DATO' SRI MOHD NAJIB HJ ABD RAZAK

v.

PP

Court of Appeal, Putrajaya
Abdul Karim Abdul Jalil, Has Zanah Mehat & Vazeer Alam Mydin Meera JJCA
[Criminal Application No: W-05(SH)-(231-233)-07-2020]
12 February 2022

Criminal Procedure: *Addsitional evidence — Application to adduce fresh evidence — Principles applicable — R v. Parks — Whether evidence sought to be adduced not available at trial — Whether evidence had no relevance and no probative value such that outcome of trial would be different — Courts of Judicature Act 1964, s 61*

Evidence: *Fresh or further evidence — Application to adduce — Principles applicable — R v. Parks — Whether evidence sought to be adduced not available at trial — Whether evidence had no relevance and no probative value such that outcome of trial would be different — Courts of Judicature Act 1964, s 61*

The applicant in this application was the appellant ("appellant") in Criminal Appeals No. W-05(SH)-231-07/2020, W-05(SH)-232-07/2020 and W-05(SH)-233-07/2020 ("appeals"). Seven days before the date of the decision on the appeals, the appellant sought leave, among others, pursuant to s 61 of the Courts of Judicature Act 1964 ("CJA") to allow the following additional evidence to be adduced in the appeals: (i) *viva voce* evidence of Datuk Seri Azam Baki, the Chief Commissioner of the Malaysian Anti-Corruption Commission ("MACC"); (ii) further *viva voce* evidence of Rosli bin Hussein, an investigating officer of the MACC; and (iii) *viva voce* evidence from other witnesses or any other additional or further evidence which might arise based on the appellant's affidavit or as the court saw fit and appropriate. The additional evidence sought to be introduced as summarised based on both of the appellant's affidavits were: (a) Tan Sri Zeti Akhtar Aziz ("TS Zeti") had a long-standing relationship and had collaborated with Low Teck Low ("Jho Low") to facilitate the misuse of funds of 1Malaysia Development Bhd ("1MDB"); (b) Nik Faisal had received substantial funds relating to 1MDB; (c) the financial interest of Tan Sri Nor Mohamed Yaacop; (d) the contents of the MACC report; and (e) *viva voce* evidence and other evidence were required. The appellant sought to adduce this additional evidence to deny his knowledge of the RM42 million transactions into his personal accounts and to support his contention that he had been deceived by Jho Low, TS Zeti, Nik Faisal, and others.

Held (dismissing the application):

(1) The principles on which an appellate court was allowed to receive additional evidence were earlier enunciated in the case of *R v. Parks*. *R v. Parks* laid down four requirements on the taking of additional evidence, namely: (i) the evidence sought to be called must be evidence which was not available at the trial; (ii) the evidence must be relevant to the issues; (iii) the evidence was credible in the sense that it was well capable of belief; and (iv) the evidence would have created a reasonable doubt in the mind of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial. Based on the established case authorities, the appellant must cumulatively satisfy all the four requirements propounded in *R v. Parks* and the prerequisite in s 61 of the CJA that it was necessary for the justice of the case in order to be allowed to adduce the additional evidence. Further, only in the most exceptional circumstances would the court receive additional evidence, and the matter was left entirely to the discretion of the appellate court if necessary in the interests of justice. Hence, admission of additional evidence at an appellate stage would only be allowed when in the opinion of the Court such evidence was relevant and necessary for the justice of the case and not as a matter of practice. (paras 7, 8, 15 & 16)

(2) With regard to whether the evidence sought to be adduced was not available at trial in the High Court, the trial at the High Court commenced on 3 April 2019, and the appellant was convicted on 28 July 2020. This application was filed on 2 December 2021. Based on the appeal record and the judgment of the trial judge, all available evidence was before the trial court and the Court of Appeal for determination of the appeals. TS Zeti was offered to the appellant at the end of the prosecution case to be called as a defence witness. However, the appellant elected not to call or interview TS Zeti to testify to establish the defence case. The defence had also questioned the AmBank officers on Bank Negara Malaysia's involvement, but they chose not to interview TS Zeti. On the allegation against Tan Sri Nor Mohamed Yaacop that he received RM85 million from 1MDB Bonds issue, they interviewed him as an offered witness but the appellant also elected not to call him as a defence witness. This showed that the fresh evidence that the appellant sought to adduce was available at trial and both TS Zeti and Tan Sri Nor Mohamed Yaacop were available to be called as witnesses. Therefore, the appellant had failed even the first requirement of *R v. Parks*. (para 18)

