FEDERAL COURT OF MALAYSIA AT PUTRAJAYA

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

Summary of Goh Leong Yong v ASP Khairul Fairoz & 3 Ors

BACKGROUND

[1] This was an appeal by the appellant herein against the dismissal of his application for a writ of habeas corpus against the detention issued under section 4(1) (a) of the Prevention of Crime Act 1959 (POCA). The learned trial Judge in dismissing the application held that the application was academic in view of the current detention (then) of the appellant, which was pursuant to section 4(2) (a) of the same. The grounds of appeal raised by the appellant were:

(i) it is not open to the High Court to entertain preliminary objection or objections based on technicalities as this would be contrary to the mandatory provision of art. 5(2) of the FC. The application for habeas corpus was not academic as a matter of law (the academic point).

(ii) Section 4 of POCA under which the detention was made is unconstitutional;

(iii) The detention was tainted with mala fides;

(iv) the Minister abused the power entrusted to him by s. 22 of POCA by including the Common Gaming Houses Act 1953 ('CGHA') as item 5 of the First Schedule. The Minister's power is provided by art. 149 of the FC as well as the recitals to the POCA. Gaming by itself did not come within art. 149(1)(a) of

the FC. It is ultra vires the spirit and intention as expressed in the recitals to POCA read with Article 149;

(v) The statement of facts delivered under section 4(1) (a) POCA does not bring the appellant's case within the recitals of POCA.

(vi) The Magistrate failed to adhere to the guidelines as stated by Vernon Ong FCJ in ***Zaidi Kanapiah v ASP Khairul Fairoz Rodzuan & Ors And Other Appeals*** [2021] 5 CLJ 581 and hence there has been procedural noncompliance which renders the detention of the appellant under section 4(1) (a) POCA unlawful.

DECISION:

The Academic Point:

[2] The operative words in art. 5(2) of the Federal Constitution (FC), sections 365 and 366 of the Criminal Procedure Code (CPC) are, "unlawfully detained", "illegally detained" or "improperly detained".

[3] The writ of habeas corpus is **only available to a person who is being physically detained unlawfully** (***Thomas John Bernado v Ford*** [1982] AC 326). In an application for a writ of habeas corpus, the remedy is for the release of the persons unlawfully detained, and nothing else. When a person is no longer "detained" (i.e. he has already been released on that particular detention order), there is no issue of the writ of habeas corpus to be issued, as there is no "authority" or body" that detained him any longer. His release is therefore no longer an issue. A writ of habeas corpus had to be addressed to the person or authority having actual

physical custody of the person alleged to be detained illegally. Hence the court does not have **jurisdiction** to determine the matter if a person is no longer detained. Support for this proposition can be found in ***Re Onkar Shrian*** [1970] 1 MLJ 28 which was adopted in the decision of this Court in ***Kerajaan Malaysia & Ors v Nasharuddin Nasir*** [2004] 1 CLJ 81 and ***Sejahratul Dursina v Kerajaan Malaysia & Ors*** [2008] 1 CLJ 593, which reiterates the law that in habeas corpus application **only one remedy is provided** i.e. to set the detainee at liberty or to release a person who is being detained "illegally or improperly".

[4] The challenge by the appellant in the present appeal is on the detention under section 4(1) (a) where the facts show that when the application for habeas corpus was brought before the High Court on 13.11.2020, that detention under section 4(1) (a) has come to an end. By then, he was detained under section 4(2) (a) for 38 days. Hence, the subject of detention (or the lis), for adjudication under section 4(1) (a), no longer exists. However the detaining authority under section 4(1) (a) and section 4 (2) (a) is the police. Unlike the detention authority under section 8 and section 73(1) of the ISA, where the detention authority under section 73(1) ISA is the police, under section 8 ISA, it is the Minister. This is the position in ***Nasharuddin Nasir*** (supra) where Steve Shim CJSS said at page 90 of the report, that a writ of habeas corpus had to be addressed to the person or authority having actual physical custody of the person alleged to be detained illegally.

[5] The principle established in ***Mohd Faizal Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors*** [2005] 4 CLJ 613 and ***L Rajanderan R Letchumanan v Timbalan Menteri Dalam Negeri*** [2018] supp MLJ 393, is that a writ of habeas corpus must be directed against the current order

of detention. Following that, in the determination of whether a detention is unlawful, the court has to determine whether there has been a procedural non-compliance of statutory condition precedent. Given that:

(i) The condition precedent under the law pursuant to which the detention is made, varies ; and

(ii) the only remedy for an application for habeas corpus is for the release of the detainee under detention,

it follows that the application for the writ of habeas corpus must be directed to the current detention order. If the detenu is no longer detained, then such application is rendered academic, because there is no body to be released.

[6] Counsel for the appellant submitted that the ratio on the academic point in ***L Rajanderan R Letchumanan v Timbalan Menteri Dalam Negeri*** [2018] supp MLJ 393 and ***Mohd Faizal Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors*** [2005] 4 CLJ 613 is no longer applicable, in view of the decision in ***Mohamad Ezam & Anor v Ketua Polis Negara*** [2001] 4 CLJ 701. This was also the view expressed by the majority (on the academic point) in ***Zaidi Kanapiah v ASP Khairul Fairoz Rodzuan v Others and Other Appeals (2021) 5 CLJ 581*** where 4 out of the 5 Judges were unanimous on the academic point, namely, the fact that the earlier detention under section 4 (1) (a) POCA for 21 days has ended, does not render the challenge on such detention as being academic, despite it has been superseded by another detention order under section 4(2) (a) POCA. It was held as a live issue despite the 21 days detention has lapsed and the detenu was being detained under section 4 (2) (a) POCA for 38 days.

[7] Counsel for the appellant further urged this court to depart from ***Mohamad Faizal Haris*** (supra***), L Rajanderan R Letchumanan*** (supra), and to adopt ***Mohamad Ezam*** (supra***)***, in determining the academic point. In this regard, it is pertinent to see the rationale why ***Mohd Faizal Haris*** (supra), established the general rule that the challenge in an application for a habeas corpus hearing must be directed at the current preventive order***.***

[8] The dominant issue in ***Mohd Faizal Haris***(supra), is whether a valid detention order made against a person under section 6 (1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 (the Act) can be vitiated by irregularities in his arrest and detention under section 3 of the Act. To appreciate the argument, one need to look at the statutory requirements under section 6(1) of the Act in determining whether there the detention under section 6(1) is unlawful, which had been explained extensively in ***Mohd Faizal Haris***.

