

**DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANG KUASA RAYUAN)**

RAYUAN JENAYAH NO: N-06B-55-09/2016

[RAYUAN JENAYAH NEGERI SEMBILAN : 42LB(A)-21 & 22-04/2015]

ANTARA

PENDAKWA RAYA

... PERAYU

DAN

SUBBARAU @ KAMALANATHAN

... RESPONDEN

CORAM:

**MOHTARUDIN BIN BAKI, JCA
VERNON ONG LAM KIAT, JCA
HARMINDAR SINGH DHALIWAL, JCA**

GROUNDS OF JUDGMENT

INTRODUCTION

[1] The prosecution's appeal relates to the decision of the High Court dismissing the prosecution's appeal against the decision of the Sessions Court in acquitting and discharging the respondent at the close of the prosecution case.

[2] After hearing of submission, we heard and allowed the appeal by a majority decision, with my learned brother Justice Mohtarudin Baki and I

being in the majority whilst our learned brother Justice Harmindar Singh Dhaliwal dissented. This then is our majority judgment.

[3] The respondent was charged with five counts under s 8(1)(c)(iii) of the Official Secrets Act 1972 (**OSA 1972**) with having possession in his Samsung Galaxy Note 2 smartphone between 9.9.2014 to 16.9.2014 the following documents, to wit:

- i. “kertas soalan Bahasa Tamil-Penulisan 037 Ujian Penilaian Sekolah Rendah 2014”;
- ii. “kertas soalan sains 018/1 Ujian Penilaian Sekolah Rendah 2014”;
- iii. “kertas soalan Matematik 035/2 Ujian Penilaian Sekolah Rendah 2014”;
- iv. “kertas soalan Matematik 015/1 Ujian Penilaian Sekolah Rendah 2014”: and
- v. “kertas soalan Bahasa Tamil-Pemahaman Ujian Penilaian Sekolah Rendah 2014”.
(hereinafter referred to collectively as ‘2014 UPSR examination papers’)

THE SALIENT FACTS

[4] The brief facts as found by the Sessions Court judge is as follows:

- “(a) Upon being informed by PW11 and upon making comparisons PW12 made a police report on the leakage of the UPSR 2014 Science question paper on 10.9.2014 (Exhibit P32);
- (b) Investigations were conducted by PW15 and the accused was arrested by PW1 on 16.9.2014 at his house nombor No 591, Jalan Bukit Gelena 13, Taman Bukit Galena, Fasa 4, Negeri Sembilan. A ‘Samsung Note 2’ handphone (**Exhibit P2**) was seized from the accused. The arrest and seizure report is produced as Exhibit p1. PW9 confirmed that the telephone number 0102250064 is registered under the accused name;
- (c) One Prem Kumar a/l Padelrangam (Prem Kumar) was arrested by PW4 and a IPhone (**Exhibit P8**) was seized from him. PW8 confirmed that telephone number 0125794650 was registered under Prem Kumar’s name;
- (d) PW3 had examined the accused’s handphone (P2) and found one image in P2. At the outset it must however be pointed out that this image is not the subject matter of any of the charges against the accused. PW3’s report is marked as Exhibit P22;
- (e) PW3 had also examined Prem Kumar’s handphone (P8) and found that the images in P8 (offending images in P8) were substantially similar to the following actual UPSR question papers:
- (i) Bahasa Tamil Penulisan O37 (Exhibit P19);
 - (ii) Science 018/1 (Exhibit P20);
 - (iii) Mathematic 035/2 (Exhibit P17);
 - (iv) Mathematic 015/1 (Exhibit P16); and
 - (v) Bahasa Tamil Pemahaman 036 (Exhibit P18);

- (f) according to PW3 the images in P8 were shared by whatsapp groups and there were 3 whatsapp communications, including communications from the accused's telephone. PW3's report on P8 is marked as Exhibit P21. Prem Kumar, a vital prosecution's witness was not called to testify in this trial;

- (g) according to PW12, she had been appointed by the Minister of Education Malaysia to classify official documents, information and material as official secret and that the UPSR 2014 question papers had been classified as 'confidential' (Sulit) by her and registered in the Buku Daftar Rahsia Rasmi (Exhibit P31). The certificate of appointment by the Minister was produced and after strong objections by the learned defence counsel was marked as ID29; and

- (h) according to the UPSR Time table (Exhibit P30) –
 - (i) Bahasa Tamil penulisan 037 was scheduled on 10.9.2014 from 12.15 noon to 1.30 pm;
 - (ii) Science 018/1 was scheduled on 11.9.2014 from 8.15 am to 9.15 am;
 - (iii) Mathematics 035/2 was scheduled on 9.9.2014 from 12.20 noon to 1.00 pm;
 - (iv) Mathematics 015/1 was scheduled on 10.9.2014 from 8.15 am to 9.15 am; and
 - (v) Bahasa Tamil pemahaman 036 was scheduled on 10.9.2014 from 10.30 am to 11.20 1m.”

