APPEAL FROM THE HIGH COURT TO THE COURT OF APPEAL AGAINST A BAIL DECISION : *DATO' SERI ANWAR BIN IBRAHIM V PUBLIC PROSECUTOR*

In the case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor,*[1] three major points were discussed. The first was in relation to the question of whether a bail decision by the High Court is appealable to the Court of Appeal.

Section 307(1) of the Criminal Procedure Code (CPC) allows any person to appeal to the High Court against a judgment, sentence or order of a lower court. The word 'judgment' has been defined as: 'The official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination. The final decision of the court resolving the dispute and determining the rights and obligations of the parties'[2] whilst the word 'sentence' has been defined as: 'The judgment formally pronounced by the court or judge upon the defendant after his conviction in a criminal prosecution, imposing the punishment to be inflicted'.[3] It is clear therefore that an acquittal or a conviction may be appealed against. Similarly, a sentence may be appealed against if either the prosecutor or the accused is dissatisfied with it. What about the 'order' then?

According to *Black's Law Dictionary*, an 'order' means 'a mandate; precept; command or direction authoritatively given, rule or regulation ... Direction of a court or judge made or entered in writing,

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[1] [1999] 1 MLJ 321.

[2] *Black's Law Dictionary,* (6th. ed.), 841-842.

[3] *Op.cit.* 1362.

and not included in a judgment, which determines some point or directs some step in the proceedings'.[4]

In the case of *Public Prosecutor v Hoo Chang Chwen*[5] the magistrate had ruled that copies of statements made to the police should be supplied to the defence. The Crown wished to appeal against this ruling, as it was thought that the ruling was an appealable matter. Rose C.J. held otherwise because:

> to arrive at any other conclusion would seem to me to open the door to a number of appeals in the course of criminal trials on points which are in their essence procedural. The proper time, of course, to take such points would be upon appeal, after determination of the principal matter in the trial court.[6]

In *Public Prosecutor v R.K. Menon & Anor,*[7] it was contended by the defence counsel that the requirements of section 129(1)(b) of the CPC had not been complied with. The president of the sessions court overruled this objection. The defence appealed against this ruling. The High Court, however, exercised its power of revision. The defence counsel, meanwhile, had conceded that the ruling was a procedural one and therefore unappealable. Ajaib Singh J. elaborated on this principle:

> The legislature has for good reason refrained from making any provision for an appeal to be preferred against a procedural ruling made in the subordinate court in a criminal case or matter. In the course of criminal trials in the subordinate courts the presiding officers quite often make rulings on questions which are purely procedural in nature. If an appeal is allowed to be preferred by the prosecution or the defence against a procedural ruling further hearing of the particular criminal trial in the subordinate court will necessarily have to be stayed pending the outcome of the appeal in the High Court.

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[4] *Op.cit.* 1096.

[5] [1962] MLJ 284.

[6] *Ibid.*

[7] [1978] 2 MLJ 152.

> Imagine the number of such appeals which are bound to be preferred against scores of procedural rulings which are a daily occurrence in criminal trials in the subordinate courts in the country. The result would be that the whole administration of criminal justice would be bogged down.[8]

In *Datuk Mahinder Singh v Public Prosecutor,*[9] no written sanction of the Public Prosecutor was obtained and the High Court held, agreeing with *R.K. Menon* that there was no right of appeal.

In *Marzuki bin Mokhtar v Public Prosecutor,*[10] the attempted appeal was against the ruling at the end of the prosecution case that there was a case for the accused to answer on the charge against him. Tan Chiaw Thong J. referred to *Sarkar's Code of Criminal Procedure 1973* which states that the word 'judgment' in criminal proceedings indicates the final order in a trial terminating in the conviction or acquittal of the accused, and adopted it. The ruling certainly is not a 'sentence', and neither is it an 'order' because when the former paragraph (f) of section 173 of the CPC used the word 'order', it was in relation to the acquittal. That word was not used where the court ruled that there was a case for the accused to answer. The ruling in question therefore did not fall within this definition of 'order'.

In *Oh Teck Soon v Public Prosecutor,*[11] it was held that the ruling of the magistrate overruling the preliminary objection of the learned counsel was not a ruling on mere procedure from which there could be no right of appeal. The ruling went to the very jurisdiction of the magistrate's court and therefore the appeal was in order.

In *Public Prosecutor v Raymond Chia,*[12] it was contended that an order of the president under section 51 of the CPC, that is, a summons issued to the person in whose possession or power some property or document is believed to be requiring him to attend and produce it at the time and place stated in the summons, was merely procedural and

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[8] *Id.* 152.