[9] The general rule and principle established by ***Mohd Faizal Haris*** (supra), in determining the legality of any detention order in an application for writ of habeas corpus, namely:

(i) that the writ of habeas corpus must be directed against the current order of detention; and

(ii) what is the condition precedent under the provision of the law pursuant to which the detention order was issued. ***Mohd Faizal Harris*** (supra) the current detention was under section 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985, hence it is the condition precedent under section 6 (1) that applies in determining whether the detention under section 6 (1) is lawful.

In ***Mohd Faizal Harris*** (supra), despite the non-compliance of the procedural requirements under section 3(2) (a), (b) and (c) of the Act, it was held that, as the wording of the statute under section 6(1) of the Act did not require a proper arrest as a condition precedent to the making of a subsequent detention order, the appellant cannot make a valid complaint of the detention under s 6 (1) of the same.

[10] The precondition to the exercise of jurisdiction under s 6 (1) is, inter alia, only a consideration of the report of investigation. There is no stipulation in s. 6 (1) that it must be the result of a valid detention. The report of investigation therefore has no direct link with the detention.

[11] The result is that the **legality of the detention of a person under s 3 (2) is not a condition precedent to the making of a detention order against him under s 6 (1).** A detention order can be made against a person under section 6 (1) even when his detention under section 3 (2) was irregular.

[12] As early as 2010, this Court in ***L Rajanderan R Letchumanan v Timbalan Menteri Dalam Negeri*** [2018] Supp MLJ 393 was urged to depart from **Mohd *Faizal Haris*** (supra)***,*** to which was refused for the following reasons:

> " [9] …….. A writ of habeas corpus must be directed only against the current detention order even if the earlier arrest of the detainee is irregular. Any questions on the legality or propriety of the arrest or detention of a detainee at the investigative stage is **not a relevant consideration nor is it a pre-condition to the order of detention of the Minister.**

[10] **Only when statute requires an act to be a condition precedent** to the making of a detention order can a valid complaint made against that detention.

[11] The scheme under the Act (similarly under POPOC) is that before a detention order is directed, the police would need to conduct an investigation which includes the power to detain any suspected persons. The manner on conducting the investigations and arrests at this stage, is **neither a condition precedent nor a matter which has a direct link with the detention order** and thus not a ground for judicial review…."

[13] Given the legal principle as established in the aforesaid cases, and the only remedy in an application for the writ of habeas corpus is release of the detenu from the detention, in situation where a person is no longer under detention under a particular section, the writ of habeas corpus against such a detention ought not to issue. This is for the simple reason and logic that a person who has been already been released cannot be ordered to be released.

[14] This explains why the judges in ***Mohamad Ezam*** (supra), gave 3 separate orders at the end of the appeal which show that the writ of habeas corpus is only available to persons who are detained. Looking at the facts of ***Mohamed Ezam*** (supra), the 2nd appellant had earlier been released. Hence, although all the learned Judges in the panel agreed that the appeal be allowed, they made three different orders, i.e. firstly, by Mohamed Dzaiddin CJ who ordered that "the appellants be released", which appears to refer to all the appellants, including the second appellant who had since been released from police detention. However when the learned Chief Justice used the word "appellants" in ***Mohamad***

Ezam (supra), that order could not have included the second appellant who had been released. Steve Shim CJSS made an order to release the appellants only for the detention under section 73 ISA but no order with regards to the detention under section 8 ISA. Abdul Malek Ahmad FCJ and Siti Norma Yaakob FCJ, in their respective orders, specifically referred to the 1st , 3rd , 4th and 5th appellants. Both did not order the release of the 2nd appellant.

[15] 4 out of the 5 Judges in ***Zaidi Kanapiah*** (supra) held that the issue on the validity of the earlier detention under section 4 (1) (a) is not academic, despite it already lapsed and a fresh detention under section 4 (2) (a) was in force, at the material time. The effect of the order granted by Vernon Ong FCJ, Hasnah FCJ and Zaleha Yusof FCJ which ordered the release of the appellants from the detention under section 4(1) (a) of POCA is that Their Lordship and Ladyships were granting the release of the appellants under the said section when they were no longer detained under the same. Heavy reliance was placed on ***Mohamad Ezam*** (supra) in support of the academic issue in ***Zaidi Kanapiah*** (supra). ***Mohamed Ezam*** concerned the preliminaries issues of whether:

(i) the 2nd appellant's appeal was academic as he had since been released from police detention; and

(ii) the remaining applications for *habeas corpus* ought not to have been directed against the respondent (the Inspector General of Police) but against the Minister of Home Affairs ('the Minister') because the appellants were no longer being detained by the police under s. 73 ISA but by the Minister under s. 8(1) ISA.

[16] The panel in ***Mohamed Ezam*** (supra) decided that the appeal was not academic without really going into the basis that the application of

habeas corpus should be directed against the relevant authority that detained the appellant at that point in time, i.e. the Minister. It is to be noted that Steve Shim CJSS only released the appellants from the detention under section 73(1) ISA when His Lordship made findings that the detention under section 73(1) was unlawful, but there was no findings as far as the detention of the appellants by the Minister under section 8 ISA. This can be seen from the judgment at page 345 para c-d of the judgment which appears to imply that the application for habeas corpus should be directed against the Minister and not the police in that case as the current detention order was by the Minister. This is what His Lordship said:

> "For all the reasons stated, I find it appropriate to agree with the learned Chief Justice and my learned brother and sister judges in holding that the detentions of the appellants by the police under s. 73(1) of the Act are therefore unlawful. In that context, I agree that the appeals should be allowed and the appellants released accordingly. **However, as the undisputed facts show that the appellants ie, 1st, 3rd, 4th and 5th appellants have now been detained by order of the Minister under s. 8 of the Act, the issue of whether or not to grant the writ of *habeas corpus* for their release from current detention does not concern us. That is a matter of a different exercise."**

[17] The order was such, because the panel in ***Mohamed Ezam*** (supra) agreed that the condition precedent in section 73 (1) (b) ISA was not fulfilled by the respondents, hence the detention under section 73(1) was unlawful. However, that is only as against the detention under section 73(1) ISA which was against the police (respondent), which was the detaining authority under section 73 (1) ISA. However at the point of

hearing, the appellants were no longer being detained by the respondent under s. 73 ISA but at the behest of the Minister under s. 8(1) ISA.

