contention on the simple ground that the said article clearly speaks of 'A person who has been acquitted or convicted of an offence …'. He argued that the plaintiff here has never been charged with any criminal offence be it under the Penal Code or under any other written law. In support of his contention, he cited the case of *Mohamed Yusoff bin Samadi v Attorney General* [1975] 1 MLJ 1. In that case the plaintiff, who was a school teacher, had been charged on five charges of using criminal force to four girls in his class to outrage their modesty. He was acquitted on those charges. Subsequently, the Public Service Commission instituted disciplinary proceedings against the plaintiff with a view to his dismissal. The plaintiff was charged with five charges that he abused his position as teacher by outraging the modesty of the same four pupils. He applied for a declaration that reg 11 of the Public Service (Disciplinary Proceeding) Regulations 1970 is ultra vires art 7(2) of the Constitution, as it applies to Singapore, and that the determination in the magistrate's court was a conclusive acquittal and discharge of the plaintiff which constituted issue estoppel or res judicata, thus making it improper for the Public Service Commission to proceed on the same charges. There, it was held that no principle of law precludes a man who has been acquitted or convicted upon a set of facts alleged to constitute an offence being subsequently subjected upon the same facts to disciplinary action by a domestic tribunal.

The learned counsel also referred the court to the English case of *R v Hogan and R v Tompkins* [1960] 2 QB 513. In that case two prisoners serving sentences of preventive detention planned with another man to escape from prison. In order to escape, wire under a skylight had to be cut. The wire was cut and the three men got out through the skylight and escaped. The two prisoners having been recaptured, the governor of the

prison reported them for an offence against discipline under r 42(13) of the Prison Rules 1949 ('the Rules'), to the visiting committee of justices, and pursuant to r 44 of the Rules the visiting committee determined upon the report and made a number of awards forfeiting privileges against the men. Both men were later tried and convicted on an indictment charging them, inter alia, with prison breach. On appeal against the convictions for that offence on the ground that, having already been dealt with by the visiting committee for simple escape, they could not subsequently be charged with prison breach since it was a charge of the same offence of escape in an aggravated form. In that case, it was held that the principle that a man who had been convicted of an offence could not subsequently be charged with the same offence in an aggravated form in relation to the same facts, was confined to courts of competent jurisdiction, and that, as the visiting committee had not convicted the prisoners of the common law offence of simple escape, but, as a matter of internal discipline, had found them guilty of an offence against discipline, there was nothing which precluded the subsequent charge of common law escape in the aggravated form of prison breach. The fact that the prisoners had already been convicted and had forfeited privileges for a breach of discipline was a matter for the trial judge to take into consideration when passing sentence, and there was no ground for interfering with the convictions.

Lord Parker CJ at p 518 made the following observation:

> The court, however, feels that the principle in *Reg v Miles* is meant to apply and can only apply to the decisions of courts of competent jurisdiction. Though not strictly a case of autrefois convict, it is very much on those lines. It so happens that the offence created under the Prison Rules 1949, an offence against discipline, is in fact the same as the common law offence of escape, but the visiting committee dealt with the matter as an offence against discipline under the Prison Rules. They have not dealt with the common law offence of simple escape. It follows, therefore, in our judgment that, strictly, Hilbery J need not have struck out the first count as to simple escape, though clearly it was the sensible thing to do, because if convicted of simple escape alone the judge, in deciding upon the sentence, would have to take into consideration what had already happened as a matter of prison discipline.
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> It is quite another matter to say that a prisoner, having been found guilty of a breach against discipline, cannot then be charged with the common law offence of simple escape in its aggravated form as a prison breach. It seems to us that he clearly can, just as the visiting committee could have dealt with the breach against discipline if that had come before them after the prisoners had been convicted at assizes. The truth of the matter is that the visiting committee are dealing with matters of internal discipline with which this court is in no way concerned.

I pause here to say that I agree entirely with the submission of learned counsel for the defendants that art 7(2) of the Constitution has no application to disciplinary matter. This is clear from the wordings of the said article. However, I must say that I do not see how the authorities cited by the learned counsel could support the defendants' case. My understanding of these authorities is that criminal action can be taken against any person base on the same facts in respect of which he had been proceeded with

earlier under a disciplinary action and vice versa. In the case before us, the situation is some what different. Here the question is, whether disciplinary action can be taken against any one for the second time base on the same facts after he had been convicted or acquitted in the earlier disciplinary proceedings. The plaintiff's counsel said you are barred from doing so. He grounded his argument on the common law principle of autrefois convict or acquit. He said the said principle is not only applicable to criminal matter but also to disciplinary matter.

