

**KES-KES DI HADAPAN PANEL SIVIL 3 PADA  
30 OGOS 2023 (RABU) JAM 9.00 PAGI SECARA ONLINE ZOOM /  
MAHKAMAH TERBUKA 4**

**(i) YA DATUK HAJAH AZIZAH BINTI HAJI NAWAWI, HMR**

**(ii) YA DATUK S. NANTHA BALAN, HMR**

**(iii) YA DATO' HASHIM BIN HAMZAH, HMR**

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**Senarai Kes Untuk Keputusan**

**9. W-01(A)-365-05/2022**

**1. JABATAN AGAMA ISLAM SELANGOR**

**2. KETUA PENGARAH JABATAN AGAMA ISLAM SELANGOR**

**3. KETUA PEGAWAI PENGUATKUASA AGAMA ISLAM  
SELANGOR**

**4. MASNIZAR @ MOHD NIZAR BIN MOHTAR  
HAKIM MAHKAMAH RENDAH SYARIAH (2)  
SHAH ALAM, SELANGOR**

**5. KERAJAAN NEGERI SELANGOR**

**6. SHANIZAH BINTI NGATIMAN,  
HAKIM MAHKAMAH RENDAH SYARIAH SHAH ALAM,  
SELANGOR**

**( PEJABAT PENASIHAT UNDANG-UNDANG NEGERI  
SELANGOR )**

**..... PERAYU/PERAYU**

**1. ABDUL KAHAR BIN AHMAD & 13 LAGI ..... RESPONDEN/  
(FAHRI, AZZAT & CO.) RESPONDEN**



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**Mah: Broad grounds of Decision – unanimous decision**

- [1] There are 2 appeals before this Court. Appeal **R9** is an appeal by the State against the decision of the learned Judge to strike down s. 23 of the Syariah Criminal Procedure (Selangor) Enactment 2003 ('SCPE'). Appeal **R10** is an appeal by the Respondents against the decision of the learned Judge that the 4<sup>th</sup> and 6<sup>th</sup> Appellants are not liable to pay for the Respondents' detention and the award of RM 10,000.00 in damages to the Respondents.
- [2] The case arises from a public complaint regarding a social media uploaded on Facebook on a message from an individual claiming to be a Prophet named Kahar Ahmad. The authorities conducted an investigation which led to the arrests of the Respondents on 20.9.2020 on the suspicions that they have committed syariah criminal offences under the Syariah Criminal Offences (Selangor) Enactment 1995.
- [3] On 21.9.2020, the Respondents were brought before the 4<sup>th</sup> Appellant, a Syariah Subordinate Court Judge. The officers of the 1<sup>st</sup> and 3<sup>rd</sup> Appellants then sought for the Respondents to be bonded pursuant to s. 23 SCPE pending investigations. This bond

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was sought due to their inability to conclude investigations within 24 hours.

- [4] The 4<sup>th</sup> Appellant allowed the bail application and ordered the Respondents to be released on bail upon furnishing the requisite bail/bond conditions (Order dated 21 September 2021).
- [5] However, some of the Respondents have failed to comply with the terms of the bail Order dated 21 September 2021. As a result, they were sent to the respective detention centres. The Respondents who have subsequently complied with the bail conditions are R1, R2 and R4 who were released on 22 September 2020, R3 and R14 only complied with the conditions and were released on 24 September 2020 whilst R8 and R9 were released on 5 October 2020.
- [6] The rest of the Respondents filed a review application on 16 December 2020 at the same syariah subordinate court. On 21 December 2020, the 6<sup>th</sup> Appellant/Syariah Subordinate Court Judge varied the 4<sup>th</sup> Appellant's Order dated 21 September 2020. It is to be noted that both acts of the 4<sup>th</sup> and 6<sup>th</sup> Appellants were made in pursuant to their judicial powers.

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[7] Aggrieved by the decision of the syariah subordinate courts, the Respondents had filed an application to review the syariah court decisions in the civil court, seeking inter alia, a declaration that the Section 22(4), 22(5), and 187 SCPE is null and void as it is inconsistent with Articles 5 and 8 of the Federal Constitution, an order of certiorari to quash the said orders and consequently a declaration that the Respondents have been unlawfully detained and seeking damages for such illegal detention.