DECISION OF THE SESSIONS COURT JUDGE

[5] The Sessions Court judge (trial judge) found that the prosecution had failed to establish a *prima facie* case in respect of all the charges

against the respondent. The following were *inter alia* the basis of the trial judge's findings:

- i. The prosecution failed to prove the documents specified in the charges (Exhibits P16 – P20) are official secret;
- ii. The classification of the 2014 UPSR examination papers as official secret by PW12 is null and void and of no effect as PW12's appointment is not in accordance with s 2B of the OSA 1972;
- iii. The appointment certificate of PW12 (ID29) by the Minister of Education is not authenticated and therefore inadmissible;
- iv. That PW12 was not a reliable and credible witness;
- v. That the non-calling of the Minister who issued ID29 is fatal to the prosecution's case and therefore adverse presumption under s 114(g) of the Evidence Act is invoked;
- vi. That the prosecution failed to prove that the respondent had physical possession of Exhibits P16 – P20 question papers;
- vii. That the respondent did not have the prerequisite knowledge (*mens rea*) nor was he in a position to acquire any knowledge that the offending images in P8 were linked to the 2014 UPSR examination papers; and

- viii. That there is no evidence to show that the respondent had 'obtained' the Exhibit P16 – P20 question papers as per the offending images in P8 and had 'retained' them in contravention of the OSA 1972.

[6] On appeal, the High Court concurred with the findings of the trial judge, hence the prosecutions appeal to this Court.

SUBMISSION OF COUNSEL

[7] Learned DPP submitted on two main issues. The first related to the question of whether PW12 is a person who is empowered to classify documents as official secret. The second issue relates to the elements of the offence under s 8(1) of the OSA 1972.

[8] On the first issue, learned DPP argued that PW12 is a public officer designated as the director of the Malaysian Examination Board (MEB). As such, PW12 is a person charged with responsibility of examinations in Malaysia within the meaning of s 16A of the OSA 1972. PW12 is directly empowered to regularise all affairs pertaining to examination and examination papers nationwide. Therefore, as mandated by s 16A, even without appointment as a 'classifying officer', PW12 can in her very capacity as the director of the MEB certify documents as official secret.

[9] Insofar as the certificate of appointment (exhibit ID29) appointing PW12 by the then Education Minister is concerned, learned DPP argued that ID29 is a public document by virtue of s 74 read together with s 78(1)(a)(ii) & (iii) of the Evidence Act 1950 renders ID29 a public document whereby the need to call the maker is dispensed with (**PP v**

Hoo Chee Keong [1997] 4 MLJ 451; Syarikat Jengka Sdn Bhd v Abdul Rashid Bin Harun [1981] 1 MLJ 201 (FC).

[10] On the second issue, learned DPP argued that there are four elements of the offence under s 8(1) of the OSA 1972. First, that the documents specified in the charges are official secret. Second, the respondent has in his possession the offending documents. Third, the offending documents were obtained by the respondent in contravention of the OSA 1972. And, fourth the respondent retained the offending documents when he had no right to retain them.

[11] The documents forming the subject matter of the charges are in the form of whatsapp images in Prem Kumar's handphone P8. The evidence of SP3 and SP4 together with the data analysis (Exhibit P21) made by SKMM confirm that the offending images found in P8 was sent to 'MHS Ipoh Whatsapp Group' from the respondent's handphone P2. SP3 who conducted an analysis found that the Whatsapp conversations contained 67 images comprising of pages of the documents particularised in the five charges. The images were identified and marked as the following exhibits:

P16 – 15 images of Kertas Matematik 015/1

P17 – 10 images of Kertas Matematik 035/2

P18 – 22 images of Kertas Bahasa Tamil Pemahaman 036

P19 – 4 images of Kertas Bahasa Tamil Penulisan 037

P20 – 16 images of Kertas Sains 018

[12] Learned DPP argued that even though none of the offending images were found in the handphone of the respondent, the evidence clearly shows that all 67 images came from one source i.e. the respondent's

handphone. The evidence of SP9 further confirmed that handphone nos. 010-2250064 and 012-5794650 were registered under the respondent's and Prem Kumar's names respectively. As such, it was argued that there is a strong nexus implicating the respondent (**Lee Wang Fatt v PP [2014] 1 LNS 1270**).

