Zaidi Kanapiah v ASP Khairul Fairoz bin Rodzuan & Others and other appeals

SUMMARY OF GROUNDS OF JUDGMENT
(*CHIEF JUSTICE TENGKU MAIMUN BINTI TUAN MAT*)

Background Facts

[1] The facts of these appeals are as gathered from the judgment of the learned Judicial Commissioner ('JC') and from the submissions of parties. I respectfully adopt them subject to some modifications.

[2] The appellants/detenus were initially detained by the Malaysian Anti-Corruption Commission ('MACC') in a specific investigation on corruption within the police force. The appellants, who were later released on MACC bail were then subsequently arrested and taken into immediate custody by the police under section 3(1) of POCA 1959. The appellants assert that they are material witnesses in that MACC investigation and that they were detained by the very police officers who were the subjects of that corruption investigation.

[3] The basis for the detention of the appellants under POCA 1959 was purportedly pursuant to the Common Gaming Houses Act 1953 ('CGHA 1953'). This must be read together with section 4 of POCA 1959 which stipulates the procedure before a Magistrate and section 22 of POCA 1959 which confers power on the Minister to amend the Schedules to POCA 1959. Vide an amendment to the Schedules in 2014, item 5 was inserted in the First Schedule. Item 5 provides that all persons concerned in the organization and promotion of unlawful gaming constitute a registrable category of persons for the purposes of POCA 1959.

[4] On 14.10.2020, the appellants were produced before the 2nd respondent, the Magistrate, who ordered their remand for a period of 21 days under section 4(1) of POCA 1959 ('First Remand'). The First Remand was to expire on 3.11.2020 but on 21.10.2020 the appellants filed the present applications for habeas corpus.

[5] The return date for the habeas corpus applications was fixed on 2.11.2020. On 30.10.2020, the 1st and 3rd respondents produced the appellants again before a Magistrate for a fresh remand order. A new remand order for a period of 38 days was issued on the same date ('Second Remand').

[6] When the applications for writ of habeas corpus (premised on the First Remand) came up for hearing on 2.11.2020, learned Senior Federal Counsel ('SFC') for the respondents recorded an objection against the applications to wit, that the habeas corpus applications had become academic on account of the Second Remand.

[7] The learned JC agreed with the respondents. He held that the issue of the appellants' detention had become academic by virtue of the Second Remand. His Lordship nevertheless proceeded to examine the applications on their merits. He did not appear to address the arguments raised by the appellants on the constitutional issue but focussed his attention mostly on whether the detention was coloured by mala fides. He concluded that the appellants had not made out a case to entitle them to the remedy of habeas corpus. The applications were thus dismissed and, hence the appeals.

[8] I have read the majority judgment in draft of my learned sister Justice Hasnah Mohammed Hashim and it is with deep regret that I do not share her views for the reasons stated in this judgment.

The Appeals

Parties' Submissions

[9] Learned counsel for the appellants made the following five-fold arguments.

[10] Firstly, he argued that the entirety of section 4 of POCA 1959 is unconstitutional. Secondly, that the preliminary objection by the respondents that the application is academic is invalid in light of Article 5(2) of the FC. He contended that the detention must be viewed as a cumulative transaction and not piecemeal. Thirdly, that the detention is tainted by mala fides. Fourthly, the Minister's exercise of power under section 22 of POCA 1959 to include the CGHA 1953 in Item 5 of the First Schedule to POCA 1959 is ultra vires Article 149(1) of the FC. Fifthly, and as a result, the statement of facts delivered under section 4(1) of POCA 1959 do not coincide with the recital in POCA 1959.

[11] Learned counsel submitted that on all the above grounds, or any one of them, the appellants' detentions are unlawful and that accordingly, they ought to be granted, as of right, a writ of habeas corpus ordering their release.