[8] In the High Court, the learned Judge made a finding that s. 23 of SCPE is unconstitutional for being inconsistent and ultra vires the Federal Constitution. Consequently, the learned Judge decided that the orders handed down by the 4th and 6th Appellants are illegal and unlawful. The said orders are therefore quashed by the learned Judge and the Respondents were awarded damages in the sum of RM10,000.00 for each person.

[9] Section 23 of SCPE reads as follows:

"Release of persons arrested

23. No person who has been arrested by a Religious Enforcement Officer or police officer under this Enactment shall be released except on bond and bail or under the order in writing of a Judge or

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Chief Religious Enforcement Officer or of a police officer not below the rank of inspector.”

[10] Section 23 of the SCPE is a provision which provides that upon the person being arrested by a religious enforcement officer he can only be released on his own bond or under an order in writing of a Judge or Chief Religious Enforcement Officer or of a police officer not below the rank of inspector.

[11] Section 23 of SCPE is *pari materia* with 29 of the Criminal Procedure Code, which reads:

*“Release of person arrested*

*29. No person who has been arrested by a police officer shall be released except on his own bond or on bail or under the order in writing of a Magistrate or of a police officer not below the rank of Inspector.”*

[12] Section 29 of the CPC is the general provision which provides that upon the accused person being arrested by a police officer he can only be released on his own bond or under an order in writing of a Magistrate or a police officer not below the rank of Inspector.

**KES-KES DI HADAPAN PANEL SIVIL 3 PADA  
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[13] The application of section 29 CPC was considered by Harun J in the case of **PUBLIC PROSECUTOR v. TAN KIM SAN** [1980] 1 LNS 66, where His Lordship held as follows:

*“It is public knowledge that crime is rampant and that the police have a difficult job to do. But there are adequate provisions in the Criminal Procedure Code giving the police powers to release persons on bail after arrest pending investigations: see ss. 28, 29, 387 and 388 of the Criminal Procedure Code. The procedure to be followed, therefore, should be to investigate first and arrest later. In cases where it is more expedient to effect an immediate arrest, the police should release the person arrested on police bail if investigations cannot be completed to enable a charge to be preferred before the Magistrate.”*

[14] Therefore, section 23 of SCPE (which is *pari materia* with 29 of the CPC) allows the person arrested to be released on bail pending the completion of the investigation into the alleged offences. As such, we are of the considered opinion that the learned Judge was plainly wrong in her decision that section 23 SCPE is akin to a remand order.

**KES-KES DI HADAPAN PANEL SIVIL 3 PADA  
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[15] The provisions relating to the release of an accused person after arrest on bail housed in s. 29, s. 387 and s. 388 of the CPC was also considered by the Federal Court in **INSPECTOR YUSOF HJ OTHMAN & ORS v. KWAN HUNG CHEONG** [2011] 8 CLJ 1. In this case, the plaintiff was arrested without a warrant on suspicion of committing an offence of house-trespass or house-breaking under s. 454 of the Penal Code. The plaintiff/suspect was remanded for three days under s. 117 of the CPC. After the expiry of the remand period, the plaintiff/suspect was brought to the police station and made to sign bail bonds for an undeposited sum of RM10,000 in two sureties.

[16] Subsequently, the plaintiff was informed that a decision was made to close the investigation on the case and to withdraw the police bail against him. The plaintiff then filed this action and raised the following questions of law for determination:

- (i) whether it was lawful for the police to release a suspect on police bail under s. 388 CPC after the said suspect was released from a remand order by a magistrate under s. 117 of the same;
- (ii) whether it was lawful to impose a condition on the bail that the suspect had to appear and report at a police station on a

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30 OGOS 2023 (RABU) JAM 9.00 PAGI SECARA ONLINE ZOOM /  
MAHKAMAH TERBUKA 4**

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---

fixed date and whether the said condition could be extended from time to time for so long as the case against the suspect was still under police investigation; and

- (iii) if either or both the police bail described above was unlawful, whether that amounted to a deprivation of the suspect's personal liberty in contravention of art. 5(1) of the Federal Constitution giving rise to a claim in damages.

