B.S.S. Kanda v. *The Government of Malaysia & Ors.*[17] and the cases cited previously. Neither was it the case of a fair opportunity of correcting or contradicting any statement prejudicial to him. If it had been possible for him to be accorded an oral hearing and he had gone before the Governor-in-Council or if he had been asked what further representations, if any, he had to make, could he have said anything more than what he had said in his letters to SESCO, that he holds a licence for a determinate and irreducible term, that he was allowed to make certain charges, that he had therefore a right to make these charges and because of these privileges he enjoyed as a matter of grant he was not prepared to reduce the charges or to give his consent to be replaced?

If he had nothing he could possibly add to what had already been said for him, the conclusion is inevitable that the Governor-in-Council then had all the material evidence before him to enable him to come to a fair and proper decision. More so, as in this particular case, his approach need not be subjective and his decision is not dependent on any particular view open to him to take on the evidence. Subsection (3) of section 15 of the Ordinance which reads

"15(3) For the purposes of the proviso to subsection (2), consent shall be deemed to be unreasonably refused or withheld if the licensee is not willing and able to supply the requisite energy upon reasonable terms and within a reasonable time, having regard, amongst other things, to the terms upon, and the time within, which the Corporation is willing and able to supply such energy."

lays down a strictly objective test and if the evidence is, as it clearly was in this case, that the licensee is, among other things, not willing to supply the energy required upon the terms which SESCO is willing and able to offer, then the licensee's consent, however he may in his own light think it reasonable to refuse or withhold, is deemed (see the definition of "deemed to be" per Cave J. in *R.* v. *Norfolk County Council*[18] at page 380) to be and is unreasonably refused or withheld. Though it is not part of the normal duty or function of the courts to review the decision of the executive, when the rules of natural justice had been observed, we would in the peculiar circumstances of this case allow ourselves a remark that on the evidence, the Governor-in-Council could have come to no other conclusion than that the licensee's consent had been unreasonably withheld or refused, according to the test laid down in section 15(3).

It will be seen that we differ from the learned trial judge only on the score whether an adequate opportunity to be heard had in fact been accorded the licensee. It seems to us reading his judgment as a whole, that this is only so because he had, with respect, failed to deal with this question adequately or perhaps not even at all.

The appeal is allowed with costs both here and in the High Court. The claims of the respondent in both actions stand dismissed.

Appeal allowed.

Solicitors: *Chan, Jugah, Wan Ullok & Co.; Ee & Lim.*

PHANG CHIN HOCK v. PUBLIC PROSECUTOR

[F.C. (Suffian L.P., Wan Suleiman & Syed Othman F.JJ.) June 28 & August 21, 1979]

[Kuala Lumpur — Federal Court Criminal Appeal No. 27 of 1977]

Criminal Law and Procedure — Unlawful possession of ammunition — Trial in accordance with Essential (Security Cases) Regulations, 1975 — Regulations validated by Emergency (Essential Powers) Act, 1979 — Power of Parliament to amend Constitution — Whether Act valid — Internal Security Act, 1960, s. 57.

Constitutional Law — Power of Parliament to amend Constitution — Rule of harmonious construction — Basic structure of Constitution — Judicial power of Courts — Whether Emergency (Essential Powers) Act, 1979 valid — Emergency (Essential Powers) Act, 1979, ss. 2(4), 9(3) & 12 — Federal Constitution, arts. 4(1), 45, 149, 150.

The appellant had been convicted of the offence of unlawful possession of ammunition and sentenced to death. He was tried in accordance with the Essential (Security Cases) Regulations, 1975, which were held to be invalid in *Teh Cheng Poh* v. *Public Prosecutor*[10] but were subsequently validated by the Emergency (Essential Powers) Act, 1979. In the appeal by the appellant it was argued that (a) any Act of Parliament which amends the Constitution, as is allowed by Article 159 of the Constitution, is valid only if consistent with the Constitution and that any provision in it which is so inconsistent, is to the extent of the inconsistency, void; (b) even if the amendments made by Parliament in accordance with article 159 may be inconsistent with the existing provisions of the Constitution, the court should read into the Constitution implied limitations on the power of Parliament to destroy the basic structure of the Constitution; (c) even if the Emergency (Essential Powers) Act, 1979 is valid, sections 2(4), 9(3) and 12 thereof are void as they destroy the basic structure of the Constitution.