[9] [1987] 2 CLJ 39.

[10] [1981] 2 MLJ 155.

[11] [1983] 1 CLJ 244.

[12] [1983] 1 CLJ 321.

therefore unappealable. An analogy was drawn to the earlier cases of *R.K. Menon* and *Hoo Chang Chwen* but this was rejected by the High Court which held that that order was a final order and therefore appealable.

When accused persons are produced before the lower courts for their trial and after the charges are read, either party may raise certain objections or make certain applications before the court. In *Maleb bin Su v Public Prosecutor,*[13] there were appeals against the dismissal by the president and a magistrate of applications made by respective counsels at the commencement of the hearing. The applications were based on the argument that the president or magistrate should disqualify himself from proceeding with the case on the ground that he belonged to a service in which the Attorney-General is said to be the head of the service. Since the Attorney-General is also the Public Prosecutor and has supervision and control of these judicial officers it was alleged that there was a likelihood of bias. The High Court held that the dismissal of the application to disqualify did not finally dispose of the rights of the accused persons and the order was therefore not a proper matter for appeal. The High Court held this after referring to the Indian case of *Mohammad Amin Bros. v The Dominion of India.*[14] It said:

> There is no argument, in my opinion, that the *ejusdem generis* rule applies to the word "order" which is preceded by the words "judgment" and "sentence". The order must therefore be a final order in the sense that it is final in effect as in the case of a judgment or a sentence. The test for determining the finality of an order is to see whether the judgment or order finally disposes of the rights of the parties.[15]

In the Singaporean case of *Mohamed Razip v Public Prosecutor,*[16] the Court of Criminal Appeal had to decide whether an order on a bail application was appealable. The relevant words in section 44(1) of the

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[13][1984] 1 MLJ 311.

[14]A.I.R. 1950 F.C. 77.

[15]*Id.* 312.

[16][1988] 1 MLJ 84.

Singaporean Supreme Court of Judicature Act (SCJA) are 'any decision made by the High Court in the exercise of its original criminal jurisdiction.' Viewed in the light of other provisions of the Act, Wee Chong Jin CJ. felt that the jurisdiction of the Court of Criminal Appeal is to hear appeals against orders of finality, that is, those resulting in conviction and sentence, or acquittal. His Lordship referred to the Indian case of *Re Balasundara Pavalar*,[17] where Govinda Menon J. delivering the judgment of the Madras High Court thought that an order on a bail application does not finally determine the guilt or innocence of a person accused or convicted of an offence. Such an order was merely 'an interlocutory and tentative expression of the conclusion as to whether a person should be set at large pending trial, or disposal of his appeal, and nothing more'. Wee Chong Jin CJ. agreed with the views expressed and concluded that an order made on a bail application, being interlocutory and tentative in nature, does not fall within the purview of section 44 of the SCJA and is therefore a non-appealable order.

Many of the above cases were discussed in *Mohamed Anuardin bin Abdul Salam & Anor v Pendakwa Raya*.[18] In this case, a sessions court judge who replaced his predecessor, decided to continue with the proceedings where his predecessor had left. The two accused persons appealed to the High Court. A preliminary issue to be disposed of was whether the decision of the succeeding sessions court judge to continue the proceedings was appealable or not. *Raymond Chia's* case was particularly emphasised by counsel for the second appellant who sought to justify the appeal on the principle enunciated in that case. Kang Hwee Gee J., however, decided that 'the order of the sessions court judge could not be a final order as any exercise of his discretion, even if wrongful, could still be raised at the appeal of the case proper'. Besides, section 261(b) allows the High Court to act to set aside any conviction if it is of the opinion that the appellants have been materially prejudiced by the fact that the conviction was based on evidence not wholly recorded by the judge who convicted them. The learned judge distinguished *Raymond Chia* because there, the application was

[17] A.I.R. 1951 Madras 7.

[18] [1996] 3 MLJ 298.

made at the pre-trial stage. The order made by the court to disallow the application must therefore be a final order as the defence would have to proceed with the trial without the documents they had asked for. In the present case, however, the aggrieved parties could still appeal to the High Court after the case is heard. The decision of the sessions court judge was therefore not a final order and unappealable. The learned judge, however, went ahead with the merit of the appeal on the assumption that the order was appealable.

