DALAM MAHKAMAH RAYUAN MALAYSIA

(BIDANGKUASA RAYUAN)

RAYUAN SIVIL NO: N-01(IM)-601-10/2018

Dalam perkara satu Usul Mahkamah Menurut Aturan 52 Kaedah (2A), Kaedah-Kaedah Mahkamah 2012

Dan

Dalam perkara Seksyen 13 Akta Mahkamah Kehakiman 1964 dan Artikel 126 Perlembagaan Persekutuan

Dan

Dalam perkara Seksyen 44 Akta Mahkamah Kehakiman 1964

Dalam perkara Pilihan Raya Umum Dewan Undangan Negeri (DUN) bagi Bahagian Pilihan Raya DUN Rantau Negeri Sembilan (DUN N.27) pada tarikh 9hb Mei 2018

ANTARA

PEGAWAI PENGURUS PILIHANRAYA DEWAN UNDANGAN NEGERI BAGI PILIHAN RAYA DUN N.27 … PERAYU
AMINO AGOS BIN SUYUB
KOMPLEKS PENTADBIRAN DAERAH REMBAU
70503 REMBAU
NEGERI SEMBILAN

DAN

1. **DR. STRERAM A/L SINNASAMY** **... RESPONDEN-**
   (NRIC NO.: 551104-01-6025) **RESPONDEN**
   NO. 727, LORONG ANGSI 12, TAMAN KELAB
   TUANKU MAMBAU
   70300 SEREMBAN, NEGERI SEMBILAN

2. **MOHAMAD BIN HAJI HASSAN**
   NO. 11, JALAN BESAR RANTAU
   71200 RANTAU
   NEGERI SEMBILAN DARUL KHUSUS

3. **SURUHANJAYA PILIHAN RAYA MALAYSIA**
   NO. 2, JALAN P2T, PRESINT 2
   PUSAT PENTADBIRAN KERAJAAN PERSEKUTUAN
   62100 PUTRAJAYA

[DALAM MAHKAMAH TINGGI MALAYA DI SEREMBAN
DALAM NEGERI SEMBILAN DARUL KHUSUS, MALAYSIA
PETISYEN PILIHAN RAYA NO. NA-26PP-1-05/2018

Dalam perkara Pilihan Raya Umum Dewan Undangan Negeri (DUN) bagi Bahagian Pilihan Raya DUN Rantau Negeri Sembilan (DUN N.27) pda tarikh 9hb Mei 2016

DAN

Dalam perkara Seksyen-seksyen 4(a), 4(g), 9(1), 10(i), 11(1)(b), 32(a), 32(b), 32(c), 34(c), 35(a), 35(b), 36 Akta Kesalahan Pilihan Raya 1954

DAN

Dalam perkara Akta Pilihan Raya 1958

DAN

Dalam Peraturan-peraturan Pilihan Raya (Perjalanan Pilihan Raya 1981)

DAN

Dalam perkara Kaedah-Kaedah Pilihan Raya 1954

ANTARA

1. DR. STRERAM A/L SINNASAMY ... PEMPETISYEN
(NRIC NO.: 551104-01-6025)
NO. 727, LORONG ANGSI 12, TAMAN KELAB
TUANKU MAMBAU
70300 SEREMBAN, NEGERI SEMBILAN

DAN

1. MOHAMAD BIN HAJI HASSAN … RESPONDEN
NO. 11, JALAN BESAR RANTAU PERTAMA
71200 RANTAU
NEGERI SEMBILAN DARUL KHUSUS

2. PEGAWAI PENGURUS PILIHAN RAYA DEWAN … RESPONDEN
UNDANGAN NEGERI BAGI PILIHAN RAYA KEDUA
DUN N.27
AMINO AGOS BIN SUYUB
KOMPLEKS PENTADBIR DAERAH REMBAU
70503 REMBAU
NEGERI SEMBILAN

3. SURUHANJAYA PILIHAN RAYA MALAYSIA … RESPONDEN
NO. 2, JALAN P2T, PRESINT 2 KETIGA]
PUSAT PENTADBIRAN KERAJAAN PERSEKUTUAN
62100 PUTRAJAYA

CORAM:

HAMID SULTAN BIN ABU BACKER, JCA
HANIPAH BINTI FARIKULLAH, JCA
KAMALUDIN BIN MD SAID, JCA

Hamid Sultan Bin Abu Backer, JCA (Delivering Judgment of the Court)

GROUNDS OF JUDGMENT

[1] The appellant, an election official of the State Legislative Assembly for By-Election of District of Rembau, Negeri Sembilan, appeals against the committal and sentencing order dated 10-10-2018, for contempt of court on the grounds of interfering with the due administration of justice by coaching a witness, referred to as Daing through *whatsapp* messages.

[2] The principle complaints against the decision of the learned judge can be summarised as follows:-

(a) failure to give short adjournment for the appellant to prepare his defence;

(b) ordering the appellant to answer to the show cause within 30 minutes after the charge was read without giving a copy of the charge to the appellant;

(c) failure to allow the appellant to call Daing or any other witness to explain the misunderstanding;

(d) allowing the appellant solicitor to ask only two questions for the appellant's defence;

(e) denying the appellant of fair and reasonable opportunity for his defence to be heard;

(f) failure to consider that the *whatsapp* messages were only meant to share his feelings, experience or to explain the situation;

(g) failure to consider that Daing was not the appellant's subordinate;

(h) failure to consider that the alleged contempt was not proven beyond reasonable doubt;

(i) failure to consider other forms of punishment;

(j) failure to consider the mitigation factors before committing the appellant for the alleged contempt.

[3] In the instant case, the *whatsapp* messages by the appellant from the court were sent to Daing who was out of the court premise. The order of court read as follows:-

"**PERINTAH PENGKOMITAN**

ATAS USUL MAHKAMAH menurut Aturan 52 kaedah 2A Kaedah-kaedah Mahkamah 2012 DAN DALAM KEHADIRAN Mohamed Haniff Khatri Abdulla (Sreekant a/l M.G. Gangadharan Pillai, Muhammad Rafique Bin Rashid Ali dan Sathia Stella Sidhu bersamanya), peguam bagi Pempetisyen, Mohd Hafarizam Bin Harun (Abu Bakar Bin Isa Ramat bersamanya), peguam bagi Responden Pertama, Rajasingam Gothandapani (Sathya Kumardas bersamanya), peguam bagi Amino Agos bin Suyub (No. K/P: 720607-08-5633) dan Responden Ketiga DAN SETELAH MAHKAMAH mengambil keterangan Daing Muhamad Rahimi Bin Abdul Hamid (No. K/P: 760628-06-5435) dan Amino Agos bin Suyub (No. K/P: 720607-08-5633) MAKA TELAH DIPERINTAHKAN bahawa Amino Agos bin Suyub (No. K/P: 720607-08-5633) menunjuk sebab mengapa Amino Agos bin Suyub (No. K/P: 720607-08-5633) tidak patut dipenjarakan kerana kesalahan menghina Mahkamah DAN SETELAH MENDENGAR Amino Agos bin Suyub (No. K/P: 720607-08-5633) MAKA ADALAH DIPERINTAHKAN BAHAWA satu perintah pengkomitan dibuat terhadap Amino Agos bin Suyub (No. K/P: 720607-08-5633) kerana mengganggu kacau pentadbiran keadilan melalui tindakannya dalam menghantar mesej *whatsapp* kepada Daing Muhamad Rahimi Bin Abdul Hamid (No. K/P: 760628-06-5435) pada 2 dan 3 haribulan Oktober 2018 semasa prosiding tindakan ini sedang berlangsung dan yang mana merupakan kesalahan menghina Mahkamah DAN SETELAH MENDENGAR penghujahan mitigasi oleh peguam Amino Agos bin Suyub (No. K/P: 720607-08-5633) MAKA ADALAH DIPERINTAHKAN BAHAWA Amino Agos bin Suyub (No. K/P: 720607-08-5633) dijatuhkan hukuman penjara selama tiga bulan bermula dari tarikh perintah ini DAN SETELAH MENDENGAR permohonan Amino Agos bin Suyub (No. K/P: 720607-08-5633) ADALAH TURUT DIPERINTAHKAN BAHAWA satu perintah penggantungan perlaksanaan interim ke atas perintah ini dibenarkan sementara menunggu pelupusan permohonan penggantungan perlaksanaan perintah ini di

hadapan Mahkamah Rayuan atau Mahkamah Persekutuan yang harus difailkan sebelum atau pada 12 haribulan Oktober 2018."