[13] Learned DPP also argued that it can be inferred that the respondent had prerequisite knowledge and thus *mens rea* possession of the offending images before sending it to Prem Kumar because (i) the images were obtained and retained by the respondent and are identical to the actual UPSR 2014 examination papers, (ii) the images were sent over a period of two days, (iii) the images were sent on 9.9.2014 and 10.9.2014 which was just prior to the UPSR examination dates, and (iv) the conduct of the respondent deleting the images in his handphone. As such, the respondent has the duty to explain his conduct (s 8 of the Evidence Act 1950; **Parlan Dadeh v PP [2009] 1 CLJ 717**; **Khairuddin Hassan v PP [2010] 7 CLJ 129**). Further, the respondent cannot avail himself as an innocent recipient (**Dzulkifli Abdul Hamid v PP [1980] 1 LNS 91**; **Frederick Tam Im Kian v PP [1986] 1 LNS 104**). Accordingly, it was argued that the element of 'obtaining' and retaining are closely linked to the fact that the respondent has had possession of the images of the examination papers. As such, the trial judge erred in holding that the prosecution has failed to prove that the respondent had knowledge of the existence of the images or had possession of the same. The offence was committed by the respondent at the material time when he had in his possession the images he had obtained in contravention of the OSA 1972 and retained it in his handphone and subsequently sending the images via whatsapp group knowingly that it was the UPSR examination papers. SP3 the forensic analyst from SKMM explained that the fact that none of

the images were found in the respondent's handphone could be due to the images being deleted and thereafter overridden so that there is nothing left to extract in the handphone. As such, the fact that nothing was found in the respondent's handphone does not negate the fact that the single source of the images came from the respondent's handphone.

[14] The main points taken by learned counsel for the respondent are as follows. First, the certificate of appointment ID29 is inadmissible because it was not signed by the Minister. As such, the adverse inference under s 114(g) should be invoked for the failure to call the Minister or the special officer of the Minister. Further, as ID29 was not gazetted, the court cannot take judicial notice of ID29.

[15] Second, the documents classified by PW12 as official secret according to the register of official secret (Exhibit P31) were only drafts of the UPSR examination papers and not the final UPSR examination papers. PW12 did not give any explanation as to why there were additional signatures affixed on the register.

[16] Third, there is a gap in the prosecution case because Prem Kumar was an important witness and he was not called to testify (***Abdullah Zawawi v PP*** [1985] 2 MLJ 16 (SC)). Further, there is no evidence to show that the respondent had possession of the images

[17] Lastly, learned counsel argued that s 16A is inconsistent with the interpretation of official secret in s 2 of the OSA 1972 and that as such s 16A is obnoxious, draconian and oppressive. Therefore, he argued s 16A, is void to the extent of the inconsistency (***Mohammad Ezam Mohd Nor v PP*** [2004] 2 CLJ 595).

DECISION

[18] Upon a perusal of the appeal record and after hearing of submission of counsel, we are in agreement with the submission of learned DPP. We of the considered view that the only real issue before the Court relates to the question of whether the final 2014 UPSR examination papers pursuant to the five charges are official secret. The point taken by counsel is that only the drafts of the UPSR examination papers were classified by PW12. In fact, this point was taken by the trial judge in the following words at para. 43 of the trial judge's written judgment which is as follows:

“43. It is needless to say that the date when Exhibits P16 to 20 were classified is very pertinent to the charge. **Exhibits P16 to 20 are certainly not the first version** (sic) that were sent to the printers for printing as admitted by PW12. Each amended copy would necessarily give birth to a fresh document and would require a fresh classification under the OSA in order to be protected as official secret. **In this case the prosecution has failed to establish on a prima facie evidence that the final amended question papers in the form of Exhibits P16 to 20 were classified as official secret before the dates specified in the charge against the accused.**” (Emphasis added)

[19] The words ‘official secret’ and ‘document’ are defined under s 2 of the OSA 1972 as follows:

‘**official secret**’ means any document specified in the Schedule and **any information and material relating thereto** and includes any other official document, information and material as may be classified as ‘Top Secret’, ‘Secret’, ‘Confidential’ or ‘Restricted’, as the case may be, by a Minister, the Menteri Besar or Chief Minister of a State or such public officer appointed under s 2B;

‘document’ includes, in addition to a document in writing and part of a document –

- (a) any map, plan, model, graph or drawing;
- (b) any photograph;
- (c) any disc, tape, sound track or other device in which sound or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other component) of being reproduced therefrom; and
- (d) any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (as aforesaid) of being reproduced therefrom;

[20] The word ‘document’ is also defined to denote any matter expressed or described upon any substance by means of letters figures of marks, or by more than one of those means, intended to be used, or which may be used, as evidence for that matter (s 29 of the Penal Code; s 3 of the Evidence Act 1950; s 3 of the Interpretation Acts 1948 and 1967).