Held: (1) Parliament have power to make constitutional amendments that are inconsistent with the Constitution. In construing Article 4(1) and Article 159 the rule of harmonious construction requires the court to give effect to both provisions;

(2) Parliament may amend the Constitution in any way they think fit, provided that they comply with all the conditions precedent and subsequent regarding manner and form prescribed by the Constitution itself;

(3) it is unnecessary in this case to decide whether or not Parliament's power of constitutional amendment extends to destroying the basic structure of the Constitution;

(4) the Emergency (Essential Powers) Act, 1979, is constitutional. Whatever may be the features of the basic structure of the Constitution, none of the constitutional amendments complained of and none of the impugned provisions of the Act have destroyed the basic structure of the Constitution.

Cases referred to:-

(1) *Kesavananda Bharati* v. *State of Kerala* [1973] S.C.R. Supp. 1; A.I.R. 1973 S.C. 1461.

(2) *Shankari Prasad Singh Deo and Others* v. *The Union of India and Others* A.I.R. 1951 S.C. 458.

(3) *Sajjan Singh* v. *State of Rajasthan* A.I.R. 1965 S.C. 845.

(4) *I.C. Golak Nath & Others* v. *State of Punjab* (1967) 2 S.C.R. 762; A.I.R. 1967 S.C. 1643.

(5) *Loh Kooi Choon* v. *Government of Malaysia* [1977] 2 M.L.J. 187.

(6) *Bribery Commissioners* v. *Ramasinghe* [1965] A.C. 172, 198.

(7) *Bank of Toronto* v. *Lambe* (1887) 12 App. Cas. 575, 586.

(8) *Attorney-General of Ontario* v. *Attorney-General of Canada* [1912] A.C. 571, 582.

(9) *Attorney-General for Alberta* v. *Attorney-General for Canada* [1939] A.C. 117, 123-5.

(10) *Teh Cheng Poh* v. *Public Prosecutor* [1979] 1 M.L.J. 50.

(11) *Piare Dusadh* v. *Emperor* A.I.R. 1944 F.C. 1.

(12) *Federal Commissioner of Taxation* v. *Munro* (1925-6) 38 C.L.R. 153.

(13) *Basanta Chandra* v. *Emperor* A.I.R. 1944 F.C. 86.

The following cases were also cited in argument: *Eng Sin* v. *Public Prosecutor* [1974] 2 M.L.J. 168; *Sin Soon Suan* v. *Public Prosecutor* [1966] 1 M.L.J. 116; *Reg.* v. *Khoo Guan Teik* [1957] M.L.J. 128; *Indira Nehru Gandhi* v. *Raj Narain* A.I.R. 1975 S.C. 2299; *Liyanage* v. *The Queen* [1967] A.C. 259, 286-9; *Attorney-General of Australia* v. *Reg. and the Boilermakers' Society of Australia and Ors.* [1957] 2 All E.R. 45; *Philip Hoalim Jr. & Anor.* v. *State Commissioner, Penang* [1976] 2 M.L.J. 231; *Government of the State of Kelantan* v. *Government of the Federation of Malaya & Anor.* [1963] M.L.J. 355.

FEDERAL COURT.

G.T.S. Sidhu (*Jagjit Singh* with him) for the appellants.

T.S. Sambanthamurthi (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Suffian L.P. (delivering the judgment of the Court): In this security case tried in accordance with the Essential (Security Cases) Regulations, 1975, ("the regulations"), the appellant was convicted of the offence of unlawful possession of six rounds of ammunition contrary to section 57(1)(b) of the Internal Security Act, 1960, and sentenced to death.

We dismissed the appeal and now give our reasons.

First, it was said in effect that the conviction was against the weight of evidence. We were of the opinion that there was ample evidence to justify the conviction and that the learned trial judge was right in concluding on the evidence that the defence had not thrown any doubt on the case for the prosecution.

Secondly, arguments were raised based on the Constitution. Three points were made.