Preliminary Jurisprudence on Contempt

[4] Contempt jurisdiction will be best understood if one can appreciate the spirit and intent of rule of law as well as the constitutional framework of executive, legislature and the judiciary which is premised on oath of office, to preserve, protect and defend the Constitution. This oath materially means each and every pillar is bound to act according to civilized concept of reasonableness, proportionality, accountability, transparency, good governance and none will act arbitrarily and the judiciary will not create laws as opposed to interpretation of the statutes and the Constitution. All these ensure that some of the common law cases on contempt does not rule us from its graves.

[5] The learned judge in this case had relied on cases related to scandalising court as well as breach of orders of court. In consequence, these area of law have to be dealt with to demonstrate that the principles stated in those judgments must be read with caution. Those principles may not be applicable to contempt in the face of the court. However, the cases related to scandalising court set out the strict test what act or conduct will amount to contempt and also the limitation inclusive of the defence to a charge. In addition, it also explains the gravity to be considered to find liability as well as punishment. [See *R v. Gray* [1900] 2 QB 36 (*Gray)*; *Ambard v. Attorney*

General of Trinidad [1936] 1 MLJ 117 (*Ambard); Arthur Reginald Perera v. The King* [1951] AC 482 *(Perera)* - (referred to as the 'Three Cases')]. In dealing with these cases, a judge is obliged to take into consideration our rule of law as per the constitutional framework. [See *Leong Bee v. Ling Nam Rubber Works* [1970] 2 MLJ 45, PC; *Lembaga Kemajuan Tanah Persekutuan v. Tenaga Nasional Bhd* [1997] 2 MLJ 783].

[6] English judges have repeatedly said that contempt jurisdiction is not in any way meant for the court to shield its own conduct or wrongdoings, from being exposed or its arbitrary exercise of powers to be questioned or buried, and/or rules of natural justice to be breached. Such an approach will also be inconsistent with the spirit and intent of the Federal Constitution which is premised on democratic principles anchored based on rule of law which in simple terms must subscribe to accountability, transparency and good governance. If these premises are perceived in the proper perspective, it will be easier to deal with this area of jurisprudence which is archaic and complicated over decisions of courts that are inconsistent with the rule of law and the Federal Constitution. Public perception of self-serving judgments in the area of contempt may immediately meet with resistance from the public as well as stakeholders of justice. Such perception will undermine the public confidence in the judiciary for years to come and will also stand as a black mark in the history related to judgments as well as the judges. To avoid such perception, English judges have narrowed down the scope of contempt to bare minimum and have always applied the strict test to assess the gravity of the act or conduct to find contempt.

[7] Some useful quotes of great judges will help to understand the need to refrain from invoking contempt jurisprudence. They are as follows:-

(a) Lord Denning

"Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself."

(b) Gajendragatkar R.C.J. India (1965)

"We ought never to forget "that the power to punish for contempt, large as it is, must always be exercised cautiously, wisely and with circumspection. Frequent or indiscriminate use of this power in anger or irritation would not help to sustain the dignity or status of the court, but may sometimes affect it adversely. Wise judges never forget that the best way to sustain the dignity and status of their office is to deserve respect from the public at large by the quality of their judgments, the fearlessness, fairness and objectivity of their approach, and by the restraint, dignity and decorum which they observe in their judicial conduct." [Emphasis added].

(c) Lord Steyn - [1999] 2 AC 294

"The field of application of the offence is also narrowed by the need in a democratic society for public scrutiny of the conduct of judges, and for the right

> of citizens to comment on matters of public concern. There is available to a defendant a defence based on the "right of criticizing in good faith, in private or public, the public act done in the seat of justice."

[8] In some jurisdictions, courts often tend to move its decision, to reflect that in exercising its contempt jurisdiction, it can assert its power and/or shield itself from public scrutiny; a position inconsistent with the English cases. [See UK Law Commission Report 2012 – after the report, the offence of scandalising the court has been abolished]. Such an approach will be inconsistent with the rule of law, the Federal Constitution as well as oath of office of each and every individual judge. Any decision of the court in exercising the contempt jurisdiction must pass the test of reasonableness, proportionality, transparency, good governance and the decision must not be arbitrary. The test is objective and in consequence, is always subject to public scrutiny.

[9] To put it mildly, contempt and nuisance share similarity, save that the former may lead to punishment by the court and the latter may be liable to relief like damages, etc. The dictionary meaning of nuisance means 'a person or thing causing inconvenience or annoyance'. The common law courts at the early stages of jurisprudence in arresting nuisance to the administration of justice, with regal vigour had developed a procedure for its own benefit to summarily punish the person who created the nuisance. This was done at a time where there was no civilized framework to deal with such issues.

Such vigour now will be against the rule of law and constitutional framework.

[10] Nowadays, civilized jurisdiction does not recognize all forms of contempt and in our Constitution it is limited to contempt 'of itself'. [See *D.J Service Association Tis Hazari Court v. State of Gujarat*, 1992 (1) U.P. Cr. Cases (S.C.) 30]. What is 'contempt of itself' has not been well defined or articulated in our jurisprudence. This case requires that to be done to put in place the rule of law and the framework of the Federal Constitution.

[11] For a start, 'contempt of itself' in our view does not mean that all forms of contempt at the early stages of the common law has been incorporated in Article 126 of the Federal Constitution. This point was not argued here or below and its best; this point is argued before the court with some guidance from this court as this case is related to public interest jurisprudence. In *D.J Service Association Tis Hazari Court v. State of Gujarat*, 1992 (1) U.P. Cr. Cases (S.C.) 30, the court observed:-

> "Article 129 declares the Supreme Court a Court of record and it further provides that the Supreme Court shall have all the powers of such a Court including the power to punish for contempt of itself. The expression used in Article 129 is not restrictive instead it is extensive in nature. <u>If the framers of the Constitution intended that the Supreme Court shall have power to punish for contempt of itself only, there was no necessity for inserting the expression "including the power to punish for contempt of Itself."</u> The article confers power on the Supreme Court to punish for contempt of itself and in addition, it confers some additional power

relating to contempt as would appear from the expression "including". The expression "including" has been interpreted by Courts to extend and widen the scope of power. The plain language of article clearly indicates that this Court as a Court of record has power to punish for contempt of itself and also something else which could fall within the inherent jurisdiction of a Court of record. In interpreting the Constitution, it is not permissible to adopt a construction which would render any expression superfluous or redundant. The Courts ought not to accept any such construction. While construing Article 129, it is not permissible to ignore the significance and impact of the inclusive power conferred on the Supreme Court. Since, the Supreme Court is designed by the Constitution as a Court of record and as the founding fathers were aware that a superior Court of record had inherent power to indict a person for the contempt of itself as well as of Courts inferior to it, the expression "including" was deliberately inserted in the Article 129 which recognised the existing inherent power of a Court of record in its full plenitude including the power to punish for the contempt of inferior Courts. If Article 129 is susceptible of two interpretations it would prefer to accept the interpretation which would preserve the inherent jurisdiction of this Court being the superior Court of record, to safeguard and protect the subordinate judiciary, which forms the very backbone of administration of justice. The subordinate Courts administer justice at the grass root level their protection is necessary to preserve the confidence of people in the efficacy of Courts and to ensure unsullied flow of justice at its base level." [Emphasis added].