[12] It is a trite principle of law that if the detaining authority fails to justify the lawfulness of a detention, habeas corpus must issue as of right unlike other prerogative writs such as certiorari which the Court otherwise has discretion to refuse even if the breach is proved (see the judgment of this Court in *Mohammad Azanul Haqimi Tuan Ahmad Azahari v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 8 CLJ 465 affirming the dictum of Abdoolcader J in *Yeap Hock Seng @ Ah Seng v. Minister of Home Affairs, Malaysia & Ors* [1975] 2 MLJ 279, at page 281).

[13] The respondents' submission, is as follows: that the present dispute is academic in light of the Second Remand; that section 4 of the POCA 1959 is constitutionally valid, that the insertion of the CGHA 1953 in Item 5 and the statement of facts delivered thereunder are within the general purview of Article 149(1) of the FC, that the detention was not mala fide and that all the impugned detentions are in accordance with the law namely the FC and POCA 1959.

Findings/Analysis

[14] It would be more cogent for me to begin this judgment by first addressing the preliminary objection followed by a discussion on section 4 of POCA 1959 and the interrelation between section 22 of POCA 1959 as well as Item 5 of the First Schedule of POCA 1959 and Article 149(1) of the FC. The remaining arguments will be addressed wherever relevant.

<u>Preliminary Objection – Whether these Appeals are Academic</u>

[15] Learned counsel for the appellants argued that in any given case, the fact of detention must be viewed as a whole and as a single cumulative

transaction. Learned counsel placed heavy reliance on the judgment of this Court in *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals* [2002] 4 MLJ 449 ('*Ezam*'). He urged us not to depart from the reasoning of this Court in *Ezam*.

[16] In response, learned SFC relied on decisions of this Court subsequent to *Ezam*, among others, *Mohd Faizal Haris v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 4 CLJ 613 ('*Faizal Haris'*) and *L Rajanderan R Letchumanan v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2010] 7 CLJ 653 ('*Rajanderan'*). *Faizal Haris* and *Rajanderan* decided that a writ of habeas corpus must be directed only against the current detention order even if the earlier arrest and detention of the detenu is irregular. It was thus submitted by learned SFC that each detention order must be viewed in isolation. Once one order lapses, a new writ of habeas corpus must be applied in respect of the subsequent decision to detain.

[17] Counsel for the appellants had, in essence, two responses to the above argument. He submitted firstly, that the five-justices bench in *Ezam* was a larger bench and thus, the benches in *Faizal Haris* and *Rajanderan* (three-justices benches) ought not to have departed from *Ezam*.

[18] Secondly, and in terms of substance, the appellants' submission is that *Ezam* is the more legally coherent decision and one which should be preferred over the latter two judgments and other subsequent pronouncements made contrary to it. In support of his contention, learned counsel referred us to numerous authorities both local and foreign (specifically those from India and Ireland).

[19] In *Ezam*, the detenus had been detained under section 73 of the now repealed Internal Security Act 1960 for planning street demonstrations. The High Court found that the detentions were valid. The detenus appealed. Parties opposing the appeal argued that as the detenus had since been released, the argument in respect of the legality of their detention had become academic. Abdul Malek Ahmad FCJ writing the judgment on this aspect of the case rejected that argument (see pages 481-482 of the report).

[20] The ratio in *Ezam'*s case is that detentions must be looked at as a whole. If the detention is found to be lawful, then the matter is not academic.

[21] For the reasons that follow, I am more inclined to accept the reasoning of the unanimous five-judge panel in *Ezam*.

[22] *Ezam* when read properly and in context posits the *ratio decidendi* that the legality of a detention or detentions must be viewed as a single overarching transaction. This is because the legality of the detention must be addressed at the time the application for habeas corpus was made. The subsequent release (and by extrapolation the extended detention) in light of a finding of lawfulness or unlawfulness of the initial detention renders the entire issue of detention a live matter. *Faizal Haris* rejected this view on the basis of English and common law authorities and by referring to local judgments which referred to such authorities.

[23] *Faizal Haris* made no reference to Article 5(2) of the FC. In stark contrast, the Court in *Ezam* was apprised of that constitutional provision

as is apparent from the separate judgment of Siti Norma Yaakob FCJ (as she then was) at page 517 observing thus:

> "Clearly, it is the legal status of the detention that determines whether habeas corpus can issue to secure the freedom of a detained person as guaranteed by art 5(2) of our Constitution.".

