IN THE COURT OF APPEAL OF MALAYSIA

(APPELLATE JURISDICTION)

[CRIMINAL APPEAL NO. W-09-141-05/2013]

Between

BADRUL HISHAM ... APPELLANT

And

PUBLIC PROSECUTOR ... RESPONDENT

IN THE COURT OF APPEAL OF MALAYSIA

(APPELLATE JURISDICTION)

[CRIMINAL APPEAL NO. W-09-142-05/2013]

Between

MOHAMED AZMIN ALI ... APPELLANT

And

PUBLIC PROSECUTOR ... RESPONDENT

CORAM

LINTON ALBERT, JCA
DAVID WONG DAK WAH, JCA
ZAKARIA SAM, JCA

GROUNDS OF DECISION

These appeals which arose from two motions each filed by the respective appellants, namely Badrul Hisham bin Shahrin (BHS) and Mohamed Azmin bin Ali (MAA). Both BHS and MAA sought to set aside the *ex parte* Order made and issued by the Magistrate on 26.04.2012, pursuant to section 98 of the Criminal Procedure Code (CPC) prohibiting any assembly at Dataran Merdeka from 28.04.2012 to 1.05.2012. The application was made by the Chief Police Officer of the Dang Wangi District. One Ambiga Sreenevasan was named as the first respondent and the organiser of the proposed sit-in assembly as the second respondent. The Order also warned the public not to attend, go to or howsoever take part in any such assembly. Stemming from the Order of the Magistrate, BHS and MAA were both jointly charged with another, for offences under the Peaceful Assembly Act 2012 and The Penal Code. Both BHS and MAA jointly with another, faced three charges at the Sessions Court for offences committed on 28.04.2012 in connection with the proscribed assembly which they also sought to strike out under the motions. The high court dismissed both motions. Hence these two appeals. They were heard and determined together.

It is perhaps useful to begin by setting out the provisions of section 98 of the CPC and the Order of the Magistrate because the outcome of these appeals hinges on them.

Section 98 of the CPC states :

> "***98. Power to issue order absolute at once in urgent cases of nuisance.***
>
> *(1) In cases where in the opinion of a Magistrate immediate prevention or speedy remedy is desirable that Magistrate may, by a written order stating the*

material facts of the case and served in the manner provided in section 90, direct any person to abstain from a certain act or to take certain order with certain property in his possession or under his management if the Magistrate considers that the direction is likely to prevent or tends to prevent obstruction, annoyance or injury to any persons lawfully employed, or danger to human life, health or safety, or a riot or any affray.

(2) An order under this section may be directed to a particular person or to the public generally when frequenting or visiting a particular place.

(3) Any Magistrate may rescind or alter any order made under this section by himself or his predecessor in office.

(4) No order under this section shall remain in force for more than seven days from the making of it."

The Order of the Magistrate is as follows :

"1. Whereas the court is satisfied that :

a) Gabungan Pilihan Raya Bersih dan Adil (BERSIH 3.0) is going to organize an assembly at Dataran Merdeka on 28.04.2012 between 2.00 pm to 4.00 pm;

b) Application for permission to use Dataran Merdeka as the venue for the assembly on 28.04.2012 is not approved by Dewan Bandar Raya Kuala Lumpur (DBKL), under the Local Government By-Laws (Dataran Merdeka)(Federal Territory Kuala Lumpur) 1992;

c) BERSIH 3.0 will proceed with the assembly without the approval from DBKL or notification to the Chief Police Officer, Dang Wangi District;

d) It is necessary for an urgent measure to prevent breach of public, tranquility, threat to life, or safety of the public, violence and affray if the assembly is to take place;

e) A prohibitory order is absolutely necessary and issued urgently ex parte immediately due to time constraints because the assembly will take place on 28.04.2012.

It is therefore ordered that any assembly at Dataran Merdeka is prohibited and the public is warned not to attend, go to, or howsoever take part in any assembly from 28.04.2012 to 1.05.2012."

It is patently clear that the learned high court judge has fallen into grave error in overlooking the material non-compliance of the provisions of section 98 of the CPC on the part of the learned Magistrate.

In the first place, the circumstances and the emergency thereby created are clearly self-induced. There is absolutely no reason for the application to have been made *ex parte* and not to accord at least the first respondent in the application the right to be served and be heard. It is clear from the affidavit of the Chief Police Officer supporting the application that he knows of the plan for the sit-in assembly as far back as 28.04.2012 more than three weeks before. That by and of itself puts into question the *bona fide*s of the Chief Police Officer who is the applicant for the Order. No reason has been offered to explain why the application is only made just two days before the planned sit-

in assembly. Clearly, the approach taken by the learned Magistrate is to unquestioningly accept everything before him thus precluding any critical devaluation of the matters that have to be considered under the provision of section 98 of the CPC. The total lack of circumspection can only mean that the learned Magistrate is only paying lip service to having been satisfied of the various matters set out in the Order. Apart from that is the fact that the respondents in the application have been deprived of their fundamental right to be heard. Thus the basis for making the application is ill-founded.