[18] This Court in ***L Rajandren R Letchumanan*** (supra) referred to ***Mohd Faizal Haris*** (supra), but did not refer to ***Mohamad Ezam*** (supra) and did not address art. 5(2). ***Mohammad Ezam*** (supra) referred to and considered art. 5(2) FC. Be that as it may, it is to be observed that ***Mohd Faizal Haris*** (supra) was decided after ***Mohamad Ezam*** (supra). It is a later decision than ***Mohamed Ezam*** (supra). The panel in ***Mohd Faizal Haris*** (supra) had considered and overruled ***Mohamad Ezam*** (supra) and was of the view that the stand taken by the panel in ***Mohamad Ezam*** (supra), is unsustainable, as evident from their judgment at page 629 of the report at para b-d.

[19] The panel of 3 Judges (Dzaiddin CJ, Steve Shim CJSS, Siti Norma Yaacob, FCJ) in ***Nasharuddin Nasir*** (supra) were part of the 5 panel of Judges (Mohd Dzaiddin CJ, Wan Adnan Ismail PCA, Steve Shim CJSS, Abdul Malek Ahmad FCJ, Siti Norma Yaacob FCJ) in ***Mohamad Ezam*** (supra), who had earlier unanimously agreed with the judgment of Abdul Malek Ahmad FCJ in ***Mohamad Ezam*** (supra) on the academic point. These 3 panel of Judges in ***Nasharuddin Nasir*** (supra) however reversed themselves from their earlier stand in ***Mohamad Ezam*** (supra), when Steve Shim CJ (Sabah Sarawak) delivering the FC judgment of ***Nasharuddin Nasir*** (supra) at page 90 para a-d, said that as the custody was no longer with the police but had been transferred to the Minister upon the issuance of a detention order under s. 8 of the ISA, hence the court has no jurisdiction to hear the application. This was in sharp contrast with the decision in ***Mohamed Ezam*** (supra), where despite the custody was no longer with the police but had been transferred to the Minister upon the

issuance of a detention order under s. 8 of the ISA, the panel was of the view that the application is not academic and still was a live issue. It is trite law that the fact of the detention gives the court the jurisdiction to adjudicate on the detention. Since the police no longer has custody of the appellants, the court has no jurisdiction to do so. There ought to have been a separate motion for a writ against the detention order issued by the Minister under section 8 ISA. As there was no such motion, the court had embarked on a misconceived course of action in assuming jurisdiction. This was precisely what ***Nasharuddin Nasir*** (supra) held at page 90 para a-d.

[20] The decision of the 3 panel of Judges in ***Nasharuddin Nasir*** (supra), gave the effect that the legality or illegality of the detention under section 73 was irrelevant in determining the legality or illegality of the detention order by the Minister under section 8 (page 100 para b-d). To that extent ***Mohamad Ezam*** (supra), has been overruled by ***Nasharuddin Nasir*** (supra). I am of the view that the position taken by ***Nasharuddin Nasir*** (supra), on this issue is the preferred stand.

[21] It is also to be observed that, a scrutiny of the judgment of Steve Shim CJSS in ***Mohamed Ezam*** (supra) discloses that the reason in allowing the release of the appellant therein is no different from what has been posited by ***Mohd Faizal Harris*** (supra), i.e. for the detention to be unlawful, there must be procedural non-compliance of statutory requirements.

[22] Examined in the context stated, Steve Shim CJSS in ***Mohamed Ezam*** (supra) differed from the view expressed in ***Re Tan Sri Raja Khalid Raja Harun v Inspector General of Police*** [1987] 2 CLJ 490 and

Theresa Lim Chin Chin & Ors v Inspector General of Police [1988] 1 LNS 132***.*** The latter 2 cases held that Section 73(1) and s. 8 of the ISA are so inextricably connected that the subjective test should be applied to both which means that the court cannot require the police officer to prove to the court the sufficiency of the reason for his belief under s. 73(1).

[23] His Lordship explained the preconditions in s. 73(1) ISA and concluded that there was sufficient compliance with section 73(1) (a) ISA from the affidavits filed. However, the situation is quite different with respect to s. 73(1)(b) ISA and found that the precondition in s. 73 (1) (b) ISA has not been discharged by the respondent. In effect, the respondent has not discharged the initial burden of satisfying the court as to the jurisdictional threshold requisite under s. 73(1) ISA . Hence His Lordship held that the detentions of the appellants by the police under s. 73(1) of the Act are therefore unlawful.

[24] Thus, from the aforesaid, even in ***Mohamed Ezam***, Steve Shim CJSS referred to the condition precedent as found in section 73(1) ISA in deciding on the legality of the detention order under the said section, which is the same as the principle as enunciated in ***Mohd Faizal Harris*** (supra) in determining the legality of any detention.

[25] I disagree with the proposition by the majority on the academic point in ***Zaidi Kanapiah*** (supra) that the legality of a detention or detentions must be viewed as a single overarching transaction. It is misconceived to state that the detaining authority relies 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*. It is trite principle of law that, in an application for a writ of habeas corpus, the only remedy is the release of the detainee from the detaining authority. If it is proven that the detention of the detenu is unlawful because of procedural non-compliance of conditions precedent of the relevant statute, a release of the detenu is, off course, inevitable. There may also be the issue of more than one detention issued by different detention authorities for different period of time, not to mention the different provisions of the statute in which the detention was made in which different consideration of condition precedent applies. Therefore, it is pertinent for the appellant to properly direct his challenge to the current detention order. It is to be observed that ***Mohamed Ezam*** (supra), ***Nasharuddin Nasir*** (supra) and ***Theresa Lim Chin Chin*** (supra) concerned detention under section 8 and section 73(1) ISA. ***Theresa Lim Chin Chin*** (supra***), Re Raja Tan Sri Khaled*** (supra) held that section 8 and section 73(1) ISA are inextricably connected which Steve Shim CJSS in ***Nasharuddin Nasir*** disagreed. In ***Nasharuddin Nasir*** (supra), His Lordship held that "even when the detenu was still in custody at the date of the decision but pursuant to an order of a different authority (i.e. the Minister), the court has no jurisdiction to hear an application for habeas corpus directed at another authority (i.e. the police) (Refer also to ***Sejahratul Dursina*** (supra)). That is where the decision on the academic point in ***Mohamed Ezam*** was wrong because the panel was deciding on the detention of the appellants under section 73(1) ISA when the appellants were no longer detained under the same and the habeas corpus was directed to the police when the police were no longer detaining the appellants. But to be fair to Steve Shim CJSS, at the end of the judgment he did limit his order only on the detention under section 73(1) of the ISA.