[12] Our Article 126 reads as follows:-

"Power to punish for contempt

126. The Federal Court, the Court of Appeal or a High Court shall have power to punish any contempt of itself."

India Article 129 reads as follows:-

> **"129. Supreme Court to be a court of record.** The Supreme Court shall be a court of record and shall have all the powers of such a court <u>including</u> the power to punish for contempt of itself." [Emphasis Added].

[13] It must be noted that 'including' is deliberately excluded in our Article 126 and in consequence, Article 126 ought to be narrowly construed. Our courts have not dealt with the distinction yet.

[14] It is a pure court rhetoric to rely on the common law cases to say that the nuisance/contempt can destroy the integrity or dignity of the court. Nuisance can never destroy any court of integrity and in the civilized world, such nuisance against any institution related to all the three pillars of the Constitution may help to improve the shortcoming of the institution itself. The English judges have accepted the above statements in their own words and the harsh punishment of fine and imprisonment is now restricted to contempt in the face of court, i.e. in the court room itself or breach of its orders. This case does not really involve contempt in the court room. This point needs further considerations by the High Court. Even if it does, the reasonableness and proportionality principle in sentencing must also be ventilated in the High Court as the magnitude of imprisonment will have serious consequence to a government servant or it's alike which will not only affect his livelihood but ultimately may lead to the destruction of his family,

etc. A court which does not take into consideration these factors in punishing the appellant will tantamount to have exercised arbitrariness in the decision making process itself. Arbitrariness compromises the integrity of the decision.

[15] In addition to the above, the court on its own motion ought not to increase its powers of contempt, inconsistent with Article 126 read with Article 10 of the Federal Constitution and also with Civil Law Act 1956 (CLA 1956) in relation to the role of common law cases. Further, when it comes to doubt as to culpability, the court is obliged to lean in favour of the contemnor in construing a statute as well as the Constitution. The Constitution cannot be liberally construed to the detriment of the accused and/or to restrict fundamental guarantees. These are some of the exceptions in construing the constitutional provisions as opposed to general principles of construction of the Constitution. [See *Dato Menteri Othman bin Baginda & Anor v. Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29].

[16] In the instant case, it may be doubtful that the act which is complained of by *whatsapp* messages, will indeed interfere with the administration of justice. In such instances, imputing contempt in relation to *whatsapp* messages is alien to common law jurisprudence. Contempt must be direct as per our criminal law. Anything less will not pass the beyond reasonable doubt test to find liability. Any courts exercising criminal jurisdiction would know for sure that you cannot impute a crime. Contempt being criminal in

nature does not permit court to impute to find liability. Support for the proposition is found in a number of cases as follows:-

(a) In *Dato' Ibrahim bin Ali v Datuk Seri Anwar Bin Ibrahim* [2015] 4 MLJ 98, the Court of Appeal observed:-

> *"...should any doubt arise as to the culpability of the alleged contemnor, it ought to be resolved in favor of the alleged contemnor."*

(b) In *Re Bramblevale Ltd* [1970] 1 Ch 125, the court opined:-

> *"Where there are two equally consistent possibilities open to the court, it is not right to hold that the offence is proved beyond reasonable doubt."*

(c) In *Wee Choo Keong v Mbf Holdings Bhd & Anor and Another Appeal* [1995] 3 MLJ 549, the court observed:-

> *"[.. .] It is already well established that in contempt of court proceedings, proof must be proof beyond reasonable doubt, and that where there is a doubt the doubt ought to be resolved in favour of the person charged. In other words, the proof must be of the standard as is required in a criminal case[...]"*

(d) In *AV Asia Sdn Bhd v. Measat Broadcast Network Systems Sdn Bhd & Anor* [2012] 1 LNS 478, Hanipah Farikullah JC (as Her Ladyship then was) held that:-

> *"29. The standard of proof required in contempt of court proceedings is proof beyond reasonable doubt such doubt ought to be resolved in favor of the alleged contemnor."*

(e) In *Foo Khoon Long v Foo Khoon Wong* [2009] 9 MLJ 441, VT Singham J (as his Lordship then was) stated:-

> *"[8] The applicant therefore has to prove beyond reasonable doubt that, the respondents had notice of the terms of the ex parte injunction and acted in breach of the said injunction. If there is a doubt as to the conduct of the respondents, no order for committal shall be made [...]"*

[17] At common law as per the 'Three Cases' cited earlier, you cannot impute contempt when there is justifiable explanation. In the instant case, it will appear that the learned judge was imputing contempt and such an approach will impinge on our criminal jurisprudence. As we said earlier, the rule of law here does not allow common law cases to rule the public from the graves. The common law cases must be read with our jurisprudence. This issue need to be ventilated in the High Court.

Gravity of Nuisance/Contempt

[18] Integrity of court in public opinion is quintessential to protect its integrity. When integrity of court is intact, nuisance created by parties in court proceedings or outside court will not impinge on integrity for courts to invoke its coercive powers. This is reflected in a number of English judgments and at times are absent in judgments from some commonwealth countries.

[19] It is well accepted by judges invoking civilized jurisprudence on contempt (as opposed to its archaic origin) that the purported contemnor must have acted in a way that 'interferes with' or 'impedes the administration of justice'. These are extremely strict tests and also objective tests. English judges have denounced when the motion is moved alleging that the conduct had 'offended the court' or 'likely to offend the court' or 'to protect the courts dignity' or 'judges dignity', etc. Penal punishment of imprisonment is only imposed in rare cases where the contempt was in the face of the court or breach of orders of court. The common law position was reflected in the Privy Council's decision of *Perera's* case, an appeal from the Supreme Court of Ceylon. The Privy Council's observation will stand as quintessential test for contempt. The threshold for contempt is very high and cannot be used arbitrarily and that has never been the position of common law as early as 1950. That part of the Privy Council observation reads as follows:-

"….. It is not necessary to go through it. Its purport was to explain without ambiguity the circumstances that had led to his making the entry complained of and to inform the court that in so doing he had acted in pursuance of his duties as a member of the legislature, and that he had no intention of bringing the court into disrepute or contempt. In response to the judge's questioning he made it clear that he had acted on the strength of the information given to him by the jail authority and that he had not been able to investigate the matter for himself. Finally, he submitted that his entry in the visitors' book did not amount to contempt of court. The judge pronounced him to be guilty of contempt and sentenced him to pay a fine of Rs.500, in default to undergo six weeks' rigorous imprisonment.

