JUDGMENT 12, 1973

(12)

IN THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL

No. 24 of 1972

O N A P P E A L
FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :-

THE PUBLIC PROSECUTOR — Appellant

- and -

FAN YEW TENG — Respondent

RECORD of PROCEEDINGS

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
28 MAY 1974
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IN THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL

NO. 24 of 1972

ON APPEAL
FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :-

THE PUBLIC PROSECUTOR — Appellant

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IN THE FEDERAL COURT OF MALAYSIA

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No. 24 of 1972

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :-

THE PUBLIC PROSECUTOR — Appellant

- and -

FAN YEW TENG — Respondent

RECORD OF PROCEEDINGS

In the High Court of Malaya

No. 1

Charge
20th January 1971

No. 1

CHARGE

MALAYA

In the Sessions Court at Kuala Lumpur

Charge Sheet

Name of Accused: Fan Yew Teng NRIC No. 4018832

Address of Accused: No. 77, Road 20/9, Paramount Garden, Petaling Jaya, Selangor.

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 hae thereby committed an offence under section4(1)(c) of the Sedition Act, 1948 (Revised - 1969) and punishable under section 4(1) of the said Act.

In the High Court of Malaya

No. 1

Charge 20th January 1971 (continued)

Name of complainant (if any):	Supt. C.C. Stevenson
Date of complaint:	4.1.71
Address of complainant (if any):	Ibu Pejabat, Polis Di-Raja Malaysia, Kuala Lumpur.
Particulars of Bail:	$5000/-. One surety
Bail Bond No.:	388502 26/1/71

SCHEDULE 'A'

PAGE 8 THE ROCKET DECEMBER, 1970

ALLIANCE POLICY OF SEGREGATION:
'EVIDENCE GALORE' LISTED BY DR. OOI

10

PENANG

"Tonight's dinner is in celebration of Sdr. Lim Kit Siang's release from detention by the Alliance Government. While it is a matter for celebration, it is also an occasion to highlight the grave Alliance error in putting away a man whose speeches during the last election campaign, especially his warnings, have been more than borne out by the events since then. To say that Sdr. Lim Kit Siang's arrest was a mindless over-reaction on the part of the Alliance Government is to be kind to the Alliance Government. The fact that a true Malaysian like Sdr. Lim Kit Siang can be summarily put away without trial, is indeed a very sad testimony to the way democracy is being practised in this country.

20

The question I keep asking myself, and I am sure there must be thousands of other thinking people in this country who feel the same way that I do, is this: 'Is the Alliance Government making any headway in the problem of forging a new Malaysian nation, of creating a Malaysian identity which truly and hlnestly reflects the various racial strands in our country?' The answer, said to say, is a firm and categorical NO. And one of the main reasons for this is because the Alliance Government practises a policy of segregation. While we in the DAP preach a sincere and honest policy of integration,

30

the Alliance policy merely pays lip service to it.

There is evidence galore of the Alliance policy of segregation.

No. 1. Take our Malaysian Army. New and better battalions are being formed from members of one ethnic group. Here you have an excellent opportunity for integration in a vital part of our national structure but this opportunity is being missed.

10 No. 2. New police contingents. Here again recruitment mainly from one ethnic group. Another excellent opportunity for integration being missed.

No. 3. Schools, colleges and universities are being organised by different ethnic groups, and everybody is moving along his own separate path. Therefore, the cleavage between our future leaders and intellectuals will be all that more difficult to bridge in years to come.

No. 4. Public housing. Another avenue for 20 integration not being exploited. Instead, housing and shopping complexes for one ethnic group are still being built all over the country.

No. 5. Land Schemes. Vast land schemes with real opportunities for people of all races to live and work and grow up together. Here again a golden opportunity being missed.

No. 6. Gigantic business and industrial concerns are being organised, not for the benefit of ALL poor Malaysians, but again only for the 30 benefit of one ethnic group. The latest of these is the National Corporation. Even the Prime Minister, Tun Abdul Razak, says blatantly that this is for the benefit of one ethnic group, although this huge multi-million dollar Corporation is called a "national" corporation. Can't the Alliance Government imagine for a minute what the reaction of the country will be, and the far-reacting implication of calling this huge corporation a "national" corporation when it 0 serves the interests of only one ethnic group? Is it being suggested that other groups in this country are not part of the national structure? Or is this another bad example of governmental arrogance?

In the High Court of Malaya

No. 1

Charge
20th January 1971
(continued)

Therefore, while we in the DAP strive for a policy of integration, the formation of a solid infra-structure, a solid mesh-work, which will make it physically impossible for anyone in this country to act and to behave in any way except as a Malaysian citizen, the Alliance Government prefers to hold tea-parties.

The DAP is a clear-cut party with a clear-cut policy. But more than anything else, the DAP is a pro-Malaysian party, pro-every single Malaysian citizen irrespective of his racial origin. In fact, the more exotic his racial origin, the more he is to be welcomed because in essence we are multi-racial. 10

It seems obvious to me that if our nation is to survive, in fact if any nation is to survive, then we must have a common denominator. A Malaysian citizen is a Malaysian citizen, full stop, and without a whole list of restrictive clauses. Therefore, whenever there are soothing but unnecessary pronouncements by Alliance ministers to the effect that "there is a place for all under the Malaysian sun", one begins to suspect that there are people in high places who do not agree that we all have a common denominator, that these people may be thinking in terms of comfortable shady places for one group of citizens, and hot uncomfortable places for other groups of citizens." 20

Signed: (Illegible)
20.1.71
MAGISTRATE
Kuala Lumpur 30

In the High Court of Malaya

No. 2

Judgment of Raja Azlan Shah J.
11th May 1971

No. 2

JUDGMENT of Raja Azlan Shah, J.

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

Criminal Trial Nos. 17, 18, 19 & 20 of 1971

1. Dr. Ooi Kee Saik)
2. Fan Yew Teng)
3. Kok San) vs. PUBLIC PROSECUTOR
4. Lee Teck Chee)

Judgment of Raja Azlan Shah, J.

10 Dr. Ooi Kee Saik (accused No. 1) is charged before this court with an offence under Section 4(1)(b) of the Sedition Act, 1948, in that on November 22nd, 1970, at Sun Hoe Peng Restaurant, 25 Light Street, Penang, he uttered seditious words, namely - "ALLIANCE POLICY OF SEGREGATION: 'EVIDENCE GALORE' - Tonight's dinner is in celebration of "Sdr. Lim Kit Siang's release from detention by the "Alliance Government. While it is a matter for "celebration, it is also an occasion to highlight 20 "the grave Alliance error in putting away a man whose "speeches during the last election campaign, "especially his warnings, have been more than borne "out by the events since then. To say that Sdr. "Lim Kit Siang's arrest was a mindless over-reaction "on the part of the Alliance Government is to be "kind to the Alliance Government. The fact that a "true Malaysian like Sdr. Lim Kit Siang can be "summarily put away without trial, is indeed a very "sad testimony to the way democracy is being 30 "practised in this country.

" The question I keep asking myself, and I am "sure there must be thousands of other thinking "people in this country who feel the same way that "I do, is this: 'Is the Alliance Government making "any headway in the problem of forging a new "Malaysian nation, of creating a Malaysian identity "which truly and honestly reflects the various "racial strands in our country?' The answer, sad "to say, is a firm and categorical NO. And one of 40 "the main reasons for this is because the Alliance "Government practises a policy of segregation. "While we in the DAP preach a sincere and honest "policy of integration, the Alliance policy merely

In the High Court of Malaya

No. 2

Judgment of Raja Azlan Shah J. 11th May 1971 (continued)

"pays lips service to it.

"   There is evidence galore of the Alliance "policy of segregation.

"   No. 1. TAKE OUR MALAYSIAN ARMY. New and "better battalions are being formed from members "of one ethnic group. Here you hae an excellent "opportunity for integration in a vital part of our "national structure but this opportunity is being "missed.

"   No. 2. NEW POLICE CONTINGENTS. Here again "recruitment mainly from one ethnic group. "Another excellent opportunity for integration "being missed. 10

"   No. 3. SCHOOLS, COLLEGES AND UNIVERSITIES are "being organised by different ethnic groups, and "everybody is moving along his own separate path. "Therefore, the cleavage between our future leaders "and intellectuals will be all that more difficult "to bridge in years to come.

"   No. 4. PUBLIC HOUSING. Another avenue for "integration not being exploited. Instead, housing "and shopping complexes for one ethnic group are "still being built all over the country. 20

"   No. 5. LAND SCHEMES. Vast land schemes with "real opportunities for people of all races to "live and work and grow up together. Here again a "golden opportunity being missed.

"   No. 6. GIGANTIC BUSINESS AND INDUSTRIAL "CONCERNS are being organised, not for the benefit "of ALL poor Malaysians, but again only for the "benefit of one ethnic group. The latest of these "is the National Corporation. Even the Prime "Minister, Tun Abdul Razak, says blatantly that "this is for the benefit of one ethnic group, "although this huge multi-million dollar Corpora- "tion is called a 'national' corporation. Can't "the Alliance Government imagine for a minute what "the reaction of the country will be, and the far- "reacting implication of this huge corporation a "'national' corporation when it serves the "interests of only one ethnic group? Is it being "suggested that other groups in this country are "not part of the national structure? Or is this "another bad example of governmental arrogance? 30 40

" Therefore, while we in the DAP strive for a policy "of integration, the formation of a solid infra-"structure, a solid mesh-work, which will make it "physically impossible for anyone in this country to "act and to behave in any way except as a Malaysian "citizen, the Alliance Government prefers to hold "tea-parties.

" The DAP is a clearcut party with a clear-cut policy. "But more than anything else, the DAP is a pro-Malaysian "party, pro-every single Malaysian citizen irrespective "of his racial origin. In fact, the more exotic his "racial origin, the more he is to be welcomed because "in essence we are multi-racial.

" It seems obvious to me that if our nation is to "survive, in fact if any nation is to survive, then we "must have a common denominator. A Malaysian citizen is "a Malaysian citizen, full stop, and without a whole list "of restrictive clauses. Therefore, whenever there are "soothing but unnecessary pronouncements by Alliance "ministers to the effect that 'there is a place for all "under the Malaysian Sun', one begins to suspect that "there are people in high places who do not agree that "we all have a common denominator, that these people may "be thinking in terms of comfortable shady places for "one group of citizens, and hot uncomfortable places for "other groups of citizens."

