

IN THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL
ON APPEAL
FROM THE FEDERAL COURT OF MALAYSIA

Appeal No. 24 of 1972

B E T W E E N :-

THE PUBLIC PROSECUTOR

Appellant

-and-

FAN YEW TENG

Respondent

CASE FOR THE RESPONDENT

10 1. This is an appeal by Special Leave from the judgment of the Federal Court of Malaysia (Azmi, L.P., Ong, C.J., Suffian, F.J., Ong, F.J., Ali, F.J., dissenting), dated the 16th day of September 1971, which allowed the Respondent's appeal from a judgment of the High Court in Malaya at Kuala Lumpur (Raja Azlan Shah, J.) dated the 11th day of May 1971 wherein the Respondent was convicted (together with three others) of publishing a seditious publication under Section 4(1)(c) of the Sedition Act 1948 (Revised - 1969) and sentenced to a fine of \$2,000/- and in default six months imprisonment. pp.45-54

20 (Revised - 1969) and sentenced to a fine of \$2,000/- and in default six months imprisonment. pp.5-22

30 2. The principal issue for determination in this appeal is whether (as the majority of the Federal Court Judges held), the Respondent's trial in the High Court was a nullity because the trial was held in contravention of Section 138 of the Criminal Procedure Code which provides that no person shall be tried before such Court unless he shall have been committed for trial after a preliminary inquiry.

3. Sections 138 and 417 of the Criminal Procedure Code which are relevant to this appeal provide as follows :-

40 "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.

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

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- (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; or
- (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

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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."

4. The Respondent was originally charged on the 20th January 1971 in the Sessions Court at Kuala Lumpur as follows :-

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"Charge: That you, in or about the month of December, 1970, in Petaling Jaya, Selangor, published a seditious publication in the December, 1970 issue of the "Rocket" (English Edition), the official organ of the Democratic Action Party to wit, the full text of a speech containing seditious words uttered by Dr. Ooi Kee Saik on the 22nd November, 1970 at the Sun Hoe Peng Restaurant, 25, Light Street, Penang, (the full text of which is attached herewith as schedule 'A' to this charge), and you have thereby committed an offence under Section 4(1)(c) of the Sedition Act 1949 (Revised - 1969) and punishable under Section 4(1) of the said Act."

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p.23 l.33 -
p.24 l.1

5. On the 16th March 1971, the Respondent applied to a Judge of the High Court (Abdul Hamid J.) for the transfer of his case under

the provisions of Section 417 of the Criminal Procedure Code when the Judge made an order for transfer as prayed.

6. In pursuance of the said order, the Respondent was brought for trial in the High Court at Kuala Lumpur on the 3rd May 1971, and tried, not by Abdul Hamid J., who had made the order, but by another Judge of the High Court, Raja Azlan Shah, J.

p.24
ll. 8 - 13

10 7. The Respondent was tried before Raja Azlan Shah, J. together with three others. On the 11th day of May 1971, the learned judge delivered his judgment convicting all four accused and sentencing them each to a fine of \$2,000/- in default six months' imprisonment.

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20 8. By Petition of Appeal dated 20th August 1971, the Respondent appealed against his conviction and sentence, on (inter alia) the following grounds :-

pp.23-27

30 "5. It is respectfully submitted that the trial of your petitioner is a nullity rendering his conviction and sentence null and void on the ground that the trial was conducted in contravention of the express prohibition contained in Section 138 of the Criminal Procedure Code which provides that no person shall be tried before the High Court unless he shall have been committed for trial after a Preliminary Inquiry.

p.24
ll.14-32

6. In the case of your petitioner no Preliminary Inquiry was held and the case was not tried before the Learned Judge who made the Order of Transfer.

40 7. Apart from your petitioner's trial being a nullity as being in contravention of the express provisions of Section 138 of the Criminal Procedure Code it is also respectfully submitted that the failure to hold a Preliminary Inquiry was an incurable defect or a defect which has prejudiced your petitioner in his defence."

50 9. With the agreement of Counsel on both sides, the Federal Court decided to deal with this question of jurisdiction as a preliminary point of law.

p.46
ll.5 - 9

10. The majority judgment of the Federal Court was delivered by Azmi, Lord President. The Court held:-

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p.47
11. 1 - 25

(a) That where a case is transferred to the High Court under the provisions of Section 417 of the Criminal Procedure Code, it need not be tried by the same judge who made the Order of Transfer;

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(b) That although the failure to hold a preliminary inquiry did not in this case prejudice the defence, Section 138 makes it clear that such an inquiry is a necessary prerequisite for every trial in the High Court, even though the case was transferred to the High Court under the provisions of Section 417;

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(c) That therefore, the trial of the Respondent in the High Court was a nullity.

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11. In his dissenting judgment, Ali, F.J., considered that Section 417, unlike Section 177 of the Criminal Procedure Code, contains no provision for a preliminary inquiry with a view to committal. In his view, Section 417 is designed for a special situation and as such can be regarded as an exception to the general rule laid down in Section 138. He concluded his judgment as follows :-

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p.53 1.29 -
p.54 1.5

"In this case it was the appellant and not the prosecution who applied for a transfer of the case which could be summarily disposed of in the Sessions Court. If Section 417 is to be construed as restricting the power of a High Court Judge to make a direct transfer without a preliminary inquiry such a construction might lead to a result which I consider irrational or unfair. To adopt the view that this case ought to have been tried only after a preliminary inquiry is to invite the possibility that the appellant may be discharged at the conclusion of the inquiry for insufficient evidence. Should that happen the purpose for which Section 417 was enacted would be completely nullified or frustrated. In my respectful view different provisions of a statute should be given an interpretation which would make them consistent, rather than one which makes one provision inconsistent with the other.

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Section 417, as I have construed it, is in my judgment consistent with Section 138. By this I mean that in an exceptional case a person can be tried by the High Court even though he has not been committed for trial after a preliminary inquiry. I so rule."

10 12. On the 8th day of June 1972, an Order in Council was made granting the Appellant Special Leave to appeal to His Majesty the Yang di-Pertuan Agong.

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p.56

20 13. The Respondent respectfully submits that the majority judgment of the Federal Court on the issue of whether a preliminary inquiry is essential, is right; that Section 138 is plain in its meaning and mandatory in its terms; that the failure to hold a preliminary inquiry deprived the Respondent from a substantive right which could not be waived; and the absence of any preliminary inquiry prior to trial before the High Court was a fatal flaw which rendered his trial in the High Court a nullity. Furthermore, the Respondent submits that contrary to the reasoning of the majority judgment, the case could only be transferred and tried before the same judge who heard the application under Section 417.

30 14. The Respondent humbly submits that this appeal should be dismissed and the majority judgment of the Federal Court affirmed for the following amongst other

R E A S O N S

- 40 (1) BECAUSE the Respondent's trial in the High Court did not comply with the provisions of Section 138 of the Criminal Procedure Code;
- (2) BECAUSE, even though the case was transferred to the High Court under Section 417 of the Criminal Procedure Code, a preliminary inquiry was still an essential prerequisite to such trial in the High Court;
- (3) BECAUSE the failure to hold a preliminary inquiry deprived the Respondent of a substantive right which could not be waived;
- 50 (4) BECAUSE the failure to hold a preliminary inquiry rendered the Respondent's trial a nullity;

- (5) BECAUSE the majority judgment of the Federal Court is right and the dissenting judgment of Ali, F.J., is wrong.
- (6) BECAUSE where a case is transferred under Section 417, it can only be tried before the judge of the High Court who ordered the transfer.

LOUIS BLOM-COOPER.

EUGENE COTRAN.

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