Their Lordships are satisfied that this order ought not to have been made. They have given the matter the anxious scrutiny that is due to any suggestion that something has been done which might impede the due administration of justice in Ceylon. And it is proper that the courts there should be vigilant to correct any misapprehension in the public that would lead to the belief that accused persons or prisoners are denied a right that ought to be theirs. But Mr. Perera, too, has rights that must be respected, and their Lordships are unable to find anything in his conduct that comes within the definition of contempt of court. That phrase has not lacked authoritative interpretation. There must be involved some " act done or writing published calculated to "bring a court or a judge of the court into contempt or to lower "his authority" or something "calculated to obstruct or interfere" with the due course of justice or the lawful process of the "courts": see *Reg*. v. *Gray* (12).

What has been done here is not at all that kind of thing. Mr. Perera was acting in good faith and in discharge of what he believed to be his duty as a member of the legislature. His information was inaccurate, but he made no public use of it, contenting himself with entering his comment in the appropriate instrument, the visitors' book, and writing to the responsible Minister. The words that he used

made no direct reference to the court, or to any judge of the court, or, indeed, to the course of justice, or to the process of the courts. What he thought that he was protesting against was a prison regulation, and it was not until some time later that he learnt that, in so far as a petitioner had his petition dealt with in his absence, it was the procedure of the court, not the rules of the prison authorities, that brought this about. Finally, his criticism was honest criticism on a matter of public importance. When these and no other are the circumstances that attend the action complained of there cannot be contempt of court."

[20] The important principles of the 'Three Cases' must be appreciated in the proper perspective before invoking the contempt jurisdiction. Not acting within the spirit or intent of the Privy Council decisions of the past and the defence in *Gray*'s case may also impinge on section 3 of the CLA 1956. Section 3 states:-

"Application of U.K. common law, rules of equity and certain statutes

3. (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall—

(a) in Peninsular Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7 April 1956."

[21] The principles on contempt stated by the Privy Council in *Perera's* case was also a reflection of the Privy Council's decision of *Ambard's* case. Both the Privy Council's decisions must be read with what Lord Russel said in *Gray's* case as early as year 1900. His Lordship observed:-

> "Judges and courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of court." [Emphasis added].

[22] *Gary*'s case also asserts the act or conduct inside or outside court must be unwarranted and ghastly to reach the threshold test of contempt and sets out the defence to the purported contempt. *Gary*'s case also reflect the common law position as at the year 1900.

[23] The decisions in India and other jurisdictions may have departed from some of the test stated in the 'Three Cases', the reason being India has regulated its contempt laws to also include defences to the charge. Relying on Indian cases or other jurisdiction on this area of law to find guilt without taking into consideration the defences at times, may be like comparing an apple with pumpkin. Such decisions will not only be perverse but plainly unconstitutional and/or breach of rule of law.

[24] In addition, court must be careful in following decisions from England or Privy Council related to contempt after the cut of period under the CLA 1956, as those decisions may relate to appeals from commonwealth countries which after independence have regulated the law on contempt. The important point is that the common law test related to contempt and the test of regulated contempt provisions of countries like India, etc. may not be the

same in consequence of clear statutory defences in favour of the contemnor. Accepting those cases to establish liability only and not considering the statutory defence will lead to grave jurisprudential flaw and that will be directly in breach of Articles 5 and 8 of the Federal Constitution. Legislation in many countries while dealing with the scope of contemptuous act, equally provides appropriate defence to nullify the charge consistent with international convention, etc.

[25] There are a number of leading decisions in Malaysia on contempt but counsel have failed to bring to the attention of court, *Perera*'s case and also *Gray*'s defence as early as the year 1900. The coram in *Perera*'s case consisted of Lord Simonds, Lord Morton and Lord Redcliff and had anchored the common law position related to contempt as well as the defence permissible to a charge. One of the extracts will be a useful guideline. It reads as follows:-

> "There must be involved some 'act done or writing published calculated to bring a court or a judge of the court into contempt or to lower his authority' or something 'calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts'."

[26] The strict test for contempt based on the 'Three Cases' will by itself stand as a defence.

[27] The above extract is related to gravity. *Perera's* case first requires the court to consider, before invoking its jurisdiction on contempt, whether the act complained of attempts to lower the authority of the court or interferes with the administration of justice. Lowering the authority of the court does not relate to the judge or his conduct as Lord Denning and many other judges have said in their own way that 'we will never use this jurisdiction as a means to uphold our own dignity'. Such an approach will be consistent with our constitutional framework and rule of law anchored on democratic values and freedom of speech. In addition, the test in criminal cases are not subjective but objective. The objective element has to be considered according to various norms of rule of law, constitution, international conventions, etc. or it will impinge on the concept of accountability, transparency and good governance. Further, it becomes more onerous for a judge in contempt proceedings as he is a prosecutor, jury, judge as well as he may be a witness, and in consequence cannot be subjective in the assessment of identifying the act of contempt. If he does so, the integrity of decision making process within our rule of law will be compromised. Whether the *whatsapp* messages will prima facie attract contempt need to be considered in the proper perspective.

[28] The common sense approach that the courts should often employ when a person creates nuisance directed at the administration of justice is to caution the perpetrator or if the nuisance is created in the court premise to ask him to leave the court premise, etc. In most cases of nuisance, there is no necessity to invoke coercive powers of the court. It can be referred to for

action under penal laws. In case of nuisance created by government servants or professionals, the court can refer them to their disciplinary bodies or direct the parties to the proceedings, to refer them to disciplinary bodies as opposed to invoking the contempt powers. [See UK Law Commission Report 2012].

Whatsapp

[29] It must be emphasised that the conduct of the appellant was related to his communication by *whatsapp* with Daing who was outside the court and was a potential witness. Strictly speaking, it may not fall under contempt in the face of court *per se* if the court has not warned the particular person that he should not communicate with the witness. In a jury trial in England, the witnesses or parties to the proceedings need to be warned by the court first before the court will want to exercise its coercive powers.

Trivial

[30] Courts generally will not exercise its coercive powers if the conduct is trivial in nature and if that conduct will not prejudice the trial process itself. All forms of conduct inside and outside court may not attract contempt jurisprudence. Even if it does, the court must strictly apply the reasonable and proportionality principle in sentencing, taking into consideration the gravity of the misconduct in interfering with the administration of justice as a whole as opposed to flaunt the ego of the court and its authority. Court is

not permitted to use a sledge hammer to silence the ant. The gravity of the contempt or what in ordinary language can also be called nuisance has to be dealt with rationality, acceptable to civil society, taking into consideration the various international conventions within the parameters of what we widely call as rule of law as opposed to rule by law.

Cross-Examination

[31] It is important to note that the learned judge sitting in an election petition case invoking contempt jurisdiction, had refused to call Daing to give evidence or to be cross-examined during the contempt trial. Criminal jurisprudence does not cater for such gross violation of the rule of law. Daing, being an important witness, ought to have been called.

