IN THE FEDERAL COURT OF MALAYSIA

(APPELLATE JURISDICTION)

CRIMINAL APPEAL NO. 05(HC)-158-11/2020(W)

BETWEEN

GOH LEONG YONG … APPELLANT

AND

1. ASP KHAIRUL FAIROZ BIN RODZUAN

2. MAJISTRET MAHKAMAH MAJISTRET

KUALA LUMPUR

3. KETUA POLIS NEGARA MALAYSIA

4. KERAJAAN MALAYSIA … RESPONDENTS

CORAM

VERNON ONG LAM KIAT, FCJ

ABDUL RAHMAN SEBLI, FCJ

ZABARIAH MOHD YUSOF, FCJ

SUMMARY OF SUPPORTING JUDGMENT

[1] This is a brief summary of my supporting judgment. The full grounds are ready and parties can collect them from my Secretary online during office hours after this morning's proceedings. If there is any conflict or inconsistency between this summary judgment

and the full grounds, the full grounds shall prevail and shall be the authoritative text.

[2] In paragraph 8 of the appellant's written submissions, he has moved this court to make an order that Act A704 which amended Article 121(1) of the Federal Constitution be struck down as being unconstitutional and therefore null and void and of no effect. The target of course is Article 121(1) of the Federal Constitution which according to the appellant impinges on the doctrine of separation of powers by removing the judicial power of the High Court of Malaya and the High Court of Sabah and Sarawak and that by doing so Parliament has breached the doctrine of basic structure.

[3] If the application were to be allowed, the amendment to Article 121(1) of the Federal Constitution would be nullified and its unamended version would be reinstated, which stipulated that the judicial power of the Federation is vested in the two High Courts of co-ordinate jurisdiction and status.

[4] From the appellant's perspective, the application if allowed would render section 4 of the Prevention of Crime Act 1959 null and void as the provision would then be in violation of the basic

structure doctrine by taking away the discretionary power of the magistrate in granting the remand orders for the detention of the appellant in police custody.

[5] In my view the application is frivolous and must be dismissed. The judicial power of the two High Courts has never been removed and will remain vested in the two High Courts for as long as Article 121(1) is embedded in the Federal Constitution, with or without the amendment, which came into force on 10 June 1988.

[6] The flaw in learned counsel's argument is in assuming that the two High Courts have been stripped bare of their judicial power by the amendment, turning them into emperors without clothes. The argument is as good as saying that with effect from 10 June 1988, the High Court of Malaya and the High Court of Sabah and Sarawak ceased to exist, with the attendant consequence that all decisions and orders that the two High Courts made after that date could potentially be declared null and void. Herein lies the fallacy (and danger) of counsel's argument. It is based on a wrong assumption.

[7] The judicial power of the two High Courts can only be removed by removing the whole of Article 121(1) and not merely by removing those few words from the Article although, admittedly, they are words of significant import.

[8] It is therefore futile for the appellant to argue that those words were taken out by Parliament for the purpose of removing the judicial power of the two High Courts because with or without those words, judicial power is still vested in the two High Courts by virtue of Article 121(1), the extent of which remains the same before and after the amendment, which is, “as provided by federal law” (before the amendment) and “as conferred by or under federal law” (after the amendment). The may be differently worded but mean the same thing.

[9] Therefore, to say that the 1988 amendment has removed the judicial power of the High Court of Malaya and the High Court of Sabah and Sarawak is a gross distortion of the law and the facts. In fact, by applying to the High Court for the writ of *habeas corpus*, the appellant recognized that the High Court of Malaya had the jurisdiction and power to grant the relief that he sought for. He

cannot now turn around and say otherwise just because the decision was not to his liking.

[10] The appellant contended that the decisions of this court in *Maria Chin* and *Rovin Joty* were given *per incuriam* i.e. wrongly decided as they "overlooked" the principles laid down in *Semenyih Jaya, Indira Gandhi and Alma Nudo* and are therefore not authorities on the issue of separation of powers.