[26] Further, the majority (on the academic point) in ***Zaidi Kanapiah*** (supra), finds support on the academic point when it referred to the Privy Council decision in ***Fuller v AG of Belize*** (2011) 79 WIR 173 in stating that habeas corpus application is not academic merely because the detainees were released on bail [para 204].

[27] That particular passage is not to be taken out of context, as it refers to the legality of bail which depends on the legality of the detention. The application of the habeas corpus therein was against the backdrop of the English Extradition Act 1870 which was extended to Belize. The detention in ***Fuller v AG of Belize*** (supra), was not pursuant to a preventive detention under preventive laws. It is detention under punitive laws. The subject there was on bail pending his extradition to the United States. Hence the consideration in the application for habeas corpus there, was in a different context and is not applicable to our present appeal where the application for habeas corpus is circumscribed by the provisions of POCA which is enacted under Article 149 of the FC. In approaching the present appeal, the court must be guided by the clear words of the FC and the provisions of POCA (***Theresa Lim Chin Chin*** (supra)).

[28] In any event, firstly, bail is never an issue in preventive detention in our case. Secondly, this Court has established that a person on bail is not "under custody or physically detained" that would attract the application for habeas corpus under preventive detention laws. Abdul Hamid Mohammad, FCJ (as he then was), in ***Sejahratul Dursina*** (supra***)***, after agreeing with the views as expressed by Steve Shim FCJ in ***Nasharuddin Nasir*** (supra) where His Lordship referred to section 365 of the Criminal

Procedure Code and art. 5(2) of the FC said that in an application for a habeas corpus, the person must be under detention. Only then can he be released if the detention is found to be illegal or improper. Hence a person at large on bail is not detained in custody so as to be entitled to the writ of Habeas corpus which is issued only when the applicant is in illegal confinement.

[29] It was also argued by counsel for the appellant, that the material date to be considered for the purpose of deciding the legality of an order of detention in a habeas corpus application is the return date, which, in this case is 9.11.2020. The majority (on the academic point) in ***Zaidi Kanapiah*** held at paragraph [229] 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.

[30] This issue as to when the legality of the detention in a habeas corpus application is to be adjudicated, has been determined by this Court in ***Sejahratul Dursina*** (supra) when it was held that the material date to be considered for the purpose of deciding the legality of an order of detention in a habeas corpus application is on the date of the hearing and decision.

[31] The stand taken by ***Sejahratul Dursina*** (supra) is the preferred view as the court is addressing the application of the writ of habeas corpus on the day of the hearing and decision. The facts of the present appeal show that, on the day of the decision, the appellant is no longer under detention under section 4(1) (a), hence the application for habeas corpus for the detention under section 4(1) (a) is no longer relevant and academic, as the detention currently then was under section 4(2) (a).

[32] ***Zaidi Kanapiah*** (supra) relied on ***Theresa Lim Chin Chin***(supra) as support for the proposition that the legality of the detention is to be adjudicated on the date of the application for the writ of habeas corpus, which is misconceived. The issue in ***Theresa Lim Chin Chin*** (supra) is not on the legality of detention to be adjudicated by reference to the date the application for a writ of *habeas corpus* is filed. The focus in ***Theresa Lim Chin Chin*** (supra) was on the issue of the constitutionality of section 73 ISA as it does not comply with art. 151 of the FC, i.e. the provision for informing a detainee of the grounds of his detention and allegations of facts constituting the grounds. It was contended by the appellant therein, that section 73 is void and as such the arrest and detention of the appellants are illegal. It was argued by the appellants that the arrest by the police under section 73 is subject to judicial scrutiny especially on the grounds to justify the detention of the appellant. There it was also argued that, there are 2 stages of detention, namely under sections 73 and 8 of the ISA. The appellant contended that the prohibition of disclosure of evidence or information by the authorities premised under section 16 of the Act was only limited to the detention under section 8 and not section 73. Hence impliedly there is nothing in the provision which prohibits the disclosure of evidence or information for the arrest under section 73. However, the Court was not persuaded by that argument and held that the "arrest and detention by the police and detention pursuant to a Ministerial Order or further detention after the matter has been considered by the Advisory Board as one continuous process beginning with the initial arrest and detention under section 73…..it is within one scheme of the preventive detention legislation." Consequently it was held that section 16 of the ISA encompass detention under section 73 ISA and 8 ISA as they are within one scheme of preventive detention legislation.

It was in that context that ***Theresa Lim Chin Chin*** (supra) was decided that the arrest under section 73 and the detention under section 8 is to be considered as one scheme. This was not in the context of the academic point as in the present appeal and neither was it in the context of the proposition of the legality of detention is to be adjudicated by reference to the date the application for a writ of *habeas corpus* was filed. The findings in *Theresa Lim* Chin Chin (supra) went on the premise that s. 8 and s. 73 of the ISA are inextricably linked and consequently s. 16 of the ISA and art. 151(3) of the Constitution applied which would have the effect of denying the courts the power to review the detention as they could not enquire into the evidence which led to the detention.

[33] Based on the aforesaid, ***Mohd Faizal Haris*** (supra), ***L Rajandren R Letchumanan*** (supra) are still good law***.*** Steve Shim CJSS's decision in ***Mohamad Ezam*** (supra),(which was agreed to by the other panel of Judges) when His Lordship held that the detention under section 73 (1) ISA was unlawful as there has been non compliance of section 73(1) (b) ISA, is actually in line with the ratio in ***Mohd Faizal Harris***, i.e that a detention under any provision of the law must fulfill the condition precedent for it to be lawful***.*** The 3 panel of judges which presided in ***Mohamed Ezam*** also presided in ***Nasharuddin Nasir*** (supra) and their decisions although following the principles in ***Karam Singh*** (supra) (which held that a court has no jurisdiction to hear a writ filed against the police for irregularities in a detention order under s 73 (1) ISA when it had been superseded by one under s 8 (1)), contradicted their decision in ***Mohamed Ezam*** (supra).