It was said first that in view of Article 4(1) of the Constitution which reads:

"4. (1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."

and of the definition of "law" and "federal law" in Article 160(1) which includes "any Act of Parliament", any Act of Parliament which amends the Constitution, as is allowed by Article 159, is valid only if consistent with the Constitution, and that any provision in it, which is so inconsistent, is, to the extent of the inconsistency, void.

Secondly and alternatively, it was said that even if amendments made by Parliament in accordance with Article 159 may be inconsistent with existing provisions of the Constitution, nevertheless the court should read into the Constitution implied limitations on the power of Parliament to destroy the "basic structure" of the Constitution, which, it was submitted, includes the following features:

(a) supremacy of the Constitution;

(b) constitutional monarchy;

(c) that the religion of the Federation shall be Islam and that other religions may be practised in harmony;

(d) separation of the powers of the three branches of Government; and

(e) the federal character of the Constitution.

This list may be compared with the features of the basic structure of the Indian Constitution given at page 165 by Sikri C.J. in *Kesavananda Bharati* v. *State of Kerala*[1] as follows:

(a) Supremacy of the Constitution;

(b) Republican and Democratic form of Government;

(c) Secular character of the Constitution;

(d) Separation of powers between Legislature, Executive and Judiciary; and

(e) Federal character of the Constitution.

Thirdly, even if the Emergency (Essential Powers) Act, 1979 ("Act 216") is valid, sections 2(4), 9(3) and 12 thereof are void as they destroy the basic structure of the Constitution.

Thus there are three issues here.

First, do Parliament have power to make constitutional amendments that are inconsistent with the Constitution?

Secondly, if Parliament have power to make constitutional amendments that are inconsistent with the Constitution, do they have power to make amendments that destroy the basic structure of the Constitution?

Thirdly, have sections 2(4), 9(3) and 12 of Act 216 destroyed the basic structure of the Constitution and are they therefore void?

As regards the first point, Mr. Sidhu drew our attention to Article 45(1) which, in its original version, provided for a majority of State representatives on the Senate — 22 members as against 16 Federally-appointed members — so as, he said, to make it difficult for Parliament to make constitutional amendments that affect adversely State interests. Mr. Sidhu drew our attention to clause (4) of the same article which expressly empowers Parliament to increase to three the number of Senators to be elected by each State Assembly and to reduce the number of Federally-appointed Senators even to vanishing point. Mr. Sidhu submitted that this clearly shows that our Constitution makers intended that in the Senate State representation should gradually be strengthened as against Federally-appointed Senators.

"But what has happened?" asked Mr. Sidhu. In 1963 Parliament, far from acting as envisaged by clause (4), by Act 26/63 increased the number of Federally-appointed Senators from 16 to 22; in 1964 by Act 19/64 to 32; in 1978 by Act A442/78 to 42 — thus today State representatives in the Senate (numbering 26) are outnumbered by the 42 Federally-appointed Senators. So it is now much easier for the Federal Government through their appointees in the Senate to push through constitutional amendments in Parliament to the detriment of State interests.

Because of its increased strength, Mr. Sidhu said, the Federal Government was enabled to amend Article 149 and clause (3) of Article 150 affecting adversely rights of the citizen.

Before the amendment to Article 149, an Act like the Internal Security Act, 1960, automatically expired one year from the date when it came into operation. After the amendment it does not so automatically expire but may go on indefinitely. Also, before the amendment such an Act may be made only to counter the activities mentioned in paragraph (a) of the present clause (1) of the Article, whereas after the amendment it may be used to counter the activities mentioned in the other paragraphs also.

Before the amendment to clause (3) of Article 150, a proclamation of emergency automatically expired two months from the date on which it was issued, and an ordinance fifteen days from the date when both Houses were first sitting. After the amendment a proclamation of emergency and an ordinance no longer expire automatically but may go on indefinitely.

Mr. Sidhu did not, however, go so far as to say that anything turns on this — and we think rightly so, because these amendments were made three years before the number of Federally-appointed Senators had been increased from 16 to 22. They were made at the time when the first emergency (1948-1960) was formally ended. Shortly before that the opportunity was taken to review the Emergency Regulations Ordinance, 1948, and other laws dependent on it, which review resulted in the repeal of the transitional Article 163 which had saved that Ordinance and all subsidiary legislation made under it, despite the fact that they contained many provisions grossly inconsistent with the Constitution.