Fan Yew Teng (accused No. 2) is charged with publishing the alleged seditious words in the December (1970) issue of The Rocket (English edition), the official publication of the Democratic Action Party, an offence under Section 4(1)(c) of the Act.

Kok San and Lee Teck Chaee (accused No.2 and 3) are charged with printing the alleged seditious words in the December (1970) issue of The Rocket (English Edition) an offence under Section 4(1)(c) of the Act.

The evidence tendered by the prosecution is to the effect that on the evening of November 22, 1970, the Democratic Action Party, Penang Branch held a subscription dinner at the Sun Hoe Peng Restaurant, 25 Light Street, Penang, in honour of the release from detention of Mr. Lim Kit Siang, the Secretary-General of the Party. It was attended by approximately 380 - 400 members and sympathisers. Several speakers spoke at the dinner including the Vice-Chairman of the Branch, accused No. 1. Two prosecution witnesses gave evidence that accused

In the High Court of Malaya

No. 2

Judgment of Raja Azlan Shah J. 11th May 1971 (continued)

spoke at the dinner. The first was Peter Paul Dason, an Advocate and Solicitor and a member of the Democratic Action Party. He was one of the organisers of the dinner. He testified that accused No. 1 was one of the speakers. But he said he cannot remember the exact words of accused No. 1's speech that night. Only after he was referred to the publication (Exh.P3) did he say "that something to this effect was said". The other witness was Chew Hock Chye, a licensed appraiser and a member of the Democratic Action Party. He attended the dinner. He testified that accused No. 1 spoke at the dinner. He identified the article that appeared on page 8 of the Rocket (Exh.P3) as "accused No.1's speech."

In support of this aspect of the prosecution case, the prosecution tendered the statement of accused No. 1 recorded under Section 75 of the Internal Security Act, 1960 which I have ruled was made voluntary. That statement admits that every word that was published in the December 1970 issue of The Rocket (English edition) was the full text of his speech. This piece of corroborative evidence established beyond doubt that the words complained of or words equivalent in substance to those words, had been spoken by accused No. 1 at the dinner.

The following facts are proved against accused No. 2. He is the editor of The Rocket. An application to publish, sell and distribute The Rocket was approved by Government (Exh.P5 and Exh.D7). The name of accused No. 2 is stated therein as its editor and publisher. Miss Chia Sai Teng (P.W.5), a clerk employed by accused Nos. 3 and 4 received the impugned article from accused No. 2 who took it back from her after printing. The impugned article was printed by Life Printers. In his voluntary statement to the police he admitted receiving the impugned article from Dr. Ooi Kee Saik and later sending it to Life Printers for printing. The Rocket containing the impugned article was offered to the public for sale. The publication of the impugned article is not disputed. What is disputed is that accused No. 2 is the publisher. In my opinion, when an editor offered a printed article to the public, that is sufficient evidence that he published it. See McFarlane v. Hulton[1] I am satisfied that there

(1) (1899) 1 Ch. 884

In the High Court of Malaya

No. 2

Judgment of Raja Azlan Shah J.
11th May 1971
(continued)

is evidence which is amply corroborated that accused No. 2 published the impugned article in the December 1970 issue of the Rocket.

I now come to accused Nos. 3 and 4. In the application form (Exh.P5) it was stated that the name and address of the printer is Life Printers of No. 2, Jalan 19/1, Petaling Jaya, Selangor. Evidence was given to the effect that both accused 3 and 4 jointly on October 7, 1969 applied for a
10 printing press licence under section 3(1) of the Printing Presses Ordinance, 1948 (Exh.P8). They were issued with a licence for the year 1970 (Exh.P9). Miss Chia Sai Teng further testified that accused 3 and 4 are the proprietors of the printing press. At the bottom of page 8 of the impugned publication there are printed the words "Published by the Democratic Action Party of "Malaysia, 77, Jalan 20/9, Paramount Garden, "Petaling Jaya, Selangor and printed by Life
20 "Printers, 2, Jalan 19/1, Petaling Jaya." No doubt these words are inserted so as to comply with the provisions of section 5(1) of the Printing Presses Ordinance, 1948. I am satisfied beyond reasonable doubt that accused 3 and 4 printed the words complained of in the same issue of the Rocket.

The next major question to determine is whether the words complained of were seditious within the meaning attributed to it in the
30 Sedition Act. The Sedition Act 1948 came into force on July 19, 1948. Section 4(1) enacts: "Any person who - (b) utters any seditious words; "(c) prints, publishes ... any seditious publica- "tion ... shall be guilty of an offence." Section 2 defines seditious words when applied to or used in respect of any act, speech words, publication having a seditious tendency. Section 3(1) contains the following provisions - A "seditious tendency" "is a tendency - (a) to
40 "bring into hatred or contempt or to excite dis- "affection against any Ruler or against any "Government; (b) to excite the subjects of any "Ruler or the inhabitants of any territory "governed by any Government to attempt to procure "in the territory of the Ruler or governed by the "Government, the alteration, otherwise than by "lawful means, of any matter as by law established; "(c) to bring into hatred or contempt or to excite

In the High Court of Malaya

No. 2

Judgment of Raja Azlan Shah J. 11th May 1971 (continued)

"disaffection against the administration of "justice in Malaysia or in any State; (d) to "raise discontent or disaffection amongst the "subjects of the Yang di-Pertuan Agong or of the "Ruler of any State or amongst the inhabitants of "Malaysia or of any state; or (e) to promote "feelings of ill-will and hostility between "different races or classes of the population of "Malaysia."

On May 15, 1969, the Yang di-Pertuan Agong issued a Proclamation of Emergency - vide P.U.(A) 145/1969. On August 3, 1970, the Yang di-Pertuan Agong promulaged the Emergency (Essential Powers) Ordinance No. 45/1970, which came into force on August 10, 1970. In pursuance of Ordinance No. 45 certain sections of the Sedition Act was amended. A new paragraph (f) was added to section 3(1) of the Sedition Act. The amended section now provides - "A 'seditious tendency' is a tendency - (f) to "question any matter, right, status, position, "privilege, sovereignty or prerogative established "or protected by the provisions of Part III of the "Federal Constitution of Article 152, 153 or 181 "of the Federal Constitution."

Section 3(2) of the Act, as amended by Ordinance No. 45 provides - "Notwithstanding "anything in sub-section (1) an act, speech, words, "publication or other thing shall not be deemed "to be seditious by reason only that it has a "tendency - (a) to show that any Ruler has been "misled or mistaken in any of its measures; "(b) to point out errors or defects in any "Government or constitution as by law established "(except in respect of any matter, right, status, "position, privilege, sovereignty or prerogative "referred to in paragraph (f) of sub-section (1) "otherwise than in relation to the implementation "of any provision relating thereto) or in legis- "lation or in the administration of justice with "a view to the remedying of the errors or defects; "(c) except in respect of any matter, right, "status, position, privilege, sovereignty or pre- "rogative referred to in paragraph (f) of sub- "section (1) -

" (i) to persuade the subjects of any Rulers
" or the inhabitants of any territory
" governed by any Government to attempt

In the High Court of Malaya

No. 2

Judgment of Raja Azlan Shah J.
11th May 1971
(continued)

"   to procure by lawful means the alteration
"   of any matter in the territory of such
"   Government as by law established; or

" (ii) to point out, with a view to their removal,
"   any matters producing or having a tendency
"   to produce feelings of illwill and enmity
"   between different races or classes of the
"   population of the Federation,

"if the act, speech, words, publication or other
10 "thing has not otherwise in fact a seditious
"tendency."

Section 3(3) is not affected by Ordinance No. 45/70. It provides - "For the purpose of proving "the commission of any offence against this Act "the intention of the person charged at the time "he ... uttered any seditious words or printed, "published ... any publication ... shall be deemed "to be irrelevant if in fact the ... words, publi-
20 "cation ... had a seditious tendency."

In interpreting the Sedition Act, 1948, I have been urged by Sir Dingle Foot to follow the common law priciples of sedition in England. In England it can now be taken as established that in order to constitute sedition the words complained of are themselves of such a nature as to be likely to incite violence, tumult or public disorder. I can find no justification for this contention. The opinion of the Judicial Committee of the Privy
30 Council in Wallace-Johnson v. The King[2] demonstrated the need to apply our own sedition law although there is close resemblance at some points between the terms of our sedition law and the statement of the English law of sedition. I can findof no better reason than that of Stratchey J. who pointed out in Queen Empress v. Balagangadhar Tilak[3] that the Indian law of sedition which is found in section 124A of the Indian Penal Code (which is quite similar to section 3(1) of our
40 Sedition Act) is a statutory offence and differs in that respect from its English counterpart which is a common law misdemeanour elaborated by the decisions of the judges. The English common law of sedition was received in Australia but the

(2) (1940) A.C. 231, 240
(3) I.L.R. (1897) 22 Bom. 112

In the High Court of Malaya

No. 2

Judgment of Raja Azlan Shah J. 11th May 1971 (continued)

offence is now statutory. The statutory definitions of sedition which are to be found in the Crimes Act 1914-1946 of Australia are almost identical with the common law definition and yet in the prevailing decision in Burns v. Ransley[4], Latham C.J. found it unnecessary to consider the common law of sedition. In my view there is a good deal to be said for the enlightened view. Although it is well to say that our sedition law had its source, if not its equivalent from English soil, its waters had, since its inception in 1948, flowed in different streams. I do not think it necessary to consider the matter in great detail because I have been compelled to come to the conclusion that it is impossible to spell out any requirement of intention to incite violence, tumult or public disorder in order to constitute sedition under the Sedition Act. The words of sub-section (3) of section 3 of our Sedition Act and the subject-matter with which it deals repel any suggestion that such intention is an essential ingredient of the offence.