[34] Given the aforesaid, on the academic point, I am of the view that the preliminary objection on the application for the writ of habeas corpus against the detention of the appellant under section 4(1) (a) of POCA by the Senior Federal Counsel (SFC) has merits. The issuance of the writ of habeas corpus would not serve any purpose for the detention under section 4 (1) (a) as it has already ended when it was brought before the High Court. Such a challenge has been rendered academic. An application for a writ of habeas corpus must be directed towards the current detention order. The principle as enunciated by ***Mohd Faizal Haris*** (supra) and ***L Rajandren*** (supra) still remains relevant and good law.

Whether section 4 of POCA was complied with in the detention of the detenu

[35] To determine whether the earlier detention under section 4 (1) (a) was lawful, the said section is referred to, in order to determine what are the statutory requirements that needs to be fulfilled before the remand order for 21 days can be granted. It is not for the courts to create procedural requirement which is not in section 4 of POCA because it is not the function of the courts to make law/rules. If there is no procedural non compliance, the detention cannot be unlawful. The courts should consider whether, on the facts, there has been procedural non-compliance (refer to ***Lew Kew Sang***).

[36] There are 3 requirements which is provided by section 4 (1) (a) of POCA, namely:

(i) Production of a statement in writing;

(ii) The statement in writing is signed by a police officer not below the rank of an Inspector;

(iii) The said statement in writing must state that there are grounds for believing that the name of that person should be entered on the Register.

[37] In this regard, ASP Khairol Fairoz bin Rodzuan, the 1st respondent affirmed an affidavit which is in Enclosure 15, in which he affirmed that he had produced a statement in writing by a police officer by the rank of an ASP which states that there are grounds for believing that the name of the appellant should be entered on the register, before the Magistrate on 30.11.2020.

The relevant Exhibit “KFR-5” which is “the statement in writing signed by a police officer not below the rank of Inspector” is attached to the affidavit.

[38] The statement in exhibit “KFR-5” which was produced before the magistrate is in line with the requirement of the provision under section 4 (1) (a) of POCA.

[39] On the issue of the application of section 28A of the CPC to be read with section 4 of POCA, this has also been met. If one is to peruse the averment by ASP Faizol, in para 7 of the affidavit in relation to the same, states that he had duly informed the detenu of the grounds of his arrest as required.

[40] In an application for remand under section 4 (1) (a) of POCA there are 2 distinct proceedings namely:

(i) The application for remand before the magistrate;

(ii) The information by the police officer relating to the reason to believe that there are grounds for believing that the name of the appellant should be entered on the register."

[41] Premised on section 4 (1) of the Act, it does not require detailed grounds to be provided in the statement in writing and neither does it involved the production of any evidence. For this I refer to ***Kam Teck Soon v Timbalan Menteri Dalam Negeri Malaysia & Ors And Other Appeals*** [2003] 1 CLJ 225 at page 228.

[42] Hence the statement in writing by ASP Khairul Faizol is regular and suffice to fulfil the requirement of section 4 (1) (a) as the statement in writing states his reasons to believe that there are grounds for believing that the name of that appellant should be entered on the Register. When the statement of the police officer dated 30.10.2020 as stated in the affidavit was produced before the Magistrate at the time when the application for remand for 21 days under section 4 (1) (a) of POCA was conducted, the pre conditions and procedural requirement stipulated by the said provision has been met.

[43] Therefore the remand order for 21 days issued by the Magistrate On 31.10.2020, for the detenu to be remanded from 31.10.2020 until 20.11.2020 under section 4 (1) (a) of POCA is valid and lawful, as the procedural requirement stipulated under section 4(1) (a) has been met.

[44] Counsel for the appellant in the written submission contends that the appellant is also challenging the detention under section 4(2) (a) on the basis that it is groundless, procedural non compliance and mala fide. On

the detention under section 4(2) (a), ASP Khairul Fairoz bin Rodzuan has affirmed 3 affidavits in reply in enclosure 15 of the Appeal Records with particular reference to pages 53-64, 116-119, 121-127 which state and shown that the procedural requirements of section 4(2) (a) (i) and (ii) has been complied with, when he appeared before the magistrate before the expiry of the 21 remand period under section 4 (1) (a). He had produced before the Magistrate :

(i) a statement in writing signed by the DPP Yusaini Ameer stating that in his opinion sufficient evidence exists to justify the holding of an enquiry under section 9;

(ii) a statement in writing signed by ASP Khairul Fairoz stating that it is intended to hold an enquiry in the case of the appellant under section 9.

On that basis, the Magistrate had granted a further remand of 38 days against the appellant.

Therefore as far as the statutory procedure is concerned for the remand to be given for 38 days, it has been complied with.

[45] Hence based on the aforesaid, there is no procedural non compliance by the respondents in the detention of the appellant under section 4(1) (a) or 4(2) (a). The detention of the appellant under both sections are therefore lawful. However, because the current detention is under section 4(2) (a) the challenge under section 4(1) (a) is academic.

Whether Section 4 of POCA under which the detention was made is unconstitutional

[46] This issue was addressed extensively by the panel in the case of ***Zaidi Kanapiah (supra)***. I agree with the conclusion of the majority that section 4 of POCA is not unconstitutional. However my reasons are as follows.

[47] The appellant challenge the constitutionality of section 4 of POCA premised on the fact that the said section dictates to the Magistrate that a remand order for 21 days shall be given upon the production of the appellant before the magistrate. It was submitted by counsel for the appellant that section 4 requires the Magistrate which is the judicial arm under art. 121 of the FC to act upon the imperative dictate of the Executive. The said section deprives the Magistrate of any discretion in exercising its powers when setting out the matters in the section.

[48] The minority judgment in ***Zaidi Kanapiah*** (supra) was of the view that section 4(1) (a) is unconstitutional, as Parliament has encroached on powers of the Judiciary by dictating to the Magistrate a fixed period of 21 days to be granted in the remand order.