He referred me to the Singapore case of *Harry Lee Wee v Law Society of Singapore* [1985] 1 MLJ 1. There, it was held by the Privy Council that the doctrine of autrefois convict and acquit is applicable to disciplinary proceedings under a statutory code by which a profession is governed. To better appreciate the issues involved in that case, I set out below the facts of the case as found in the head note:

> In this case, the appellant was an advocate and solicitor practicing under the name of Braddell Brother, of which firm he was the sole proprietor.
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> In February 1976, he found that a legal assistant in his employment called Santhiran had misappropriated monies from his firm's clients' account amounting to just short of $300,000. When he discovered the defalcations, the appellant did not make any report to the Law Society or to the police. Santhiran continued in the employment of the appellant and made restitution of substantially the whole of the sums he had taken. It was only later that the appellant reported to the Law Society and the police. The first disciplinary proceedings against the appellant were commenced by the Inquiry Committee in 1978 and subsequently the council of the Law Society having received the findings of the Inquiry Committee applied to the Chief Justice for the appointment of a Disciplinary Committee to investigate the appellant's failure to report the criminal breach of trust committed by Santhiran to the Law Society earlier. Meanwhile the appellant was charged and convicted of offences under s 213 of the Penal Code of accepting restitution of property to himself in consideration of concealing an offence. The Inquiry Committee commenced the second disciplinary proceedings based on the conviction. The appellant applied to have the inquiry adjourned pending his appeal against the conviction but this was refused.
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> The disciplinary proceedings on the first charge were heard in the High Court on 16 March 1981 and the appellant was suspended for two years. The appellant's appeal against conviction was dismissed.
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> With the coming into force of the Legal Profession Act, a new Inquiry Committee was appointed to inquire into the second charge and eventually the proceedings were heard by the High Court on 21 and 22 February 1983. An order was made that the appellant be suspended from practice for two years (see [1984] 1 MLJ 331). The appellant appealed against this order.

The Privy Council stated that the principles laid down in *Connelly v Director of Public Prosecutions* [1964] AC 1254 are apt to apply to the circumstances in that case and enable the appellant to rely on the order made against him in the first proceedings as a complete bar to further disciplinary action against him in the second proceedings. It also held that even if the facts cannot be brought within the strict test laid down in *Connelly v DPP*, the second proceedings in that case brought by the Law Society against the

appellant following the first proceedings were an abuse of the disciplinary process. At p 2, Lord Bridge of Harwich in delivering the judgment of the Board said:

> The essence of the appellant's attack on the second order can be shortly stated. Both sets of disciplinary proceedings arose from exactly the same conduct by the appellant and although it was possible to attach a different label in each case to the particular form of professional misbehaviour alleged, the gravamen of the complaint against him in each case was either identical or nearly so, so as to entitle him either to rely on the principle of autrefois convict or on the closely analogous principle, applicable alike to criminal and civil litigation, that the unnecessary duplication of proceedings is an abuse of process which the court has an inherent jurisdiction to restrain.

Reverting to the facts of the present case, the plaintiff was, in the first and the second proceedings, charged with breaches of discipline under the Public Officers (Conduct and Discipline) (Chap 'D') General Orders 1980 ('the GOD') which is a statutory code of conduct governing public services in Malaysia, a code enacted under cl (2) of art 132 of the Constitution. In the circumstances, I am of the view that the principle sets out in the case of *Harry Lee Wee*, is apt to apply to the present case.

It is necessary at this stage to consider the charges made against the plaintiff. In the first proceedings, he was charged with an offence of failing to abide by the order of his superior officer that is, to stop any relation that he has with Cik Puziah bte Ariffin. While in the second proceedings, one of the charges brought against him was for having intimate relation with the same lady between March 1988 and September 1991. In the second proceedings, it was alleged that the conduct of the plaintiff, have brought disrepute to the public services, which is an offence under general order 4(2)(d) of the GOD. It was contended on behalf of the plaintiff that these two charges essentially relate to the same facts, ie the conduct of the plaintiff in having an intimate relation with the same lady. It was argued that eventhough the first charge was one of failure to obey the order of a superior officer but the said order relates to the conduct of the plaintiff in relation to the same lady.

In *Harry Lee Wee*'s case, the second proceedings was in respect of his convictions under s 213 of the Penal Code which was based on the same facts for which the first proceedings were taken and the Privy Council at p 6 made the following observation:

> If the facts here cannot be brought within Lord Devlin's strict test, they are certainly covered by the alternative form of relief which he favoured as mitigating the rigour of his strict test. The alternative approach is explained at length in the latter part of Lord Devlin's speech and leads clearly to the conclusion in the present case that the conviction proceedings brought by the Law Society against the appellant following the delay proceedings were an abuse of the disciplinary process.

The plaintiff's complaint here is that there is duplicity between the charge brought in the first proceedings and the first charge in the second proceedings as they are both related to the same conduct of the plaintiff.

The only difference is that in the first proceedings, he was charged under general order 4(2)(i) of the GOD for insubordination, whereas in the second proceedings he was charged under general order 4(2)(d) of the GOD for conducting himself in such a manner as to bring public service into disrepute. Looking at the facts, I agree with the plaintiff that in substance, the two charges were in respect of the same conduct of the plaintiff in relation to Cik Puziah. Therefore, in all fairness, there should have been only one charge as far as that is concerned. To charge the plaintiff twice for the same conduct clearly goes against the principle as stated by the Privy Council in *Harry Lee Wee*'s case. Therefore, on that score, the first charge in the second proceedings ought to be set aside.