[24] The constitutional authority upon which the Court derives its power of review over preventive detention is Article 5(2) of the FC. For completeness, the provision is reproduced below:

> "(2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.".

[25] The authorities (which have been set out in the grounds) establish the proposition that when a person is detained, the legality of his detention is to be adjudicated by reference to the date the application for a writ of habeas corpus is filed. The detaining authorities are not permitted to 'shift the goal post' – so to speak – by alleging that further or subsequent detentions have been made with a view to render the argument on the impugned detention academic. In other words, the detaining authority cannot rely on subsequent detentions to circumvent the illegality of the initial remand or detention under challenge at the time of filing of the writ of habeas corpus. Accepting such an argument would amount to condoning an abuse of the process of the Court and narrowing the interpretation of Article 5(2) – a safeguard of a fundamental liberty – against settled constitutional cannons of interpretation. It would also render the safeguard in Article 5(2) illusory.

[26] Our jurisprudence has always been that it is the detenu who is allowed to benefit from every technical error made by the detaining authorities and not the other way around (see *Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri & 1 Lagi* [1994] 4 CLJ 47, at page 55 and *Re Datuk James Wong Kim Min* [1976] 1 LNS 129; [1975] 2 MLJ 244 at page 251).

[27] Given the weight of authorities, I hold with respect that *Ezam* is the correct decision and the one that ought to be followed. *Faizal Haris*, *Rajanderan* and other cases such as *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2004] 1 CLJ 81 and *Mohammad Jailani Kasim v Timbalan Menteri Keselamatan Dalam Negeri & Ors* [2006] 4 CLJ 687 (and any other related decisions) that came after and departed from *Ezam* are no longer good law and cannot be relied upon for the academic point raised by the respondents.

[28] It follows that the respondents' preliminary objection that the present application for habeas corpus is academic, is bereft of any merit. The preliminary objection is accordingly dismissed.

<u>Section 4 of POCA 1959, Act A704 and Article 121(1) read with Article 4 of the FC</u>

[29] In advancing his case on the unconstitutionality of section 4 of POCA 1959, learned counsel for the appellants posited that the constitutional amendment to Article 121(1) of the FC vide the Amendment Act A704 effective on 10 June 1988 is a nullity because it reduces the judicial arm of government to a subordinate or subjugate of Parliament. Judicial power is in turn a 'basic structure' of the FC and accordingly

Parliament had no authority to do that. As such, the constitutional validity of section 4 of POCA 1959 must be tested against Article 121 as it stood before 10 June 1988. And, since section 4 of POCA 1959 subordinates the judicial power of the Federation to the Executive arm of government (specifically the Attorney General cum Public Prosecutor and the police), it is in that vein, unconstitutional.

[30] In this regard, I shall deal firstly, with the concept of the basic structure doctrine and the post-amendment Article 121(1) and as a consequence, Act A704.

[31] In *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 and *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors* [2018] 1 MLJ 545, this Court observed that 'judicial power' is a basic structure of the FC and cannot therefore be removed. It is in this context and in light of the arguments that I proceed to examine the history of the basic structure doctrine ('BSD'). But before I do that, for the record, the majority judgment of this Court in *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 2 CLJ 579 and *Rovin Joty a/l Kodeeswaran v Lembaga Pencegahan Jenayah & 4 Ors & Other Appeals* [2021] MLJU 195 attempted to unravel the BSD although both the appellants and the respondents in these two cases accepted that the BSD is part of the law and they were on common ground that *Semenyih Jaya, Indira Gandhi* and *Alma Nudo* correctly propounded the law on judicial power and on the BSD. To clarify, the issue in *Maria Chin* (supra) and *Rovin Joty* (supra) was essentially whether Parliament could exclude judicial review **remedies** from judicial power of the Courts and whether the same forms part of the BSD, not whether the BSD applies to our FC.