[17] Section 388 of the CPC allows a person accused of non-bailable offence to be released on bail. The FC held that section 388 of the CPC empowers the police to release the accused person on police bail, while the investigation is still in progress. Therefore, in answer to Question (i), the FC answered it in the positive, that is, it is lawful for the police to issue a police bail under s. 388(1) of the CPC against the accused person who has been released by a Magistrate after a detention under s. 117 of the CPC.

[18] Question (ii) is a general question regarding the imposition of conditions on the bail. The FC answered this question as follows:

*“[28] Having answered Question 1 in the positive, my answer to Question 2 is also in the positive. **The police having the power to grant a police bail must necessarily have the power to impose***

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*conditions in the bail bond that the accused person has to appear and report at a police station on a fixed date and the said conditions can be extended from time to time for so long as the case against the accused person is still under police investigation.”*

[19] Therefore, the Federal Court in the above case has held that the bail provisions, including section 29 CPC allows the release of the accused person on police bail while the investigation is still in progress and that the police have the necessary powers to impose conditions on the bail bond.

[20] Applying the same principles to our present appeal, section 23 of the SCPE allows the person arrested to be released on bail pending the completion of the investigation into the alleged offences. At the same time, section 187 of SCPE provides the necessary powers to impose conditions, including the sum of the bond and the sureties. Therefore, based on the above case, we are of the considered opinion that section 23 of the SCPE is not ultra vires the Constitution and is not null and void.

[21] Added to that, we find that the Respondents are not without judicial recourse. The Respondents were sent to the detention centres because of their failure to comply with the terms of the bail order. If

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MAHKAMAH TERBUKA 4**

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---

they are not happy with the bail conditions, they could have applied for a review under section 168 or an appeal to the Syariah High Court under section 138 of SCPE. The facts of the case shows that apart from the Eighth, Ninth and Fourteenth Respondent, the other Respondents have not filed a review application and none of them have filed any appeals against the orders of the Fourth and the Sixth Appellant.

[22] Further thereto, we are of the considered opinion that the learned Judge has no jurisdiction to quash the orders of the syariah courts as the civil and syariah courts are two separate legal system, and that the syariah courts are not inferior tribunals subject to judicial review pursuant to Order 53 ROC 2012, but are courts of competent jurisdiction. Therefore, the civil courts cannot review the decisions of the syariah courts pursuant to Order 53 ROC 2012. The High Court in this present case can only declare the validity of section 23 of the SCPE with the State Government as the contradictor.

### **Appeal R10**

[23] The learned Judge had dismissed the Respondents' claim for damages against the 4<sup>th</sup> and the 6<sup>th</sup> Appellants, who were the

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MAHKAMAH TERBUKA 4**

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Syariah Subordinate Court Judge who had issued the orders under section 23 of SCPE, which the learned Judge had declared to be null and void and had even quashed the same.

[24] Section 76 of the Selangor Islamic Religious Administration Enactment 2003 which provides as follows:

**“Protection of Judges, Court officials, etc.**

76. (1) No Syariah Appeal Court Judge or Syarie Judge shall be liable to be sued in any Syariah or Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty whether or not within the limits of his jurisdiction, nor shall any order for cost be made against him. provided that at the time he in good faith believed himself to have jurisdiction to do or order the act complained of.

(2) No officer of any Court or other person bound to execute the lawful warrant or order of a Syariah Appeal Court Judge or a Syarie Judge shall be liable to be sued in any Syariah or Civil Court for the execution of such warrant or order.".

[25] The protection afforded to Shariah Judges as provided above is in *pari materia* with the protection granted to Judges of the Civil Courts under section 14(1) of the Courts of Judicature Act 1964.

**KES-KES DI HADAPAN PANEL SIVIL 3 PADA  
30 OGOS 2023 (RABU) JAM 9.00 PAGI SECARA ONLINE ZOOM /  
MAHKAMAH TERBUKA 4**

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**(iii) YA DATO' HASHIM BIN HAMZAH, HMR**

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**"Protection of Judges and other judicial officers**

14. (1) No Judge or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction. nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of."

(2) No officer of any court or other person bound to execute the lawful warrants or orders of any Judge or other person acting judicially shall be liable to be sued in any civil court for the execution of any warrant or order which he would be bound to execute if within the jurisdiction of the person issuing the same."