[21] According to the ‘Daftar Surat-an Rahsia Rasmi Di Luar Jadual Akta Rahsia Rasmi 1972 Dan Berhubungan Dengannya Yang Dikelaskan’ (exhibit P31) the documents in question were classified by PW12 in the following format:

Bil.	Tarikh Surat	Rujukan Surat	Perkara	Pengelasan	Dikelaskan Oleh	Tandatangan	Catatan
...
		UPSR 2014					
...
...
543	1.7.2014	015/1	Mathematics 2 SK (signature)	SULIT	DR. NA'IMAH BT ISHAK	(tandatangan)	...

					Pengarah Peperiksaan Lembaga Peperiksaan Kementerian Pendidikan Malaysia		
...
...
545	8.7.2014	018	Science SK (signature)	SULIT	DR. NA'IMAH BT ISHAK Pengarah Peperiksaan Lembaga Peperiksaan Kementerian Pendidikan Malaysia	(tanda tangan)	...
...
...
548	8.7.2014	035/2(P.P.)	P.P Mathematics 2 SJKT	SULIT	DR. NA'IMAH BT ISHAK Pengarah Peperiksaan Lembaga Peperiksaan Kementerian Pendidikan Malaysia	(tanda tangan)	...
...
568	22.7.2014	036	Bahasa Tamil Pemahaman SJKT (signature)	SULIT	DR. NA'IMAH BT ISHAK Pengarah Peperiksaan Lembaga Peperiksaan Kementerian Pendidikan Malaysia	(tanda tangan)	...
569	22.7.2014	037	Bahasa Tamil Penulisan SJKT (signature)	SULIT	DR. NA'IMAH BT ISHAK Pengarah Peperiksaan Lembaga Peperiksaan Kementerian Pendidikan Malaysia	(tanda tangan)	...

...
574	22.7.2014	037 (P/P)	P.I. Bahasa Tamil Penulisan SJKT	SULIT	DR. NA'IMAH BT ISHAK Pengarah Peperiksaan Lembaga Peperiksaan Kementerian Pendidikan Malaysia	(tandatangan)	...
...

[22] In our view, as the documents in question is the 2014 UPSR examination paper, it is the 2014 UPSR examination paper that were classified and not the draft or the paper on which it is created. For instance, when PW12 classified the document described as Mathematics 035/2 examination paper on 1.7.2014, it was the Mathematics 035/2 examination paper which was classified. We say this in the light of the meaning ascribed to the words 'official secret' includes 'any information and material relating thereto'. Any information and material relating to the said Mathematics 035/2 examination paper would include the information and material contained in all initial and subsequent drafts of the said examination paper and the final version of the examination paper.

[23] In the ordinary course of work, the making of a document begins with the creation of an initial draft containing such information and material relating to the document in question. In the case of the initial draft for the Mathematics examination paper for instance, the initial draft would contain instructions, mathematics questions graphs, drawings and other material. Any revisions or amendments to the instructions, questions and materials in the initial draft and subsequent drafts would relate to the Mathematics examination paper – i.e. such information and material relating thereto.

[24] Accordingly, we hold that a document which has been classified includes any information and material contained in an initial draft of the document, which contents are official secret once the document has been classified, and the official secret attaches to the any information and material of all subsequent drafts including the final version of the document.

[25] To hold otherwise would lead to absurdity as it would in effect require a certifying public officer to classify each and every draft of a document including the final version of the document. It would lead to the further absurdity that if the subsequent drafts and final version are not classified individually, then the information and material in the subsequent and final drafts will not fall to be protected as official secret. Therefore, we do not think that it is necessary for PW12 to classify each and every draft and the final version of the UPSR examination paper. On the established facts, it is clear that PW12 intended to classify the UPSR examination papers and that the classification thereof includes the information and material in the initial and subsequent drafts and final version of the UPSR examination papers. As such, we hold that the final UPSR examination papers in question are official secret.

[26] We are therefore constrained to hold that the trial judge and High Court judge misdirected themselves on the law and on the facts. On the totality of the evidence, we agree with submission of learned DPP that there is ample evidence to establish a prima facie case on all the five charges.

[27] For the foregoing reasons, we set aside the orders of the High Court and the Sessions Court and ordered the respondent to enter on his defence on the five charges.

sgd

(Vernon Ong)

Judge

Court Of Appeal

Malaysia

Dated : 1st August 2017

Counsel:

For the Appellant:

Nadia Hanim Mohd Tajuddin
Timbalan Pendakwa Raya
Bahagian Perbicaraan dan Rayuan
Jabatan Peguam Negara

For the Respondent:

M. Kula Segaran
Messrs Kula & Associates