[32] In holding that the BSD does not apply to our FC, the majority in *Maria Chin* and *Rovin Joty*, with the greatest of respect, decided on a point which parties were not at variance and which point was not therefore an issue for the Court's determination. The majority decided that the BSD has no application to our FC on their own volition, contrary to the position taken by the parties in those cases. It follows that the decisions of the majority in *Maria Chin* and *Rovin Joty* that BSD does not exist in our FC do not form the *ratio decidendi* as such, and cannot be treated as having a binding effect on subsequent cases.

[33] It is pertinent to note that even Raja Azlan Shah FJ in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 accepted separation of powers as one of the features constituting the FC's basic concepts where his Lordship said as follows at page 188:

> "The Constitution is not a mere collection of pious platitudes. It is the supreme law of the land embodying 3 **basic concepts**: One of them is that the individual has certain fundamental rights upon which not even the power of the State may encroach. The second is the distribution of sovereign power between the States and the Federation, that the 13 States shall exercise sovereign power in local matters and the nation in matters affecting the country at large. **The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among the Executive, Legislative and Judicial branches of government, compendiously expressed in modern terms that we are a government of laws, not of men.**".
>
> [Emphasis added]

[34] The FC is not self-executing and this is why the Judiciary is the mechanism and device through which its supremacy is upheld. If a law is void, it is solely the superior Judiciary that has the power to strike it down

as being so void. The exercise of this power to strike down legislation even legislation that seeks to make amendments inimical to the supremacy of the FC is thus not judicial supremacy but a fundamental aspect of the second limb of Article 4(1) as entrusted to the Superior Judiciary by the drafters of the FC. This is also recorded in the Reid Commission Report 1957, as follows:

> "161. ...The guarantee afforded by the Constitution is the supremacy of the law and the power and duty of the Courts to enforce these rights and to annul any attempt to subvert any of them whether by legislative or administrative action or otherwise. It was suggested to us that there should also be written into the Constitution certain principles or aims of policy which could not be enforced by the Courts. We do not accept this suggestion. Any guarantee with regard to such matters would be illusory because it would be unenforceable in law ...".

[35] Thus, to say that our FC does not have any basic structure or basic concept is incorrect. We have at least three basic concepts as stated by Raja Azlan Shah FJ in *Loh Kooi Choon* (supra). As per the advice of this Court in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333 at paragraph 8, as to what exactly the Malaysian doctrine entails, our courts should be free to develop it on the facts of each case.

[36] In other words, we need not look elsewhere to know that basic structure or basic concept, whatever term one may want to use, is engraved within the very fabric of our Article 4(1). For the purposes of these appeals, it is sufficient to know that caught within the definition of constitutional supremacy and the essence of the FC is the notion of separation of powers. Any attempt by federal law to override or undermine this concept is inconsistent with the FC and thus any federal law to the extent that it seeks to do that is void.

[37] With the greatest of respect, I do not therefore think that it is correct to say that 'judicial power' is merely a 'statutory power' which may be abridged or curtailed by Parliament. The reasoning in this judgment and the proper construction of Articles 4(1) and 121 in light of our historical records belies that strained method of interpretation.

[38] In light of these principles, how is the post-amendment Article 121(1) and its amending authority, A704, to be construed? In this regard, I respectfully agree with and adopt the judgments of this Court in *Semenyih Jaya* and *Indira Gandhi*. These were most recent decisions of this Court which had overruled *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1. By the doctrine of *stare decisis*, *Semenyih Jaya* and *Indira Gandhi* ought to be followed. Accordingly, Article 121(1) should be read in the sense that the words 'the judicial power of the Federation shall be vested in the two High Courts of co-ordinate jurisdiction and status' still exist despite their removal from Article 121(1) and in the same vein, the words inserted by the 1988 amendment to the extent that the 'the High Courts … shall have such jurisdiction and powers as may be conferred by or under federal law' as having no effect whatsoever of diminishing or subordinating judicial power to Parliament or declaring Parliament supreme in any way. This is because, by the spirit of Article 121(1) read together with the first and second limbs of Article 4(1), judicial power continues to vest in the Superior Courts as otherwise, a fundamental aspect of the FC that is the judicial arm, is rendered obsolete and the FC is unable to maintain its status as the supreme law of the Federation.