If it is correct that amendments made to the Constitution are valid only if consistent with its existing provisions, then clearly no change whatsoever may be made to the Constitution; in other words, Article 159 is superfluous, for the Constitution cannot be changed or altered in any way, as if it has been carved in granite. If our Constitution makers had intended that their successors should not in any way alter their handiwork, it would have been perfectly easy for them to so provide; but nowhere in the Constitution does it appear that that was their intention, even if they had been so unrealistic as to harbour such intention. On the contrary apart from Article 159, there are many provisions showing that they realized that the Constitution should be a living document intended to be workable between the partners that constitute the Malayan (later Malaysian) polity, a living document that is reviewable from time to time in the light of experience and, if need be, amended.

In our judgment, in construing Article 4(1) and Article 159, the rule of harmonious construction requires us to give effect to both provisions and to hold and we accordingly hold that Acts made by Parliament, complying with the conditions set out in Article 159, are valid even if inconsistent with the Constitution, and that a distinction should be drawn between on the one hand Acts affecting the Constitution and on the other hand ordinary laws enacted in the ordinary way. It is federal law of the latter category that is meant by law in Article 4(1); only such law must be consistent with the Constitution.

In other words, in our judgment the position here is the same as that declared in India by the Supreme Court in 1951 in *Shankari Prasad Singh Deo & Ors.* v. *The Union of India & Ors.*[2] and in 1965 in *Sajjan Singh* v. *State of Rajasthan.*[3]

As to the second and alternative point that if constitutional amendments may be made that are inconsistent with the Constitution nevertheless by necessary implications Parliament may not destroy the basic structure of the Constitution, Mr. Sidhu submitted that the Constitution is a solemn contract between the Queen of England and the Sultans on the one hand and the different communities on the other, and drew our attention to various documents from which stems our independence: namely the Reid Report; the Federation of Malaya Act, enacted by the British Parliament in 1957; the Federation of Malaya Independence Order in Council made by the British sovereign; the Federation of Malaya Agreement, 1957; the Federal Constitution Ordinance, 1957, enacted by the then Legislative Council giving the force of law to the Constitution; and the Proclamation of Independence read by Tunku A. Rahman at the Independence Celebrations Ceremony. Mr. Sidhu submitted that these documents show the basic structure of our Constitution some of whose features have been set out above.

Mr. Sidhu referred us to amendments to Act 150, in particular its clauses (5) and (6), made by Parliament in 1963 by Act 26 of 1963 which greatly enlarged the power of Parliament to make laws during an emergency. Before the amendment, during an emergency Parliament could legislate on state subjects (except Muslim law and Malay custom), extend the duration of Parliament or a State Legislative Assembly and suspend any election; and any law made by Parliament and an Ordinance made by His Majesty might be inconsistent only with the provisions of Part II of the Constitution; whereas today any law or Ordinance so made may be inconsistent with *any* provision of the Constitution. Mr. Sidhu says that the amendments give Parliament unlimited power not contemplated by our Constitution makers and permit Parliament and the Executive during an emergency to make laws and pass Ordinances even to destroy its basic structure by a simple majority. Mr. Sidhu submitted that these amendments are too wide, have destroyed the basic structure of the Constitution and are therefore void.

Mr. Sidhu referred us to decisions of the Indian Supreme Court in *I.C. Golak Nath & Ors.* v. *State of Punjab;*[4] and *Kesavananda Bharati* v. *State of Kerala*[1] as being persuasive authority for the proposition that Parliament cannot destroy the basic structure of the Constitution.

These two cases were considered by this court in *Loh Kooi Choon* v. *Government of Malaysia.*[5] With respect we agree with Raja Azlan Shah F.J., as he then was, when he said at pages 188-9:

"Whatever may be said of other Constitutions, they are ultimately of little assistance because our Constitution now stands in its own right and it is in the end the wording of our Constitution itself that is to be interpreted and applied, and this wording 'can never be overridden by the extraneous principles of other Constitutions' — see *Adegbenro* v. *Akintola & Anor.* (1963) 3 All E.R. 544, 551. Each country frames its constitution according to its genius and for the good of its own so-

ciety. We look at other constitutions to learn from their experiences, and from a desire to see how their progress and well being is ensured by their fundamental law."

