

No. 6 of 1978

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

ZAINAL BIN HASHIM (Plaintiff)
Appellant

- and -

THE GOVERNMENT OF MALAYSIA (Defendant)
Respondent

CASE FOR THE RESPONDENT

1. This is an appeal from the Federal Court of Malaysia (Suffian L.P., Lee Hun Hoe C.J. Borneo, and Wan Suleiman F.J.) allowing an appeal by the Respondent against an order made by Abdul Hamid J. on 21st March 1975 granting to the Appellant a declaration that the Appellant's dismissal from the Royal Malaysian Police was void and inoperative and of no effect and that he was still a member of the Royal Malaysian Police, and granting the Appellant an order for an account of all emoluments owing to him as a Police Constable from the date of the said dismissal.

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2. The facts are not in dispute. The Appellant was appointed a Police Constable on 1st March 1962. By reason of his appointment the Appellant was subject to the provisions of the General Orders 1969. On 29th April 1971 the Appellant who was at that time serving in Kajang as Police Constable No. 31209 was charged in the Kajang Magistrates' Court with

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75 an offence under Section 353 of the Penal Code. On 16th December 1971 the Appellant pleaded guilty to that charge and was discharged conditionally upon his entering into a bond of \$500 to be of good behaviour for a period of two years pursuant to Section 173A(2)(b) of the Criminal Procedure Code. By letter dated 20th December 1971 and signed by the Deputy Chief Police Officer Selangor the Appellant was suspended from duty without pay with effect from 16th December 1971 being the date of the Appellant's plea of guilty. On 23rd December 1971 the Chief Police Officer Selangor considered the Police investigation papers and the Appellant's record of service, and directed that the Appellant show cause why he should not be dismissed. By letter dated 28th December 1971 the Chief Police Officer informed the Appellant that he intended to take action to dismiss him and therefore invited the Appellant to make representations to the Chief Police Officer in writing within 14 days. The Appellant wrote making such representations to the Chief Police Officer on 30th December 1971. By letter dated 20th January 1972 signed by the Deputy Chief Police Officer the Appellant was informed on the instructions of the Chief Police Officer that after considering his representations and the circumstances surrounding the commission of the offence he was dismissed with effect from 16th December 1971. He was also informed of his right to make representation in writing to the Inspector-General of Police within 10 days. On 22nd January the Appellant duly appealed to the Inspector-General of Police on compassionate grounds but his appeal was dismissed by letter dated 7th February 1972 signed by the Inspector-General of Police. A further appeal on the grounds of procedural irregularity was made by letter dated 21st July 1972 from the Appellant's Solicitors to the Inspector-General of Police. This appeal was also dismissed. At the time of his dismissal the Appellant was on the permanent and pensionable establishment drawing a salary of \$230 per month, plus a Tamil language allowance of \$15 per month.

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3. The principal issue which arises on this appeal arises out of an amendment to the Federal Constitution effected by the Constitution (Amendment) Act 1976 which expressly purports to be of retrospective effect. That issue is whether the provisions of the Proviso to Article 135(1) of the Federal Constitution added by amendment by the said Constitution (Amendment) Act 1976 and expressly purporting to be retrospective to Merdeka Day (31st August 1957) is effective in this case, where the amendment was passed after judgment at first instance in this litigation, to validate the dismissal of the Respondent by the Chief Police Officer Selangor, which dismissal would otherwise be invalid by virtue of Article 135(1) of the Constitution.

It may be that the Appellant will seek to raise subsidiary issues of procedure but none of those subsidiary issues raised by the Appellant before the Federal Court was considered worthy of mention in its judgment.

4. Statutory provisions and General Orders which have been considered relevant in the Court below are as follows :

CONSTITUTION

Chapter X

Article 132 Public Services

(1) For the purposes of this Constitution, the Public Services are -

....

(b) the Police Force;

Article 135(1)

No member of any of the services mentioned in paragraphs (b) to (g) of Clause (1) of Article 132 shall be dismissed or reduced in rank by an authority subordinate to that which, at the time of the dismissal

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or reduction, has power to appoint a member of that service of equal rank.

(2) ...

Provided that (not relevant) ...

