IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)
CRIMINAL APPEAL NO. 05(L)-289-12/2021

Between

Dato' Sri Mohd Najib bin Hj Abd Razak … Appellant

And

Pendakwa Raya … Respondent

(HEARD TOGETHER WITH)

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Coram:

Tengku Maimun binti Tuan Mat, CJ
Abang Iskandar bin Abang Hashim, CJSS
Nallini Pathmanathan, FCJ
Mary Lim Thiam Suan, FCJ
Mohamad Zabidin bin Mohd Diah, FCJ

BROAD GROUNDS
(*Application for Adjournment*)

INTRODUCTION

[1] Having dismissed the motions to adduce additional evidence, we directed parties to proceed with the appeals. Learned counsel for the appellant, Tuan Haji Hisyam Teh, however moves to adjourn the hearing of the appeals to a later date in three to four months. The basis of his application for adjournment is that he and his team only recently took over and that the appeals – spanning tens of thousands of documents – disclose strong serious points to be canvassed and that his team be given adequate opportunity to do a good job.

[2] To put it bluntly, the defence seeks an adjournment of these appeals for the simple reason that they are not prepared.

[3] The respondent's position is that the fixing of the dates of the appeals in August 2022 has been known since as far back as the case management on 8.4.2022 – which is some four months ago. Parties were then advised that the Court would proceed on the dates fixed. The Court's minutes of the case management on 8.4.2022 confirm this. Parties were therefore well aware that the Court will proceed on those dates.

[4] The Federal Court Registry, issued a Notice of Hearing dated 29.4.2022 informing all parties that the hearing of the appeals is scheduled on 15.8.2022 to 26.8.2022. Therefore, any change in counsel was done with full knowledge of the dates that have been fixed for hearing.

[5] Then, on 26.7.2022, the Court received a letter from the appellant's former solicitors, Messrs. Shafee & Co. stating that the appellant had discharged them as his solicitors on record. This is in Enclosure 237. The former solicitors clearly indicated that the choice to discharge the former solicitors was the appellant's. Messrs. Shafee & Co stated as follows:

> "2. Sila ambil perhatian bahawa pada 25 Julai 2022, jam lebih kurang 5.00 petang, **pihak kami telah menerima sesalinan surat dari Dato' Sri Mohd Najib Bin Hj Abd Razak ("Perayu")** yang mana Perayu telah memberhentikan (discharged) dengan serta merta Tetuan Shafee & Co. daripada bertindak sebagai kaunsel dan peguamcara yang mewakili beliau di dalam Rayuan-Rayuan Jenayah ini dan Prosiding-Prosiding berkenaan. Menerusi surat yang sama, Perayu telah memaklumkan bahawa beliau telah melantik Tetuan Zaid Ibrahim Suffian TH Liew & Partners ("ZIST") sebagai peguamcara.".
>
> [Emphasis added]

[6] It is obvious that the appellant took it upon himself to discharge his solicitors to the present ones, Messrs. Zaid Ibrahim Suflan TH Liew &

Partners ('Messrs. Zaid Ibrahim') who in turn appointed Tuan Haji Hisyam Teh as lead counsel.

[7] Messrs. Zaid Ibrahim thereafter wrote to Court vide a letter dated 26.7.2022 notifying and confirming the change of solicitors. Their letter is to be found in Enclosure 239. In this letter, Messrs. Zaid Ibrahim requested for an urgent case management and sought permission to participate in a case management that was already fixed on 29.7.2022. They also stated their intention to put on record their motion to adjourn for the reason that "a wholly new team has taken over the conduct of the above matter".

[8] The Court's reply is to be found in Enclosure 245 which contains a letter dated 28.7.2022 stating two things. Firstly, the Deputy Registrar of the Federal Court, Puan Wan Fatimah Zaharah binti Wan Yussof, confirmed the case management on 29.7.2022 and secondly, indicated the Court's directions that the hearing of the appeals would proceed as scheduled on 15.8.2022 to 26.8.2022. In short, the Court refused the adjournment.

[9] It is to be noted that despite having been discharged by the appellant on 25.7.2022, the appellant's former counsel Tan Sri Shafee Abdullah had nonetheless attended the case management on 29.7.2022. This is reflected in the Court's minutes for case management on 29.7.2022.

[10] The case management minutes on 29.7.2022 also disclose that Tan Sri Shafee had advised the Court that the digital copies of the records of appeal had been uploaded and shared with the new counsel, Messrs. Zaid

Ibrahim on 22.7.2022. This is despite discharge only having been effected subsequently on 25.7.2022.

[11] Finally, the minutes also state that the Court reminded parties, no less than four times, that the appeals will proceed as scheduled notwithstanding the change in solicitors.

[12] It is against this backdrop that an adjournment is sought once again.

DECISION

The Law on Adjournments

[13] It is beyond settled that though the Courts have absolute discretion to grant or refuse adjournments, such discretion must be exercised judiciously. What is judicious hinges on a proper and wholesome consideration of the facts and circumstances of the case before making a decision.

[14] In the context of this case, we accept unreservedly the notion that the right to a fair trial is part and parcel of the right to life and personal liberty guaranteed by Article 5(1) of the Federal Constitution. See: *Yahya Hussein Mohsen Abdulrab v Public Prosecutor* [2021] 5 MLJ 811. The right of the accused to meaningful legal representation by counsel of his choosing is another important component of the right to a fair trial. This much is also apparent from Article 5(3) of the Federal Constitution but we hasten to add that this right is not absolute.