[49] Learned counsel said as section 4 deprives the Magistrate of a discretion to decide on the period of days for the remand, shows that Parliament has transgressed on the judicial power, hence the said section is unconstitutional.

[50] I am of the view that such a contention is without merit. In this regard I refer to the decision of this Court in ***Letitia Bosman v PP & Other***

Appeals [2020] 8 CLJ 147 where Azahar Mohamed, CJM delivering the majority decision, where the challenge was in relation to the mandatory death penalty as contained in section 39(2) of the Dangerous Drugs Act 1952. There, it was also argued that the impugned provision deprived the courts of the discretion to impose any other sentence. Azahar Mohamad CJM held that:

> [67] **By prescribing a mandatory death penalty on the cases covered in these appeals, Parliament did not encroach into the power of the Court as it is within their power to do so. This connotes a respect to the doctrine of separation of power and complements the independence and impartiality of the Court. As such, the court as a guardian of constitution is expected to give effect to law duly passed by Parliament."**

[51] Art 74 (1) FC confers Parliament with power to make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List.

Amongst the matters in the Ninth Schedule, List 1, Federal List are external affairs, defence, internal security and so on. Item 4 (b) states the powers of Parliament to legislate on matters such as:

> "4. Civil and criminal law and procedure and the administration of justice, including-
>
> (a) Constitution and organization of all courts other than Syariah Courts;
>
> **(b) Jurisdiction and powers of all such courts;….."**

[52] Clearly from the aforesaid provisions of the FC, the jurisdiction and powers of the courts (except the Syariah courts) are within the Federal

List, meaning Parliament can legislate with regards to jurisdiction and powers of the courts. POCA was enacted by Parliament under Article 149 of the FC.

[53] It is the FC, which is the supreme law of the Federation that confers Parliament the power to legislate on jurisdiction and powers of the courts, and art. 149 of the FC confers Parliament with the power to prescribe the period of 21 days in the remand order to be granted by a Magistrate under section 4 (1) (a) of POCA.

[54] In ***Letitia Bosman***, the essence of the contention by the appellants therein was that the power to determine the appropriate punishment on convicted criminals is part of the judicial power and only the judiciary can exercise such function. Therefore, it was argued that it is not for Parliament to encroach on judicial power by stipulating in the law the punishment of death sentence on convicted criminals thus depriving the Courts of judicial discretion.

[55] In like vein, in the present appeal, the contention by the appellant is that, by removing the discretion of the judiciary vis-à-vis the courts in determining the remand period of 21 days are inconsistent with art.121 and therefore are violative of the doctrine of separation of powers.

[56] Azahar Mohamad, CJM in ***Letitia Bosman v PP & Other Appeals*** [2020] 5 MLRA 636 referred to the decision of this Court in ***PP v Lau Kee Hoo*** [1983] 1 MLJ 157 where the Court considered the constitutionality of the mandatory death sentence provided by statute, whether it violated Art 121. This involved section 57(1) of the ISA 1960 which prescribed a mandatory death sentence for offence having ammunition under one's

possession and control in a security area without lawful authority. This Court upheld this law as being consistent with Article 5(1) and rejected the contention that the provision tantamount to the legislature usurping the powers of the judiciary. In this regard the cautionary words of Lord Diplock in ***Ong Ah Chuan v PP*** [1981] AC 648 was referred to at page 72 of ***Lau Kee Hoo*** (supra) said that it would be an extreme position to accept the argument of the appellant especially in provisions where mandatory fixed or minimum penalty even when it was not capital was imposed.

[57] Barwick CJ in ***Ong Ah Chuan*** (supra) which is a Privy Council case, emphasized that such a discretion to impose the measure of punishment is indeed a legislative decision. His Lordship said that " If Parliament chooses to deny the court such a discretion, and to impose such a duty, …… the court must obey the statute in this respect assuming its validity in other respects. It is not, …., a breach of the Constitution not to confide any discretion to the court as to the penalty imposed."

[58] Thus, it cannot be said that Parliament has encroached on the powers of the judiciary, when it enacted laws that provides mandatory sentences or a fixed period of remand to be imposed on detenus. The FC, which is the supreme law of the Federation provides in the Federal List, the powers conferred to Parliament to legislate on jurisdiction and powers of the Courts. In our present context art. 149 FC confers on Parliament the power to legislate POCA and the powers on the Magistrate to issue remand of 21 days. Accepting the argument by counsel of the appellant will throw into chaos the laws pertaining to the period of remand under the CPC and the Penal Code provisions which prescribe the period of imprisonment, not to mention the prescription of

a mandatory minimum/maximum sentences. This would mean Parliament can never legislate on any prescription of any number of period in detaining a person or imprisonment of any convicted person. Does it then mean that the Court must be given free hand to determine whatever number of days for remand or whatever sentence as the Court deems fit?

[59] I do not think so. Art. 121 FC specifically provides that the courts derives its powers from federal law. The relevant exercise of judicial powers consists of the application of the law by the court according to the terms of the law. As POCA is a federal law, it is for the courts to construe its provision in accordance to what it says. In other words it is for the Magistrate to follow what section 4 (1) (a) states as to the condition precedent and procedure to be followed in the granting of the 21 days remand period under the said provision.

[56] Counsel for the appellant also submitted that the amendment to art. 121 by way of Act A 704 is a nullity because it reduces the judicial arm from a separate and independent organ of Government to a subordinate or subjugate to Parliament, and it ought to be struck down. This, according to counsel for the appellant, cuts across the doctrine of separation of power which is part of the basic structure of the FC. This appears to be a collateral attack on Act A 704 which cannot be countenanced, when there is no specific challenge to the amendment to art. 121. This issue is being addressed by my learned brother Abdul Rahman Sebli FCJ in his supporting ground.

[57] I had addressed the submission on basic structure doctrine and cases relating thereto, and the rejection by this Court, in the main

judgment which I will not read out in this summary. Suffice to say that the doctrine has been rejected by the judgment in ***Loh Kooi Choon, Phang Chin Hock, the majority judgments in Maria Chin, Rovin Jothy and Zaidi Kanapiah.***

[58] It was argued by the appellant that, in Malaysia, there is no necessity to resort to the theory of an implied limitation upon the power of Parliament to amend a provision of the FC to give effect to the basic structure doctrine. This is because, that doctrine is integrated into the FC by way of art. 4(1) which employs the phrase "inconsistent with **this Constitution**". Art.4(1) does not say "inconsistent with **any provision** of this Constitution".