(3) The evidence sought to be adduced in the appellant's affidavit and further affidavit was also not relevant as no nexus existed between the additional evidence sought and the charges against the appellant. A *fortiori*, the additional evidence was not necessary for the interests of justice and fair disposal of the appeals. In light of the foregoing, this application was devoid of merit. The appellant had failed to convince this Court to exercise its discretionary power to allow additional evidence premised on *R v. Parks* and the provision of s 61 of the CJA. Not only had the appellant failed to meet the first and

second requirements, but he had, in fact, failed to satisfy all the four cumulative requirements of *R v. Parks*. In this application, the subject matter sought in the appellant's application to adduce additional evidence had no bearing on the trial or the appeals. There was no nexus between the additional evidence sought and the charges against the appellant. Ultimately, the appellant had to show how the evidence he wanted to adduce was relevant to the charges he faced before the trial court, and how it would affect the outcome. The appellant had failed to do so. By and large, the evidence sought by the appellant had no relevance and had no probative value such that the outcome of the trial would be different. (paras 19-22)

Case(s) referred to:

Che Din Bin Ahmad v. Public Prosecutor [1975] 1 MLRH 536 (folld)

Dato' Seri Anwar Ibrahim v. PP [2014] 4 MLRA 331 (folld)

Dol Lasim v. Public Prosecutor & Another Case [1986] 1 MLRA 54 (refd)

Lo Fat Thjan & Ors v. Public Prosecutor [1968] 1 MLRA 832 (refd)

Mohamed Bin Jamal v. Public Prosecutor [1964] 1 MLRA 588 (refd)

Murugayah v.PP [2004] 1 MLRA 280 (folld)

PP v. Dato' Seri Anwar Ibrahim [2014] 4 MLRA 97 (folld)

R v. Parks [1961] 3 All ER 633 (folld)

R v. Pendleton [2002] 1 WLR 72 (refd)

Legislation referred to:

Criminal Procedure Code, s 317

Court of Judicature Act 1964, ss 15A, 61

Counsel:

For the appellant: Muhammad Shafee Abdullah (Harvinderjit Singh, Farhan Read, Wan Aizuddin Wan Mohammed, Rahmat Hazlan, Muhammad Farhan Muhammad Shafee, Syahirah Hanapiah, Zahria Eleena Redza, Wan Arfan Wan Othman & Alaistrair Norman (PDK) with him); M/s Shafee & Co

For the respondent: V Sithambaram (Donald Joseph Franklin, Sulaiman Kho Kheng Fuei, Ashrof Adrin Kamarul & Manjira Vasudevan with him); AG's Chambers

JUDGMENT

Abdul Karim Abdul Jalil, Has Zanah Mehat & Vazeer Alam Mydin Meera JJCA:

Introduction

[1] The applicant in this application is the appellant ("the appellant") in the Criminal Appeals No: W-05(SH)-231-07-2020, W-05(SH)-232-07-2020 and

W-05(SH)-233-07-2020 ("the appeals"). Seven days before the date of the decision on the appeals, the appellant by notice of motion dated 1 December 2021 vide encl 277 supported by the appellant's affidavit dated 29 November 2021 in encl 278 and additional affidavit in encl 280 sought leave, among others pursuant to s 61 of the Courts of Judicature Act 1964 ("CJA") to allow the following additional evidence to be adduced in the appeals:

(i) *viva voce* evidence of Datuk Seri Azam Baki, the Chief Commissioner of the Malaysian Anti-Corruption Commission ("MACC");

(ii) further *viva voce* evidence of Rosli bin Hussein, an investigating officer of the MACC ("PW57"); and

(iii) *viva voce* evidence from other witnesses or any other additional or further evidence which may arise based on the appellant's affidavit (encl 278) or as the court sees fit and appropriate.

[2] We heard the application in a hybrid proceeding under s 15A of the CJA. Having heard and considered the oral submissions of both parties and their respective affidavits filed therein, we dismissed the application. We now give the full grounds of our decision.

Grounds Of Application

[3] The additional evidence sought to be introduced as summarized based on both of the appellant's affidavits are as follows:

(a) Tan Sri Zeti Akhtar Aziz ("TS Zeti") had a long-standing relationship and had collaborated with Jho Low

(i) the recent availability of the evidence that Tan Sri Zeti Akhtar Aziz ("TS Zeti"), the former Central Bank Governor, was facilitating Low Teck Low's ("Jho Low") disingenuous endeavours. The appellant claimed that this evidence was unavailable during the appellant's trial at the high court and when the Court of Appeal heard the appeal. The appellant contended that there is evidence that TS Zeti, through her family, had received millions of dollars from Jho Low, including funds linked to 1Malaysia Development Bhd ("1MDB"). The appellant also posited that TS Zeti had a long-standing relationship and had collaborated with Jho Low to facilitate the misuse of the 1MDB funds;