[26] In **TAI CHOI YU v. IAN CHIN HON CHONG** [2002] 2 CLJ 259, the High Court held as follows:

"It is also clear from the indorsement on the writ that the basis of the plaintiff's claim is in respect of an alleged libel contained in the defendant's written judgment in the 1990 Suit. It is without doubt that the said judgment was written and delivered by the defendant

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**(iii) YA DATO' HASHIM BIN HAMZAH, HMR**

---

in the discharge of his judicial function as the trial judge in the said suit. The Courts of Judicature Act 1964, in s. 14(1), provide for the protection of a judge as follows:

No judge or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limit of his jurisdiction, nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of.

In view of the immunity conferred on a judge by the aforesaid provision, the plaintiff's action against the defendant is clearly unsustainable and is doomed to fail right from the outset. It is also my finding by reason thereof that the hardship to the defendant if the writ is extended would far outweigh the hardship to the plaintiff if the extension is disallowed.”

[27] In **Tai Choi Yu v. Ian Chin Hon Chong**, the judge was sued in the discharge of his judicial function as the trial judge. Sulaiman Daud JC had invoked s. 14(1) and held that in view of the immunity conferred on a judge thereunder, the plaintiff's action against the

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**(iii) YA DATO' HASHIM BIN HAMZAH, HMR**

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defendant is clearly unsustainable and is doomed to fail right from the outset.

[28] The judicial immunity under section 14 was extended to administrative acts of a judge in the case of **Indah Desa Sauiana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor** [2008] 1 CLJ 651, where this Court held as follows:

[68] From the facts in the instant appeal, it was clear that the first defendant was at the material time the judge heading the civil division of the Kuala Lumpur High Court in charge of, inter alia, all matters pertaining to execution and attachment process including writs of seizure and sale in the Kuala Lumpur area.

[69] In our judgment, judicial immunity conferred by s. 14(1) is wide enough to extend to the discharge of his duties under Art. 121 and the written law. These duties include all acts and duties expected or assigned to be performed by the first defendant, both within and outside Malaysia. The instructions and orders made by the first defendant are entirely within his authority and within the limits of his jurisdiction legally conferred upon him by Art. 121 and the written law, regardless of the fact that he was on leave in Singapore and outside the country. The mode and the manner

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30 OGOS 2023 (RABU) JAM 9.00 PAGI SECARA ONLINE ZOOM /  
MAHKAMAH TERBUKA 4**

**(i) YA DATUK HAJAH AZIZAH BINTI HAJI NAWAWI, HMR**

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**(iii) YA DATO' HASHIM BIN HAMZAH, HMR**

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including the place from which he exercised that authority (phone call from Singapore while on leave) are irrelevant.”

[29] In **MARCEL JUDE MS JOSEPH v. CHIEF JUSTICE TAN SRI MD RAUS SHARIF** [2017] 1 LNS 1636, the High Court held as follows:

“29. Judicial immunity conferred by s. 14(1) CJA is wide enough to extend to the discharge of the Respondent's judicial duties under Articles 121, 122, 122B, 124, 125 and 125A of Part IX of the Federal Constitution and the written law: see *Indah Desa Saujana Corp Sdn Bhd 7 Ors v. James Foong Chen Yuen, Judge, High Court Malaya & Anor* [2008] 1 CLJ 651; [2008] 2 MLJ 11; *Messrs Tai Choi Yu & Co, Advocates (suing as a firm and Tai Choi Yu as sole-proprietor) v. The Court of Appeal of Malaysia & Ors* [2017] 7 CLJ 329; [2017] 1 LNS 395; [2017] MLJU 310. As stated above, the Applicant did not complain of any wrong doing against the Respondent either in his judicial capacity or in his personal and private capacity. Based on the immunity conferred on the Respondent under s. 14(1), this application against the Respondent is without any basis and incompetent.”

[30] For the above reasons, we are of the considered opinion that being Syariah Subordinate Court Judges, the 4<sup>th</sup> and the 6<sup>th</sup>

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30 OGOS 2023 (RABU) JAM 9.00 PAGI SECARA ONLINE ZOOM /  
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Appellants were discharging their judicial functions when granting the said orders and are therefore protected under s. 76 of the Selangor Islamic Religious Administration Enactment 2003.

[31] In conclusion, we allow the appeal in R9 and set aside the decision of the Judge dated 14 April 2022. Appeal R10 is also dismissed. We make no order as to costs.