[15] This leads us to the primary reason given by counsel for the appellant in favour of an adjournment which we stated earlier. In short, an adjournment ought to be granted because the new defence team needs adequate time to prepare. In the other words, they are not ready.

[16] We start by saying that we agree that in appropriate cases, where counsel is not ready to proceed for legitimate reasons, the Court should be minded to adjourn a cause or matter. We do not think this is the case here.

[17] Firstly, from our narration of the procedural history on the fixing of these appeals, all parties to this matter, including the appellant, were well aware that the appeals had been fixed for hearing on 15-26.8.2022 since April 2022 and the request for an adjournment on the same ground had been refused.

[18] In this regard, we find Rule 6(a) of the Legal Profession (Practice and Etiquette) Rules 1978 ('1978 Rules') most relevant. It stipulates thus:

> "**Rule 6. An advocate and solicitor not to accept brief if unable to appear.**
>
> (a) An advocate and solicitor shall not accept any brief unless he is reasonably certain of being able to appear and represent the client on the required day.".

[19] Thus, where counsel has accepted a brief, he should be deemed as 'reasonably certain of being able to appear and represent the client on the required day'. The 1978 Rules also appear to recognise the general disposition of the Courts in this country to disfavour adjournments unless

cogent reasons are provided. The general rule is that counsel shall make every effort to be ready for trial (and we think by extension appeals) on the day fixed. See: Rule 24(a) and (b) of the 1978 Rules.

[20] The 1978 Rules are not, in a sense, binding on the Courts. But they are nevertheless binding on members of the Bar who are obliged to comply with them. And, they are indicative of the fact that any disciplined lawyer such as the counsel for the appellant would not have accepted a brief with dates already fixed for hearing unless he was prepared.

[21] In fact, the appellant having been well aware of the dates fixed for hearing elected to discharge his former solicitors and appoint Messrs. Zaid Ibrahim and Tuan Haji Hisyam Teh as his solicitors and counsel respectively. This is his right to do so but he cannot, after having made that decision, turn around and say that his new lawyers are not ready to proceed with the hearing of the appeals. The new lawyers too, having accepted the brief, are not entitled to say they need more time to prepare knowing fully well that the dates had been fixed well in advance.

[22] Given the circumstances we have outlined, the request for the adjournment and the grounds in support thereof are neither cogent nor reasonable.

[23] In this regard, we recall the following words of Harun J from *Public Prosecutor v Mohtar bin Abdul Latiff* [1980] 2 MLJ 51, at pages 51-52:

> "In any criminal trial, there are three parties, the Court, the prosecution and the defence. If dates of hearing are to be fixed at the convenience of all three parties, then trial dates will be fixed at some considerable time hence. There

> is of course no guarantee, as happened in this case, that the trial will go on as scheduled on the date fixed, if everyone's convenience is taken into account. The general rule, therefore, has always been that trial dates are fixed at the convenience of the court, on a first-come-first-served basis. This is fair to all concerned. Public funds are not wasted on idle courts when there is so much work to do.".

[24] The stark reality is that considerable public funds would be wasted if granting an adjournment in a case of this kind was an easier option. Article 8 of the Federal Constitution and the Rule of Law demand that the appellant be treated just like any other accused. As such, we state again that while the appellant is entitled to his right to change his counsel, he is not entitled to make this choice at the expense of the Court, the prosecution or the entire justice system.

[25] While on this subject, another very significant component of the right to a fair trial is that justice cannot be unduly delayed. In this regard, we remind ourselves of Arahan Amalan Ketua Hakim Negara No 2/2003 which states that cases of this nature must be prioritised.

[26] Further, the time taken on this case, especially the number of days fixed for hearing means many other criminal cases and accused persons have had to wait their turn for their appeals to be heard. Justice delayed in this case is also justice denied to other accused persons. In this regard we echo the following words of Richard Talalla J in *Lai Cheng Chong v Public Prosecutor* [1993] 3 MLJ 147, at page 151:

> "At no time has it been truer to say that justice delayed is justice denied. It cannot be disputed that at this point of time, justice is so delayed in our courts as to amount to denial. There is a huge backlog of cases. Statistics indicate

> that a main cause for this unfortunate situation is adjournment and postponement of trials on the date appointed for trial, largely occasioned by counsel applying for the same on a variety of grounds, most of them avoidable if counsel's affairs were managed fairly and reasonably, bearing in mind counsel's duty not only to the client but also to the court and the public at large.".

[27] For these reasons, the appellant's motion to adjourn and vacate these appeals for a period of at least three to four months is unanimously refused.

Dated: 16th August, 2022.

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

(ABANG ISKANDAR BIN ABANG HASHIM)
Chief Judge of Sabah and Sarawak,
Federal Court of Malaysia.

(NALLINI PATHMANATHAN)
Judge,
Federal Court of Malaysia.

(MARY LIM THIAM SUAN)
Judge,
Federal Court of Malaysia.

(MOHAMAD ZABIDIN BIN MOHD DIAH)
Judge,
Federal Court of Malaysia.