I reject the liberal interpretation of the provisions of section 124A of the Indian Penal Code as adopted by courts in India which brought the Indian law of sedition at par with English law. (See Niharendu Majumdar v. King Emperor[5]; Kedar Nath v. State of Bihar[6]. I rely on the strict and literal interpretation as adopted by the Privy Council cases: see Tilak's case (supra); Wallace-Johnson (supra); King Emperor v. Sadashiv Narayan[7]).

In my view what the prosecution have to prove and all that the prosecution have to prove is that the words complained of, or words equivalent in substance to those words, were spoken by accused No. 1 at the dinner party. Once that is proved the accused will be conclusively presumed to have intended the natural consequences of his verbal acts and it is therefore sufficient if his words have a tendency to produce any of the consequences stated in section 3(1) of the Act. It is immaterial whether or not the words complained of could have

(4) (1949) 79 C.L.R. 101
(5) (1942) F.C.R. 38;
(6) A.I.R. (1962) S.C. 955
(7) L.R. 74 I.A. 89

In the High Court of Malaya

No. 2

Judgment of Raja Azlan Shah J.
11th May 1971
(continued)

the effect of producing or did in fact produce any of the consequences enumerated in the section. It is also immaterial whether the impugned words were true or false. (See Queen Empress v. Amba Prasad[8]). And it is not open to the accused to say that he did not intend his words to bear the meaning which they naturally bear. (See Maniben v. Emperor[9]).

Before I proceed to deal with the facts there is one point which assumes importance in the defence
10 submission. Sir Dingle Foot has stressed the need to give the greatest latitude to freedom of expression. Dato Seenivasagam, as I understand him, said that the Sedition Act strikes at the very heart of free political comment. It is of course true, as a general statement, that the greatest latitude must be given to freedom of expression. It would also seem to be true, as a general statement, that free and frank political discussion and criticism of government policies cannot be developed in
20 an atmosphere of surveillance and constraint. But as far as I am aware, no constitutional state has seriously attempted to translate the 'right' into an absolute right. Restrictions are a necessary part of the 'right' and in many countries of the world freedom of speech and expression is, in spite of formal safeguards, seriously restricted in practice. In the United States all types of speech "can claim no talismanic immunity from constitutional "limitations. It must be measured by standards that
30 "satisfy the First Amendment." (See New York Times v. Sullivan [10]. The Supreme Court of India too has conceded that fundamental rights are subject to limitations in order to secure or promote the greater interests of the community. If I may quote a passage from A.K. Gopalan v. State of Madras[11]: "There cannot be any such thing as absolute or uncontolled liberty wholly free from restraint; for "that would lead to anarchy and disorder. The "possession and enjoyment of all rights ... are
40 "subject to such reasonable conditions as may be "deemed to be, to the governing authority of the "country, essential to the safety, health, peace "and general order and moral of the community ...

(8) (1898) I.L.R. 20 Allahabad, 55, 69
(9) A.I.R. (1933) Bombay 65, 67
(10) 376 U.S. 255 (1964)
(11) A.I.R. (1950) S.C. 27

In the High Court of Malaya

No. 2

Judgment of Raja Azlan Shah J.
11th May 1971
(continued)

"What the Constitution attempts to do in declaring "the rights of the people is to strike a balance "between individual liberty and social control." In England too, there is no unrestricted freedom of expression. Dicey's summary of the situation still holds good. "Freedom of discussion in "England is little else than the right to write "or say anything which a jury of 12 shopkeepers "think it expedient should be said or written. "Such 'liberty' may vary at different times from "unrestricted licence to severe restraint ... the "amount of latitude conceded to the expression of "opinion has in fact varied greatly according to "the condition of popular sentiment." (See Law of the Constitution, 3rd edition, p.231). In this connection it is not out of place if I quote the well-known words of Sir Samuel Griffith C.J. in Duncan v. State of Queensland[12], which were quoted in the Privy Council case of Freightlines, etc. Ltd. v. State of New South Wales:[13] "But "the word 'free' does not mean extra legem any "more than freedom means anarchy. We boast of "being an absolutely free people, but that does "not mean that we are not subject to law."

My purpose in citing these cases is to illustrate the trend to which freedom of expression in the constitutional states tends to be viewed in strictly pragmatic term. We must resist the tendency to regard right to freedom of speech as self-subsistent or absolute. The right to freedom of speech is simply the right which everyone has to say, write or publish what he pleases so long as he does not commit a breach of the law. If he says or publishes anything expressive of a seditious tendency he is guilty of sedition. The Government has a right to preserve public peace and order, and therefore has a good right to prohibit the propagation of opinions which has a seditious tendency. Any Government which acts against sedition has to meet the criticism that it is seeking to protect itself and to keep itself in power. Whether such criticism is justified or not, is, in our system of Government, a matter upon which, in my opinion, Parliament and the people, and not the courts, should pass judgment. Therefore, a meaningful understanding of the right to freedom of speech

(12) (1916) 22 C.L.R. 536, 576
(13) (1967) 2 All E.R. 436

under the Constitution must be based on the realities of our contemporary society in Malaysia by striking a balance of the individual interest against the general security or the general morals, or the existing political and cultural institutions. Our sedition law would not necessarily be apt for other people but we ought always to remember that it is a law which suits our temperament.

A line must therefore be drawn between the right to freedom of speech and sedition. In this country the court draws the line. The question arises: where is the line to be drawn; when does free political criticism end and sedition begin? In my view, the right to free speech ceases at the point where it comes within the mischief of section 3 of the Sedition Act. The dividing line between lawful criticism of Government and sedition is this - if upon reading the impugned speech as a whole the court finds that it was intended to be a criticism of Government policy or administration with a view to obtain its change or reform, the speech is safe. But if the court comes to the conclusion that the speech used naturally, clearly and undubitably, has the tendency of stirring up hatred, contempt or disaffection against the Government, then it is caught within the ban of para (a) of section 3(1) of the Act. In other contexts the word "disaffection" might have a different meaning, but in the context of the Sedition Act it means more than political criticism; it means the absence of affection, disloyalty, enmity and hostility. To 'excite disaffection' in relation to a Government refers to the implanting or arousing or stimulating in the minds of people a feeling of antagonism, enmity and disloyalty tending to make Government insecure. If the natural consequences of the impugned speech is apt to produce conflict and discord amongst the people or to create race hatred, the speech transgresses paragraphs (d) and (e) of section 3(1). Again para (f) of section 3(1) comes into play if the impugned speech has reference to question any of the four sensitive issues - citizenship, national language, special rights of the Malays and the sovereignity of the Rulers.

The speech begins by reference to Lim Kit Siang who had been detained without trail. It goes on to say that his arrest was a mindless

over-reaction on the part of the Alliance Government. After saying that his detention without trial reflects the way how democracy is practised in Malaysia, we come to the second paragraph which shows the standpoint of the speech. It says the reason why the Alliance Government is not making any headway in the problem of forging a new Malaysian nation, of creating a Malaysian identity which truly and honestly reflects the various racial strands in our country is because the Alliance Government practises a policy of segregation. It then cites six instances of the Alliance Government's policy of segregation. The third and fourth paragraphs refer to the Democratic Action Party's stand in building a multi-racial Malaysian nation. The fifth paragraph stresses the need to have a common denominator. It says a Malaysian citizen is a Malaysian citizen fullstop and without a whole list of restrictive clauses. It goes on to say that when Alliance Ministers made pronouncements that there is a place for everybody under the Malaysian sun, those pronouncements are tainted with partiality, favouring one group of citizens in place of another.

My purpose in making the citation from the impugned speech is to show why I think that the speech which is certainly full of hatred and bitterness is clearly directed against the Government. It is doing exactly what Strachey, J. in Tilak's case said must not be done: "But if he "goes on beyond that, and, whether in the course "of comments upon measures or not, holds up the "Government itself to the hatred or contempt of "its readers - as for instance, by attributing "to it every sort of evil and misfortune "suffered by the people, or imputing to it base "motives, or accusing it of hostility or indifference to the welfare of the people - then he is "guilty under the section, and the explanation "will not save him."

There can be no doubt that Dr. Ooi's speech was very carefully prepared. It was not made casually and without purpose. The real gravamen of the charge which Dr. Ooi brings against the Government is that Government is siding the Malays. Dr. Ooi refers to six instances in which it it said that the Malays are in a privileged position. The speech seems to me to be a sustained

attempt on the part of Dr. Ooi to hold the Government in hatred and contempt and to excite disaffection. I must point out that allegations of partiality (and we are not concerned with its falsity or truth) in favour of one ethnic group is of itself clear evidence on the part of Dr. Ooi to bring the Government into hatred or contempt, or excite feelings of disaffection against the Government. To accuse the Government of gross partiality in favour of one group against another is, in my opinion, calculated to inspire feelings of enmity and disaffection amongst the people of this country. I further find that Dr. Ooi's scurrilous attacks on one ethnic group and disseminating false views played a significant part in creating racial tensions that on another occasion had resulted in race riots. Such speech is apt to promote feelings of ill-will and hostility among the different races in this country. The speech also touches on the special rights of the Malays. The baseness of its motives lies in the readiness of Dr. Ooi to touch on this sensitive issue. That, in my view, is caught within the mischief of para (f) of section 3(1) of the Act.

In my view the speech taken as a whole, after making all allowances for the enthusiasm of the speaker, goes very much beyond the limits of freedom of expression. It proceeds upon well worn lines - partiality of Government in favour of the Malays. I am satisfied that the impugned speech is expressive of a seditious tendency.

That is not the end of the matter. Sir Dingle Foot has attacked the validity of the Emergency (Essential Powers) Ordinance No. 45 of 1970, on the ground that it infringes the legislative authority of the Federal Parliament which is vested in a Parliament consisting of the Yang di-Pertuan Agong and both Houses of Parliament (Article 44). In other words, learned counsel says Parliament only can legislate emergency laws and any legislative power assigned to the executive is unconstitutional as amounting to an abrogation by Parliament of its power to legislate. With due respect I think that contention is untenable. Were learned counsel reviewing the situation in England I would have agreed with his proposition. In England the executive does not possess such independent power of legislation. Nor is there a

In the High Court of Malaya

No. 2

Judgment of Raja Azlan Shah J.
11th May 1971
(continued)

precedent of such a power existing in the Dominions except in India (see Article 123 of the Indian Constitution). It is true that like the Queen in England, the Yang di-Pertuan Agong is a component part of Parliament. But our Constitution is framed in such language as by known intentions of the draftsman to allow for far-reaching powers in the Yang di-Pertuan Agong in the sphere of legislation when Parliament is not sitting. Article 150 confers on His Majesty powers to promulgate emergency laws. His Majesty is the sole judge of the necessity of issuing emergency laws and he is not to give reasons for promulgating it. It is therefore clear that the power of the Yang di-Pertuan Agong to legislate by Ordinance when Parliament is not sitting is co-extensive with the power of Parliament itself.