Mohamed Anuardin bin Abdul Salam and the earlier cases were discussed in *Tennakoon D Harold v Public Prosecutor.*[19] In this case, the sessions court judge had overruled the defence's objection for certain documents to be marked as exhibits. The defence filed an appeal against that decision. The issue before the High Court was whether there was a right of appeal against a procedural ruling made in this case. The High Court held that there is no such right. The appeal was therefore dismissed.

For appeals from the High Court to the Court of Appeal, section 50(1) of the Courts of Judicature Act 1964 (CJA) is relevant. It reads:

> (1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court -
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> (a) in the exercise of its original jurisdiction; and
> (b) in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.

The definition for the word 'decision' first appeared in the CJA in 1984, through the Courts of Judicature (Amendment) Act 1984[20] and took effect from 1 January 1985. That definition read: '"decision" includes judgment, sentence or order'. In 1998, that definition was substituted with a new one, as follows:

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[19] [1997] 4 MLJ 497.

[20] Act A606/84.

> "decision" means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.[21]

In the case of *Saad bin Abas v Public Prosecutor*,[22] the two applicants were acquitted and discharged by the magistrate at the end of the prosecution case. The prosecutor appealed and the High Court allowed the appeal with the order that both the applicants were to enter their defence before the magistrate. The applicants were unhappy with this decision and applied for leave to appeal to the Court of Appeal under section 50(2) of the CJA.

Counsel for the applicants submitted that the words 'decision of the High Court' appearing in subsection 50(2) must mean that the decision is final and therefore appealable. The deputy public prosecutor, however, submitted that the order of the High Court must be complied with and the proceedings before the magistrate must continue.

Lamin PCA, delivering the judgment of the Court of Appeal, fell back on the trial process which should be allowed to complete before it may be said that the rights of the parties have been finalised. He said:

> A complete criminal trial involves both the case for the prosecution and the case for the defence. This is implied from the very charge itself. A charge accuses a person of having committed an offence. That suggests that he has to put up his defence. The moment the prosecution has proved its case meaning that the court has decided that there is a case for the accused to answer, the accused must therefore forthwith enter his defence. So it would be premature to question whether the decision calling for the accused to enter his defence was right or wrong. The proceedings must continue until the end of the case for the defence and only then would the court be able to finally decide the fate of the accused. On the other hand, if he is acquitted at the end of the case for the prosecution, that means that

[21] See Act A1031/98, w.e.f. 1 August 1998.

[22] [1999] 1 MLJ 129.

> the court has decided the fate of the accused and that as far as that court is concerned, the accused is a free man. Similarly, when a High Court judge rules at the end of an appeal by the prosecutor in a case where the accused has been acquitted at the end of the prosecution case that the accused must enter his defence, it is as good as saying that the sessions court judge himself has decided to call for the defence assuming that he has analysed the case in the way that the High Court judge has done. Only after he has heard the defence can he finally decide the fate of the accused.[23]

His Lordship felt that the position is the same with regard to criminal trials in the High Court. Referring to the definition of 'decision' in the CJA, his Lordship ruled that the decision of the High Court in this case in ordering the applicants to enter on their defence was not a ruling that had the effect of finally disposing of their rights. This would happen only after a decision had been made at the close of the defence case.

Following *Saad bin Abas* was the Court of Appeal decision in the case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor.*[24] The appellant was charged in the High Court and pending the hearing of his case had applied for bail. The High Court refused the application. The appellant appealed to the Court of Appeal.

The issue before the Court of Appeal was whether the matter of bail is appealable to it. N.H. Chan JCA., delivering the judgment of the court, felt that the new definition of the word 'decision' excludes the type of judgments and orders which are termed 'interlocutory'. Guided by *Halsbury's Laws of England,*[25] his Lordship explained 'interlocutory', in the context of a bail decision, as follows:

> For instance, an order granting or refusing bail is final (conclusive) as to the application with which it deals but it is still an order which does not deal with the final rights of the parties. Such an order is made before judgment or sentence and gives no final decision on the matters in dispute. A judgment or order, even though not conclusive (final) of the main dispute, may be conclusive (final) as to the sub-

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[23] *Id.* 133.

[24] [1999] 1 MLJ 321.

[25] (4th. ed.), Vol. 6, p. 240, para. 506.