[39] In simpler terms, because the FC is not self-executing, the duty lies on the Judiciary to give effect to Article 4(1) to ensure that the FC remains the supreme law of the Federation. The Judiciary discharges that duty by

protecting fundamental rights/liberties guaranteed by the FC and by declaring any law passed which is inconsistent with the FC as void. Now, if the judicial power is confined to what is conferred or given by Parliament and if Parliament choose to enact a law which disallows the courts to scrutinize acts of constitutional transgressions by the Executive or the Legislative, the notion that the courts are the last bastion of justice would be rendered illusory and nugatory. It follows that no law is capable of being upheld if its effect is to diminish the basic and essential powers of the Judiciary. Otherwise, the Judiciary could never discharge its duty or responsibility of executing Article 4(1). Of course in declaring any law as invalid, regard must also be had to the doctrine of presumption of constitutionality (see *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116.

Constitutional Validity of Section 4 of POCA 1959

[40] In determining the constitutional validity of section 4 of POCA 1959, I am very much conscious of the fact that POCA 1959 is a specially enacted law dealing with security matters and preventive measures. That said, it was not the intention of the framers of the FC that the Courts are disabled from scrutinising specially enacted security or preventive laws. This is apparent from the Reid Commission Report:

> "174. To deal with any further attempt by any substantial body of persons to organise violence against persons or property, by a majority we recommend that Parliament should be authorised to enact provisions designed for that purpose notwithstanding that such provisions may involve infringements of fundamental rights or State rights. It must be for Parliament to determine whether the situation is such that special provisions are required by Parliament but Parliament should not be entitled to authorise infringements of such a

character that they cannot properly be regarded as designed to deal with the particular situation. **It would be open to any person aggrieved by the enactment of a particular infringement to maintain that it could not properly be so regarded and to submit the question for decision by the Court**.". [Emphasis added]

[41] In other words, the fact that POCA 1959 is a legislation authorised under Article 149 FC does not necessarily render POCA 1959 and/or any of its provisions automatically valid. It remains a question for the Court to consider constitutional validity when a challenge is being made by an aggrieved person against any law even if that law was passed under Article 149.

[42] Section 4 of POCA 1959 is couched in imperative language. Under both subsections (1) and (2), the Magistrate is not otherwise entitled to apply his or her judicial mind nor exercise independent discretion to determine whether the remand application should be granted. Under subsection (1), the Magistrate has no choice but to order the detention for a period of 21 days, upon the Magistrate being produced with a signed statement in writing by a police officer of a certain rank, whereas under subsection (2), the Magistrate is mandatorily required to order continued detention for a period of 38 days. The Magistrate is also denied the discretion to decide the length and measure of the detention. He or she is to mechanically allow the first detention for 21 days and the second for 38 days on the express dictation of the police and Public Prosecutor respectively.

[43] Learned SFC, in an attempt to justify such imperative language argued that the presence of the Magistrate serves as a check and balance

and this accordingly, is concomitant with the doctrine of separation of powers. Learned SFC further argued that the Magistrate acts in an Executive capacity and not an extension of the judicial arm. To bolster his argument, learned SFC relied on the judgment of this Court in *Jaideep Singh v ASP Mahathir Abdullah Sapawi & Ors* [2017] 10 CLJ 145 ('*Jaideep*').

[44] With the greatest of respect, the two arguments, namely that the Magistrate serves as a check and balance and that the Magistrate acts in an Executive capacity materially contradict one another. It is either the Magistrate is or is not a member of the Executive and as such, either does or does not exercise judicial power. The argument of learned SFC that the Magistrate acts in the Executive capacity and serves as a check and balance with respect, is also flawed. The notion of separation of powers refers to powers of different branches of the Government and check and balance by one branch over the other. It is not the notion that the same branch of Government acts as a check and balance over itself.