[11] With due respect, the appellant has misapplied the *per incuriam* rule as laid down in *Morelle Ltd v Wakeling* [1955] 2 QB 379 and *Huddersfield Police Authority v Watson* (1947) 2 All ER 193. First of all, being the apex court, this court in *Maria Chin* and *Rovin Joty* was not strictly bound by the doctrine of *stare decisis* such that it must abide by the decisions in *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo*. Secondly, the appellant has not shown which "inconsistent statutory provision" this court in *Maria Chin* and *Rovin Joty* had forgotten or was ignorant of.

[12] On the issue of smaller and larger benches of this court, it was the submission of the appellant that the majority in *Maria Chin* and *Rovin Joty* had disobeyed judicial courtesy by departing from

Alma Nudo, stressing the point that *Alma Nudo* was decided by a bench of 9 judges whereas *Maria Chin* and *Rovin Joty* were decided by smaller benches of 7 and 5 judges, and that too by majority of 4:3 and 4:1 respectively. Size does matter to the appellant.

[13] The *per incuriam* rule was again invoked by the appellant to argue that being a smaller bench of 3 judges, this panel cannot depart from the decision of the larger bench of 5 judges in *Zaidi Kanapiah*, as to do so would render our decision *per incuriam*. With due respect, the principle is not meant for this kind of situation. In any event, it is not a correct proposition of law. It has never been the law in Malaysia that a smaller bench of the apex cannot overrule the decision of a larger bench. That also appears to be the position in the UK as well. In *Conway v Rimmer* [1968] AC 919, a 5 member bench of the House of Lords overruled the decision of a 7 member bench of the same House in *Duncan v Cammell, Laid & Co Ltd* [1942] 1 All ER 58.

[14] On the need for certainty in judicial decisions by the apex court, reference may be made to the observation by Azahar Mohamed CJ (Malaya) in *Asia Pacific Higher Learning Sdn Bhd v*

Majlis Perubatan Malaysia & Anor [2020] 3 CLJ 153 that although certainty is important, justice would be the paramount consideration when deciding a case. Nothing can be closer to the truth. Indeed, as Lord Denning said in *Ostime v Australian Mutual Provident Society* (1960) AC 459, "The doctrine of presedent does not compel your Lordships to follow the wrong path until you fall over the edge of the cliff".

[15] My learned sister Justice Zabariah Mohd Yusof has pointed out in her judgment that this court in *Mohd Faizal Haris v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 4 CLJ 613 had departed from *Mohamad Ezam Mohd Noor v Ketua Polis Negara & Other Appeals* [2002] 4 CLJ 309 by following its earlier decision in *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2004] 1 CLJ 81.

[16] In *Nasharuddin Nasir*, 3 members of the panel who were bench members in *Mohamad Ezam* resiled from the position that they took in that case which dismissed the preliminary objection raised by the respondents that the second appellant's appeal was academic because he had been released from detention.

[17] It is not clear if this change of position by Dzaiddin CJ, Steve Shin CJ (Sabah and Sarawak) and Siti Norma Yaakob FCJ from the position they took in *Mohamad Ezam* was brought to the attention of this court in *Zaidi Kanapiah* but it is certainly not reflected in both the majority and minority judgments where all 5 judges wrote separate judgments. This raises doubts whether the majority (4 of the 5 judges) in *Zaidi Kanapiah* would still have followed *Mohamad Ezam* on the academic issue had they been made aware of the change of position by the 3 judges in *Nasharuddin Nasir*.

[18] For all the reasons that I have given in my full grounds of judgment, I concur with my learned sister Justice Zabariah Mohd Yusof that the present appeal has become academic. The High Court was therefore correct in dismissing the appellant's application for the writ of *habeas corpus*.

[19] I also reject the appellant's argument that being a smaller bench of 3 judges, this panel cannot depart from the decision of the larger bench of 5 judges in *Zaidi Kanapiah* on the academic issue. I have reminded myself that such power to depart must be exercised very sparingly by this court given the dangerous

consequences of the exercise of such power, but having done so, I feel bound by duty to depart from *Zaidi Kanapiah* on the academic issue as there are compelling enough reasons to render the decision unsustainable. I will therefore dismiss the appeal.

ABDUL RAHMAN SEBLI

Federal Court Judge Malaysia

Dated: 30 July 2021