Considering the differences in the making of the Indian and our Constitutions, in our judgment it cannot be said that our Parliament's power to amend our Constitution is limited in the same way as the Indian Parliament's power to amend the Indian Constitution.

In India which achieved independence on August 15, 1947, when the British left they did not leave a full-fledged Constitution; the Indians had to make do with the previous constitutional provisions as very slightly amended. The Indians did not want their Constitution to be a gift from the British. They wanted to write it themselves.

The Indian Independence Act, 1947, passed by the British Parliament, unlike Government of India Acts passed by it between 1858 and 1935, did not seek to lay down a Constitution for the Government of India by the legislative will of the British Parliament. It provided that as from August 15, 1947, India's own *Constituent* Assembly (i.e. an Assembly with power to frame or amend a Constitution) which had been specially set up, was to have unlimited power to frame and adopt any Constitution and to repeal any Act of the British Parliament, including the Indian Independence Act. The Assembly held its first meeting on December 9, 1946, and reassembled on August 14, 1947, as the sovereign Constituent Assembly for India.

The Assembly set up various Committee to put up proposals on different aspects of the Constitution. On August 29, 1947, a Drafting Committee was appointed under the chairmanship of Dr. Ambedkar and it published a draft in February 1948. The Assembly next met in November that year to consider the draft clause by clause, and after several sessions consideration of the draft or second reading was completed by October 17, 1949. The Assembly again sat on November 14, for the third reading and finished it on November 26, on which date the Constitution received the signature of the President of the Assembly and was declared passed. A few provisions came into force on November 26 and the rest on January 26, 1950, the "date of its commencement". See *Basu's* Introduction to the Constitution of India, fifth edition, pages 18-20.

As the Constitution was made by a Constituent Assembly not by ordinary mortals, it is this perhaps which has influenced the Indian courts in their view that, despite Article 368 (which empowers Parliament to amend the Indian Constitution) there are implied limitations on that power to so amend as to affect fundamental liberties and destroy the basic structure of the Indian Constitution.

The Indian Constitution contains a preamble which states quite explicitly that the Constitution was made by the people of India in their Constituent Assembly. It reads:

"WE, THE PEOPLE OF INDIA, having solemnly resolved to Constitute India into a SOVEREIGN DEMOCRATIC REPUBLIC and to secure to all its citizens JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and opportunity; and to promote among them all;

FRATERNITY assuring the dignity of the individual and the unity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION."

The Indian Constitution also contains in Part IV "directive principles of state policy" which in 15 articles set out national objectives which it was thought desirable that the State should promote.

M. Hidayatullah, Chief Justice of the Supreme Court of India, in the 8th Feroze Gandhi Memorial Lecture delivered on September 12, 1968, and reproduced in *A Judge's Miscellany* says at page 84:

"My view is that the significance of the Preamble has been inadequately understood. I regard it as the soul of the Constitution eternal and unalterable. I said so in my dissenting judgment in *Sajjan Singh's* case."[3]

and at page 85:

"Our Preamble ... is a declaration of our faith and belief in certain fundamentals of national life, a standard from which we must not depart and a resolve which must not be shaken."

At page 91 he comments on the Directive Principles as follows:

"... the Directive Principles [are] the moral ends to be served by the Government."

Thus it is understandable that Indian jurists should infer from the Preamble and Directive Principles ideas and philosophies animating the Indian Constitution and controlling its interpretation so much so that there are limits on the power of the Indian Parliament to amend their Constitution.

In Malaya, on the other hand, the Constitution was the fruit of joint Anglo-Malayan efforts and our Parliament had no hand in its drafting. The first draft was put up by a Royal Commission headed by Lord Reid jointly appointed by the British sovereign and the Malay Rulers; it was published for public discussion and debate; an amended draft was agreed by the British Government and the Malay Rulers and also by the then Alliance Government; it was approved by the British Parliament, by the Malayan Legislative Council (the then federal legislature) and by the legislature of every Malay State. When the British finally surrendered legal and political control, Malaya had a ready-made Constitution and there was no occasion for Malayans to get together to draw up a Constitution.

Our Constitution has no preamble and no directive principles of state policy.

Indian Courts draw a distinction between the power of the Indian Parliament to amend the Constitution in its constituent capacity and to make ordinary law in its ordinary legislative capacity.

