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
(*The Main Appeals*)

INTRODUCTION

[1] The appellant in this case is the former Prime Minister of Malaysia, Dato' Sri Mohd Najib bin Haji Abdul Razak. He was charged with seven offences against his conduct in relation to a company called SRC International Sdn Bhd ('SRC'). The High Court found him guilty and convicted him on all seven charges. The sentence imposed on the appellant is an aggregate concurrent custodial sentence of twelve years and a fine of RM210 million (in default 5 years' imprisonment). The Court of Appeal affirmed the conviction on all seven charges and the sentence imposed. In these three appeals before us, the appellant challenges the conviction and sentence.

[2] We must state that respondent has not challenged the measure of the sentence imposed against the appellant.

[3] The seven charges against the appellant are, in summary, simply these. The first charge relates to abuse of power under section 23 of the Malaysian Anti-Corruption Commission Act 2009 ('MACC Act 2009'). The next three charges are on criminal breach of trust under section 409 of the Penal Code while the last three charges are under section 4(1)(b) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('AMLA 2001').

[4] At the outset, we state that counsel for the appellant, Tuan Haji Hisyam Teh, impressed upon us with considerable fervour that these appeals concern strong serious points of law and fact. In point of fact, we find that there is nothing complex in these appeals. Putting aside the personality of the appellant, this is a simple and straightforward case of abuse of power, criminal breach of trust and money laundering.

[5] The trial itself took an aggregate number of at least 86 days (57 for the prosecution case and 29 days for the defence). It is understandable that the trial took that long because of the number of witnesses involved, the sheer number of documents and due to the fact that a great part of the trial took place during the Covid-19 pandemic. However, these considerations do not in themselves render the case complex.

[6] This area of the law is very much settled. There is an abundance of cases on the law on abuse of power (the first charge) and money-laundering (the last three charges). The Penal Code too was first enacted in 1936 and section 409 and the entire body of law on criminal breach of trust has developed since then. There are to our minds, no novel legal issues on this area of the law. The issues in these appeals mostly concern issues and findings of fact. It bears mentioning, and this will be elaborated

in greater detail later, that as the apex Court, our role is not to make new findings of fact but to consider whether the existing findings are correct.

[7] Before we proceed to state our unanimous decision, we must first address some preliminary issues.

PRELIMINARY ISSUES

Counsel for the Appellant's Refusal to Make Submissions

[8] These appeals were fixed for hearing on the 15th of August to the 19th of August 2022 and the 23rd of August to the 26th of August 2022. This constitutes a total of nine days.

[9] The first two days of the appeal, the 15-16.8.2022, were spent on the appellant's motion to adduce fresh evidence. We considered the motion and on 16.8.2022, after careful deliberation, we unanimously dismissed them with written grounds stating our reasons for doing so. On the same day of 16.8.2022, we instructed parties to proceed with the substantive merits of the appeals. Tuan Haji Hisyam Teh, counsel for the appellant stated that he and his team, being the new lawyers for the appellant, were not prepared to argue the main appeals and moved to adjourn the appeals for three to four months.

[10] We stood down to consider the application for adjournment and on 16.8.2022 itself, we provided our written grounds stating our reasons for refusing the adjournment. In those written broad grounds, we stated the procedural history leading up to the appeals and how parties were well aware that the appeals will proceed and that the reasons of not being

ready to argue the appeals would not be accepted. While the appellant was entitled to change his counsel from Messrs. Shafee & Co. to the present ones, he did so mindful of the date of the appeals. He cannot then turn around and say, having changed them so late in the day and counsel having accepted the brief when they did, that new counsel and solicitors are not ready. In any event, we agreed to vacate the hearing on 17.8.2022 (Wednesday) with the view to allowing time to counsel for the appellant to organise themselves.

[11] The hearing of the appeals commenced on 18.8.2022 (Thursday). Again, on the morning of that day, counsel for the appellant moved to adjourn the appeals on the ground that he and his team were not prepared. With the adjournment refused yet again, Tuan Haji Hisyam Teh moved to discharge himself as counsel for the appellant. However, the Court, in invoking its inherent power to prevent abuse of process and injustice, refused counsel's application to discharge himself as that would have left the appellant unrepresented. Tuan Haji Hisyam Teh thus remained on record as counsel for the appellant.