That brings me to one point taken by Dato S.P. Seenivasagam. Learned counsel's argument is based on the premise that since emergency laws promulgated when Parliament is not sitting have a temporary existence, such laws must receive legislative sanction on the re-convening of Parliament and that implies that the Yang di-Pertuan Agong must summon Parliament as soon as possible and not wait until 1 year and 9 months after the proclamation of emergency. Clause (2) of Article 150 is enacted in two parts. The first part provides: "If a Proclamation of Emergency is "issued when Parliament is not sitting, the Yang "di-Pertuan Agong shall summon Parliament as "soon as may be practicable." "When Parliament "is not sitting" must mean "when Parliament is not in session", in other words "when Parliament is prorogued or dissolved." The phrase "as soon as may be practicable" reduces the obligation of the Yang di-Pertuan Agong to summon Parliament from being absolute and unqualified to being what is possible having regard to existing conditions including the circumstances that the general Parliamentary election was not yet completed. Any other view would render inept the provisions of clause (2) of Article 150. His Majesty is again the sole judge of "when it is possible" to summon Parliament and the matter is above judicial review. In my opinion the long delay in summoning Parliament does not affect the validity of Ordinance No. 45.

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The learned Solicitor-General in his submission quite properly submitted that in interpreting a written constitution such as the Federation of Malaya Constitution the court must look at the expressed wording of the written constitution itself rather than be guided by extraneous principles of other constitutions. The principle of interpretation of a written constitution was enunciated by Viscount Radcliffe in Adegbenro v. Akintola. (14). In view of the fact that Ordinance 45 was purportedly to have been promulgated under Article 150 of the Constitution, it is to the wording of that Article that I must look for an answer.

Clause (1) of Article 150 gives the Yang di-Pertuan Agong power to proclaim a state of emergency if satisfied that a grave emergency exists whereby the security of the Federation is threatened. It is common knowledge that the civil disturbances broke out in Kuala Lumpur on May 13, 1969 and spread all over the country. On May 15, 1969 the Yang di-Pertuan Agong proclaimed a state of emergency throughout the country vide P.U. (A) 145/69. The fact that the Yang di-Pertuan Agong issued the proclamation showed that he was so satisfied that a grave emergency existed whereby the security of the whole country was at stake. (See Special Reference No. 1 of 1964 reported in (1965) 1 S.C.R. 413). Counsel have not challenged the validity of the proclamation. Indeed the proclamation is not justiciable. (See Bhagat Singh v. King Emperor[15] and Emperor v. Benoari Lall.[16]). The same principles governing discretionary powers confided to subordinate administrative bodies cannot be applied to the Yang di-Pertuan Agong and are inapplicable. His Majesty occupies a special position. This reasoning equally applies to the question of justiciability of ordinances promulgated under clause (2) of Article 150.

There is a further consideration on this aspect of the case which is equally applicable to the provisions of clause (1) of Article 150. Clause (2) of Article 150 gives power to the Yang di-Pertuan Agong during the period an emergency proclamation

(14) (1963) 3 All E.R. 544, 550-551
(15) (1930-33)58 I.A. 169
(16) (1945) A.C. 14 P.C.

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11th May 1971
(continued)

is issued when Parliament is not sitting to promulgate ordinances which have the force of law "if satisfied that immediate action is required." I will now refer to an Australian case which has expressed the view that action taken by the Governor-General in Council under such power "if he is satisfied" that a certain state of affairs exist is not justiciable so long as the declaration recites the statutory formula. That is the case of Australian Communist Party v. The Commonwealth(17) which concerns the constitution validity of the Communist Party Dissolution Act, 1950. Section 5(2) of the Act gave power to the Governor-General in Council to declare a body of persons to be an unlawful association where "the Governor-General-in-Council is satisfied" that the body of persons had certain specified characteristics. The Australian High Court held the Act unconstitutional because the declaration was not properly framed. Dixon J. said at p.178-179: " ... the expression "by the Governor-General in Council of the result "in a properly framed declaration is conclusive. "In the case of the Governor-General in Council "it is not possible to go behind such an executive "act done in due form of law and impugn its "validity upon the ground that the decision upon "which it is founded has been reached improperly, "whether because extraneous considerations were "taken into account or because there was some "misconception of the meaning or application, as "a court would view it, of the statutory description "of the matters of which the Governor-General in "Council should be satisfied or because of some "other supposed miscarriage." Wijeysekera v. Festing(18) is an older case to the same effect. Another case which supports this view is Land Realisation Co. Ltd. v. Post Office(19).

What the court is interested in is to examine the emergency law in question and see whether it has been issued within the scope of the powers conferred by the Constitution. Once the court has determined that such law lies within the province of a competent authority, the court is not authorised to reweigh what a competent authority has weighed. The court will not assume the role of

(17) (1951) 83 C.L.R.1, 178-179
(18) (1919) A.C. 646
(19) (1950) 1 All E.R. 1062

a third legislative chamber. I cannot forbear from quoting a passage from the opinion of Lord Guest in Akar v. Attorney-General of Sierra Leone:[20] "Although the courts are the guardians of the "Constitution I believe that in interpreting the "Constitution the ground has to be trod warily and "with great circumspection. ... The courts cannot "go behind the scenes and enquire what were the "motives or policy behind a particular piece of "legislation. They can only as a matter of construc-"tion decide whether the Act is or is not within the "powers of the Constitution. This question must be "decided on the terms of the Act in conjunction "with the provisions of the Constitution."

Adopting the principles of law enunciated by Dixon J. in the Australian Communist Party's case and applying them to the present case there can be no doubt that Ordinance No. 45 was promulgated within the four corners of clause (2) of Article 150. The Ordinance had recited the statutory formula. The recital is conclusive and that closed the door to all review. The onus now shifts to those who wish to challenge its validity by proving mala fides or bad faith. (See Sephen Kalong Ningkan v. Government of Malaysia[21]). That has not been done. In my judgment Ordinance No. 45 is not violative of clause (2) of Article 150.

I now call on the defence of the four accused.

Accused Nos. 1 and 2 elect to remain silent.

Accused No.3 give evidence and so did accused No. 4. They say they did not know the contents of the impugned article was seditious. They do not read or write English nor do they employ English translators.

Now section 6(2) of the Sedition Act enacts -

"No person shall be convicted of any offence "referred to in section 4(1)(c) or (d) if the "person proves that the publication in respect of "which he is charged was printed, ... without his "authority, consent and knowledge and without any "want of due care or caution on his part, or that

(20) (1969) 3 All E.R. 384, 394
(21) (1968) 2 M.L.J. 238

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"he did not know and had no reason to believe that "the publication had a seditious tendency."

It may be stated here that the onus on the accused is not as heavy as that which rests on the prosecution to prove the facts which they have to establish and may be discharged by evidence satisfying the court of the probability of that which they are called upon to establish. In my judgment they have not satisfied the burden of proof imposed upon them by the sub-section inasmuch as bare words to the effect that they did not know the contents of the impugned article was seditious is not even prima facie evidence of absence of knowledge or reasonable belief.

I therefore find each of the accused guilty and I convict them.

I now come to the most painful task of the trial, i.e. to impose a suitable sentence on each of the accused. Although intention to incite violence, tumult and public disorder is not the criterion of guilt that is a relevant factor in assessing sentence. Dr. Ooi in his statement to the police has stated that he had no intention to incite feelings of hatred, enmity or hostility among the races. He is a responsible man and I accept his words.

In imposing sentence it is necessary to consider the public interest as well as the interests of the accused. It has been stated that speeches of this nature were permitted and indeed fashionable prior to May 13, 1969. The Attorney-General's Department has now deemed fit to enforce the law of sedition in recognition of the changing conditions in this country.

I have seriously considered what sentence to impose on each of the accused. I think a term of imprisonment would not be appropriate in the circumstances of this case. In my view a fine would be adequate. Since this court has drawn a line between political criticism and sedition, let that in future be the yardstick.

I impose on each of the accused a fine of $2,000/- in default six months' imprisonment.

(RAJA AZLAN SHAH)
Judge, High Court,
Malaya.

Kuala Lumpur,
11th May, 1971.

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Dato Mohd. Salleh bin Abbas, Solicitor-General and Mr. Ajaib Singh, Senkor Federal Counsel for Public Prosecutor

Sir Dingle Foot Q.C., Mr. Peter Mooney and Mr. D.P. Xavier for accused No. 1

Dato S.P. Seenivasagam, Mr. N. Sahadevan and Mr. Paramjit Singh Gill for accused No. 2

Mr. Lee Beng Cheang for accused Nos. 3 and 4.

No. 3

10 PETITION OF APPEAL

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR

(APPELLATE JURISDICTION)

FEDERAL COURT CRIMINAL APPEAL NO. 7 OF 1971

BETWEEN

FAN YEW TENG APPELLANT

AND

THE PUBLIC PROSECUTOR RESPONDENT

PETITION OF APPEAL

20 TO THE HONOURABLE THE JUDGES OF THE FEDERAL COURT

Fan Yew Teng, the Appellant abovenamed having given notice of appeal to the Federal Court against the decision of the Honourable Mr. Justice Raja Azlan Shah in the High Court at Kuala Lumpur in the State of Selangor on the 11th day of May, 1971 states the following grounds for his said appeal:-

1. On 25th day of January, 1971 your petitioner was charged in the Court of the Special President at Kuala Lumpur for an alleged offence under 30 Section 4(1)(C) of the Sedition Act, 1948 (Revised 1969) and punishable under Section 4(1) of the said Act.

