

No. 24 of 1972

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

THE PUBLIC PROSECUTOR (MALAYSIA)      Appellant

- and -

FAN YEW TENG      Respondent

CASE FOR THE APPELLANT

10      Introductory

1.      This is an Appeal by Special Leave, granted by the Judicial Committee on the 28th March 1972, from a judgment of the Federal Court of Malaysia which, on the 16th September 1971 and by a majority of four to one, allowed the Respondent's appeal from his conviction by the High Court on the 11th May 1971 of an offence under section 4(1)(c) of the Sedition Act 1948 as amended.

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20      2.      The sole issue raised in this Appeal is whether the trial of the Respondent by the High Court, following his successful application for transfer of the case from a Sessions Court, was a nullity by reason of the absence of any preliminary enquiry and committal for trial. The following provisions of the Criminal Procedure Code of the Federation are principally

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relevant :-

CHAPTER XVII

OF PRELIMINARY ENQUIRIES INTO CASES TRIABLE  
BY THE HIGH COURT

138. The following procedure shall be adopted in inquiries before a Magistrate where the inquiry is held with a view to committal for trial before the High Court, and no person shall be tried before such Court unless he shall have been committed for trial after a preliminary inquiry under the provisions of this Chapter.

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CHAPTER XLII

OF THE TRANSFER OF CRIMINAL CASES

417. Whenever it is made to appear to a Judge -

- (a) that a fair and impartial inquiry or trial cannot be had in any criminal Court subordinate to him; or
- (b) that some question of law of unusual difficulty is likely to arise; or
- (c) that a view of the place in or near which any offence has been committed may be required for the satisfactory inquiry into or trial of the same;
- (d) that an order under this section will tend to the general convenience of the parties or witnesses; or
- (e) that such an order is expedient for the ends of justice, or is required by any provision of this Code,

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he may order -

that any offence be inquired into or tried by any Court not empowered under Sections 121 to 126 but in other respects competent

to inquire into or try such offence; or  
that any particular criminal case be  
transferred to and tried before himself; or  
that a person committed for trial in one  
place be tried in another place."

418. (i) every application for the exercise  
of the power conferred by the last  
preceding section shall be made by  
motion which shall, except when the  
applicant is the Public Prosecutor,  
be supported by affidavit.
- (ii) every such application shall be made  
before the inquiry into or trial  
of the offence has been concluded.
- (iii) when an accused person makes an  
application under this section, a  
Judge may, if he thinks fit, direct  
him to execute a bond with or  
without sureties, conditioned that  
he will, if convicted, pay the  
expenses of the prosecution.
- (iv) . . . . ."

3. The following were the salient facts of the  
case:- The Respondent was at the material  
time the editor of "The Rocket", the official  
journal of the Democratic Action Party which  
is one of the principal opposition parties in the  
Federation. The December 1970 issue of "The  
Rocket" reproduced the text of a speech made by  
one Dr. Ooi Kee Saik at a dinner in November  
1970. The Public Prosecutor being of opinion  
that the speech contravened s.4 of the Sedition  
Act 1948 gave his written consent, as required  
by s.5 of the Act, to the prosecution of Dr. Ooi,  
the Respondent, and two other persons who were  
the printers of "The Rocket". The Public  
Prosecutor also under s.5 designated the court  
of trial as the Special Sessions Court at  
Kuala Lumpur. Charges were accordingly preferred

p.1 against Dr. Ooi under s.4(1)(b) and against the Respondent and the printers under s.4(1)(c) of the Act, for summary trial in the Special Sessions Court. On the 16th March 1971 Counsel for Dr. Ooi, supported by Counsel for the Respondent and the two other accused, applied by notice of motion to a High Court Judge (Abdul Hamid, J) for an order that the case be transferred from the Special Sessions Court to the High Court, Kuala Lumpur, to be heard by the Judge. The affidavit in support alleged inter alia that questions of law of unusual difficulty were likely to arise, i.e. the application was founded upon section 417(b) of the Code. An order of transfer was granted in the case of all four accused. Their trial took place before Rajah Azlan Shah, J, sitting alone, on 3rd, 4th, 5th, 6th and 11th May 1971. All four accused were found guilty, each being sentenced to a fine of \$2,000 with six months' imprisonment in default. 10

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4. The Respondent alone appealed to the Federal Court and amongst his grounds of appeal he raised, for the first time, and notwithstanding his support of the application for a transfer, the contention that his trial was a nullity because there had been no committal after a preliminary inquiry as, he contended, was required by section 138 of the Criminal Procedure Code. With the agreement of Counsel on both sides, the Federal Court heard the appeal on this point first since it raised an issue of jurisdiction. On the 16th September 1971 a majority of the Federal Court upheld the Respondent's contention. Although they held that the absence of a preliminary inquiry had not in any way prejudiced the defence, that the conduct of the trial had been impeccable, and that the defence now raised was so purely technical in character that the requirement of going through the motions of a preliminary inquiry could be nothing but "an egregious exercise in futility", they held "with the utmost reluctance" that the wording of section 138 permitted no special exception where a criminal case was transferred to the High Court 30 40

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under section 417. Ali F.J. dissented on the ground that section 417 was designed for a special situation, namely a transfer of a case from a subordinate court to the High Court, and that in such a case no preliminary inquiry or committal was required.