Order 52 rule 2A and other Issues

[32] In the instant case, the learned judge had initiated the contempt proceedings under Order 52 rule 2A of Rules of Court 2012. Order 52 rule 2A relates to contempt in the face of court. Further, there are many other issues of concern in this case such as the appellant was not given fair hearing which will attract Articles 5 and 8 of the Federal Constitution. Whether interference in the administration of justice may fall under other statutory offences or disciplinary rules, etc. and cannot fall within the regime of contempt pursuant to Article 10 of the Federal Constitution need also be considered. The reason being the parameters of contempt have not been

legislated as required by Article 10 but penal provision to arrest such nuisance is in place. In India, they have also done by virtue of Contempt of Court Act 1972 and they also had one or two version of Contempt of Court Act before even their constitution was given birth. Malaysia strictly is bound by the common law as per CLA 1956 with such dominant adjustments as necessary pursuant to our Constitution and rule of law. The founding fathers of our Constitution have given a restrictive meaning to contempt jurisdiction inclusive of restricting the state to move a contempt petition pursuant to Article 145 without legislating under Article 10. The relevant Articles for the purpose of criminal contempt, must be read to lean towards the accused. By doing so, many forms of contempt will become obsolete. Some of the decisions here have developed the contempt jurisdiction, in contrast to England where courts have narrowed down or refused to exercise the common law jurisdiction arbitrarily.

Common Law Cases

[33] It must also be noted that it will be jurisprudentially a misconceived proposition to accept common law cases of contempt in respect of procedure as part of our judicial precedent when the law of contempt in England do not consider provisions like Articles 5, 8, 10 and 126, etc. inclusive of other statutory provisions and disciplinary procedures, etc.; which were not part of the English law when archaic jurisprudence of contempt was developed. The Constitutional provisions make it unconstitutional to summarily move any form of contempt application without giving appropriate opportunity

to the purported contemnor for the matter to be dealt with according to due process of law where the judge is the prosecutor, jury, judge as well as may be a witness in cases of contempt in the face of court. An onerous duty of such nature if exercised must be done with courtesy and fairness without extending the scope of Article 126 of the Constitution, failing which it will lead to public condemnation and/or ridicule and will place the administration of justice in disrepute by judges themselves. To put it mildly, it is not a trigger-happy jurisdiction and if exercised arbitrarily as well as subjectively, it becomes sinful in nature when custodial sentence are ordered without full appreciation of rule of law and due process. In consequence the English Courts are extremely slow in invoking the jurisdiction.

Summary Process – Medical Evaluation

[34] Contempt proceedings is often said to be a summary process and does not mean it has to be rushed through without taking procedural safe guards and giving opportunity to the contemnor as well as counsel to prepare and defend the accusation. In addition, at this time and era, the need for medical evaluation will also arise to ensure that the conduct of the contemnor is not related to medical condition of severe nature as well as the contemnor is not under medication for severe ailments inclusive of recent surgeries, such as heart and/or other transplants where the medications may result in inconsistent behaviour. Thus, archaic coercive powers in civilised society must be exercised with humanity as the judge is the prosecutor, jury, judge and witness, etc.

Forms of Contempt

[35] At the outset, we must say that we have to briefly deal with most forms of contempt as judgments of courts have diversified the judicial principles indiscriminately without distinguishing the type of contempt and the threshold requirement to be satisfied for guilt. For example, contempt in the face of court jurisprudence for throwing a shoe at the judge cannot bear the same jurisprudence as contempt for scandalising court or interference of administration of justice from outside the court. Scandalising court is a form of interference of administration of justice from outside the court. The threshold is low in the first example, i.e. contempt in the face of court and extremely high in the second example where due process of law must be strictly observed as the concept of scandalising court will usually involve third parties to the proceedings. Parties in this case have also cited cases which do not fit the occasion. That is to say, an apple must be compared with an apple and not a pumpkin. If it is done, the integrity of the decision making process will not only be compromised but also will become unconstitutional by virtue of Articles 5 and 8 of the Federal Constitution.

[36] In our view, contempt jurisprudence is at an infant stage in Malaysia as many of the issues which we have raised earlier, were not raised by parties or within their comprehension, as most of our judgments have only taken cognisance of old common law cases and diversified by taking into consideration cases from other jurisdictions, without deliberating on the

constitutional provisions which we have brought to light and other options before exercising the coercive powers of the court.

[37] As the instant case is in the radar of public due to media coverage, it becomes incumbent upon us to set out the general parameter of law of contempt, its shortcomings, inclusive of lack of legislative measures under Article 10 to regulate the parameters of contempt and other options to deal with nuisance related to administration of justice. This is necessary to put in place the rule of law within the parameters of our constitutional framework. The shortcomings have been well appreciated by the Indian Legislature and they have brought in place the Contempt of Courts Act 1972 as per the requirement to a similar Article as our Article 10 of the Federal Constitution.

Historical, General and Constitutional Jurisprudence Related to Law of Contempt

[38] Criminal contempt of court has been described by judges as "inordinately sweeping and vague" and as the offence with "the most ill-defined and elastic contours in law". [See Article by D.G.T. Williams titled "Contempt of Court and Victimisation of Witnesses"]. In the origin of common law courts, this jurisdiction was very much necessary to assert sovereign power to maintain respect in the administration of justice. The contempt jurisdiction was necessary as there were no civilised democratic laws to regulate the affairs of mankind then. For example, constitution, statutory law, disciplinary procedures for organised persons in the

government service, medical profession, lawyers, etc. The contempt jurisdiction was coercive in nature and in the later part of the common law jurisprudence, judges distance themselves away from the archaic concept of scandalising the courts as well as nuisance in court, keeping only to contempt associated with severe conduct related to contempt in the face of court as well as disobedience of court orders and/or gravely unwarranted interference in the administration of justice with regard to trial process where the court is not *functus officio*. Great judges like Lord Denning are some of the judges who have distanced themselves from the archaic jurisprudence of contempt, when applied with force and might in a civilised society will lead to public odium and ridicule of the administration of justice itself. The 'Three Cases' would reflect the common law position even before our Constitution was formulated. These decisions also limits the jurisprudence of scandalising the court in contrast to the case of *Rex v. Almon* [1765] Wilm 243 ER 94 and narrows the scope for citing parties for all types of contempt.

[39] In *Ambard*'s case, the appellant was fined for contempt of court alleged to have been committed by publication in a newspaper of a certain article commenting on the inequality of sentences. The Privy Council held that it is the ordinary rights of members of the public or the press to criticise in good faith in private or public the administration of justice. Further, restriction was placed to curb contempt action by the Privy Council in *Perera's* case, taking into consideration the principles stated in *Gray's* case.

[40] Following decisions like *Gray, Ambard* and *Perera*, our founding fathers when formulating the Federal Constitution had impliedly restricted the powers of contempt of court to matters of 'any contempt of itself' meaning contempt in the face of court or orders of court, leaving parliament to legislate other forms of contempt by way of legislation in Article 10 of the Federal Constitution. Whether purported interference of administration of justice inside and/or outside court with *whatsapp* messages will fall under Article 126 has not been dealt with in detail yet. Parties also have not submitted on that.

[41] Both articles if read together with Articles 5 and 10 inclusive of Article 145 of the Federal Constitution, expound that the courts common law powers of contempt is restricted and the state power to move for contempt is also not available unless it is legislated. The said Articles read as follows:-

> **"Power to punish for contempt**
>
> 126. The Federal Court, the Court of Appeal or a High Court shall have power to punish any contempt of itself."

> **"Attorney General**
>
> 145. (3) The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial."

"Liberty of the person

5. (1) No person shall be deprived of his life or personal liberty save in accordance with law."

"**Equality**

8. (1) All persons are equal before the law and entitled to the equal protection of the law."

"Freedom of speech, assembly and association

10. (1) Subject to Clauses (2), (3) and (4)—

(a) every citizen has the right to freedom of speech and expression;

(2) Parliament may by law impose—

(a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence." [Emphasis added].