[59] It is also submitted by the appellant that a harmonious result is obtained by interpreting art. 4(1) and art.159 through the application of either the direct consequence test or by applying the pith and substance canon of construction. Accordingly, where federal law amends a provision of the Constitution and a challenge is taken that the amendment violates the basic structure, the Court must make that determination by asking whether the direct and inevitable consequence of the amending law is to impact upon the basic structure.

[60] In my view, this does not answer how does one determine which provision constitutes basic structure and not amenable to amendment. Art. 159 expressly provides for the procedure on amendment upon the fulfilment of certain requirements. How does one read art. 159 harmoniously with Article 4 (which, according to counsel for the appellant that it had been impliedly integrated the basic structure doctrine) to determine whether an impugned provision is unconstitutional? Raja Azlan Shah FCJ in ***Phang Chin Hock*** (supra) clearly has said that the

constitutionality of any provision is premised on the provision of the Constitution, not premised on any concepts or doctrine which are outside the FC. In any event I do not see the relevance of the basic structure doctrine to be applicable to our present appeal. Such doctrine is only relevant when the constitutionality of a law passed by Parliament which seeks to amend the FC is challenged. In that situation, applying the doctrine, the court may rule that the provision which sought to be amended forms part of the basic structure of the FC which cannot be amended.

[61] In our case, section 4 (1) (a) of POCA does not seek to amend the FC. Hence, the basic structure doctrine (if we are to accept its existence in our jurisprudence) is of no relevance and application to the present challenge.

[62] Given the aforesaid, it is my view that section 4 of POCA is constitutional. The FC has empowered Parliament to legislate on the jurisdiction and powers of the court under Art 74. Art 149 empowers Parliament to legislate laws in relation to preventive detention. Parliament has legislated that powers of the courts is derived from federal law (art. 121) and POCA is one of them. As the Magistrate's powers to grant 21 days remand is provided under section 4(1) (a) of POCA, there is nothing unconstitutional about it.

Whether the Minister abused the power entrusted to him by s. 22 of POCA by including the Common Gaming Houses Act 1953 ('CGHA') as item 5 of the First Schedule. The Minister's power is provided by art. 149 of the FC as well as the recitals to the POCA. Gaming by itself did not come within art. 149(1)(a) of the FC. It is ultra vires the spirit

and intention as expressed in the recitals to POCA read with Article 149

Whether the statement of facts delivered under section 4(1) (a) does not bring the detenu's case within the recitals of POCA.

[63] On these 2 issues raised I refer to the majority judgment in **Zaidi Kanapiah** (supra) and subscribe to their findings as such.

[64] Even in 1959 since the promulgation of POCA, it was the intention of Parliament to include unlawful gaming as one of the categories under POCA.

[65] The meaning of "organised violence against persons or property" should not be viewed in a narrow sense as suggested by learned counsel of the appellant but through the context of the entire scheme of POCA.

[66] There is a nexus between unlawful gambling and criminal organisations. Organised crime groups or syndicates often run illegal gambling operations and the money derived from these illegal gambling operations are being used to fund other criminal activities, as in human trafficking, prostitutions, drugs and weapons, not to mention tax evasion and money laundering. It also propagates the rise of unlicensed loan sharks. These gambling operators and loan sharks uses threats and violence against its gambling and drug customers to force compliance. Unlawful gaming activity and its domino effects on society and public order should never be underestimated. As time progresses, unlawful gaming activity has evolved into a much more sophisticated illicit activity that even in this present day constitutes a threat to family institutions,

social life, public order and safety. The involvement of organised crime in the business of gambling has, on occasion, led to the corruption of law enforcement officers and other government officers in certain regions of the world. Unlawful gaming activity has significant influence on society, both national and internationally and is critical on public health issue.

[67] The aforesaid meets the intendment of the legislature, as its long title expressed, when it enact POCA, namely for effectual prevention of crime throughout Malaysia and for the control of criminals, members of secret societies, terrorists and other undesirable persons, and for matters incidental thereto.

[68] On the other hand, the CGHA is legislated to suppress and control common gaming houses, public gaming and public lotteries. Unlike POCA, CGHA regulates lawful gaming by the issuance of a license by the Minister of Finance under section 27, which authorises a company registered under the Companies Act 1965 to promote and organise gaming.

[69] It was never the intention of the legislature to include the CGHA under POCA and neither was it included in the Schedule to the same as suggested by the Appellants. Thus, the argument of learned counsel for the Appellants that the inclusion of unlawful gaming in the Schedule to POCA is unconstitutional has no merits for the reasons I have stated above.

[70] Premised on the statement in writing signed by ASP Khairol Fairoz bin Rodzuan in enclosure 15, pursuant to section 4(1) (a) show the activities of the appellant falls under the scope of the item as stated under

the First Schedule, Part 1, of Paragraph 5 of POCA. The activities also fall under the scope of the items listed under art. 149 (1) (f) FC, namely activities which are prejudicial to public order in, or the security of, the Federation or any part thereof,"

The recital of POCA did not set out in full Clause (1) of Article 149 FC.

[71] It is the argument of learned counsel that the failure of Parliament to incorporate in the Recital to the Act the complete Clause (1) of Article 149 FC prescribing the intent and purpose would necessarily mean that the POCA is invalid and therefore unconstitutional.

[72] I am not persuaded by such an argument that would result in the Act as being invalid and unconstitutional purely on the technical ground that its recital failed to set out in full Clause (1) of Article 149 FC. So long as the Act in question is passed pursuant to Article 149 and the recital to the Act refers to a permissible item listed therein, the requirement of Article149 is met. The same was also addressed by the majority judgment in ***Zaidi Kanapiah*** (supra) at para (73).

[73] Therefore this argument by the counsel for the appellant has no merits.

Whether the detention was tainted with mala fides:

[74] The appellant contends that the detention was tainted with mala fide because the police officers making the arrest and recommending the detention were also subject of an inquiry by MACC into their corrupt activities. The appellants are material witnesses in that inquiry. The

appellant also said that the detention under section 4(2) (a) amount to an act of contempt.