2. On the 16th day of March, 1971 on the application of your petitioner the Honourable Mr. Justice Dato Abdul Hamid made an order under

In the Federal Court of Malaya

No. 3

Petition of Appeal 20th August 1971 (continued)

Section 417 of the Criminal Procedure Code.

3. Section 417 of the Criminal Procedure Code provides inter alia, that whenever it is made to appear to a Judge that some question of law of unusual difficulty is likely to arise, he may order that any particular criminal case be transferred to and tried before himself.

4. In pursuance of the said order your petitioner's case came on for trial in the High Court at Kuala Lumpur on 3rd day of May, 1971 but it was tried not by the Learned Judge who made the order but by the Honourable Mr. Justice Raja Azlan Shah.

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.

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.

7. Apart from your petitioner's trial being a nullity as being in contravension of the express provisions of Section 138 of the Crminal 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.

8. The Learned trial Judge ought to have held that the Proclamation of Emergency issued by His Majesty the Yang Di-Pertuan Agong on the 15th day of May, 1969 was invalid and of no effect having regard to the provisions of Article 150 of the Federal Constitution:-

(1) because Parliamentary elections not having been completed, there was no Parliament which could be summoned and therefore it was not competent for His Majesty to issue a Proclamation of Emergency when it was impossible for him to

comply with the requirements of Article 150.

(2) alternatively - if there was a Parliament which could have been summoned, then it was not summoned as soon as possible and the continued validity of the Proclamation ceased to exist.

9. The Learned trial Judge erred in law in holding that the validity of the Proclamation and of any Ordinance promulgated under Clause (2) of Article 150 of the Federal Constitution was not justiciable.

10 10. For the same reasons as set out in paragraphs 8 and 9 above the Learned trial Judge ought to have held that the Emergency (Essential Powers) Ordinance No. 45 of 1970 which amended the Sedition Act was ultra vires.

11. The Learned trial Judge erred in admitting in evidence the statements to the police made by your petitioner and by the others who were tried jointly with your petitioner.

12. The said statements were recorded under
20 Section 112 of the Criminal Procedure Code and not under Section 75 of the Internal Security Act, 1960 as erroneously assumed by the Learned trial Judge.

13. It is respectfully submitted that statements recorded under Section 112 are not voluntary as the person interrogated is bound to answer questions (with certain exceptions).

14. The Learned trial Judge ought to have held that the prosecution had failed to prove that your petitioner was the publisher of the article in
30 question and ought further to have held that the evidence of PW5 was not corroborated as required by law and a conviction could not be had on her uncorroborated evidence.

15. In considering the question as to whether the words in the Article complained of had a seditious tendency or not the Learned trial Judge misdirected himself on the principles which are applicable in a country like Malaysia which is governed by a democratically elected government answerable to the people as contrasted with the principles which were applied in deciding cases in former British Colonial territories where the Government was not elected

and was not answerable to the people.

16. The Sedition Act being restrictive of the fundamental right of freedom of speech guaranteed by the Federal Constitution to citizens of Malaysia, the Learned trial Judge ought to have construed it in favour of the citizens.

17. The learned trial Judge erred in holding that: "It is also immaterial whether the impugned words were true or false".

18. It is respectfully submitted that a finding as to whether the speech was substantially true or false is essential and relevant in considering whether it falls within any of the exceptions to Section 3 of the Sedition Act.

19. The Learned trial Judge ought to have held that the speech in question was a criticism of Government policy and acts with a view to obtaining its change or reform and did not have a seditious tendency and that even if it had a seditious tendency it was protected by the exceptions in Section 3(2) of the Sedition Act.

20. The Learned trial Judge erred in law and in fact in holding that the speech complained of touched on the special rights of the Malays and further erred in holding that the speech was caught within the mischief of para (f) of Section 3(1) of the Sedition Act.

21. It is respectfully submitted that para (f) of Section 3(1) of the Sedition Act only prohibits the calling in question of the special rights of the Malays but expressly preserves the right to call in question the manner in which these rights are implemented.

22. In considering whether the speech complained of was seditious the Learned trial Judge erred in taking judicial notice of the causes of the riots of May, 1969.

23. There was no evidence whatsoever for the Learned trial Judge to hold as follows:-

> "I further find that Dr. Ooi's scurrilous attacks on one ethnic group and disseminating false views played a significant part in

creating racial tensions that on another occasion had resulted in race riots".

24. It is respectfully submitted that in the absence of evidence the Learned trial Judge misdirected himself by making a finding on a question which has never been inquired into and allowing such a finding to influence his interpretation of the Sedition Act.

25. The sentence is manifestly excessive having
10 regard to the following:-

(a) The consequences which follow the imposition of a fine of $2,000/- or more include disqualification of your petitioner as a Member of Parliament and barring him from offering himself as a candidate at any future election for 5 years.

(b) There has been no previous decision of any Court in Malaysia interpreting the provisions of the Sedition Act.

26. It is respectfully submitted that the interests
20 of justice do not require that, in the circumstances of this case, the quantum of the fine should be such as would disqualify your petitioner from being a Member of Parliament.

27. The conviction and sentence is otherwise contrary to law and against the weight of evidence.

Your petitioner prays that the conviction and sentence on him may be set aside or a retrial ordered or for such order as Your Honourable Court may think just and reasonable.

30 Dated this 20th day of August, 1971.

Sgd.

(S.Seenivasagem & Sons)

Solicitors for the Petitioner.

The address for service of the Petitioner is care of Messrs. S. Seenivasagam & Sons, Advocates and Solicitors, No. 7, Hale Street, Ipoh, Solicitors for the Petitioner.

In the Federal Court of Malaysia

No. 4

Notes of Argument by Azmi, Lord President, Malaysia
13th September 1971

No. 4

NOTES OF ARGUMENT BY AZMI, LORD PRESIDENT, MALAYSIA

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR
(APPELLATE JURISDICTION)

FEDERAL COURT CRIMINAL APPEAL NO. 7 OF 1971
(Selangor Criminal Trial No. 18 of 1971)

Fan Yew Teng — Appellant

and

The Public Prosecutor — Respondent

Coram: Azmi, Lord President, Malaysia,
Ong Hock Thye, Chief Justice, Malaya
Suffian, Federal Judge, Malaya,
Ali, Federal Judge, Malaya
Ong Hock Sim, Federal Judge, Malaya.

NOTES OF ARGUMENT RECORDED BY AZMI LORD PRESIDENT.

Kuala Lumpur — 13th September, 1971

Seenivasagam, Xavier and Sahadevan with him for Appellant.

Solicitor General, Dato Mohamed Salleh bin Abas and Gunn Chit Tuan, Federal Counsel for the Respondent.

Seenivasagam: Refer to grounds 1 to 7.

Question of validity of trial without preliminary inquiry.

Sect. 417(b) - whenever it is made to appear to a Judge -

(b) that some question of law of unusual difficulty is likely to arise he may order that the case be transferred to and tried before himself.

Question is whether judge competent to try before himself without previous preliminary inquiry.

Refer to sec. 176 Singapore Criminal Procedure Code.

Malall's Criminal Procedure Code 4th Edn. page 285.

In our Criminal Procedure Code transfer to himself but under sec. 176 of Singapore Criminal Code transfer and tried before the High Court.

So that when Abdul Hamid J. made the order the case should be tried by himself.

But in this case the case was ultimately tried by another Judge Raja Azlan Shah J.

Second and most important question is whether there should have been a preliminary inquiry before the case was tried by Raja Azlan Shah J.

Refer to sec. 138 of Criminal Procedure Code.

Section provides "that no person shall be tried before such court unless he shall have been committed for trial after preliminary inquiry under the provisions of this chapter." There is express prohibition of trial without preliminary inquiry.

No such prohibition in the S.S. Criminal Procedure Code.

Refer to T.T. Rajah v. Regina 1963 M.L.J. 281 Page 282 headnote 3 - an order for transfer under sec. 186 of Criminal Procedure Code does not call for a preliminary inquiry. Page 284 left column:- "The short answer ...."

Another case Fung Yin Ching & Others v. Public Prosecutor 1965 M.L.J. 49 also held that no preliminary inquiry required under the Singapore Criminal Procedure Code.

Sect. 25 of the Judicature Act proviso:

"Provided that all such powers shall be exercised in accordance with any written law or rules of Court relating

In the Federal Court of Malaysia

No. 4

Notes of Argument by Azmi, Lord President, Malaysia 13th September 1971 (continued)

to the same."

That means that we cannot dispense with law or rules of court relating to same.

I submit trial a nullity.

Sd. Azmi.

Solicitor-General

I put in my written submission.

No distinction between Singapore and our law. 10

Reference word "himself" in sec. 417.

No question of personal relationship.

Only a drafting point. In other words it is not necessary that the judge should direct that the matter be tried by himself and not also by another judge.

Reference sec. 138 and 417 Criminal Procedure Code.

Sec. 417 refers to transfer of cases. 20

Refer 1965 1 M.L.J. 49 at page 51 F left "With regard to first ground of appeal ..."

There could be no qestion of it being something that natural justice demands should be held as a preliminary condition of any criminal trial so as to let the accused know the case against him or anything else."

Sec. 417 stands on its own footing and Preliminary inquiry is dispensed with. 30

Sd. Azmi.

Short Adjournment

Seenivasagam:

Sec. 417 Court may make 3 kinds of orders.

Sec. 9 Criminal Procedure Code - criminal jurisdiction of magistrates.

Sec. 73 Criminal Procedure Code - inquiry by magistrates.

Sec. 418 Criminal Procedure Code submit it does affect situation.

Sd. Azmi
13.9.71

16th December 1971

Counsel as before

I read the majority judgment.

10 Appeal allowed and conviction and sentence set aside.

Ali F. Judge reading a dissenting judgment.

Judgment: Order in terms of the majority judgment.

(Conviction and sentence set aside.)

Sd. Azmi.

True Copy

20 Sd. G.E.Tan
(G.E.Tan)
Secretary to the Lord President, Malaysia.

18th April, 1972

No. 5

No. 5

Notes of Argument by Ong, Chief Justice, Malaysia 13th September 1971

NOTES OF ARGUMENT BY ONG, CHIEF JUSTICE, MALAYSIA

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR

30 (Appellate Jurisdiction)

Federal Court Criminal Appeal No. 7 of 1971
(Selangor Criminal Trial No. 18/71)

Fan Yew Teng — Appellant

v.