And further provided that this Clause shall not apply to a case where a member of any of the services mentioned in this Clause is dismissed or reduced in rank by an authority in pursuance of a power delegated to it by a Commission to which this part applies, and this proviso shall be deemed to have been an integral part of this Clause as from Merdeka Day.

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Article 140(1)

There shall be a Police Force Commission whose jurisdiction shall extend to all persons who are members of the Police Force and which, subject to the provisions of any existing law, shall be responsible for the appointment, confirmation, enplacement on the permanent or pensionable establishment, promotion, transfer and exercise of disciplinary control over members of the Police Force.

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...

(6) The Police Force Commission may provide for all or any of the following matters :

...

(b) ... the delegation to ... any member of the ... Police Force ... of its powers or duties.

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Article 144(5)(A)

Save as provided in Clause 5(B) Federal law and, subject to the provisions of any such law, regulations made by the Yang di-Pertuan Agong may, notwithstanding the provisions of Clause (1) of Article 135, provide for the exercise by any officer in a service to which

the jurisdiction of a Commission to which this part applies extends, or by any Board of such Officers, of any of the functions of the Commission under Clause (1) :

...

- 10 (6) A commission to which this part applies may delegate to any officer in a service to which its jurisdiction extends, or to any board of such officers appointed by it, any of its functions under Clause (1) in respect of any grade of service, and that officer or board shall exercise those functions under the direction and control of the commission.

INTERPRETATION ACT

Section 30(1)(b)

20 The repeal of a written law in whole or in part shall not ... affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law.

Section 3 defines "amend" as including "repeal".

INTERPRETATION & GENERAL CLAUSES MALAYAN UNION ORDINANCES NO. 7 OF 1948

Section 29

30 Where a written law confers upon any person or authority a power to make appointments to any office or place, the power shall, unless the contrary intention appears, be construed as including a power to dismiss or suspend any person appointed and to appoint another person temporarily in the place of any person so suspended or in place of any sick or absent holder of such office or place:

40 Provided that where the power of such person or authority to make such appointment is only exercisable upon the recommendation or subject to the approval or consent of some other person or authority, such power of dismissal shall, unless the contrary intention appears, only be exercisable upon the recommendation or subject to the approval or consent of such other person or authority.

COURTS OF JUDICATURE ACT No. 7 of 1964

Section 69

- (1) Appeals to the Federal Court shall be by way of re-hearing, and in relation to such appeals the Federal Court shall have all the powers and duties, as to amendment or otherwise, of the High Court, together with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner. 10
- (4) The Federal Court may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.

POLICE FORCE COMMISSION

Instrument of Delegation of Powers and Duties

- (2) In accordance with Article 140(6)(b) of the Federal Constitution, the Police Force Commission hereby delegates its functions relating to appointments, confirmation and emplacement on the permanent or pensionable establishment, so as to be exercised by the members of the Police Force or Boards of Police Officers to the extent set forth in the Second Schedule hereto 20
- ...
- (5) In accordance with Article 140(6) of the Federal Constitution, the Police Force Commission hereby delegates its functions relating to exercise of disciplinary control, so as to be exercised by the members of the Police Force or Boards of Police Officers, to the extent set forth in the Fifth Schedule hereto. 30

Second Schedule

Appointments

The functions of the Police Force Commission relating to appointments ... shall be exercised by : 40

....

- (ii) the Inspector-General of Police in respect of senior Police Officers of the rank of Inspector and of any grade, junior police officers and constables;

Fifth Schedule

Discipline

10 The functions of the Police Force Commission relating to discipline ... shall be exercised by the Inspector-General of Police, subject to the following provisos :-

....