The principles to be applied in determining the validity of an order made under section 98 of the CPC are set out in many Indian cases and are relevant in the present appeals because the Indian equivalent of section 98 of the CPC, which is section 144 of the Indian Criminal Procedure Code, is almost identical and it reads as follows :

> *"(1) In cases where, in the opinion of a District Magistrate, a Chief Presidency Magistrate, Sub-Divisional Magistrate, or of any other Magistrate (not being a Magistrate of the third class) specially empowered by the "State Government" or the Chief Presidency Magistrate or the District Magistrate to act under his section, there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable.*
>
> *Such Magistrate may, by a written order stating the material facts of the case and served in manner provided by S. 134, direct any person to abstain from a certain act or to take certain order with certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent obstruction, annoyance or injury or risk of obstruction, annoyance or injury*

to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquility, or a riot, or an affray.

(2) An order under this section may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed, ex parte.

(3) An order under this section may be directed to a particular individual, or to the public generally when frequenting or visiting a particular place."

In *Chulan Abas & others v. State of U. P* [1981] AIR 2198 S. C. the following observations are relevant at p 2200:

"Furthermore, it would not be a proper exercise of discretion on the part of the Executive Magistrate to interfere with the lawful exercise of the right by a party on a consideration that those who threaten to interfere constitute a large majority and it would be more convenient for the administration to impose restrictions which would affect only a minor section of the community rather than prevent a larger section more vociferous and militant. Legal rights should be regulated and not prohibited altogether for avoiding breach of peace or disturbance to public tranquility"

And at p 2225:

"The entire basis of action under Section 144 is provided by the urgency of the situation and the power thereunder is intended to be availed of for preventing disorders, obstructions and annoyances with a view to secure the public weal by maintaining public peace and tranquility. Preservation of the public peace and

tranquility is the primary function of the government and the aforesaid power is conferred on the executive magistracy enabling it to perform that function effectively during emergent situations and as such it may become necessary for the Executive Magistrate to override temporarily private rights and in a given situation the power must extend to restraining individuals from doing acts perfectly lawful in themselves, for, it is obvious that when there is a conflict between the public interest and private rights the former must prevail."

Further at p 2227 :

" I must nevertheless observe that this power (to suspend the exercise of legal rights on being satisfied about the existence of an emergency) is extraordinary and that the Magistrate should resort to it only when he is satisfied that other powers with which he is entrusted are insufficient. Where rights are threatened, the persons entitled to them should receive the fullest protection the law affords them and circumstances admit of. It needs no argument to prove that the authority of the Magistrate should be exerted in the defence of rights rather than in their suspension: in the repression of illegal rather than in interference with lawful acts. If the Magistrate is satisfied that the exercise of a right is likely to create a riot, he can hardly be ignorant of the persons from whom disturbance is to be apprehended, and it is his duty to take from them security to keep the peace" (Emphasis supplied)."

On the authority cited, we do not think that the Magistrate is correct in exercising his decision under section 98 of the CPC because the affidavit in support of the Chief Police Officer upan which the Order is made falls woefully short of the requirements of that section. There is clearly no immediate need to prevent the ills set out in section 98 of the CPC based simply on references in the affidavit of

the Chief Police Officer to vitriolic speeches and empty rhetoric of several politicians.

The paranoia evinced in references to several thousand members of opposition parties organized to supervise the sit-in assembly is of no in assistance in meeting the requirements of section 98 of the CPC nor does references to two isolated incidents of violence which occurred the week before the application trigger a need to apply the drastic power to deny the respondents of their legal right to freedom of assembly. To top it all, the Order itself is erroneous, in that it refers to DBKL having refused permission to use Dataran Merdeka as the venue for the sit-in assembly because there has never been an application by the respondents to DBKL for that purpose and it is also incorrect to state that the Chief Police Officer is unaware of the planned sit-in assembly. In the circumstances the order of the Magistrate pursuant to section 98 of the CPC is clearly ill-conceived.

We do not think it is necessary or useful to embellish the determination of these appeals with issues of constitutionality because the pith and substance of this appeal is really on the import of section 98 of the CPC. For the reasons aforesaid it is our considered view that the Magistrate has erred in exercising his discretion, as does the learned high court judge who fell into error in not taking into consideration the various material aspects of the Order alluded to above.

We therefore allow the appeals in part to the extent that the order of the Magistrate is set aside.

Dated: 30 NOVEMBER 2014

(LINTON ALBERT)
Judge
Court of Appeal Malaysia Putrajaya

COUNSEL:

For the 1st appellant - Mohd Yusof Zainal Abiden, SN Nazir & Lim Kon Keen; M/s S. N. Nair & Partners
J-05-01, No. 2, Jalan Solaris
Solaris Mon't Kiara
50480 Kuala Lumpur

For the 2nd appellant - CV Prabhakaran; M/s Praba & Associates
Suite No:2-05, Tingkat 2
Wisma Pantai
Jalan Kampung Gajah
12200 Butterworth

For the respondent - Mohamad Hanafiah Zakaria, Wan Shaharuddin Wan Ladin, Mhd Farizul Hassan Bakri & Nurdeenie Abdul Rashid, Jabatan Peguam Negara; Bahagian Perbicaraan Dan Rayuan
Aras 5, No. 45, Lot 4G7
Presint 4, Persiaran Perdana
62100 Putrajaya

Case(s) referred to:

Chulan Abas & others v. State of U. P [1981] AIR 2198

Legislation referred to:

Criminal Procedure Code, s. 98

Indian Criminal Procedure Code, s. 144