The Public Prosecutor — Respondent

In the Federal Court of Malaysia

No. 5

Notes of Argument by Ong, Chief Justice, Malaysia 13th September 1971 (continued)

Cor: Azmi, L.P.
Ong, C.J.
Suffian, F.J.
Ali, F.J.
Ong Hock Sim, F.J.

NOTES OF ARGUMENT RECORDED BY ONG, C.J.

Monday 13th Sept. 1971

Dato S.P. Seenivasagam with D.P. Xavier and N. Sahadevan for appellant.

S-G & Gunn Chit Tuan for respondent. 10

Seeni :

Grd. 1 - validity of trial?

S. 417 - appln must be made to a judge - he may order trial before himself.

Could case be assigned to another judge for trial?

,cf.Singapore's S. 176 - "High Court" instead of "Judge". See Mallal p.285.

(L.P.: S'pore is like India).

Submit different language means that intention is different. 20

Secondly, a trial in H.C. can't be held without a P.E. vide S.138 - "no person shall be tried etc."

T.T. Rajah v. The Queen (1963) M.L.J. 281 @ 282.

Fung Yin Chung v. P.P. (1965) 1 M.L.J. 49.

M. S. 252A = s. 192(3).

No evidence to be given by any witness unless he had given evidence in a P.E.

Furthermore, case was not tried before Hamid J. himself. 30

Submit - written law regulating procedure must be followed.

S. 25 Courts of Judicature Act - see the proviso.

The fact that H.C. has jurisdiction does not imply that it can dispense with following of prescribed procedure.

Even if P.E. could be dispensed with in trial by himself, it won't be so when the trial is before another judge.

Hence trial was vitiated and a nullity.

Tan Sri Salleh, S-G in reply:

- written submission.
- was trial before Azlan J. illegal? or must it be before same judge who made order under s.417?

10 True Singapore S.176 not same as our S.417 only difference is "High Court" used for "Judge".

But note "transfer" in S.417 - "Judge" and "Court" not material difference. "Himself" is a drafting rule being followed grammatically.

As to P.E. being a precondition to H.C. trial.

The 2 cases support respt's contention.

- submit a "transfer" is still a transfer for

20 summary trial.

Note: Singapore trials by judge without jury - S.177B.

Submit S.138 applies only to committal cases, not to cases transferred - Chap. XVII.

S.417 comes under Chapt. XLII - stands on different footing.

Take special note of S.418(ii).

Seenivasagam: re S.418(ii) what is his view?

An order needn't kill the inquiry.

30 Inquiries are of many types - e.g. under S. 9 Cr. P.C., S 73; S.418(ii) not in conflict with S.138.

C.A.V.
Sgd. H.T. Ong
13.9.71

16th Sept. 1971

L.P. reads the majority judgment of the Court.

Ali dissents.

Order - declaration of nullity
Conviction and sentence set aside.

40 Sgd. H.T. Ong
16.9.71

In the Federal Court of Malaysia

No. 6

Notes of Argument by Suffian, Federal Judge 13th September, 1971

No. 6

NOTES OF ARGUMENT BY SUFFIAN, FEDERAL JUDGE

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR

(Appellate Jurisdiction)

FEDERAL COURT CRIMINAL APPEAL NO. 7 OF 1971

(Kuala Lumpur High Court
Selangor Criminal Trial No. 18 of 1971)

Fan Yew Teng — Appellant 10

versus

The Public Prosecutor — Respondent

Coram: Azmi L.P., H.T. Ong C.J.,
Suffian, Ali and H S. Ong, F.JJ.

NOTES OF SUFFIAN, F.J.

Monday, 13th September, 1971

Dato S.P. Seenivasagam (Xavier and Sahadevan with him).

Tan Sri Salleh Abas, Solicitor-General, for Public Prosecutor. 20

Seenivasagam addresses

Grounds 1 to 7 - validity of trial without preliminary enquiry.

Section 417, Criminal Procedure Code - "himself". May another judge try the case? In Singapore law is different - section 176.

Mallal, p. 285.

Different meaning must have been intended by different words.

Submit only Hamid J. could have tried this case - if he had died, a second application should have been made. 30

Secondly, submit there should have been a preliminary enquiry.

Section 138, Criminal Procedure Code - 2nd part is express prohibition of trial in High Court without preliminary enquiry. Section 417 does not make exception to section 138. Section 417.

This is a transfer trial (not committal) - but submit transfer subject to section 138, Criminal Procedure Code.

T.T. Rajah v. P.P. (1963) M.L.J. 281

Fung Yin Ching v. P.P. (1965) M.L.J. 49 - p.50 - decision of this court.

Section 252A, Criminal Procedure Code, same as Singapore section 192. But our law has never been amended like Singapore, p.51.

Section 25, Court of Judicature Act - all powers exercisable only in accordance with written law - mere fact High Court has jurisdiction, does not entitle it to dispense with any legal requirement.

Submit trial a nullity.

Subramaniam

Solicitor-General addresses on preliminary point raised in grounds of appeal 1 to 7, hands in written submission and speaks to it.

Section 417 - nothing personal in it - judge ordering transfer cannot regard case as his own personal case.

Submit preliminary enquiry not necessary.

Singapore section 177B.

Section 138 applies only to committal cases, not to transfer cases.

Section 417 stands on its own. It is in different chapter.

Emergency trials are committal cases (not transfer) - law expressly provides for dispensing with preliminary enquiry.

Preliminary enquiry not required by natural justice. Fung's case, p.51.

Constitution does not require preliminary enquiry.

Section 252A does not apply to committal cases, nor to transfer cases.

In the Federal Court of Malaysia

No. 6

Notes of Argument by Suffian, Federal Justice 13th September 1971 (continued)

Seenivasagam replies:

Section 417. Section 418(ii).

Enquiries of many kinds - section 9, section 73.

To Thursday 16.9.71 for judgment. C.A.V.

Thursday, 16th September, 1971 in Kuala Lumpur

Coram: Azmi L.P., H.T. Ong C.J., Suffian, Ali, H.S. Ong, F.JJ.

Continued from 13.9.71.

Counsel as before.

L.P. reads majority judgment. 10

Ali reads dissenting judgment.

Order: trial declared a nullity; conviction quashed, sentence set aside.

(Signed) M. Suffian.

Certified true copy.

Secretary to Judge,
Federal Court,
Malaysia,
Kuala Lumpur.

No. 7

Notes of Argument by Ali, Federal Justice 13th September 1971

No. 7 20

NOTES OF ARGUMENT BY ALI, FEDERAL JUSTICE

IN THE FEDERAL COURT OF MALAYSIA AT KUALA LUMPUR

(Appellate Jurisdiction)

FEDERAL COURT CRIMINAL APPEAL NO. 7 OF 1971

Fan Yew Teng — Appellant

vs.

The Public Prosecutor — Respondent

Coram: Azmi, Lord President, Malaysia.
Ong, C.J., Malaya
Suffian, F.J.
Ali, F.J.
Ong, F.J.

NOTES OF ALI, F.J.

Kuala Lumpur. 13th September, 1971

Dato S.P. Seenivasagam (M/s Xavier and Sahadevan with him) for appellant.

10 Tan Sri Dato Mohd. Salleh bin Abbas, Solicitor-General (Mr. Gunn Chit Tuan, Senior Federal Counsel with him) for respondent.

Seenivasagam: Points - Grounds 1 to 7.

Validity of trial without P.E.

Refers to Sec.417 C.P.C. - different from Singapore Code. Sec.176 C.P.C. Mallal's C.P.C. 245.

Submits section 417 only applies to the judge making the order hearing the
20 case himself.

Refers to Sec.138 C.P.C. reads.

Submits Section 417 is not an exception to the general rule.

Refers to Singapore cases -

(1) T.T. Rajah v. Reg. (1963) MLJ 281
(2) Fung Yin Ching & Ors. v. P.P. (1965) MLJ 49, 54.

Submits judgments in these cases cannot apply to Malaysia inasmuch as
30 Sec. 252A has not been amended. Refers to Sec. 25 of Court of Judicature Act.

Submits trial irregular and a nullity. If Hamid J. has tried it himself there might not be objection.

Submits trial vitiated.

Solicitor-General: In reply to preliminary point. He hands in written submission (PP.1).

In the Federal Court of Malaysia

No. 4

Notes of Argument by Ali, Federal Justice
13th September 1971
(continued)

On 1st point: Trial in High Court should be by the same judge who ordered transfer under Sec.417 C.P.C. Concedes different from Singapore Code. Reads Singapore provision. Except for the words 'High Court' difference in wording is not of particular importance.

Word 'himself' a drafting point.

On 2nd point: Refers to the 2 Singapore cases. Judgment of Thomson L.P.

10

Submits sec. 417 stands on its own footing.

Reads.

Short adjournment.

Seenivasagam in reply: Sec. 418(ii) does not apply to a P.E. which is admitted.

Judgment on the point reserved.

Sd. Ali

20

16th September, 1971

Seenivasagam with Sahadevan for appellant.

Solicitor-General with Gunn Chit Tuan for respondent.

L.P. reads majority judgment.

I read my dissenting judgment.

(Conviction and sentence set aside.)

Sd. Ali.

No. 8

NOTES OF ARGUMENT BY ONG, HOCK SIM
FEDERAL JUSTICE

13th SEPTEMBER, 1971

FEDERAL COURT CRIMINAL APPEAL NO. 7 OF 1971
(Kuala Lumpur High Court Criminal Trial
No. 18 of 1971)

BETWEEN

Fan Yew Teng   Appellant

10   and

The Public Prosecutor   Respondent

Coram: Azmi, L.P. Malaysia
Ong, C.J. Malaya
Suffian, F.J.
Ali, F.J.
Ong, Hock Sim, F.J.

NOTES RECORDED BY ONG HOCK SIM, F.J.

Dato S.P. Seenivasagam with Mr. D.P. Xavier and
Mr. Sahadevan for Appt.

