Privy Council Appeal No. 24 of 1972

The Public Prosecutor - - - - - - *Appellant*

v.

Fan Yew Teng - - - - - - - *Respondent*

FROM

THE FEDERAL COURT OF MALAYSIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND MAY 1973

Present at the Hearing:
LORD WILBERFORCE
LORD HODSON
LORD DIPLOCK
LORD SIMON OF GLAISDALE
LORD SALMON
[*Delivered by* LORD SALMON]

On the 11th May 1971 the respondent was convicted before Raja Azlan Shah J. of an offence under section 4 (1) (*c*) of the Sedition Act 1948 (Revised 1969) and fined $2,000 and in default six months imprisonment. He appealed to the Federal Court against his conviction and sentence. That Court by a majority (Azmi, Lord President, Ong, Chief Justice, Suffian and Ong, Federal Judges; Ali, Federal Judge, dissenting) allowed the appeal against conviction, declaring the trial to have been a nullity. From that decision the Public Prosecutor now appeals to this Board.

The respondent had originally been charged before the President of the Sessions Court; but on the 16th March 1971 he successfully applied under section 417 (*b*) of the Criminal Procedure Code to Abdul Hamid J. for the transfer of his trial to the High Court.

The respondent on his appeal to the Federal Court relied on two points to support his contention that his trial had been a nullity.

1. That section 138 of the Criminal Procedure Code enacted that no person could be tried before the High Court unless previously committed for trial after a preliminary inquiry under the provisions of Chapter XVII of the Code, and that no such committal had taken place; and

2. That if an order for transfer of a trial were made under s. 417 (*b*), only the judge who made the order had any power to try the case, and that the judge who made the order of transfer, namely Abdul Hamid J., did not try the case.

Section 138 of the Code 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 High Court and no person shall be tried before such Court unless he shall have been committed for trial after a preliminary inquiry under the provisions of this Chapter."

Section 417 of the Code reads as follows:

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

(*a*) that a fair and impartial inquiry or trial cannot be had in any criminal Court subordinate to him; or

(*b*) that some question of law of unusual difficulty is likely to arise; or

. . . .

(*d*) that an order under this section will tend to the general convenience of the parties or witnesses; or

(*e*) that such an order is expedient for the ends of justice, or is required by any provision of this Code;

he may order—

that any offence be inquired into or tried by any Court not empowered under sections 121 to 126 but in other respects competent to inquire into or try such offence; or

that any particular criminal case be transferred to and tried before himself;

. . . ."

Their Lordships will first consider the respondent's second point which can speedily be disposed of. It failed in the Federal Court; but the respondent's counsel has sought to rely on it before this Board in order to support the Federal Court's decision that the trial had been a nullity. Section 417 is not felicitously drafted, as it is impossible to give each of its words its strict literal meaning and at the same time make any sense of the section. For example, the words in para. (*a*) " any criminal Court subordinate to him " cannot have their strictly literal meaning but must mean any *particular* criminal Court subordinate to him. Yet later on when the Legislature intends to refer to any particular criminal case it uses the word " particular ". It is, however, impossible to suppose that the Legislature contemplated that a transfer should only be ordered under paragraph (*a*) in the unlikely event that a fair and impartial inquiry or trial could not be had in any subordinate Court whatever. Clearly it intended to deal with a fair and impartial inquiry or trial being impossible in a particular inferior Court, and went on to make provision for the inquiry or trial to be held in some other inferior Court or transferred to the High Court.

Similarly, their Lordships cannot accept that the word " himself " towards the end of s. 417 can be meant to refer to the very judge who made the order of transfer. The words " a judge " at the beginning of the section clearly refer to any judge of the High Court and in its context the word " himself " at the end of the section refers to any judge of the High Court. If the section had been worded " whenever it is made to appear to the High Court " it would have continued after paragraph (*e*) " it may order . . . that any particular criminal case can be transferred to and tried before *itself*." Their Lordships do not consider it feasible that the form of words actually used was intended to have any other meaning. Their Lordships agree with the Federal Court that " there is neither rhyme nor reason in holding that the same judge must try the case once he has made the order of transfer ". Indeed, so to hold would lead to unnecessary difficulties should the judge who ordered the transfer be incapacitated, retired or dead when the case came on for trial. Their Lordships entirely agree with the Federal Court in rejecting the respondent's second point.

The respondent's first point is, however, more difficult and raises a question of more general importance. The last part of section 138, "no person shall be tried before such Court [the High Court] unless he shall have been committed for trial after a preliminary inquiry under the provisions of this Chapter", appears to their Lordships to be clear, unambiguous and of general application. It makes no reservation in respect of a trial before the High Court following upon an order under s. 417, as it could have done and as one would have expected it to do had it intended to exclude such a trial from its ambit. Their Lordships can find no justification for implying such a reservation into s. 138, particularly as that section may provide valuable safeguards for a defendant. It ensures that a defendant shall not face trial in the High Court unless an inferior Court is satisfied that on the evidence adduced by the prosecution there is a *prima facie* case against him, and also that before he stands trial he shall be acquainted with the evidence which he will have to meet.