[12] After discharge was refused, we proposed that the respondent submit first with the view to providing Tuan Haji Hisyam Teh time to prepare his submission. We asked Tuan Haji Hisyam Teh whether he would rely on the submission filed by the appellant in the Court of Appeal. He confirmed that he would rely on them. The respondent commenced their submissions in the morning and we broke for lunch thereafter. After the lunch break, Tuan Haji Hisyam Teh informed the Court that 'the correct position is that the Court can rely on the appeal records' which would include the submissions filed in support of the appeal in the Court of Appeal. Most critically, counsel for the appellant requested for leave to

file written submissions in the Federal Court and perhaps to amend the petition of appeal. We duly allowed counsel for the appellant full liberty to do so. Thereafter, the respondent completed their submission for the day and requested to continue the rest of their oral submission on the next day.

[13] Come the next day, 19.8.2022 (Friday), before the respondent continued with their oral submission, Tuan Haji Hisyam Teh informed the Court that the appellant had on his own accord, discharged his solicitors Messrs. Zaid Ibrahim Suflan TH Liew & Partners. We note that the appellant did not discharge Tuan Haji Hisyam Teh and his team of supporting counsel Messrs. Low Advocates & Solicitors. Tuan Haji Hisyam Teh and his supporting counsel, in accordance with the order of the Court on 16.8.2022, remained on record and were present in Court throughout the hearing. By the end of the day, the respondent completed their oral submission on the appeals.

[14] At this point, it bears repeating that first, Tuan Haji Hisyam Teh stated that he would rely on the submissions filed in the Court of Appeal. He later stated that this Court could instead, as a matter of course rely on those submissions as they comprise part of the records of appeals. Counsel then asked for permission to file written submissions, and if need be, amend the petition of appeal. At the close of the hearing on 19.8.2022 however, counsel took a different position stating that he would not be making any submission oral or written despite the Court having given him the opportunity to do so.

[15] In fact, we asked counsel on 19.8.2022 (Friday) if he would submit on Tuesday, 23.8.2022 which was the next date fixed for hearing. Tuan

Haji Hisyam Teh stated that 'he would not be submitting'. We clarified whether this included even oral submission, and counsel confirmed that he would not be making any submission on any of the 94 grounds of appeal in the petition of appeal – even oral submission. We told counsel that he had at least three days to prepare (that is the weekend and the Monday of 22.8.2022). He, despite this, and despite having asked for leave to file a written submission, took the position that he will not submit. Come 23.8.2022, counsel again confirmed that he will not be making any submission on the appeal – oral or written. This again, is in spite of his previous request to file a written submission.

[16] In the circumstances, we cannot but conclude from the above facts that counsel, having been given the opportunity to prepare oral or written submissions, refused to make any submission.

Duty of the Court in the Absence of Submissions from the Appellant

[17] The question, in light of the counsel for the appellant's refusal to make submissions is, how is this Court supposed to proceed with the disposal of these appeals. In this vein, the respondent advanced the following authorities on how this Court is to proceed in such circumstances. They cited the following cases:

(i) *Mohd Zulkifli bin Md Ridzuan v Public Prosecutor* [2014] 1 MLJ 257;

(ii) *Nordin Hamid & Co v Pathmarajah* [1990] 2 MLJ 308;

(iii) *Go Pak Hoong Tractor and Building Construction v Syarikat Pasir Perdana* [1982] 1 MLJ 77

(iv) *Mohamed bin Abdullah v Public Prosecutor* [1980] 2 MLJ 201;

(v) *Public Prosecutor v Tanggaah* [1972] 1 MLJ 207;

(vi) *Tan Teow Swee v R* [1955] 21 MLJ 76; and

(vii) *Hayati bte Aizan v Public Prosecutor* [2000] 1 MLJ 359.

[18] None of the above authorities deal with the specific situation where counsel has been retained on record by inherent power of the Court and which counsel, having been given time and opportunity to submit, refuses to submit. The authorities above do however deal with cases where the accused himself is (1) absent or (2) is left without his counsel or (3) counsel continues to represent the accused but is absent on the day fixed for trial or hearing. It has been held in those cases that the Courts may still refuse to grant an adjournment and may proceed with and dispose of those cases even in the absence of the appellant or counsel. The proceedings in those cases were not vitiated on account of a breach of natural justice.