However, that is not the end of the matter, learned senior federal counsel, in his submission, further contended that even if the court were to hold that one of the charges in the second proceedings was invalid, that should not vitiate the punishment imposed by the first defendant on the plaintiff since the punishment was in respect of two separate charges. He contended that the first defendant could still impose the same punishment on the plaintiff based on just one of the charges. Therefore, he argued it does not really matter whether one of the charges is valid or not. With respect to the learned counsel, I do not think it is open for us to speculate as to the likely punishment that the first defendant will impose had there been only one charge before him. In my opinion, once the first charge is found to be unsustainable in law, then the punishment need to be set aside. There is no procedure for the court to remit the case to the disciplinary authority nor is there any power vested in the court to substitute its own punishment. For the above reasons, it is my finding that the order of dismissal made against the plaintiff is wrong in law and accordingly, I order that the same be set aside.

Freedom of religious practice

With regard to the second charge in the second proceedings the plaintiff contended that the charge is unsustainable on the ground that it goes against the plaintiff's right to practise his religious belief as enshrined in art 11 of the Federal Constitution. The plaintiff contended that the practice of polygamous marriage is permissible under the Islamic faith and the first and second defendants had acted contrary to the said provisions of the Federal Constitution in taking that right away from the plaintiff.

In this regard, it is relevant to refer to *surah An Nisa* verse 3 of the *Holy Koran*, the English translation of which reads as follows:

> … Marry women of your choice, two, or three, or four; But if ye fear that ye shall not be able to deal justly (with them), then only one, or (a captive) that your right hand possess. That will be more suitable, to prevent you from doing injustice.

(See *The Holy Quran Text, Translation and Commentary, A Yusuf Ali*). In the commentary, A Yusuf Ali wrote:

> The unrestricted number of wives of the 'Times of Ignorance' was now strictly limited to a maximum of four, provided you could treat them with perfect

> equality, in material things as well as in affection and immaterial things. As this condition is most difficult to fulfill, I understand the recommendation to be towards monogamy.

It is obvious from the verse cited that polygamous marriage is merely permissible in Islam. A muslim is therefore not required, as a matter of religious obligation, to take upon more than one wife. As a matter of fact, there are certain conditions that need to be met before a muslim is allowed to do so. On that premise, I don't think it is fundamentally wrong for the disciplinary authority to require any member of the police force to obtain prior permission from his superior officer before entering into a polygamous marriage. Such a condition could not, in my view, be construed as infringing the constitutional guarantee to profess and practise his religion as contained art 11(1) of the Federal Constitution. Failure to obtain such a permission, of course, amount to a breach of discipline. Further, I don't think it is open to the plaintiff to argue that the need to seek permission from his superior is merely a matter of formality and as such it could not render him liable to disciplinary action under the GOD. I am of the view that the plaintiff had clearly acted contrary to good discipline in marrying his second wife after his request for permission to do so was turned down by his superior officer. For the above reasons, I am unable to accept the second ground put forward by the plaintiff.

Whether the sentence imposed is appropriate in the circumstances of the case

The third and final ground advanced by the plaintiff is that the sentence imposed by the first defendant is in the circumstances of the case excessive. The learned counsel for the plaintiff contended that it is open to the court in appropriate cases to interfere with the punishment imposed by the disciplinary authority. He relied on the decision, the Court of Appeal in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 in support of this proposition. There, at p 298, Gopal Sri Ram JCA said:

> … But it must, when deciding what punishment it ought to impose on the particular public servant, act reasonably and fairly.
>
> If it acts arbitrarily or unfairly or imposes a punishment that is disproportionate to the misconduct, then its decision, to that extent, becomes liable to be quashed or set aside.

The case of *Ekambaram a/l Savarimuthu v Ketua Polis Daerah Melaka Tengah* [1997] 2 MLJ 454, was also cited in support of the point. However, the decision in *Tan Tek Seng*, on this narrow point had been overturned by the Federal Court in *Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 1 MLJ 405. The Federal Court in that case at p 159 stated thus:

> It cannot be denied further that the disciplining of a public officer by his department head is part of the function of the executive branch of the government and any usurpation by a court will be viewed with something very much more than disfavour even though the judiciary is the judicial branch of the government as well as an institution which belongs to the people. To repeat, a court intervenes only on the nature and manner of accusation against

a public officer as distinct from a consequential punishment as explained above.

That dispose of the third ground relied upon by the plaintiff.

Conclusion

For the reasons given, I find there are merits in the plaintiff's contention as set out in the first ground, and I, therefore, made an order in terms of prayers (a), (c) and (d) of the plaintiff's claim.

Plaintiff's application allowed in part.

Reported by Moy Saw Han