[45] In my view, the correct position in law is that the Magistrate exercises judicial power. This is because the source of the Magistrate's power is derived from Article 121(1) of the FC in the words: 'and such inferior courts as may be provided by federal law ... and shall have such jurisdiction and powers as may be conferred by or under federal law.' In this regard, *Jaideep* is not the authority for the proposition that the Magistrate does not exercise judicial power but detaining power of the Executive. The constitutional validity of section 4 of POCA was not raised and thus was not an issue in *Jaideep*. Hence, the decision that the Magistrate does not exercise judicial power is not the *ratio decidendi* of *Jaideep*. The *ratio decidendi* in *Jaideep* is on the proper mode of

proceeding to mount a challenge on an alleged unlawful detention, namely by habeas corpus and not by judicial review.

[46] *Jaideep* aside, at this juncture, it bears the question: can 'federal law' therefore provide that the Magistrate shall have absolutely no discretion in deciding whether remand should be ordered or not, and have absolutely no discretion on the length of it within the radius prescribed by Parliament?

[47] As highlighted earlier, the FC is supreme. This includes all enumerated provisions and, as recognised by Raja Azlan Shah FCJ in *Loh Kooi Choon* (supra), implicit concepts such as separation of powers ingrained by the historical design of the FC. As found earlier, judicial power remains vested in the Courts under Article 4(1) and the post-amendment Article 121(1).

[48] Remand is a judicial order and a Magistrate making such an order performs a judicial act (see generally *Hassan bin Marsom & Ors v Mohd Hady bin Ya'akop* [2018] 5 MLJ 141). The fact that it was ordered under a preventive law, in my view does not change the judicial character of the remand order. POCA 1959 provides for remand by a Magistrate and under section 4 of POCA 1959, the Magistrate is clearly bound to act upon the dictates of the police and the Public Prosecutor by use of the imperative words 'shall'. There are two cases to illustrate that this form of 'law' seeking to direct the judiciary or a judicial body to do or omit from doing something without any choice, is a violation of separation of powers.

[49] The first is the decision of the Supreme Court in *Yap Peng* (supra). In that case, section 418A of the Criminal Procedure Code which vests

power in the Public Prosecutor to decide when and to which Court a case ought to be transferred, was held to be unconstitutional.

[50] The other case which is directly on point is that of *Semenyih Jaya*. It would be recalled that in that case, section 40D of the Land Acquisition Act 1960 mandatorily bound the High Court Judge to the opinion or decision of the lay assessors.

[51] The *ratio decidendi* of both cases is that binding judicial bodies to the opinion or whims of non-judicial bodies or more so Executive bodies is wholly inconsistent with the scheme of separation of powers established intrinsically by the FC.

[52] Based on the foregoing analysis, section 4 of POCA 1959 in particular subsections (1) and (2) cannot be regarded as valid 'federal law' within the meaning of Article 121(1) read in light of Article 4(1) respectively of the FC. The first limb of Article 4(1) declares that the FC is supreme. One of the intrinsic features of the FC is the judicial power of the Federation being vested in the Superior Courts with constitutional sanction afforded to the subordinate courts to exercise some degree of judicial power. By binding the Magistrate to the dictates of the Executive in the police and the Public Prosecutor, the law passed by Parliament seeks to override this particular constitutional feature. As such, subsections (1) and (2) of section (4) of POCA 1959 are inconsistent with the Constitution and are void. The presumption of constitutionality has been overcome rendering the said provisions liable to be struck down.

[53] Since the First Remand, which formed the initial detention was done on the basis of an unconstitutional 'law', there was accordingly no basis

in law to detain the appellants. This effectively means that their life and personal liberty was not deprived in accordance with law under Article 5(1) of the FC. Their detention is therefore unlawful and habeas corpus must issue as of right.