(ii) the appellant believed that the above evidence is relevant to his case as it was part of the appellant's case that he had relied on Bank Negara Malaysia ("BNM") and TS Zeti to raise any issue to him if there was anything untoward happening in regards to transactions of funds into his personal account;

(iii) the appellant had no knowledge or involvement in the transaction, which led to RM 42 Million being transmitted out of SRC International Sdn Bhd ("SRC") and eventually credited into the appellant's accounts. The appellants believed that the monies entered into his accounts were a donation from the Arab royal family because there was never any issue raised by BNM or AmBank, or TS Zeti concerning the transaction of funds in his personal account;

(iv) Jho Low and his cohorts had been manipulating the transactions relating to funds into and out of the appellant's personal accounts;

(v) this crucial evidence was never disclosed by the prosecution or the witnesses from the MACC or BNM during the trial. The appellants contended that this evidence of the involvement of TS Zeti in 1MDB funds together with Jho Low was intentional and kept away from the appellant to put the blame on the appellant eventually;

(b) Nik Faisal had received substantial funds relating to 1MDB

(vi) Nik Faisal had personally benefitted from funds of 1MDB and justified the inference that Nik Faisal was party to the fraud undertaken by Jho Low;

(vii) this evidence is relevant to the appellant because it established that Nik Faisal also facilitated Jho Low's schemes by keeping material information and documents relating to the appellant's bank accounts away from the appellant;

(c) The financial interest of Tan Sri Nor Mohamed Yakcop

(viii) the appellant states that in respect of the 1MDB transaction, Tan Sri Nor Mohamed Yakcop, the then minister in charge of the Economic Planning Unit of the Prime Minister's Department, had received a certain sum of money through a proxy account in Singapore. The appellant alleges that the failure of the prosecution to disclose this alleged financial interest of Tan Sri Nor Mohamed Yakcop at trial amounts to a material non-disclosure by the prosecution and the MACC as Tan Sri Nor Mohamed Yakcop had prepared and executed the relevant papers to the Cabinet concerning KWAP's government guarantees that form the subject matter of the charge;

(d) The contents of the MACC report

(ix) it was contended that some matters noted in the MACC report, such as the relationship, involvement, and dealings between TS Zeti, AmBank, and BNM, were not disclosed to the appellant, and this action was taken to deny a fair trial to the appellant. It was further contended that MACC was in possession of some other evidence that was never disclosed to the appellant; and

(e) *Viva voce* evidence and other evidence are required

(x) the *viva voce* evidence of Datuk Seri Azam Baki, the Chief Commissioner of the MACC, and further *viva voce* evidence of the investigating officer, PW57, are required to verify matters known to the MACC at the material time.

[4] In summary, the appellant said it is necessary and expedient in the interest of justice and fair play for the additional and/or further evidence to be admitted, adduced and/or taken in the appeals as:

(a) the proposed evidence was not available to the appellant at the trial and was only cumulatively crystallized as a result of the events and matters that have transpired recently;

(b) the cumulative crystallization of this evidence is credible and capable of belief as the same has been officially published by the MACC, confirmed by the Law Minister, and admitted by the then Attorney General himself;

(c) the cumulative evidence is relevant to the issues which were before the trial court and the issues which are before this Court in the appeals;

(d) had the said evidence been adduced and/or admitted and/or disclosed by the prosecution or the MACC or the BNM during the trial, the trial court would have arrived at different findings which would have fortified the other evidence in the appellant's favour and resulted in sufficient reasonable doubt being raised against the prosecution's case on all the charges;

(e) the said evidence was not disclosed by the prosecution, MACC, and/or BNM despite the material impact it would have had on the issues at trial;

(f) a failure of justice would be occasioned, and the administration of justice would be adversely perceived unless the said evidence is brought before this Court and considered in the appeals;

(g) the said evidence would enable all material matters to be brought before this Court and would assist this Court in arriving at a just decision in the appeals; and

(h) that the proposed evidence was not made available to the appellant at the trial as the same was suppressed by the respondent and the relevant investigating authorities, including BNM, MACC, and the Special Task Force to prejudice the appellant's previous fair trial rights for political reasons.

[5] In essence, it is our understanding that the appellant wanted to adduce this additional evidence to establish the following:

(i) the appellant had no knowledge of the RM42 million which arrived into his accounts from SRC;

(ii) to maintain that the appellant honestly believed that the SRC funds he utilized were donations from the Arab royal family; and

(iii) Jho Low, TS Zeti, and many others had deceived the appellant who, by conspiracy, illegally executed the transactions in and out of the appellant's personal accounts, which were not known or consented to by the appellant.