Constables

- (v) The power to award disciplinary punishment of dismissal may be exercised by a senior Police Officer of and above the rank of Senior Assistant Commissioner of Police or a Chief Police Officer, in respect of Constables;

20 5. Abdul Hamid J. held on 26th March 1975, following the decision in Government of Malaysia v. Isnan bin Osman (1972) 2 M.L.J. 1 that as the Chief Police Officer did not have power to appoint Police Constables, the delegation to him of the power to dismiss constables was in violation of Article 135(1) of the Constitution, and the Appellant's dismissal was therefore void. He made no finding on the Appellant's other contentions. 30

30 6. On 27th August 1976 there came into force the Constitution (Amendment) Act 1976 which by Section 30 added the further proviso to Article 135(1) of the Constitution hereinbefore set out; and by Affidavit of 9th March 1977 the Respondent herein sought leave to amend their Memorandum of Appeal accordingly which leave was granted by the Federal Court on 22nd June 1977 prior to the consideration of the substantive appeal herein. 37

40 7. Upon the said appeal by the Respondent to the Federal Court of Malaysia Suffian L.P. delivering the judgment of the Court held following Loh Kooi Choon 51

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55 v. Government of Malaysia, Federal Court Appeal
No. 157 of 1975, that an amendment to the
Federal Constitution, in that case to Article
5(4), could be made with retrospective effect
and that the same applied to the present
55 amendment to Article 135(1). The Lord President
further held, rejecting the argument of the
Appellant that the amendment could only affect
future cases, that since appeals to the Federal
Court were by way of re-hearing and since the
Federal Court might by Section 69(1) and (4) of
the Courts of Jurisdiction Act No. 7 of 1964
make not only any order which ought to have been
made by the trial Court but any further or other
order which the case required, the Federal Court
was entitled to make such order upon the appeal
as ought to be made according to the law as it
stood at the time of appeal. Quilter v. Mapleson,
9 Q.B.D. 672; Attorney-General v. Birmingham
Tame & Rea District Drainage Board (1912) A.C. 20
788. Having further held, as was accepted by
the Appellant, that subject only to the former
provisions of Article 135, power to dismiss a
constable had been validly delegated by the
Police Force Commission to the Chief Police
Officer; and having held that the Chief Police
Officer Selangor was both a person and an
authority within the meaning of Section 29 of
the Interpretation & General Clauses Ordinance
No. 7 of 1948, the Federal Court therefore held 30
that his dismissal of the Appellant was
validated by the said proviso to Article 135(1)
and therefore allowed the appeal.

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8. The Respondent submits that having regard
to the express and unequivocal wording of the
proviso, namely that "this proviso shall be
deemed to have been an integral part of this
Clause as from Merdeka Day" (31st August 1957)
the Federal Court rightly held that it was of
retrospective effect. The Respondent further 40
submits that by the Police Force Commission
Instrument of Delegation of Powers and Duties
the power to dismiss a constable was validly
delegated to the Chief Police Officer. In the
premises the Respondent submits that the
provisions of the relevant clause of Article
135(1) do not, in the light of the Amendment
apply to the present case and the Appellant was

therefore validly dismissed.

10 The Respondent further submits that, if and
in so far as the Appellant seeks to raise anew
the further matters raised before the Federal
Court (i) all relevant procedures were correctly
followed without irregularity, and in particular
the fact that the Chief Police Officer did not
specifically apply to the Registrar of the Court
for a copy of the Record of the Court proceedings
following the Appellant's plea of guilty was
irrelevant having regard to the fact that it was
a guilty plea and the fact that the Appellant
admitted the offences charges and the penalties
sustained; (ii) that as expressly found by the
trial Judge the Deputy Chief Police Officer was
at all material times acting on the instructions
of and as the agent of the Chief Police Officer;
and (iii) that in the light of the ruling of the
20 Federal Court on the main issue the submissions
on behalf of the Appellant in relation to Article
144(6) were irrelevant.

9. The Respondent therefor submits that the
Order of the Federal Court was right and ought
to be upheld for the following among other

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R E A S O N S

- 30 (1) BECAUSE the power to dismiss a Constable
was validly delegated by the Police Force
Commission to the Chief Police Officer
Selangor by the Instrument of Delegation of
Powers and Duties above.
- (2) BECAUSE the provisions of Section 30 of
the Constitution (Amendment) Act 1976 have
retrospective effect and apply to the
present case.
- (3) BECAUSE all relevant procedures were
correctly followed by the Respondents.
- (4) BECAUSE in the premises the Appellant was
validly dismissed and the judgment of the
Federal Court was right.

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NICHOLAS LYELL

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Appellant

- and -

THE GOVERNMENT OF (Defendant)
MALAYSIA Respondent

CASE FOR THE RESPONDENT

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