Article 149 of the FC and Item 5 of the Schedule to POCA 1959

[54] To recapitulate, the appellants were detained under the CGHA 1953 read into POCA 1959 vide item 5 of its First Schedule. The appellants' argument was that the fact of their detention does not conform to the express requirements of Article 149(1)(a). In response, learned SFC contended that this Court ought not to restrict itself to merely Article 149(1)(a) as POCA 1959 was passed generally under Article 149.

[55] Article 149 is contained within Part XI of the FC which relates to the special powers of Parliament against subversion, organized violence, and acts and crimes prejudicial to the public and emergency powers.

[56] In this regard, paragraphs (a) to (f) of Article 149(1) set out recitals which Parliament is required to include in the offending statute to bring that statute within the purview of Article 149 to insulate it from the scrutiny of Articles 5, 9, 10 and 13.

[57] In my view, the inclusion of the Article 149 recitals in anti-subversion and other such laws serves as a constitutional safeguard ensuring that any such law is properly enacted for the purposes envisaged by that Article.

[58] It is a settled principle of constitutional construction that constitutional provisions and laws which safeguard fundamental rights must be read generously and in a prismatic fashion while provisions that limit or derogate from those rights must be read restrictively (see *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301, at paragraph 13).

[59] The most recent authority on the importance of Article 149 is the judgment in *Selva Vinayagam Sures v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2021] 2 CLJ 29 (‘*Selva*’). In *Selva*, this Court found that the detention of the detenu under section 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 was bad because the appellant acted alone and that was in violation of Article 149(1)(a) and (f), which allowed Parliament to make the relevant law on account of action which is prejudicial to public order in Malaysia has been taken and further similar action is being threatened by ‘a substantial body of persons’ both inside and outside Malaysia. In construing the provision narrowly, this Court held that the detenu (acting alone) was not a ‘substantial body of persons’ and thus was not caught by the purpose for which the relevant statute was enacted under Article 149.

[60] This takes me to the recital in POCA 1959. It reads as follows:

> “WHEREAS action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property;
>
> AND WHEREAS Parliament considers it necessary to stop such action;

NOW, THEREFORE, pursuant to Article 149 of the Federal Constitution IT IS ENACTED by the Parliament of Malaysia as follows…"

[61] The above recital is drawn from Article 149(1)(a) which provides:

"**149.** (1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation —

(a) to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property…".

[62] In light of the foregoing, it is untenable to conclude that Parliament intended to refer to all the recitals contained in Article 149(1) when the recital in POCA 1959 in fact referred only to paragraph (a). In other words, since Parliament enacted POCA 1959 under paragraph (a) of Article 149(1), POCA 1959 has to be construed in accordance with that paragraph. To accept learned SFC's argument in that respect would be to give POCA 1959 a broader interpretation against the weight of settled, recent and high authorities which suggest that the most restrictive approach ought to be taken on a provision which permits derogation from fundamental liberties.

[63] Quite apart from their argument that Article 149(1) as a whole is sufficient to sustain Item 5 of the First Schedule to POCA 1959 without regard to the specific selection of only paragraph (a) of Article 149(1), the respondents also suggested that the words 'organized violence' in the recital to POCA 1959 do contemplate unlawful gambling and gaming offences. In all fairness to the respondents, there appears to be some

support for their contention in the legislative history of POCA 1959 as it presently stands.

[64] The relevant Minister in stating the Government's intention for moving the Bill to amend POCA 1959 in its present form suggested that gambling syndicate is one of the reasons why POCA 1959 was eventually amended. In this regard, I recall the decision of House of Lords in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] 1 ALL ER 810 which sets out the principle that legislation is given legal effect on subjects by virtue of judicial decisions, and it is the function of the courts to say what the application of the words used to particular cases or individuals is to be. This power which has been devolved on the judges from the earliest times is an essential part of the constitutional process by which subjects are brought under the Rule of Law; and it would be a degradation of that process if the courts were to be merely a reflecting mirror of what some other interpretation agency might say.