[19] The principle in those cases, in our view, extends to the present case where counsel is present in name and in body but refuses, for whatever reason, to make any submission even though he was given time and called upon to do so. This is also supported by section 313 of the Criminal Procedure Code which provides as follows:

“**Procedure at hearing**

313. (1) When the appeal comes on for hearing the appellant, if present, shall be first heard in support of the appeal, the respondent, if present, shall be heard against it, and the appellant shall be entitled to reply.

(2) **If the appellant does not appear to support his appeal the Court may consider his appeal and may make such order thereon as it thinks fit:**

Provided that the Court may refuse to consider the appeal or to make any such order in the case of an appellant who is out of the jurisdiction or who does not appear personally before the Court in pursuance of a condition upon which he was admitted to bail, except on such terms as it thinks fit to impose.”.

[Emphasis added]

[20] The above section applies in relation to criminal appeals to the High Court but we see no reason why it ought not to apply analogously to appeals to the Federal Court from the Court of Appeal. The instant appeals mirror a position similar to that envisaged in section 313(2) in that while the appellant and his counsel are physically present, they deliberately refuse to participate in the appeal hearing. This, in our view, is equivalent to the appellant ‘not supporting’ the appeals. In such circumstances, the Court is empowered to proceed with the appeal.

[21] Further, as explained in our broad grounds delivered on 16.8.2022 refusing the oral request for adjournment, counsel is not entitled to request for an adjournment on the ground that he is not prepared if he already accepted the brief knowing full well that the case had long been fixed for hearing. He cannot therefore refuse to make submissions in protest of not being granted an adjournment. Adjournments are granted with the

discretion of the Court and they are not a tool to be used to hold the Court to ransom.

[22] Having said that, we shall now proceed to consider the appellant's case by having regard to the appeal records including the petition of appeal enclosing 94 grounds of appeal, the submissions filed in the Court of Appeal and the written judgments of the High Court and the Court of Appeal. In so doing, we find it necessary to state the settled role of the apex Court as the final and apex court of appeal.

The Role of the Apex Appellate Court

[23] We do not consider it necessary to reproduce the charges or repeat any of the facts which have been adequately stated and analysed in the lengthy judgments of the High Court and the Court of Appeal. The High Court judgment is reported in *Public Prosecutor v Dato' Sri Mohd Najib bin Hj Abd Razak* [2020] 11 MLJ 808 while the Court of Appeal judgment is reported in *Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor* [2022] 1 MLJ 137.

[24] The High Court judgment is especially lengthy because the learned trial Judge undertook an extensive analysis of all the evidence – documentary and oral that surfaced before him over the 86 or so days of trial. The Court of Appeal, though the judgment is not as long, meticulously examined these findings and found no appealable errors.

[25] The role of the apex Court, as is settled law, is not to make any new findings of fact on the evidence on record or to substitute those findings with its own. In this regard, where there are concurrent findings of fact

before the apex Court, the apex Court would not be inclined to disturb those findings unless it can be shown that they are perverse, for example, if it can be shown that those findings were made in the absence of any evidence supporting them. See: *Puganeswaran a/l Ganesan & Ors v Public Prosecutor and other appeals* [2020] 12 MLJ 165 (Federal Court).

[26] In light of this, all appellants in criminal appeals must understand that the burden is on them in the apex appellate Court not to reargue the submission at trial but to show that the concurrent findings were perverse so as to warrant appellate intervention and for the reason that those perverse findings materially occasioned a miscarriage of justice. In those circumstances, appellate intervention is warranted by the apex Court to correct those findings, resulting in an outright acquittal or an order for retrial – depending on the circumstances.

[27] In the present case, the respondent took us through their submissions and illustrated how the findings of the trial judge were supported by the evidence. The respondent argued that a *prima facie* case was validly established at the close of the prosecution case and that the defence, when called, was adequately considered and found not to raise a reasonable doubt thereby resulting in a safe conviction on all seven charges.