We do not think that we can draw such a distinction here as our Constitution was not drawn up by a constituent assembly and was not "given by the people."

In our judgment, in the words of the Privy Council in *Bribery Commissioners* v. *Ranasinghe*[6]:

"... a constitution [certainly our constitution] can, indeed, be altered or amended by the legislature, if the regulating instru-

ment so provides and if the terms of those provisions are complied with and the alteration or amendment may include the *change or abolition* of those *very* provisions."

The fear of abuse of Parliament's power to amend the Constitution in any way they think fit cannot be an argument against the existence of such power, *Bank of Toronto* v. *Lambe*,[7] and *Attorney-General for Ontario* v. *Attorney-General for Canada*;[8] for actual abuse of power can always be struck down, *Attorney-General for Alberta* v. *Attorney-General for Canada*.[9]

For the reasons which will appear when we deal with the third point in a moment, it is unnecessary for us to say whether or not Parliament's power of constitutional amendment extends to destroying the basic structure of the Constitution. For the purpose of this appeal it is enough for us merely to say that Parliament may amend the Constitution in any way they think fit, provided they comply with all the conditions precedent and subsequent regarding manner and form prescribed by the Constitution itself.

As regards the third point concerning the validity of Act 216, it will be recalled that the Act was passed in consequence of the Privy Council judgment in *Teh Cheng Poh* v. *Public Prosecutor*[10] and that it was passed in pursuance of Clause (5) of Article 150 of the Constitution in the words of its long title "to enact as an Act of Parliament the Emergency (Essential Powers) Ordinance, 1969, and to provide for the validation of all subsidiary legislation made or purporting to have been made under the said Ordinance on or after February 20, 1971, and for the validation of all acts and things done under the said Ordinance or any subsidiary legislation made or purporting to have been made thereunder . . ." It is convenient to reproduce the sections of the Act which Mr. Sidhu submitted have destroyed the basic structure of the Constitution and are therefore void. They are sections 2(4), 9(3) and 12, which provide as follows:

"2(4) An Essential Regulation [which His Majesty is empowered by the Act to make], and any order, rule or by-law duly made in pursuance of such a regulation shall have effect notwithstanding anything inconsistent therewith contained in any written law, including the [Federal] Constitution or the Constitution of any State, other than this Act or in any instrument having effect by virtue of any written law other than this Act.

9(3) Any prosecution instituted, trial conducted, decision or order given, in respect of any person in any court, or any other proceeding whatsoever had, or and other act or thing whatsoever done or omitted to be done, under or by virtue of the Ordinance or any subsidiary legislation whatsoever made or purporting to have been made thereunder is declared lawful and hereby validated.

12. No court shall have jurisdiction to entertain or determine any application or question in whatever form, on any ground, regarding the validity or the continued operation of any proclamation issued by the Yang di-Pertuan Agong in exercise of any power vested in him under any Ordinance promulgated, or Act of Parliament enacted, under Part XI of the Federal Constitution."

Mr. Sidhu submitted that section 2(4) is too wide and empowers the Yang di-Pertuan Agong to make essential regulations to make laws inconsistent with the whole of the Federal Constitution and any State Constitution and may be misused to destroy the basic structure of the Constitution.

As regards section 9(3), Mr. Sidhu submitted that it encroached on the judicial power of the Federation which has been vested in the judiciary and amounts to a Bill of Attainder or a Bill of Pains and Penalties.

As regards section 12, Mr. Sidhu submitted that it destroys the basic structure of the Constitution by ousting the jurisdiction of the courts by preventing it from questioning the validity of Proclamations of Emergency issued by His Majesty.

As regards the objection to section 2(4) — we have already stated our view that Article 159 means what it says, that Parliament may amend the Constitution in any way they think fit provided that they comply with all the conditions prescribed, and that fear of abuse of power is no argument for denying its existence.

As regards section 12, it only precludes the courts from questioning the validity of proclamations issued under Acts or Ordinances based on Part XI of the Constitution, not that of proclamations of emergency issued under the Constitution.

As regards section 9(3), Mr. Sidhu submitted that it has the effect of finding the accused guilty by legislative act, thus encroaching on the judicial power of the courts enshrined in Article 121 which provides:

". . . the judicial power of the Federation shall be vested in [the courts]."