[75] The Appellants in my view have failed to show *mala fide* as it was only their allegation that the police have detained to shut them up from revealing information to the MACC.

[76] It is to be borne in mind that the principles in determining whether the detention of the appellant is lawful and the grounds relied on, is mala fide, this Court in ***Lew Kew Sang*** (supra) held that:

> **[1]** "The cases decided prior to the amendments, *ie*, 24 August 1989, showed various grounds upon which the detention orders were challenged. *Mala fide* appeared to be the most important ground. Courts seemed to place lesser importance on procedural non-compliance unless the requirement was mandatory in nature. However, the amendments appear to have reversed the position by limiting the ground to only one ground - non-compliance with procedural requirements.",

[77] The only ground accepted to challenge the impropriety of the detention is procedural non compliance of the procedures as set out in the Act pursuant to which the detenu was detained (***Abdul Razak Baharuddin v Ketua Polis Negara*** [2005] 4 CLJ 445)

Further in ***Manoharan Malayalam & Yang lain lwn Menteri Dalam Negeri Malaysia & 1 Lagi*** [2009] 4 CLJ 679 this Court reiterate the stand by the Court that mala fide does not amount to statutory non compliance.

[78] Given the clear authorities as aforesaid, such contention by the detenu that their arrest is mala fide does not amount to a procedural non compliance.

The guidelines in Zaidi Kanapiah by Vernon Ong FCJ:

[79] Parties submitted before us on the viability of the guideline which was stated by my learned brother Vernon Ong FCJ in ***Zaidi Kanapiah*** (supra) can be found at paragraphs 144-147 and submitted that the respondent failed to fulfil the guidelines when granting the remand period of 21 days.

[80] Counsel for the appellant submitted that these guidelines as stated by Vernon Ong FCJ was merely reiterating what is already in the law. However the SFC submitted that, firstly the issue of guidelines for the Magistrates which relate to "Matters to be considered in an application for remand under subsection 4 (1) of POCA " is clearly per incuriam as, firstly, it was never an issue and neither did parties address it at the hearing of the appeal in ***Zaidi Kanapiah*** (supra). Secondly, the guidelines states procedures which are over and above than what is required to be done by the Magistrate in issuing the 21 day remand under section 4 (1) (a) POCA.

[81] Premised on the aforesaid cases referred to, especially ***Lew Kee Sang*** (supra), ***Chua Kian Voon v Menteri Dalam Negeri Malaysia & Ors*** [2019] 6 MLRA 673, in an application for the writ of habeas corpus, the determination of whether a particular preventive detention is lawful or not, depends on what is the statutory requirement as required under the particular Act under which the appellant was detained. In this case it

is section 4 (1) (a) of POCA which provides for the requirements for the remand of 21 days to be granted, which are :

> (a) the production of a statement in writing signed by a police officer not below the rank of Inspector stating that there are grounds for believing that the name of that person should be entered on the Register, remand the person in police custody for a period of twenty-one days; or
>
> (b) if no such statement is produced, and there are no other grounds on which the person is lawfully detained, direct his release.

Those are the 2 requirements required for the 21 days remand to be granted. Nothing more and nothing less, because that is what the law says. The validity of the prior arrest before that is of no consequence because that is not the requirement for the remand of 21 days to be given. Issues like whether "the police diary discloses sufficient facts and particulars to support the arresting officer's belief that grounds exist which would justify the holding of an inquiry into the case of the person arrested" is not a procedural requirement under the section.

[82] It is also to be borne in mind that the procedure of granting remand under the Criminal Procedure Code is not applicable when dealing with remand under POCA. POCA is a special law that deals with remand with a view for detention under preventive law. The Criminal Procedure Code deals with remand under punitive laws. Hence the remand procedure under the Criminal Code is not applicable for remand under POCA.

[83] In any event, with the greatest of respect to my learned brother Vernon Ong FCJ, the procedures as set out in ***Zaidi Kanapiah*** are merely

guidelines and it cannot override and replace the statutory requirements as mandated by section 4 because those are procedures provided by law.

[84] The guidelines goes against the very principle as stated in ***Lew Kew Sang*** when determining whether a particular detention has complied with statutory requirement as mandated by the relevant section in the Act, in determining whether the detention is lawful or not. I agree with the submissions of the learned SFC that the guidelines are per incuriam.

Conclusion:

[85] With regards to the challenge on the detention under section 4 (a) (a), based on the authorities as discussed in the earlier paragraphs, the challenge of the detention of the appellant under section 4(1) (a) is academic as the detention has come to an end and the appellant is no longer detained under the said section. ***Mohd Faizal Harris*** and ***L Rajandren*** is relevant and still good law. The learned trial Judge did not err in upholding the preliminary objection by the respondent and dismissed the application.

[86] In addition, there is no procedural non-compliance of any statutory requirements in the detention of the appellant under the provision of section 4 (1) (a) of POCA.

[87] As for the challenge for the detention under section 4 (2) (a), it has been shown there is no procedural non compliance.

[88] Section 4 of POCA is not unconstitutional. It does not breach art.121 of the FC. Parliament is empowered by the FC to legislate laws prescribing for jurisdiction of the Courts under Art 74, generally, and art 149 specifically for POCA. By prescribing a period of 21 days for remand under section 4(1) (a) of POCA, Parliament did not encroach into the power of the Court as it is within their power to do so, which power was vested by the FC, the supreme law of the Federation. Hence it cannot be said to breach the doctrine of separation of power, in fact it complements the independence and impartiality of the Court (***Letitia Bosman, Lau Kee Hoo).***

[89] The guidelines as stipulated in ***Zaidi Kanapiah*** (supra) is per incuriam as the guidelines provides for procedures which is beyond than what is required under section 4(1) (a) of POCA (***Lew Kew Sang***).

[90] Therefore the learned trial judge did not err when he dismissed the application premised on the fact that the application has been rendered academic. The appeal by the appellant is hereby dismissed. My learned brother, Abdul Rahman Sebli FCJ, who is also providing a supporting judgment, has read the main judgment and has agreed that it be the majority judgment of this court.

Zabariah Mohd Yusof
Judge of the Federal Court,
Putrajaya.
Date: 30.7.2021

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