[42] Rule of law necessarily means giving full force and might to the Federal Constitution and there is no provision to develop any form of law by judicial decisions, more so in favour of the courts inconsistent with the Federal Constitution at the expense of the accused and/or purported contemnor.

[43] If decisions of courts have strayed from constitutional parameters, it has to be revisited. [See *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561; *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors and Other Appeals* [2018] 3 CLJ 145]. Judicial precedent plays only a secondary role when it relates to the Federal Constitution. [See *Dato Menteri Othman bin Baginda & Anor v. Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29]. Courts have no powers or jurisdiction to increase their powers or jurisdiction based on common law case or cases outside our jurisdiction to compromise constitutional guarantees inclusive of the spirit and intent of the Constitution. Plainly wrong and perverse decisions in this area of law must be revisited.

[44] In addition, the safe guards under Articles 5 and 8 of the Federal Constitution, must be strictly complied with and must also be clearly demonstrated in the grounds of the decision to find guilt. In *Messrs Hisham, Sobri & Kadir Advocates & Solicitors v. Kedah Utara Development Sdn. Bhd. & Anor* [1988] 1 CLJ 627, Edgar Joseph J (as His Lordship then was) observed:-

> *"Now, it is well-settled law that contempt of court is an offence of a criminal character since the liberty of the alleged contemnor is at stake. That being so, it is fundamental that a man ought not to be penalized unless he has both a fair opportunity to comply with the law and the capacity to do so. Any other approach would not only be morally objectionable but also should have no place in a legal system based on ideas of fair play and justice."*

In *Merino-ODD Sdn Bhd v Peed Construction Sdn Bhd* [2010] MLJU 2201, the court stated:-

"*It is trite that contempt proceedings are quasi-criminal in nature. As a general rule strict compliance of the rules of procedure are mandatory failing which the court is not obliged to allow the application on the grounds that it will breach the dominant provision of the Federal Constitution Article 5 (1) which reads as follows: No person shall be deprived of his life or personal liberty save in accordance with law*."

Contempt of Court, its classification and case laws

[45] Contempt of court is a generic phrase and it may mean at least the following: (a) disrespect to the court at the court proceedings itself, e.g. throwing a shoe; (b) comments or interference with witness on cases pending in the court ('sub-judice'); (c) breach of orders of court (committal); (d) scandalising court, i.e. publication of scandalous matters which means publication of unwarranted material as opposed to warranted materials in public interest. The case of *Almon*, the court sets out the archaic concept of contempt and is reproduced from UK Law Commission Report 2012, "Contempt of Court: Scandalising The Court" paper No. 207, which read as follows:-

"10. The first clear mention of an offence of scandalising the court was in a draft judgment of Mr Justice Wilmot in *Almon,* this judgment was never actually delivered, as the proceedings were abandoned, but it has been quoted with approval in subsequent cases.

> The arraignment of the justice of the judges, is arraigning the King's justice; it is an impeachment of his wisdom and goodness in the choice of his judges, and excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the judges, as private individuals, but because they are the channels by which the King's justice is conveyed to the people.
>
> To be impartial, and to be universally thought so, are both absolutely necessary for the giving justice that free, open, and uninterrupted current, which it has, for many ages, found all over this kingdom, and which so eminently distinguishes and exalts it above all nations upon the earth.

11. The leading authority is *Gray,* where a journalist was found to be in contempt by scandalising the court for describing Mr Justice Darling as an "impudent little man in horsehair, a microcosm of conceit and empty-headedness". (The article went on to observe that "no newspaper can exist except upon its merits, a condition from which the bench, happily for Mr Justice Darling, is exempt".) As in *Almon* the main thrust of the judgment was that the summary procedure, whether described as "committal" or "attachment", had always formed part of the common law, applying to all forms of contempt.

12. In *Gray,* the offence of scandalising the court was described by Lord Russell of Killowen CJ as follows:-

> Any act done or writing published calculated to bring a court or a judge of the court into contempt, or to lower his authority, is a contempt of court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the courts is a contempt of court. The former class belongs to the category which Lord Hardwicke LC characterised as "scandalising a court or a judge". *(In re Read and Huggonson.)* That description of that class of contempt is to be taken subject to one and an important qualification. Judges and courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of court. [Empasis added].

13. There is no further detailed definition in the case law. There is therefore some uncertainty about the precise elements of the offence, in particular whether there is a fault requirement and whether the identified defences are true defences or only examples of conduct falling outside the proscribed conduct." [Emphasis added].

[46] The UK Law Commission Report 2012 itself identifies the uncertainties in the law of contempt based on common law decisions. Thus, it is incumbent under our constitutional framework to lean in favour of the accused and/or contemnor as opposed to lean in favour of the courts, when dealing with such uncertainties. Thus, the test for contempt is much higher

than the proposition in the common law cases, in consequence of our Constitution and Rule of Law.

[47] In respect of (a) to (c), the English, Malaysian, Indian and Singapore Courts have claimed jurisdiction to deal with it. The English Courts deal with the issue under the common law principle. The Malaysian courts deal with it under Article 126 of the Federal Constitution which is also repeated in section 13 of Courts of Judicature Act 1964 (to a limited extent the sub-ordinate courts under Subordinate Courts Act 1948). In India and Singapore, the courts deal with it under their equivalent of Article 126 to a limited extent and also under the Act related to contempt.

[48] The common law concept of scandalising courts which was mentioned in *Almon*'s case, did not find favour in the Australian High Court decision in *The King v. Nicholls* [1911] 12 CLR 280. In addition, the Privy Council in the well-known cases of *Gray, Ambard and Perera*, restricted the scope of scandalising court by asserting there must be malice, etc. and further restrictions were set out by the Privy Council in *Perera's* case. Subsequent English Courts' decisions were not prepared even to support or convict a person for all types of contempt readily, notwithstanding it was contempt in the face of court or mild interference of justice as per the facts of the instant case. Support for the proposition is found in a number of cases. A case in point is *Balogh v. St Albans Crown Court* [1975] QB 73, where the defendant suggested to the judge that he was "a humourless automaton. Why don't you self-destruct?" Lord Denning took the view that no punishment ought

to be inflicted as "insult are best treated with disdain, save where they are grossly scandalous".

[49] Grossly scandalous means the statement made by the maker has no evidential strength or the truth cannot be established at all. For example, all form of defamatory statements will on the face of it will appear to be scandalous but if the maker is in a position to give evidence and/or call evidence to substantiate the allegation, then it cannot be said to be scandalous. [See *Christie v. Christie* [1873] Ch. App 499].

[50] In *Gray's* case, Lord Russel as early as the year 1900, had made it clear that criticism of judges cannot be scandalous *per se* and had asserted that:-

> "Judges and courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of court."

[51] Dr. Venkat Iyer gives two examples to demonstrate the gravity of the statements to be categorised as scandalous, which appear in the UK Law Commission Report 2012 and that part reads as follows:-

> "(1) In *Wong Yeung Ng v. Secretary of Justice* a newspaper was held guilty of contempt for describing some judges as "dogs and bitches", "scumbags", "public enemy of freedom of the press and a public calamity to the six million citizens of Hong Kong", "British white ghosts" and "pigs", and threatening to "wipe [them] all out".

(2) In a then unreported case in South Australia, a radio presenter discussing a story about a magistrate invited his listeners to "smash the judge's face in".”