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10 5. The Appellant submits that the reasoning of the majority was wrong in that they failed to interpret the second part of s.138 in the context of the opening words of the section, of the subject matter of Chapter XVII and of the Statute as a whole; and that the conclusion reached by Ali F.J. was correct for the reasons he gave and for the further reasons hereafter set out.

20 6. It is apparent from many of the provisions of the Criminal Procedure Code that a clear distinction is maintained between, on the one hand, cases of summary trial of comparatively less serious offences and, on the other hand, cases of High Court trials of the most serious offences. Whilst section 22(1)(a) of the Courts Judicature Act 1964 confers unlimited jurisdiction upon the High Court with regard to the trial of all criminal offences committed within its local jurisdiction, for obvious administrative reasons the practice adopted in the Federation is for the prosecution to confine high court criminal trials to the most serious 30 offences, i.e., those which are beyond the jurisdiction of Magistrates' and Sessions Courts. In such cases, the effect of section 138 is that there can be no High Court trial unless and until the accused has been committed for trial after a preliminary inquiry in a Magistrates' Court or a Sessions Court in accordance with the procedure laid down in Chapter XVII of the Criminal Procedure Code. Where, however, as 40 in the great majority of cases, an offence is within the jurisdiction of a Magistrates' or Sessions Court, the practice is to prosecute summarily, whereupon the procedures laid down in Chapter XIX of the Criminal Procedure Code will apply - subject only to the possibilities

set out in paragraph 7 below. (A Sessions Court is in a like position to a Magistrates' Court for the purpose of Chapter XVII (preliminary inquiries) and XIX (Summary trial) by reason of the Courts' Ordinance 1948, sections 61, 63 and 100).

7. Once the prosecution has, as in the present case, chosen Summary Trial in either a Magistrates' Court or a Sessions Court the only ways in which the accused can override the prosecution's choice are :-

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(i) by persuading the subordinate court to exercise the power granted by s.177 to proceed under Chapter XVII with a view to committal of the accused for trial by the High Court; or

(ii) by satisfying the High Court that for one or more of the reasons in paragraphs (a) to (e) of section 417 the case should be "transferred to and tried before" that Court.

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8. As Ali F.J. pointed out, the Legislature has expressly provided for a preliminary inquiry where the first course is pursued whereas no such provision is made under the second type of order contemplated by s.417.

Furthermore this omission would appear to be deliberately intended, since a preliminary inquiry (with a view to committal for trial by the High Court) is one of the express subject-matters of the first type of order referred to, and committal for trial (after a preliminary inquiry) is expressly referred to in the third type of order contemplated by section 417.

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9. The Appellant also relies upon the Heading and subject-matter of Chapter XLII. The Chapter is dealing specifically with Transfer (i.e. of venue), and each of the three types of order which the Judge may make is a transfer order and no more: either a transfer of preliminary inquiry 40

or summary trial from one venue to another, or a transfer of trial from a subordinate court to the High Court, or a transfer of a High Court trial from one High Court venue to another. The Chapter does not purport to be dealing with, and does not empower the Judge to order, a change in the nature of the proceedings, i.e. from Summary Trial to preliminary inquiry with a view to High Court trial.

10 10. The reasoning of the majority in the Federal Court furthermore requires a construction of s.417 contrary to the plain words of the section. Upon an accused person who is being, or is about to be, tried summarily satisfying the Judge under, e.g., s.417(b), the order made by the Judge would not, in effect, be "that the accused's case be transferred to and tried before" the High Court, but "that the accused's summary trial be stayed and that a preliminary inquiry be held with a view to committal of the accused for trial by" the High Court.

20 Not only would such an order be beyond the power conferred in express words upon the Judge: it may, as pointed out by Ali F.J., nullify the purpose of the s.417 application. For at the close of the preliminary inquiry the accused may be discharged, in which case the order that the case be "transferred to and tried before" the High Court is frustrated.

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30 11. The Appellant submits that a transfer to the High Court necessarily involves the High Court becoming immediately and for all purposes seised of the case. Accordingly s.138, read in the context of the Statute as a whole, has no application to such case. The prohibitory words of s.138 should be limited, as the Chapter heading and the opening words of the section clearly indicate, to the subject-matter, namely, preliminary inquiries "held with a view to committal for trial before the High Court".

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12. Furthermore, the contingency provided for in section 417(a), however unlikely it may be to arise in practice, was a possibility contemplated by the Legislature, and it would be wholly illogical for a transfer to be ordered on the ground that a fair and impartial inquiry or trial could not be had in any subordinate criminal court, if the effect of such order were that the preliminary inquiry into the case were to be held by just such a subordinate court.

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Wherefore the Appellants submit that this appeal should be allowed and the case remitted to the Federal Court to determine the other issues raised by the Respondent upon appeal from his conviction before Rajah Azlan Shah J. for the following among other

#### R E A S O N S

(a) BECAUSE upon a proper construction section 138 of the Act applies only to inquiries commenced by a Magistrates' or Sessions Court with a view to committal for trial before the High Court and does not apply to proceedings commenced summarily.

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(b) BECAUSE upon a proper construction a transfer to the High Court under section 417 of the Code does not require a preliminary inquiry or committal.

(c) BECAUSE the decision of the majority of the Federal Court was wrong and the dissenting judgment therein was right.

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ROBERT GATEHOUSE

ROBERT ALEXANDER



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STEPHENSON HARWOOD & TATHAM,  
Saddlers Hall,  
Gutter Lane,  
Cheapside, E.C.2.

Appellant's Solicitors