Penal Code are specifically dealt with in section 105 of the Evidence Ordinance 1950 which reads as follows:

"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of such circumstances."

But section 105 should not be read in isolation but must be read in relation to the Ordinance as a whole. In particular, sections 101 and 102 provided in effect that in a criminal case it is for the prosecution to prove the guilt of the accused person. Thus in the words of Illustration (a) to section 101 of the Evidence Act:

"A. desires a court to give judgment that B. shall be punished for a crime which A. says B. has committed. A must prove that B. has committed the crime."

We accordingly answered the questions posed simply in the following terms. To earn an acquittal in a criminal proceeding for an offence under section 420 of the Penal Code, an accused has only to cast a reasonable doubt on the prosecution case.

We also set aside the order for retrial.

Order accordingly.

Solicitors: *Manjeet & Associates.*

CHE OMAR BIN CHE SOH v. PUBLIC PROSECUTOR

WAN JALIL BIN WAN ABDUL RAHMAN & ANOR v. PUBLIC PROSECUTOR

[S.C. (Salleh Abas L.P., Wan Suleiman, Seah, Hashim Yeop A. Sani & Syed Agil Barakbah S.C.JJ.) 16 December 1987 & 29 February 1988]

[Kuala Lumpur – Supreme Court Criminal Appeals Nos. 28 and 29 of 1986]

Criminal Law – Mandatory death sentence for offence of trafficking in dangerous drugs and under Firearms (Increased Penalties) Act – Whether against injunctions of Islam and therefore void – No reliance can be placed on wording of Article 3 of Federal Constitution – Federal Constitution, Arts. 3, 4 & 162.

Constitutional Law – Provision that Islam is religion of Federation – Significance of – Provision relates only to rituals and ceremonies – Not much reliance can be placed on wording of Article 3 to sustain submission that the punishment of death for the offence of drug trafficking or any other offence will be void as being unconstitutional – Federal Constitution, Arts. 3, 4 & 162.

In this appeal, an additional ground of appeal sought to show that the mandatory death sentence for the offence of drug trafficking and for the offence under the Firearms (Increased Penalties) Act is against the injunctions of Islam and therefore unconstitutional and void.

Held: (1) the term "Islam" or "Islamic religion" in Article 3 of the Federal Constitution in the context means only such acts as relate to rituals and ceremonies;

(2) during the British colonial period, through their system of indirect rule and establishment of secular institutions, Islamic law was rendered isolated in a narrow confinement of the law of marriage, divorce and inheritance only. It is in this sense of dichotomy that the framers of the Constitution understood the meaning of the word "Islam" in the context of Article 3;

(3) it should thus appear that not much reliance can be placed on the wording of Article 3 to sustain the submission that punishment of death for the offence of drug trafficking or any other offence will be void as being unconstitutional.

SUPREME COURT.

S. Sivasubramanian for the appellant in Criminal Appeal No. 28/86.

T Mura Raju for the first appellant in Criminal Appeal No. 29/86.

Ramdas Tikamdas for the second appellant in Criminal Appeal No. 29/86.

Mohamed Noor Haji Ahmad (Deputy Public Prosecutor); *Zaini Haji Abdul Rahman* (Deputy Public Prosecutor) with him for the respondent.

Cur. Adv. Vult.

Salleh Abas L.P. (delivering the grounds of decision of the court): The additional ground of appeal in Criminal Appeal Nos. 28 and 29 of 1986 seeks to show that a mandatory death sentence for the drug trafficking offence and for the offence under the Fire Arms (Increased Penalties) Act is against the injunctions of Islam and therefore void. It is argued that since Islam is the religion of the Federation (Article 3(1)), and since the Constitution is the supreme law of the Federation (Article 4(1)), the imposition of the death penalty on these offences, not being a *"huddud"* or *"qisas"* according to Islamic law, is contrary to Islamic injunction and is therefore unconstitutional.

The first point to consider here is the meaning which could be given to the expression "Islam" or "Islamic religion" in Article 3 of the Constitution. If the religion of Islam in the context

means only such acts as relate to rituals and ceremonies, the argument has no basis whatsoever. On the other hand, if the religion of Islam or Islam itself is an all-embracing concept, as is normally understood, which consists not only the ritualistic aspect but also a comprehensive system of life, including its jurisprudence and moral standard, then the submission has a great implication in that every law has to be tested according to this yardstick.

There can be no doubt that Islam is not just a mere collection of dogmas and rituals but it is a complete way of life covering all fields of human activities, may they be private or public, legal, political, economic, social, cultural, moral or judicial. This way of ordering the life with all the precepts and moral standards is based on divine guidance through his prophets and the last of such guidance is the Quran and the last messenger is Mohammad S.A.W. whose conduct and utterances are revered. (See S. Abdul A'la Maududi, *The Islamic Law and Constitution,* 7th Ed., March 1980.)

The question here is this: Was this the meaning intended by the framers of the Constitution? For this purpose, it is necessary to trace the history of Islam in this country after the British intervention in the affairs of the Malay States at the close of the last century.