[See ‘The Media and Scandalising: Time for a Fresh Look’ (2009) 60 Northern Ireland Legal Quarterly 245].

[52] In addition, relying on common law cases to increase contempt jurisdiction in breach of CLA 1956 may not be correct, though it may be acceptable to reduce the gravity of liability by relying on English cases after 1956 or taking into consideration various international conventions. What the courts cannot do is to rely on cases to increase its jurisdiction or power to punish.

[53] Contempt jurisdiction can only be invoked where there is real need. If other options are available which can suitably deal with the nuisance caused by the accused that should be the appropriate option under our constitutional framework. In *Zainur Zakaria v. Public Prosecutor* [2001] 3 MLJ 604, Steve Shim (CJSS) as he then was, observed:-

> “I have, at the outset of this judgment, cited with approval those observations of Lord Donning MR in *Balogh v Crown Court*, which will, I believe, echo in the corridors of the judiciary for all time. He said that the power of summary punishment was a great power but a necessary one given to maintain the dignity and authority of the judge and to ensure a fair trial. He emphasized that it should only be exercised when it was urgent and imperative to act immediately with

scrupulous care and when the case was clear and beyond reasonable doubt. The summary procedure in proceedings for criminal contempt has been succinctly laid down by Mustill LJ in *R v Griffin* (1988) 88 Cr App R 63 when he said, *inter alia*:

> We are here concerned with the exercise of a jurisdiction which is sui generis so far as the English Law is concerned. In proceedings for criminal contempt, there is no prosecutor, or even a requirement that a representative of the Crown or of the injured party should institute the proceedings. The judge is entitled to proceed of his own motion. There is no summons or indictment, nor is it mandatory for any written account of the accusation made against him to be furnished to the contemnor. There is no preliminary inquiry or filtering procedure such as a committal. Depositions are not taken. There is no jury. Nor is the system adversarial in character. The judge himself enquires into the circumstances so far as they are not within his personal knowledge. He identifies the grounds of complaint, selects the witnesses and investigates what they have to say (subject to a right of cross-examination), decides on guilt and pronounces sentence. This summary procedure, which by its nature is to be used quickly if it is to be used at all, omits many of the safeguards to which an accused is ordinarily entitled, and for this reason it has been repeatedly stated <u>that the judge should choose to adopt it only in cases of real need</u>." [Emphasis added].

In *R v. Huggins* [2007] EWCA Crim 732, Moses LJ stated:-

> "[17] Since the power summarily to commit a person to prison must be a matter of last resort, it is incumbent on the judge to consider <u>whether some lesser alternative to protect the court processes may be deployed.</u> The judge must consider whether

the need to protect the court process and those who participate in it, and in particular the jury, can be met by steps other than an immediate committal to prison." [Emphasis added].

Rules of Natural Justice

[54] It is a strict rule in dealing with any form of contempt, rules of natural justice must be strictly complied with and the court must ensure the person alleged to be in contempt under the offence alleged against him, has been given the full opportunity to be heard in his own defence and the full right to call witness to support his case or to cross-examine witnesses who are in court or outside court or has nexus to the proceedings without undue interruption by the judge. That is to say, even though at common law, it was used to be a summary process under our Constitution, Articles 5 and 8 will require the court to extent all procedural advantage to the accused like that in criminal cases. In *Zainur Zakaria*'s case, Steve Shim (CJSS) as he then was, observed:-

"In my view, the phrase 'an opportunity of answering the charge' must necessarily include that a reasonable opportunity be given to the alleged contemnor to prepare his case. That the conduct of the hearing must be fair is a reflection of the deeper principle that the alleged contemnor is entitled to present his case fully."

Adjournment

[55] Natural justice also includes granting of adjournment for contemnor as well as his counsel to prepare his defence. Preparing defence must be reflective of what is the courtesy and time period provided in criminal court practice as contempt is seen as criminal in nature failing which Articles 5 and 8 of the Federal Constitution may be breached. In *Zainur Zakaria's* case, Haidar, FCJ (as he then was) observed:-

> *"Hence, the question of undermining the authority and/or integrity of the trial in progress did not arise. I would add that the issue of trying to derail the trial also did not arise as evidence showed that the appellant was merely asking for a short adjournment to prepare his defence, that is, just a few days. Surely justice should be accorded to him to do so as his liberty was at stake and such an application should not be viewed negatively by the court as if to prevent or delay the course of justice.*

[56] It is now well-known that even in England, rules have been promulgated to ensure rules of natural justice is not breached in dealing with contempt cases. [See English Practice Direction 81].

[57] Malaysia too have incorporated rules of natural justice accepting it to be of paramount importance. Order 52 rule 2A of the Rules of Court 2012 reads as follows:-

"2A. Contempt committed in the face of the Court (O 52 r 2A)

(1) If a contempt is committed in the face of the Court, it shall not be necessary to serve a formal notice to show cause, but the Court shall ensure that the person alleged to be in contempt understands the nature of the offence alleged against him and has the opportunity to be heard in his own defence, and the Court shall make a proper record of the proceedings.

(2) Where a Judge is satisfied that a contempt has been committed in the face of the Court, the Judge may order the contemnor to appear before him on the same day at the time fixed by the Court for the purpose of purging his contempt.

(3) Where such person has purged his contempt by tendering his unreserved apology to the Court and the Judge considers the contempt to be not of a serious nature, the Judge may excuse such person and no further action shall be taken against him.

(4) Where such person declines or refuses to purge his contempt, then the Judge shall sentence him."

[58] If it is a committal proceedings pursuant to Rules of Court, strict compliance is necessary. [See *Wong Chim Yiam v. Bar Malaysia* [2019] 3 MLJ 129; Janab's Key to Civil Procedure, 5th edn pgs. 730 to 741].

[59] One of the condition precedent, the rule tacitly acknowledges is that contempt must relate to contempt in the face of court. If it is not contempt in the face of court, the said order will not apply. In the instant case, it is doubtful whether the nuisance complained of which relates to a person

outside the court premise that too by *whatsapp* messages will tantamount to contempt in the face of court sufficient for the court itself, to initiate the action summarily.

Brief Facts and Grounds of Judgment of the High Court

[60] The brief facts and the grounds of judgment of the learned High Court judge has been placed before us in a rudimentary manner and to save courts time we repeat the same and it reads as follows:-

> "1. Encik Amino, the Appellant was appointed as the Registration Officer for the nomination of candidates on 24.8.2018.
>
> 2. He was assisted by Mr. Daing who is also an ADO of the Rembau's Land Office and was under the direct control of the Appellant's administration ("Appellant's subordinate")
>
> 3. It is undisputed that Mr. Daing has received *whatsapp* messages from the Appellant, while the Appellant was cross-examined by the Petitioner's counsel although he knew that Mr.Daing was also summoned by the Court to testify on 4.1.2018 in regards to the same Election Petition.
>
> 4. The messages that was sent on 3.8.2018 by the Appellant to Mr. Daing are as follows:-
>
> - "*Assalam...lepas ini ko akan jadi saksi. Hati-hati...teruk den kena soal dalam Court.. Hari ini sambung lagi. Cuma semalam den bagi tahu PAS dah tak*

relevan semasa penamaan calon kerana ko kono bertugas dalam dewan. Hanya perlu beritahu aku untuk kebenaran masuk dewan. Good luck"; and

- "*Lebih baik cakap tak tahu*"

5. The learned High Court Judge has read out and explained the charge to the Appellant and straight away calling him to show cause.