20 Tan Sri Mohd Salleh S-G with Mr. Gunn Chit Tuan
for Respondent

Dato Seenivasagam:

1st Point concerns validity of trial in High
Court without a preliminary inquiry.

Reads S.417 C.P.C. - "tried before himself"

Q. Can it be subsequently heard before
another Judge?

S. 138 C.P.C. - trial in High Court cannot be
held w/o p.e.

30 T.T. Rajah vs Reg. 1963 M.L.J. 281 at 282-284.

Fung Yin Ching & Ors. 1965, 31 M.L.J. 49

Section 25 Courts of Judicature Act 1964 &
Proviso to Subsection (2)

In the Federal Court of Malaysia

No. 8

Notes of Argument by Ong Hock Sim, Federal Justice 13th September 1971 (continued)

Tan Sri Mohd Salleh submits written submissions on the question of jurisdiction.

Seenivasagam: refers to S.9 C.P.C.

Judgment resd.

16TH SEPTEMBER, 1971

Judgment by Majority read by Azmi L.P.

Dissenting judgment by Ali F.J.

Certified true copy.

Secretary to Judge
Federal Court
Malaya
Kuala Lumpur

10

No. 9

Written Submission by Solicitor-General

No. 9

WRITTEN SUBMISSION BY SOLICITOR-GENERAL

FEDERAL COURT CRIMINAL APPEAL NO. 7 OF 1971

FAN YEW TENG - APPELLANT

AND

THE PUBLIC PROSECUTOR RESPONDENT

SUBMISSION OF THE SOLICITOR-GENERAL

1. Should the trial be held by the same judge who made the order for the transfer of the case under section 417 of C.P.C. ?

20

Submitted that it is not necessary that the same judge should hear the case. Although section 417 of C.P.C. says that a Judge may order "that any particular criminal case be transferred to and tried before himself", it does not mean that by reason of the word "himself" the same Judge, and he alone to the exclusion of all other high court judges, will and must hear the case. The word "himself" used in the section is purely to denote a grammatical pronoun consistent with the earlier word "Judge" to which it refers. Nothing in the

30

nature of personal interest or relation is to be inferred therefrom. For example, if the word "High Court" instead of the word "judge" is used the subsequent word would be the word "it" and not the word "himself", as is done in section 176 of the Singapore C.P.C. This is thus purely a drafting point.

2. <u>When a case is transferred, as opposed to committal, to the High Court under section 417 of C.P.C., is preliminary inquiry a condition precedent to the trial by the High Court?</u>

Submitted that preliminary inquiry is not such a condition precedent. Under section 22(1)(a) of the Judicature Act 7/64, the original jurisdiction of the High Court is, inter alia, "to try all offences committed within its local jurisdiction". This jurisdiction is exercisable in either of the two ways:-

(a) by committal of accused person to the High Court, in which case there must be a preliminary inquiry, unless there is a written law to the contrary; and

(b) by transfer of case from a lower court to the High Court under section 417 of C.P.C.

With regard to the case transferred under section 417 of C.P.C., the case must of necessity be triable by the lower court by way of summary trial. There seems to be no reason why such case, on transfer to the High Court, should be proceeded with by way of committal and therefore preliminary inquiry should be held. Section 417 of C.P.C. does not lay such a condition. This is clearly reflected by the judgment of Wee Chong Jin. C.J., in a Singapore case <u>T.T. Rajah v. P.P. (1963) MLJ. 281 at page 284</u>:-

> "The short answer to the question I have to decide is, as stated by the learned Solicitor-General, that there is no provision in the Criminal Procedure Code which requires that before an accused person is brought before the High Court under its original criminal jurisdiction there must first be a preliminary inquiry and a committal for trial following upon such inquiry. It seems

to me that it is not a question of what the practice has been but whether under the provisions of the Criminal Procedure Code the High Court can only take cognizance of an offence under the Penal Code after the matter has been first inquired into by a subordinate court with a view to committal for trial by the High Court. So considered it seems to me that the High Court is not precluded from so doing. Furthermore section 176 of the Criminal Procedure Code, which is the relevant section under which this application ought to be considered, specifically provides that the High Court may make an order that any particular case shall be transferred to and tried before the High Court without any qualifying words at all and in my view the discretion conferred by this section is not limited to a discretion to remit the case to a subordinate court for a preliminary inquiry with the view to committal of the accused for trial by the High Court. In my view section 176 enables the High Court in a proper case to make an order transferring any particular criminal case from a subordinate court direct to the High Court for trial by the High Court and for the High Court thereupon to dispose of that particular case by way of summary trial. In the result I now make an order that the 1st Criminal District Court Case No. 108 of 1963 be transferred to the High Court for summary trial on a date or dates to be fixed by the Registrar of This Court.".

In another Singapore case concerning the same issue, i.e. Fung Yin Ching & Ors. v. P.P. (1955) MLJ. 49, Thomson, L.P., delivering judgment for the Federal Court, arrived at the same conclusion by adopting a different reasoning. In this case, Thomson, L.P., held that as respects transferred cases from the lower court to the High Court preliminary inquiry is not a pre condition essential to the trial of these cases by the High Court. He considered that the necessity for holding a preliminary inquiry arose by virtue of section

192(3)* of the Singapore C.P.C. and that since this section only applied to trial by jury and not trial by a Judge sitting alone for which a different provision was applicable, no preliminary inquiry was therefore necessary in cases of trial by a Judge sitting alone. With the greatest respect to the learned Lord President, it is submitted that this reasoning would lead to an inevitable abolition of preliminary inquiry altogether in cases of trial of non-committal cases by a Judge sitting alone. Experience, however, has shown that the Legislature in Singapore abolished the preliminary inquiry and jury trial by legislation. Fortunately, the learned Lord President qualifies his judgment by saying:-

> "From this the conclusion would seem to follow that when the Legislature enacted the 1960 Ordinance it contemplated that the requirement of a preliminary inquiry should not apply in non-committal cases <u>in respect of which the court had cognition otherwise than by reason of commitment by a Magistrate</u>".

It is submitted that section 192(3) of the Singapore C.P.C. cannot be invoked as an authority for the requirement of holding a preliminary inquiry. This provision is purely dealing with

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*S. 192(3) of Singapore C.P.C. reads:-

> "A person who has not given evidence at a preliminary inquiry shall not be called as a witness by the prosecution at any trial before the verdict of the jury is given, unless the accused person or his advocate and the registrar have been previously served with a notice in writing of the intention to call such person stating the person's name and address and the substance of the evidence intended to be given".

Thomson, L.P., says:

> "Turning to the other two classes of cases, it is quite clear that had the present case been tried by a judge as it would have been prior to the commencement of the Criminal Procedure Code (Amendment) Ordinance, 1960, the trial would have been governed by the provisions of Chapter XX of the Code and the provisions of that chapter make the holding of a preliminary inquiry a necessary condition. That arises by reason of section 192(3) which reads as follows:-"

In the Federal Court of Malaysia

No. 9

Written Submission by Solicitor-General (continued)

the calling of witnesses at the actual trial and in no way deals with the requirement of preliminary inquiry.

It is true that section 138 of the C.P.C. says that "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" and that section 252A says that "a witness who has not given evidence at the preliminary inquiry shall not be called by the prosecution at any trial before the High Court, unless the accused person or his advocate has been previously served with a notice - ..... " 10

Submitted that these two sections, namely 138 and 252A, do not apply to "transferred cases" but only to "committal cases" by virtue of the placing of these two sections under particular and also different headings. "Committal cases" are the normal method by which the High Court exercises its original jurisdiction, whereas "transferred cases" are exceptional cases which are dealt with under a special heading under which section 417 appears. 20

After all what is a preliminary inquiry. Thomson L.P. in Fung Yin Ching & Ors. v. P.P. (1965) MLJ. 49 at p. 51 defines it as a "preliminary condition of a criminal trial so as to let the accused know the case against him or anything of the sort. After all the great majority of persons convicted of criminal offences both here and in England are convicted after a summary trial without any question of a preliminary inquiry". If preliminary inquiry is purely to enable the accused person to know the case against him, the summary trial without preliminary inquiry has given him sufficient information for this purpose. In this case the facts are not in dispute. What is in dispute is the interpretation which is sought to place upon the publication of the "Rocket". Preliminary Inquiry, therefore, is purely a repetition. 30 40

Further, under section 417, in granting the application for the transfer of the case, the Judge may order "that any particular criminal case be transferred to and tried by himself". If it is intended that a preliminary inquiry is necessary

in such case, the Legislature would have used the expression "inquired into and tried by" which has been used in the earlier paragraph. This clearly indicates that preliminary inquiry is not a necessity in respect of transferred cases.

No. 10

JUDGMENT OF THE COURT BY AZMI, LORD PRESIDENT, MALAYSIA

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA
10 LUMPUR

(APPELLATE JURISDICTION)

FEDERAL COURT CRIMINAL APPEAL NO. 7 OF 1971
(Selangor Criminal Trial No. 18/71)

Fan Yew Teng — Appellant

v.

The Public Prosecutor — Respondent

Coram: Azmi, Lord President,
Ong, Chief Justice,
Suffian, Federal Judge,
20 Ali, Federal Judge,
Ong, Federal Judge.

JUDGMENT OF THE COURT

The Appellant was convicted together with three others of having committed an offence under section 4(1)(c) of the Sedition Act 1948 (Revised - 1969) punishable under section 4(1) of the said Act. He has appealed to this court against both his conviction and sentence.

He was originally charged before the President
30 of the Sessions Court but on 16th March 1971 he applied to a Judge under section 417 of the Criminal Procedure Code for the transfer of his trial to the High Court. Abdul Hamid J. made the order prayed for. Pursuant to that order of transfer the appellant was brought before the High Court on 3rd May 1971 and tried, not by Abdul Hamid J.

In the Federal Court of Malaysia

No.10

Judgment of the Court by Azmi, Lord President, Malaysia
16th September 1971
(continued)

himself, but by another Judge, Raja Azlan Shah J., by whom he was duly convicted and sentenced.