[65] Accordingly, the Hansard and the Parliamentary speeches it contains merely serve as an interpretive aid. It is relevant insofar as it helps the Court determine any supposed mischief Parliament sought to remedy with a view to resolve, for example, ambiguous interpretation. The Hansard is not otherwise a definitive corpus on what the law actually says or means or for that matter, what it ought to say or mean.

[66] Statutory construction, and more so constitutional construction is exclusively a matter for the Judiciary. While the Honourable Minister is entitled to express his view that 'organized violence' includes gambling and gaming offences, the question of construction of those words and

whether they can constitutionally include such kinds of offences remain very much a judicial question.

[67] Thus, the only question that remains is whether the CGHA 1953 read into POCA 1959 vide Item 5 of its First Schedule is sufficiently within the scope of the recital stipulated by Article 149(1)(a) of the FC, as judicially determined. At face value, it would appear that there is no logical or legal nexus between gaming offences and organized violence. Be that as it may, the appellants cited two judgments of the Indian Courts for the point that gaming and other lesser offences do not constitute organized violence.

[68] The first is the judgment of the Indian Court in *Ajay Gupta v State of Maharashtra* (2014) 3 Bom CR (Cri) 96, where the Court observed that two crimes relating to the commission of thefts were not even remotely close to being recognised as movements or actions which would imminently cause alarm or danger or harm.

[69] In another case, *Jalim Chand Saraogi v District Magistrate* (1972) CriLJ 1599, the Indian Court observed that the grounds on which the detenu was detained i.e. activities confined to his organisation of gambling could not be viewed as one which causes public disorder. Neither can it be considered as anything 'subversive, violent, dangerously mischievous or general fear-foreboding'.

[70] With respect, I concur with the above reasoning. Gaming offences can hardly be considered anything close to organized violence, though it may perhaps be classified as organized crime. Organized crime is not necessarily equivalent to organized violence. For instance, 'white-collar

crime' committed by businesses and government professionals is a non-violent crime. More importantly, apart from stating that 'Tangkapan terhadap Pemohon di bawah Akta tersebut telah dibuat kerana ada sebab untuk mempercayai bahawa ada alasan-alasan yang mewajarkan siasatan di bawah Akta tersebut dilaksanakan ke atas Pemohon kerana penglibatan Pemohon dalam pengelolaan dan penggalakan judi haram sebagaimana yang dinyatakan di Perenggan 5 Bahagian 1, Jadual Pertama Akta tersebut', the respondents made no mention of 'organized violence' in their affidavit.

[71] Applying *Selva*, the consequence is that Item 5 of the First Schedule to POCA 1959 to the extent that it includes gaming offences such as the ones under the CGHA 1953 is ultra vires Article 149(1)(a) of the FC which is the recital under which POCA 1959 was enacted, although and I say this without the benefit of argument, it may perhaps be valid had POCA 1959 been enacted under recital (f) of Article 149(1) as well, which relates to action prejudicial to public order.

[72] For the above reason, the appellants' arrests and detentions under section 4 of POCA 1959 were unlawful. It follows on this ground as well that the appellants are entitled *ex debito justitiae* to a writ of habeas corpus.

Mala Fide

[73] The mala fide issue as submitted by the appellants concerns issue of fact. As my findings of law on the constitutional invalidity of section 4 of POCA 1959 and the legal untenability of the facts delivered under the invalid Item 5 of the First Schedule have sufficiently dealt with the legality

of the detention of the appellants, I find it unnecessary to deal with this point as canvassed.

Conclusion

[74] In light of all the above, the respondents have not met their legal burden to justify the lawfulness of the appellants' detention. The appeals are allowed, the order of the High Court is set aside and the appellants' application for a writ of habeas corpus is allowed. It is hereby directed that each of the appellants be released from custody forthwith.

[75] My learned sister Justice Rhodzariah Bujang has read my judgment in draft and has agreed with it.

Dated: 27th April 2021.

(TENGKU MAIMUN BINTI TUAN MAT)
Chief Justice,
Federal Court of Malaysia.

Note: This press summary is merely to assist in the understanding of the final judgment. The final judgment is the authoritative text.