In our judgment Parliament has not by section 12 encroached on the judicial power of the courts and the section is perfectly valid. We so conclude following the reasoning of Spens C.J. in *Piare Dusadh* v. *Emperor*.[11]

Paraphrasing the words of Spens C.J. at page 5 in that case, as regards security cases like the one in question, where sentences have already been passed, it would have been a serious demand on public time, not to speak of public funds, to think of the retrial of all the accused who have been thus sentenced, as their number must have been very large (when introducing in January 1979, the bill that became Act 216, the Attorney-General mentioned in Parliament that over 1,000 cases were involved, see [1979] 1 M.L.J. lxx). Nor can it be assumed that it would in all cases have been to the interest of the accused themselves to be retried, if they could in some way be given an opportunity of showing that their convictions were not justified; and they have an opportunity to appeal in the ordinary way and, in the case of those whose appeals have previously been dismissed by the Federal Court, to have their cases reviewed under section 10 of the Act.

Again paraphrasing the words of the learned Chief Justice this time from page 9, it is not a fair or correct view of the position to say that the accused and others like him have been found guilty and sentenced by the legislature. Parliament have not attempted to decide the question of the guilt or innocence of any of the accused. That question has as a matter of fact been decided by a court which was directed to follow a certain judicial procedure. There is no justification for importing a fiction that there has in fact been no judicial trial and that it is the legislature that declares the guilt of the accused and imposes sentences on them; and their convictions and sentences are in due course subject to appeal and, as already stated, in some cases subject to review.

In *Piare Dusadh*[11] the sentences which were confirmed by the legislature had been passed by special criminal courts which the court held had no jurisdiction but which were subsequently validly conferred with jurisdiction.

See also an Australian case, the *Federal Commissioner of Taxation* v. *Munro*[12] mentioned by Spens C.J. at pages 8 and 9.

The instant case may be contrasted with *Basanta Chandra* v. *Emperor.*[13] There the legislature provided that proceedings pending in the courts challenging the validity of detention orders shall be discharged and it was held that that was an unlawful exercise by the legislature of judicial power. Spens C.J. said at page 90:

"The distinction between a 'legislative' act and a 'judicial' act is well known, though in particular instances it might not be easy to say whether an act should be held to fall in one category or the other. The Legislature is only authorised to enact laws. Some of the pending proceedings hit by clause (2) of section 10 may raise questions of fact and their determination may wholly depend upon questions of fact and not upon any rule of law, as for instance, when it is alleged that an order of detention was not really the act of the authority by whom it purports to have been made or that it was a *mala fide* order or one made by a person who has not been authorised to make it. A direction that such a proceeding shall be discharged is clearly a judicial act and not the enactment of a law. This question was discussed at some length in [*Piare Dusadh*]. The nature of the provision then considered was essentially different from clause (2) of section 10 of the present Ordinance. As explained in that judgment, the position there was that certain cases had in fact been tried by Tribunals instituted under an earlier Ordinance and decisions had been pronounced by those tribunals, but the jurisdiction of those tribunals was negatived by a decision of this court. The later Ordinance provided that those decisions should be treated as decisions of duly constituted Tribunals. Applying the test laid down in [*Federal Commissioner of Taxation* v. *Munro*] this court held that that did not constitute an exercise of judicial power by the ordinance-making authority. But here there has been no investigation or decision by any Tribunal which the legislating authority can be deemed to have given effect to. It is a direct disposal of cases by the Legislature itself."

Finally, whatever the features of the basic structure of the Constitution may be, it is our view that none of the amendments complained of and none of the impugned provisions of Act 216 have destroyed the basic structure of the Constitution; and it is for this reason that we find it unnecessary to express our view on the question whether or not Parliament has power to so amend the Constitution as to destroy its basic structure.

To summarise, our answers to the three issues raised are: first, Parliament have power to make constitutional amendments that are inconsistent with the Constitution. Secondly, Parliament may amend the Constitution in any way they think fit, provided they comply with all the conditions precedent and subsequent regarding manner and form prescribed by the Constitution itself and it is unnecessary for us to say whether or not Parliament's power of constitutional amendment extends to destroying the basic structure of the Constitution. Thirdly, Act 216 is constitutional. Whatever may be the features of the basic structure of the Constitution, none of the constitutional amendments complained of and none of the impugned provisions of Act 216 have destroyed the basic structure of the Constitution.