> ordinate matter with which it deals. In this way, an interlocutory judgment or order may be conclusive (final) as to the subordinate matter with which it deals even though it is not conclusive (final) of the main dispute.[26]

The term 'final' therefore refers to judgments and orders which are not interlocutory in nature. Judgments and orders which are 'final' are those which determine the principal matter in question and are appealable. Those judgments and orders which give no final decision on the matters in dispute namely, the interlocutory judgments and orders are no longer appealable. His Lordship finally concluded:

> A decision made pending the trial of the charges against the appellant is not, in our considered opinion, a decision (ruling) that had the effect of finally determining the rights of the appellant. It is only the outcome of the trial that would have the effect of finally disposing of his rights. A decision on bail (by the court of first instance), whether the grant or refusal of it, will not finally determine the rights of the appellant in the outcome of his trial. That being so, the order of the High Court in refusing to admit the appellant to bail is not appealable to the Court of Appeal.[27]

The appeal was dismissed.

The Court of Appeal reached this decision based on its interpretation of the new definition for the term 'decision' provided in section 3 of the CJA. The Court of Appeal did not consider the fact that if an appeal against a bail decision is disallowed, the result is that the appellant has to remain on remand pending his trial. It is very well if the date of hearing is fixed early or the hearing of the case is completed within a short duration, in which case, the appellant need only to remain on remand for as short a period as is necessary. If the position is otherwise, the only alternative left for the appellant is to prove that there are changes in the circumstances which may move the High Court to positively consider the application for bail. Cases such

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[26] *Id.* 330.

[27] *Id.* 335.

as *Mohamed Razip v Public Prosecutor*[28] and *Public Prosecutor v Abdul Rahim bin Hj Ahmad & Ors*[29] have indicated that such applications may be considered. In *Dato' Seri Anwar's* case, N.H. Chan did refer to *Babu Singh v State*,[30] where the Indian Supreme Court held that an order refusing bail is no bar to another subsequent application. Changes in circumstances, however, take time and meanwhile the appellant has to remain on remand.

The question is, is this effect of the new definition to the term 'decision' intended?

N.H. Chan JCA., in his judgment, referred to *Maleb bin Su v Public Prosecutor*[31] and was of the opinion that the High Court was wrong to hold that the words 'judgment, sentence or order' means a decision which would 'finally dispose of the rights of the accused persons'. His Lordship opined that this tantamounts to 'adding words which are not there to a statutory provision'.[32] This, despite the Supreme Court's approval, albeit *obiter*, in *Ang Gin Lee v Public Prosecutor*.[33]

In *Maleb bin Su*, the High Court was considering 'judgment, sentence or order' as they appear in section 307(1) of the CPC. These same words appeared in the previous definition of 'decision' in section 3 of the CJA. The High Court therefore at that time had no guidance in the interpretation thereof and sought assistance from an Indian authority. After reference to the authority, the High Court concluded that the *ejusdem generis* rule should apply to 'order' and that an 'order' would have to be final in nature, that is, a decision which would finally dispose of the rights of the accused persons.

This same interpretation could have applied to the first definition of 'decision' in section 3 of the CJA; except that the word 'includes' used therein posed a problem. It would mean that although the 'order' would have to be final in nature, there might be other decisions which

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[28] [1998] 1 MLJ 84.

[29] [1988] 3 MLJ 272.

[30] A.I.R. 1978 S.C. 527.

[31] [1984] 1 MLJ 311.

[32] *Id.* 330.

[33] [1991] 1 MLJ 498.

need not be final in nature but still appealable.[34] This could have led Parliament to introduce the new definition of the word 'decision', making it very clear that any ruling which is not made in the course of a trial or hearing of any cause or matter which finally disposes of the rights of the parties is unappealable. Besides, the new definition in the CJA could have been inspired by the decision in *Maleb bin Su.*

Be that as it may, the issue which may still be raised is whether it was intended that a bail decision should be unappealable because it is a decision which does not finally dispose of the rights of the parties.

A bail decision involves the liberty of the accused person, be it freedom or incarceration. Although that decision has no effect on the rights of the parties in the trial, where lies the purpose of waiting for the disposal of the hearing, be it through an acquittal or conviction, when the accused still has to be on remand throughout the trial? By the time he appeals against his conviction, he would have been on remand until then. If he wins the appeal, what then of the period spent on remand? It will not be credited to him at all. If he is acquitted at the end of the trial, what about the time he has spent on remand? Should he therefore not be allowed to appeal against a bail decision because loss of freedom cannot be recompensed especially in cases where the accused is acquitted either at the end of the trial or after an appeal against his conviction?

Admittedly, if he has been on remand and subsequently gets convicted at the end of the trial, the court may consider the duration he had spent on remand when it considers the appropriate sentence. Similarly, if at the end of an appeal, the court decides to convict the appellant, the time spent on remand may be considered. But then again the matter is at the discretion of the court. The court is not bound to consider the duration spent on remand.[35] It is submitted therefore that bail decisions should be made exceptions to the rule because they involve the liberty of a person. If indeed the accused or appellant is

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[34]See Mimi Kamariah Majid, *Criminal Procedure in Malaysia* (2nd. ed.) (1995), p. 337.