6. The Appellant confirmed that he understood the charge and seek from the Court for an adjournment to show cause and prepare the defense. However, this was refused by the Judge and he was asked to show cause and give his defense in half an hour time.

7. **In his defense,** the Appellant apologizes to the Court and states as follows:-

- That he is not aware of the implication of the *whatsapp* messages;
- He did not have the intention to coach or exercised his influence on Mr. Daing;
- He was only telling Mr. Daing what he experienced while being crossed;
- At the material time, Mr. Daing was no longer he's subordinate; and
- He did not in any way intended to interfere with the due administration of justice.

8. **The Learned High Court Judge** is not satisfied with the show cause given by the Appellant and held him for contempt in the face of Court.

9. The Appellant counsel appealed to the learned judge against the contempt as the Appellant has offered his apology at the first available opportunity. The mitigation factors addressed by the Appellant's counsel are as follows:-

- He do not have the intention to commit the contempt;
- The Appellant has 7 children and his last child, age 1 year and 2 months was born with a heart condition (jantung berlubang);
- The Appellant is the sole breadwinner of the family;
- Imprisonment might affect his career as a public servant, such as no future prospect or fired from public service;
- 1st offense and the Appellant had indicated his remorse.

10. **The Learned High Court Judge** after balancing the mitigation factors and severity of the Appellant's conduct, sentenced the Appellant with 3 **months' imprisonment** from the date order given on the following grounds (based on the notes of proceedings. No GOJ provided):-

- The severity of the Appellant's conduct; even though he has no intention to coach the witness, but the witness is coming to court the next day;
- He ought to know the consequence of his conduct, being a government officer with an educated background and also a second class magistrate (ADO);
- The proceeding is still ongoing.

11. Note: The Appellant manage to get a stay from Federal Court pending disposal of this appeal. (Order at page 6-10 of Additional Record of Appeal)."

[61] We have read the appeal records and the able submissions of the learned counsel of the appellant and respondent. We take the view that the appeal must be allowed with terms. Our reasons *inter alia* are as follows:-

(a) In essence, the principle complaint of the appellant is that the rules of natural justice has been breached and the court should order retrial of the contempt proceedings. The 1st respondent's position is that the learned trial judge has exercised the jurisdiction correctly under Article 126 of the Federal Constitution as well as section 13 of Courts of Judicature Act 1964 (CJA 1964).

(b) What is plainly wrong in the instant case is that the authorities the parties relied on, relate to not only different type of contempt of court but also largely relate to contempt related to scandalising court. When courts as well as parties rely on case laws in criminal proceeding to find guilt on principles of law which are not relevant to the case, the decision on the face of record may become unconstitutional. It will be different if cases cited related to scandalising court in the instant case, were meant to exclude liability to make a finding of guilt. This distinction must be appreciated in the proper perspective. To appreciate this distinction, we have dealt with the jurisprudence of contempt extensively in the earlier part of the judgment.

(c) In the instant case, the learned trial judge has taken the position that it was contempt in the face of court pursuant to Article 126 of the Constitution. Whether it is or not, we are doubtful for reasons we have stated earlier.

(d) The court in saying the contempt is contempt in the face of court, had relied on the following cases which had no relevance to contempt in the face of court. They are as follows:-

(i) *Arthur Reginald Perera v. The King* [1951] AC 482 - (Scandalising court);

(ii) *Re He Kingdon v. SC Goho* [1948] 1 MLJ 17 - (Scandalising court);

(iii) *Syed Kechik Holdings Sdn Bhd & Ors v. Syed Gamal bin Syed Kecik* [2013] 8 MLJ 720 - (Breach of court order);

(iv) *Arthur Lee Meng Kwang v. Faber Merlin (M) Bhd & Ors* [1986] CLJ 58 (Rep) – (Publication);

(v) *Tan Sri Dato' (Dr.) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 2 CLJ 849 – (Breach of court's order).

(e) None of the 5 cases have anything to do with contempt in the face of court. Many of our courts' decision in this area of law also attempts to diversify the cases of different types of contempt for finding of guilt as well as punishment. Much of courts time and energy would be wasted in going through all those cases as parties have not placed them before us. It is the prime duty of counsel to ensure that the courts do not make unconstitutional decision by submitting cases that are not relevant. Unconstitutional decisions are often perceived to be greatest violation of Oath of Office of a judge by the public.

(f) In the instant case, we note that the appellant has requested a retrial of the contempt proceedings before another judge. Courts are generally slow in ordering a retrial before another judge. If the judge has erred, the fault never lies on the judge as per common law jurisprudence. The fault lies with the counsel in not properly guiding the court. This elementary jurisprudence must be appreciated in the proper perspective. In addition, the development of technology by way of audio, visual recording system which is often referred to as CRT captures the conduct or misconduct of all in the court during the trial process including the adjudicators. Further, CRT in modern times stand as primary evidence based on the *res gestae* rule and if witnesses or government servant or lawyers, professionals, etc. misconduct themselves that misconduct in the first instance can be referred

to relevant bodies for action to be taken and the CRT recording will stand as relevant, admissible and also evidence of high probative value. [See *Mohd Khairy bin Ismail v. PP* [2014] 4 CLJ 317].

(g) In the context of rehearing partly or wholly, it is up to the trial judge when a retrial is ordered to have a look at the CRT and decide whether the matter ought to be heard wholly or partly. It must be emphasised here that when the court orders a retrial, there may not be a necessity to call all the witnesses again and such issues can be suitably sorted out at the case management stage by looking at the CRT recording. CRT being related to notes of proceedings in court is a public document available to all upon payment of prescribed fees and this will also expedite retrial process. [See Article by Dr. Ashgar Ali – "Technology And Delivery of Justice: With Reference To Court Recording Transcription"].

[62] In our view, this is a fit and proper case for the contempt proceedings to be sent for retrial as per CJA 1964 and the court be at liberty to hear wholly or partly with liberty, for parties to make a comprehensive submission of our observations to ensure rule of law and constitutional framework has been strictly complied with. As far as practical, this matter must go before the same learned judge to reconsider the contempt process as we have great confidence in Her Ladyship's ability to deliver judgment upon proper

guidance of the learned counsel on the rule of law and our constitutional framework.

[63] For reasons stated above, the appeal is allowed on terms. The contempt proceedings to be reheard wholly or partly as stated above.

We hereby order so.

Dated: 17 May 2019

sgd

(DATUK DR. HAJI HAMID SULTAN BIN ABU BACKER)
Judge
Court of Appeal
Malaysia.

Note: Grounds of judgment subject to correction of error and editorial adjustment etc.

Counsel for Appellant:

Mr. Mr. G. Rajasingam [with Mr. Sathya Kumardass and Ms Sharon Jessy]
Messrs Shearn Delamore & Co.
Advocates & Solicitors
7th Floor, Wisma Hamzah-Kwong Hing
No. 1 Leboh Ampang
50100 Kuala Lumpur.
[Ref: N-01(IM)-601-10/2018]

Counsel for 1st, 2nd and 3rd Respondents:

Mr. Muhammad Rafique bin Rashid Ali [with Mr. Sreekant Pillai, Satia Stella Sidhu, Akif Rusli, Abu Bakar Isa Ramat and Muhammad Amin bin Othman]
Messrs Sreekant Pillai
Advocates & Solicitors
No. 45, Jalan SS21/38
Damansara Utama
47400 Petaling Jaya
Selangor.
[Ref: SP/Streram/EP/2018]