The Appeals

[28] In these circumstances, we shall now proceed to state our findings in relation to the main appeals. In the absence of any submissions from the appellant, we turn our attention to the 94 grounds of appeal in the

petition of appeal. We have examined them in great detail and in our view, they disclose only two main complaints, as follows.

[29] Firstly, that the Court of Appeal erred in fact and in law by finding that the High Court Judge had correctly found that the prosecution had made out a prima facie case on all seven charges.

[30] Secondly, that the Court of Appeal erred in fact and in law by finding that the High Court Judge had correctly appreciated the defence. It is argued that the defence managed to raise a reasonable doubt on all seven charges.

[31] As stated earlier, in order to warrant appellate intervention in the face of concurrent findings of fact, the appellant must show that the said concurrent findings of the Courts below are so perverse that they occasioned a miscarriage of justice.

[32] The respondent, over the course of two full days, took us through the evidence and the High Court's findings in relation thereto. The respondent illustrated how the evidence was so overwhelming that at the close of the prosecution case, the learned trial judge was satisfied in law and in fact that all the ingredients of all the seven charges were satisfied to warrant calling for defence. We have considered these submissions in length and find that the learned High Court Judge, undertook a very deep, detailed, objective and extensive analysis of the evidence to support his findings at the close of the prosecution case. In the circumstances, we fail to see how and where any of the learned trial judge's findings leading to the ultimate finding that a *prima facie* case had been made out, are perverse. The learned trial Judge correctly held that all the ingredients of

the seven charges were established at the close of the prosecution case to warrant calling the appellant to enter his defence.

[33] The respondent then took us through the defence case and highlighted how the defence was completely inconsistent and incoherent, and unworthy of belief. For the record, during the trial the appellant never really disputed whether the SRC funds in issue in this case ever entered the appellant's personal bank accounts. Instead, he challenged the *mens rea* element of all the seven offences, that is, the appellant denied knowledge that the funds were from SRC.

[34] The respondent maintains that the defence was unworthy of belief because, on the one side, the defence maintained that the RM42 million said to be have been wrongfully gained by the appellant to the wrongful loss to SRC was not within the knowledge of the appellant. Then on the other hand, the appellant maintained that he was framed in a conspiracy hatched by one Low Taek Jho ('Jho Low'), Azlin Alias, Nik Faisal Ariff Kamil, and the bankers. Then, the appellant also maintained the defence that the monies that were credited into his personal AmIslamic bank accounts, i.e. Accounts 880 and 906 which are the subject of the last six charges, were received from Arab Donations from Saudi Arabia. The respondent contended in essence, that they had always maintained at trial that the narrative of these defences, are completely inconsistent and diametrically opposed to one another.

[35] According to the respondent, the learned High Court Judge correctly evaluated all the evidence led in relation to the defence and did not believe the defence narrative.

[36] We have not been shown why these findings are incorrect such that the Courts below should have believed that they, taken together or severally, would have casted a reasonable doubt on the seven charges. We agree that the defence is so inherently inconsistent and incredible that, when considered in totality, does not raise a reasonable doubt. We also agree that the learned High Court Judge thoroughly considered the defence and undertook a thorough analysis of the evidence produced by the defence and made findings thereupon to the effect that the defence was not capable of belief and hence did not raise a reasonable doubt on the prosecution case. We are unable to conclude that any of these findings, as affirmed by the Court of Appeal were perverse or plainly wrong so as to warrant appellate intervention.

[37] In the circumstances, and having pored through the evidence, the submissions and the rest of the records of appeal, we are not satisfied that the conviction on all seven charges is unsafe.

CONCLUSION

[38] Based on the foregoing, it is our unanimous view that the evidence led during the trial points overwhelmingly to guilt on all seven charges so much so that it would have been a travesty of justice of the highest order if any reasonable tribunal, faced with such evidence staring it in the face, were to find that the appellant is not guilty of the seven charges preferred against him.

[39] We are not satisfied that that any of the findings of the Courts below are perverse so as to warrant appellate intervention from this Court.

As such, it is our unanimous finding that the appellant's conviction on all the seven charges is safe.

[40] These appeals are therefore unanimously dismissed and the conviction and sentence are affirmed.

Dated: 26th 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.