The appeal raises a number of grounds, in the forefront of which is the appellant's contention that the trial was a nullity. With the agreement of counsel on both sides we decided to hear full argument first on this preliminary point, since the question of jurisdiction goes to the root of the whole appeal. The appellant's submission is that - 10

(1) his trial was a nullity, rendering his conviction null and void, because the trial was conducted in contravension of the express prohibition contained in section 138 of the Criminal Procedure Code, which provides that no person shall be tried before the court of a Judge unless he shall have been committed for trial after a preliminary inquiry; 20

(2) his trial was held before a Judge other than the Judge who made the order for transfer, contrary to the provision in section 417 of the Criminal Procedure Code that the Judge making the order try the case himself;

(3) the failure to hold a preliminary inquiry was not only in contravension of the express provisions of section 138 but also an incurable defect which prejudiced the appellant in his defence. 30

We shall deal first with the objection raised under section 417 the relevant portion of which reads:-

"Whenever it is made to appear to a Judge ...

(b) that some question of law of unusual difficulty is likely to arise ... he may order ... that any particular criminal case be transferred to and tried before himself ... " 40

It was contended that, since Abdul Hamid J. made the order of transfer, he himself should have

In the Federal Court of Malaysia

No.10

Judgment of the Court by Azmi, Lord President, Malaysia
16th September 1971
(continued)

tried the case, in compliance with the express provisions of section 417, although there is no suggestion that the change affected the outcome in any way. The learned Solicitor-General, in answer, directed our attention to the corresponding section in the Criminal Procedure Code of Singapore where "High Court" is substituted for "Judge" and "itself" for "himself". The rules of syntax, he explains, requires the preposition "himself" to be
10 used when the antecedent subject is "Judge", just as "itself" should be the correct preposition when the antecedent is "the High Court". In our opinion the logic is inescapable. There is neither rhyme nor reason in holding that the same Judge must try the case once he has made the order of transfer. All Judges of the High Court exercise similar powers and the personality of the Judge can in no way affect the conduct or result of the trial. After all, what the accused is only concerned about
20 in making an application for transfer from the subordinate court is that a difficult question of law should be determined by a higher tribunal, more competent to deal with it. We accordingly hold that there are no merits in this particular ground of appeal.

The next objection, under section 138, however, poses a problem of unusual difficulty. We are unable to trace any Malayan case in which section 138 fell to be construed in similar circumstances.
30 Neither Indian authorities nor the two Singapore cases cited to us by learned counsel for the appellant, namely, T.T. Rajah v. Regina[1] and Fung Yin Ching v. P.P.[2], are of much relevance because the corresponding provisions in the Criminal Procedure Codes of India and Singapore are not wholly in pari materia with ours. In the case of T.T. Rajah for instance, the learned Chief Justice of Singapore said in his judgment -

> "Section 176 of the Criminal Procedure Code,
> 40 which is the relevant section under which this application ought to be considered, specifically provides that the High Court may make an order that any particular case shall be transferred to and tried before the High Court without any qualifying words

(1) (1963) M.L.J. 281
(2) (1965) M.L.J. 49

In the Federal Court of Malaysia

No.10

Judgment of the Court by Azmi, Lord President, Malaysia 16th September 1971 (continued)

at all and in my view the discretion conferred by this section is not limited to a discretion to remit the case to a subordinate court for a preliminary inquiry with the view to committal of the accused for trial by the High Court. In my view section 176 enables the High Court in a proper case to make an order transferring any particular criminal case from a subordinate direct to the High Court for trial by the High Court and for the High Court thereupon to dispose of that particular case by way of summary trial." 10

The distinction between section 137 (Singapore) and our section 138 is that in the latter appear the additional provision, namely, "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." There is no such precondition to a High Court trial in Singapore. In Fung Yin Ching's case, the explanation was 20 clearly set out in the judgment of Thomson, L.P. and calls for no further exegesis.

Under the circumstances, we must deal with the point now raised under section 138 as res integra. The section reads as follows:

> "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 Court of a Judge, and no person shall be tried before 30 such Court unless he shall have been committed for trial after a preliminary inquiry under the provisions of this Chapter."

Counsel for the appellant strenuously contends that the second limb in our section 138 is not to be construed as a meaningless excrescence merely because section 417 remains silent as to what follows an order of transfer. Once such an order is made, he argues, section 138 comes into 40 operation because, in effect, the order means a committal of the accused for trial in the High Court and, in categorical terms, it is provided that no one shall be tried before the court of a Judge unless he shall have been committed for trial after a preliminary inquiry.

In the Federal Court of Malaysia

No.10

Judgment of the Court by Azmi, Lord President, Malaysia 16th September 1971 (continued)

On the other hand the learned Solicitor-General just as strongly contends that this case, being triable in the Sessions Court, was clearly not a committal case and the mere fact that it was transferred for hearing before a Judge - for special reasons and in the exceptional circumstances provided for by section 417 - does not transmogrify the case into one of a different character. A non-committal case remains a non-committal case and the fact that section 417 does not specify any precondition to a trial in the High Court must be taken to show that the Legislature refrained from so stipulating because an application by the accused for the transfer was for his own advantage and any provision in his favour can be dispensed with if he so elects. Indeed the appellant, and the other co-accused, all of whom were defended by eminent and experienced counsel were content with the order of transfer and never raised any objection to the competency of the High Court to try the case without there having been a preliminary inquiry needed to formulate the charge. There is much force and truth in this argument.

We have given the arguments on both sides most axious consideration. The crux of the problem is whether or not we should give full effect to the second limb in section 138. It declares in the plainest terms that no one shall be tried by a Judge unless and until there has been a preliminary inquiry. We cannot overlook what their Lordships of the Privy Council said in Subramania Ayyar v. King Emperor(3) that -

> "Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity ...
>
> The remedying of mere irregularities is familiar in most systems of jurisprudence but it would be an extraordinary extension of such a branch of administering the criminal law to say that, when the Code positively enacts that such a trial as that which has taken place here shall not be permitted, this contravention of the Code comes within the description of error, omission, or irregularity."

In our view the fact that both the prosecution and the defence at the trial were in apparent

(3) I.L.R. 25 Mad. 61, 97

In the Federal Court of Malaysia

No.10

Judgment of the Court by Azmi, Lord President, Malaysia 16th September 1971 (continued)

agreement that no preliminary inquiry was required under section 417 cannot derogate from the application of section 138. No default by the defence or waiver or agreement by the parties can supersede the written law - especially in criminal matters.

We have perused the record with utmost care and we are satisfied that dispensing with the preliminary inquiry in this case did not by one iota prejudice the defence. We are also abundantly satisfied that the conduct of the trial was impeccable. Indeed we would go further and say that the defence now raised is so purely technical in character that the requirement of going through the motions of a preliminary inquiry can be nothing but an egregious exercise in futility. The second limb of section 138, nevertheless makes such an exercise inevitable and we express the hope that its deletion by Parliament will not be unduly postponed. But, since section 138 in our view makes no special exception for a High Court trial where a criminal case goes before it by way of an order of transfer under section 417, we have reached the conclusion, with the utmost reluctance, that the duty of this court is to give effect to the law as it stands, rather than what it might have been had this contingency been contemplated. We are accordingly constrained to hold and declare the trial a nullity, with all the consequences that follow in such event.

Sgd. Azmi bin Haji Mohamed
LORD PRESIDENT

Kuala Lumpur,
16th September, 1971

Dato' S.P. Seenivasagam (Mr. D.P. Xavier and Mr. Sahadevan with him) for appellant.

Tan Sri Mohd. Salleh bin Abas (Mr. Gunn Chit Tuan with him) for respondent.

In the Federal Court of Malaysia

No.11

Judgment of Ali, Federal Judge

16th September 1971 (continued)

found in section 177 of our Criminal Procedure Code. The principle of interpretation is that where the words of a section in a statute are plain, the court must give effect to them, and the court is not justified in depriving the words of their only proper meaning in order to give effect to some intention which the court imputes to the legislature from other provisions of the Act. Such a course can only be justified where a literal
10 construction of the section is inconsistent with the meaning of the statute as a whole. In my 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. The legislature is presumed to know the law. If provision for a preliminary inquiry with a view to committal is expressly provided in section 177 the legislature would, if so minded, have made similar provision in section 417. The plain and literal
20 meaning of "transfer" which is the only word used in section 417 is to remove a case from one venue to another. As was stated in Magor and St. Mellons Rural District Council v. Newport Corporation (2) in the construction of a statute the duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in any gaps disclosed. To do so would be to usurp the functions of the legislature.

In this case it was the appellant and not the
30 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
40 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. Section 417, as I have construed

(2) (1952) A.C. 189

In the Federal Court of Malaysia

No.11

Judgment of Ali, Federal Judge 16th September 1971 (continued)

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.

Kuala Lumpur,
16th September, 1971.

(Ali bin Hassan)
Judge,
Federal Court, Malaysia.

Dato' S.P. Seenivasagam (Mr. D.P. Xavier and Mr. Sahadevan with him) for appellant. 10

Tan Sri Mohd. Salleh bin Abas (Mr. Gunn Chit Tuan with him) for respondent.

No.12

Order of Federal Court 16th September 1971

No. 12

ORDER of Federal Court

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR

(APPELLATE JURISDICTION)

FEDERAL COURT CRIMINAL APPEAL NO. 7 OF 1971

(Kuala Lumpur High Court Criminal Trial No.18/1971)

Fan Yew Teng — Appellant 20

vs.

The Public Prosecutor — Respondent

CORAM: AZMI, LORD PRESIDENT, FEDERAL COURT, MALAYSIA;
ONG HOCK THYE, CHIEF JUSTICE, HIGH COURT, MALAYA;
SUFFIAN, JUDGE, FEDERAL COURT, MALAYSIA;
ALI, JUDGE, FEDERAL COURT, MALAYSIA;
ONG HOCK SIM, JUDGE, FEDERAL COURT, MALAYSIA. 30

IN OPEN COURT
THIS 16TH DAY OF SEPTEMBER, 1971

O R D E R

THIS APPEAL coming on for hearing on the 13th day of September, 1971 in the presence of Dato S.P. Seenivasagam (with him Mr. D.P. Xavier and

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

No. 24 of 1972

O N   A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :-

THE PUBLIC PROSECUTOR	Appellant
- and -	
FAN YEW TENG	Respondent

RECORD of PROCEEDINGS

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