Before the British came to Malaya, which was then known as Tanah Melayu, the sultans in each of their respective states were the heads not only of the religion of Islam but also as the political leaders in their states, which were Islamic in the true sense of the word, because, not only were they themselves Muslims, their subjects were also Muslims and the law applicable in the states was Muslim law. Under such law, the sultan was regarded as God's vicegerent (representative) on earth. He was entrusted with the power to run the country in accordance with the law ordained by Islam, *i.e.* Islamic law and to see that law was enforced. When the British came, however, through a series of treaties with the sultans beginning with the Treaty of Pangkor and through the so-called British advice, the religion of Islam became separated into two separate aspects, *viz.* the public aspect and the private aspect. The development of the public aspect of Islam had left the religion as a mere adjunct to the ruler's power and sovereignty. The ruler ceased to be regarded as God's vicegerent on earth but regarded as a sovereign within his territory. The concept of sovereignty ascribed to humans is alien to Islamic religion because in Islam, sovereignty belongs to God alone. By ascribing sovereignty to the ruler, *i.e.* to a human, the divine source of legal validity is severed and thus the British turned the system into a secular institution. Thus all laws including administration of Islamic laws had to receive this validity through a secular fiat. Although theoretically because the sovereignty of the ruler was absolute in the sense that he could do what he likes, and govern according to what he thought fit, the Anglo/Malay Treaties restricted this power. The effect of the restriction made it possible for the colonial regime under the guise of "advice" to rule the country as it saw fit and rendered the position of the ruler one of continuous process of diminution. For example, the establishment of the Federated Malay States in 1895, with the subsequent establishment of the Council of States and other constitutional developments, further resulted in the weakening of the ruler's plenary power to such an extent that Islam in its public aspect had become nothing more than a mere appendix to the ruler's sovereignty. Because of this, only laws relating to family and inheritance were left to be administered and even this was not considered by the court to have territorial application binding all persons irrespective of religion and race living in the state. The law was only applicable to Muslims as their personal law. Thus, it can be seen that during the British colonial period, through their system of indirect rule and establishment of secular institutions, Islamic law was rendered isolated in a narrow confinement of the law of marriage, divorce, and inheritance only. (See M.B. Hooker, *Islamic Law in South-east Asia,* 1984.)

In our view, it is in this sense of dichotomy that the framers of the Constitution understood the meaning of the word "Islam" in the context of Article 3. If it had been otherwise, there would have been another provision in the Constitution which would have the effect that any law contrary to the injunction of Islam will be void. Far from making such provision, Article 162, on the other hand, purposely preserves the continuity of secular law prior to the Constitution, unless such law is contrary to the latter.

It would thus appear that not much reliance can be placed on the wording of Article 3 to sustain the submission that punishment of death for the offence of drug trafficking, or any other offence, will be void as being unconstitutional.

We, therefore, do not consider important to discuss cases cited by counsel on the question of death penalty being contrary to Islamic perception.

It is the contention of Mr. Ramdas Tikamdas that because Islam is the religion of the Federation, the law passed by Parliament must be imbued with Islamic and religious principles and Mr. Mura Raju, in addition, submitted that, because Syariah law is the existing law at the time of Merdeka, any law of general application in this country must conform to Syariah law. Needless to say that this submission, in our view, will be contrary to the constitutional and legal history of the Federation and also to the Civil Law Act which provides for the reception of English common law in this country.

A great deal of argument was spent to say that the law must be just, and the Proclamation of Independence was cited as an authority. There is of course no need for us to go further than to say that the standard of justice naturally varies from individual to individual; but the only yardstick that the court will have to accept, apart from our personal feelings, is the law that was legislated by Parliament.

We thank counsel for the efforts in making researches into the subject, which enabled them to put the submissions before us. We are particularly impressed in view of the fact they are not Muslims. However, we have to set aside our personal feelings because the law in this country is still what it is today, secular law, where morality not accepted by the law is not enjoying the status of law. Perhaps that argument should be addressed at other forums or at seminars and, perhaps, to politicians and Parliament. Until the law and the system is changed, we have no choice but to proceed as we are doing today.

Solicitors: *Siva, Ram & Associates; Mura Raju & Co.*

YEE CHEE PANG v. WONG NAM SANG ENTERPRISE SDN. BHD.

[S.C. (Abdul Hamid C.J. (Malaya), Hashim Yeop A. Sani & Syed Agil Barakbah S.C.JJ.) 19 January & 27 February 1988]

[Kuala Lumpur – Supreme Court Civil Appeal No. 253 of 1987]

Land Law – Agreement for sale and purchase of land – Provision for payment of balance of purchase price within six months of date of agreement – Time declared essence of contract – Failure to settle balance of purchase price – Agreement rescinded and deposit forfeited – Application by purchaser – Finding by trial judge of condition precedent – Deposit ordered to be returned – Appeal allowed – Whether deposit true deposit.

In this case, the appellant had agreed to sell, and the respondents had agreed to purchase, certain premises in Kuala Lumpur for the sum of $230,000. A sum of $54,000 was paid by the purchaser by way of deposit. The balance of the purchase price was to be settled within six months from the date of the agreement. Time was declared to be the essence of the contract. The respondents did not pay the balance of the purchase price on the due date and the appellant instructed his solicitors to rescind the agreement and forfeited the deposit. On application to the High Court, the learned judge held that there was a condition precedent that the appellant should co-operate and not hinder or obstruct the performance of the agreement. She attributed the delay in the settlement of the purchase price to the appellant and his solicitors. The learned judge therefore ordered the deposit to be returned and that the appellant pay all the necessary expenses incurred by the respondent. The appellant appealed.

Held, allowing the appeal: the appellant was within his right under the sale and purchase agreement to rescind the contract and to forfeit the deposit and therefore the appeal must be allowed.

Cases referred to:

(1) *K. Umar Rajah* v. *E.L. Magness* [1985] 1 M.L.J. 116 (distd.)

(2) *Sun Properties Sdn. Bhd. & Ors.* v. *Happy Shopping Plaza Sdn. Bhd.* [1987] 2 M.L.J. 71 (cited).

SUPREME COURT.

T. Thomas (*Miss C.L. Wong* with him) for the appellant.

Cyrus V. Das for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani S.C.J. (delivering the judgment of the court): This appeal arose out of a sale and purchase agreement relating to premises No. 16 Persiaran Puteh, off Klang Road, Kuala Lumpur which agreement was executed on June