As already indicated it is impossible to give each of the words in s. 417 its strict literal meaning. In their Lordships' view the words "transferred to and tried" in the High Court mean no more than "transferred for trial" to the High Court. S. 417 has to be read in conjunction with s. 138 and the latter section makes it plain that the trial can only take place in the High Court if the defendant is previously committed for trial in accordance with the provisions of Chapter XVII.

There is no reason why the High Court judge who makes an order for transfer under s. 417 should give any directions in respect of committal proceedings and no reason therefore to attach any importance to the omission from s. 417 of any reference to committal proceedings, for which ample provision is already made in Chapter XVII.

Counsel for the Public Prosecutor has attempted to support this appeal by contrasting the language of s. 417 and that of s. 177 of the Criminal Procedure Code, which reads as follows:

> "177. In any trial before a Magistrate in which it appears at any stage of the proceedings that from any cause the case is one which in the opinion of such Magistrate ought to be tried by some Court of higher jurisdiction than his own, or if before or during such trial application is made by the Public Prosecutor, the Magistrate shall stay proceedings and transfer the case to such higher Court or proceed under Chapter XVII with a view to the committal of the accused for trial by the High Court, and shall record such order upon the proceedings."

The argument is that since committal is expressly mentioned in s. 177 when a case is to be transferred for trial to the High Court, the fact that it is not mentioned in s. 417 suggests that committal is not necessary before trial in the High Court following upon an order under s. 417. Their Lordships cannot accept this argument. The omission in s. 417 of any reference to committal proceedings has already been dealt with. As for s. 177, the Magistrate before whom a trial is being held or is about to be held, is the person to whom an application to transfer the trial to the High Court is made under s. 177. If the case is to be transferred to the High Court the Magistrate already seized of the case is clearly the appropriate Magistrate to conduct the committal proceedings and s. 177 naturally provides that he shall do so.

An application may be made under s. 177 for "any cause", which would include any of the grounds set out in s. 417. It would be odd if the Legislature intended to give the Public Prosecutor the right to deprive a defendant of the benefit of committal proceedings by electing to apply for a transfer under s. 417 rather than under s. 177.

On the particular facts of the present case the respondent has not suffered one iota of prejudice. It was he who made the application for transfer. None of the facts was in dispute. If there had been committal proceedings, he must have been committed for trial and the result of the trial would have depended solely upon the difficult points of law in issue. Moreover at the trial he never took the point that the Court lacked jurisdiction to try him because he had not been committed for trial. No question of waiver however has or could successfully have been argued before this Board. Everything depends upon the true construction of the Statute, which has a much wider application than to the special facts of this particular case. It may be that an amendment to the Statute is desirable in order to make committal proceedings unnecessary in such very special circumstances as these. But this is irrelevant; the Board must apply the law as it now exists and their Lordships are of the opinion that s. 138 applies to all trials in the High Court including those following an order made under s. 417.

There are many cases which can be tried by inferior Courts or by the High Court. Suppose such a case brought for trial before an inferior Court (in which there could of course be no question of committal proceedings), it is not only the defendant but the Public Prosecutor also who can apply for a transfer of the trial to the High Court under s. 177 or s. 417 if it subsequently appears that the case is of sufficient importance to be a High Court case. Suppose that the Public Prosecutor applies under s. 417 for a transfer of the trial to the High Court on the ground, as in this present case, that some question of law of unusual difficulty is likely to arise or on the ground that such a transfer is expedient for the ends of justice. In the former case, the point of law might depend, as it so often does, upon facts which are hotly in dispute. In the latter, the case might turn entirely upon disputed facts, no point of law arising at all. If the Public Prosecutor had originally chosen trial in the High Court clearly there would have been committal proceedings and the defendant would have known the evidence he had to meet at his trial. He would also have enjoyed the chance that the inferior Court might have held that no *prima facie* case had been made out and might thus have been saved the worry and expense of standing trial. It does not seem likely that the Legislature intended that the Public Prosecutor should be enabled to deprive a defendant of these valuable rights by changing his mind and asking at a later stage for the trial to be transferred to the High Court. Had this been the intention of the Legislature it would surely have been clearly stated. Their Lordships are satisfied that the Federal Court's construction of sections 138 and 417 is correct and for these reasons their Lordships will report to the Head of Malaysia that the appeal should be dismissed.

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In the Privy Council

THE PUBLIC PROSECUTOR

v.

FAN YEW TENG

DELIVERED BY
LORD SALMON

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