[35]See, e.g. *Public Prosecutor v Dato' Seri Anwar bin Ibrahim* (No. 3) [1999] 2 MLJ 1, pp. 231-233.

thought to be more suited to remain on remand, the court on hearing the appeal may decide to affirm the lower court's refusal of bail.

It is interesting to note that at the end of his judgment, N.H. Chan JCA. did lament the current position where the bail decision cannot be appealed on to the Court of Appeal. Indeed:

> everything now will have to depend on the judicial conscience of a single judge of the High Court who is to exercise his discretion, not in opposition to, but in accordance with, established principles of law. But, what is there to stop a renegade judge from knowingly misusing his discretion by exercising it in opposition to established principles of law? Sadly, there is nothing that can be done under the law to correct such a miscarriage of justice![36]

This miscarriage of justice is further aggravated by the consequence thereof, namely, the deprivation of liberty of a person. Legislative amendment is therefore urged.

The second point highlighted in *Dato' Seri Anwar's* case is that appeals are creatures of statute. The right to appeal must be provided by a statutory provision. N.H. Chan JCA. observed:

> the right to appeal from one court to another must be conferred by some statutes, otherwise, the decision of every court of law is final'.[37]

In the case of appeals against bail decisions made by the lower courts, section 394 of the Criminal Procedure Code clearly provides for them. There is therefore no need to resort to section 307(1) of the CPC. However, in the case of appeals against bail decisions made by the High Court, there is no similar enabling provision. Reliance therefore must be placed on section 50(1) of the CJA, that is, the general provision which states the jurisdiction of the Court of Appeal. For this reason, the Court of Appeal had to construe the subsection, specifically the meaning of the word 'decision'.

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[36] *Id.* 341.

[37] *Id.* 329.

The third point in this case, albeit *obiter*, is the discussion of the merits thereof. It will be recalled that Augustine Paul J. at the High Court had decided that the bail application should be rejected primarily because of the likelihood of witnesses being tampered with if the accused was released on bail. The prosecution tendered some police reports made by potential witnesses who had been tampered with and the learned judge had opined that an allegation of tampering with witnesses was a serious matter in bail applications. His Lordship had referred to the early case of *Public Prosecutor v Wee Swee Siang*[38] where Callow J. had relied on *Sohoni's Code of Criminal Procedure* which in turn states that 'any allegation that the accused is tampering or attempting to tamper with evidence would be a cogent ground for refusing bail'.[39] Augustine Paul J. said:

> In my opinion, the fact that the reports lodged are not against the accused personally is not relevant. What is material is the fact that potential witnesses for the prosecution may be tampered with. This is supported by the reports that have been lodged.[40]

At the Court of Appeal, N.H. Chan rapped the High Court judge for referring to a 1948 version of *Sohoni's Code of Criminal Procedure* when there is the latest 1997 edition. This latest edition states that where allegations are made that the accused might abscond or tamper with evidence or the like, bail will not be refused merely on the basis of vague allegations. There must be material on record which may give an indication of such a possibility. Courts also have repeatedly pointed out that a vague and general allegation that the accused would tamper with the evidence is not a sound reason for refusing bail. Some of the cases referred to are *Ingley & Ors v Emperor*,[41] *Guru v Emperor*,[42] and *Emperor v Abhairaj Kunwar*.[43] His Lordship concluded:

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[38] [1948] MLJ 114.

[39] *Id.* 115.

[40] *Id.* 495.

[41] A.I.R. 1944 Nagpur 149.

[42] A.I.R. 1930 Bom. 484.

[43] A.I.R. 1940 Oudh 8.

> The above cases have repeatedly emphasised that a vague and general allegation that the accused, if released, will suborn or intimidate witnesses or tamper with the evidence or try to obtain false evidence in support of his defence, is not a sound reason for refusing bail. Such an allegation is nothing more than the usual slogan which the prosecution raises in opposing bail. There must be some material put before the court to substantiate the apprehension raised on behalf of the prosecution. Bail is not to be refused merely on the basis of allegations about it. Even the tampering of evidence or intimidation of witness by others (unless it could be shown that this was done at the instigation or with the connivance of the accused) is no indication of the possibility that the accused himself would do so.[44]

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[44] *Id.* 340.

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ISSN 0126-6322