Order accordingly.

Solicitors: *Khoo & Sidhu.*

SU AH PING v. PUBLIC PROSECUTOR

[F.C. (Suffian L.P., Wan Suleiman F.J. and Hashim Yeop A. Sani J.) July 12 & August 21, 1979]

[Kuala Lumpur — Federal Court Criminal Appeal No. 35 of 1977]

Criminal Law and Procedure — Possession of pistols and ammunition — Pistols and ammunition recovered as a result of information given by appellant — Proof of exhibits — Exhibits handed over by Police Inspector to another Police Officer — Exhibits identified at trial by Police Inspector as things recovered at scene — Other officers who handled exhibits not called — No objection by defence — Ensuring no break in chain of evidence — Waste of judicial time — Conviction of appellant valid until quashed — Trial under Essential (Security Cases) Regulations, 1975 — Doubt as to validity of conviction — Validated by Emergency (Essential Powers) Act, 1979.

Constitutional Law — Accused tried under Essential (Security Cases) Regulations, 1975 — Regulations held to be void — Conviction not quashed — Regulations validated by Emergency (Essential Powers) Act, 1979 — Whether Act constitutional.

The appellant had been convicted of possession of four pistols and 175 rounds of ammunition and sentenced to death. In the course of his interrogation by the police, the appellant had led the police to the place where he hid the pistols and ammunition and the exhibits were found. The exhibits were subsequently handed over by Inspector Takbir to another police officer. At the trial Inspector Takbir produced the exhibits and identified them. No other police officers who had handled the exhibits were called to testify. No objection was raised by the defence. At the appeal it was argued that there was a break in the chain of evidence. It was also argued that as the Essential (Security Cases) Regulations, 1975 had been held to be invalid, the accused had been declared judicially innocent and in enacting the Emergency (Essential Powers) Act, 1979 Parliament in effect had purported to condemn the accused and therefore the Act was unconstitutional, null and void.

Held: (1) it is unnecessary to call evidence to ensure that there is no break in the chain of evidence. If the officer who picked up the object at the scene produced it and identified it as that very object that is enough and there is no need to call every other officer who handled it, unless there is doubt as to the identity;

(2) the appellant in this case had been convicted and the conviction had not been quashed. If there was any doubt as to the validity of the conviction, it has been validated by the Emergency (Essential Powers) Act, 1979 and thereafter it was subject to appeal in the ordinary way.

Cases referred to:-

(1) *Teh Cheng Poh* v. *Public Prosecutor* [1979] 1 M.L.J. 50.

(2) *Calvin* v. *Carr* [1979] 2 All E.R. 440, 446.

(3) *Indira Nehru Gandhi* v. *Raj Narain* A.I.R. 1975 S.C. 2299.

(4) *Phang Chin Hock* v. *Public Prosecutor* [1980] 1 M.L.J. 70.

The following cases were also referred to in argument: *Mohamad Yatim bin Abu Bakar* v. *Public Prosecutor* [1950] M.L.J. 57; *Sia Soon Suan* v. *Public Prosecutor* [1966] 1 M.L.J. 116; *Chong Yik* v. *Public Prosecutor* [1953] M.L.J. 92; *Wong Kok Keong* v. *Reg.* [1955] M.L.J. 13; *Marbury* v. *Madison* 1 Cra. 137; *Panama* (1935) 293 U.S. 338; (1935) 295 U.S. 495; *Shell Co. of Australia* v. *Commissioner of Taxation* [1931] A.C. 275, 295; *Bilston Corporation* v. *Wolverhampton* [1942] 2 All E.R. 447; *Hinds* v. *The Queen* [1967] A.C. 259; *Sri Sadasib Prakash Bramachari* v. *Orissa* (1956) S.C.R. 43, 58.

FEDERAL COURT.

Jagjit Singh (*K.C. Cheah* with him) for the appellant.

Sharkawi bin Alias (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Suffian L.P. (delivering the judgment of the Court): We dismissed this appeal and now give our reasons.