[6] In their affidavit in reply filed on 6 December 2021 (enclosure 281), the respondent objected to the application. Among the reasons for the objection are as follows:

(i) all the evidence in the case had been made available to the High Court and subsequently at this Court. There is no relevant additional evidence that is required for the fair disposal of this case;

(ii) the appellant failed to establish any exceptional circumstances to justify this Court to exercise its discretionary power to allow additional evidence to be adduced;

(iii) the application to adduce the additional evidence is to delay the decisions on the appeals by reopening the entire case and was deliberately timed and not due to the subsequent unraveling of events;

(iv) the prosecution denied that they had concealed any fact relevant to the charges during the trial at the high court or appeal process before this Court;

(v) TS Zeti had been offered as a witness when the appellant was ordered to enter his defence but had elected not to call or interview her for the purpose of calling her as the appellant's witness;

(vi) it is a *mala fide* application. The appellant could have made the application in January 2021 before the hearing of the appeals as the defence had known by December 2020 about the issue of the statutory declarations made by TS Zeti's husband, Tawfik Ayman,

and his two sons. This is a deliberate delay, and the irrelevance of the additional evidence to the charges demonstrates that this is a *mala fide* application. Further, there was no statutory declaration made by TS Zeti in this matter;

(vii) the subject matter sought in the application had no bearing on the trial or the appeals. The issue of whether Tawfik Ayman and his two sons had received monies from 1MDB had no bearing on the subject matter of this appeal, which concerns SRC funds in the appellant's accounts. There is also no nexus in the appellant's application to examine Datuk Seri Azam Baki, the Chief Commissioner of the MACC, to further adduce oral evidence as the evidence sought is concerning 1MDB and not SRC;

(viii) the appellant's allegation that TS Zeti had a long-standing relationship with Jho Low is just hearsay which he obtains via online publication. The evidence adduced by the prosecution and admitted by the appellant himself in the trial showed that Jho Low, Nik Faisal, and Dato' Azlin were acting on his instructions concerning his bank accounts. As found by the learned trial judge, the prosecution had also proved in the trial that the appellant had knowledge of the RM42 million of SRC funds in the appellant's accounts;

(ix) the prosecution did not conceal favourable defence evidence as former Attorney-General Tan Sri Tommy Thomas, and subsequently, the minister in the Prime Minister's Department (Law) had pointed out that the matter relates to 1MDB and not the subject matter of the appeals;

(x) Tan Sri Tommy Thomas's explanation, when read in its entirety, does not confirm that TS Zeti and her husband Tawfik Ayman had facilitated Jho Low in 1MDB. This investigation is again not related to the charges in the appeals;

(xi) the recovery of funds from Nik Faisal and Tawfik Ayman is concerning 1MDB and has no relevance to the SRC funds, which is the subject matter of the charges in the appeals; and

(xii) the prosecution had proved the appellant's knowledge of the RM42 million of SRC funds in his accounts, resulting in the commission of the offences charged. In addition, the appellant alone had benefitted from the RM42 million of the SRC funds, as the trial court found.

The Law On Reception Of Additional Evidence

[7] The principles on which an appellate court is allowed to receive additional evidence were earlier enunciated in the case of *R v. Parks* [1961] 3 All ER 633

("*R v. Parks*"), which was later approved by the House of Lords in the case of *R v. Pendleton* [2002] 1 WLR 72.

[8] *R v. Parks* laid down four requirements on the taking of additional evidence, namely:

(i) the evidence that it sought to call must be evidence which was not available at the trial;

(ii) the evidence must be relevant to the issues;

(iii) the evidence is credible in the sense that it is well capable of belief; and

(iv) the evidence would have created a reasonable doubt in the mind of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.

[9] The statement of the law in *R v. Parks* has been adopted and applied in local cases such as *Mohamed Bin Jamal v. Public Prosecutor* [1964] 1 MLRA 588; *Dol Lasim v. Public Prosecutor & Another Case* [1986] 1 MLRA 54; *Lo Fat Thjan & Ors v. Public Prosecutor* [1968] 1 MLRA 832 and *Che Din Bin Ahmad v. Public Prosecutor* [1975] 1 MLRH 536.

[10] In *Che Din Bin Ahmad v. Public Prosecutor supra* Syed Agil Barakbah J (as he then was) had stated that it is the court's discretion to allow the application only in most exceptional circumstances and subject to exceptional conditions. His Lordship further observed that the conditions adumbrated in *R v. Parks* are cumulative and not in the alternative. His Lordship, in considering the application before the high court under s 317 of the Criminal Procedure Code ("CPC") on additional/further evidence in the appeal, stated the following:

> "Now, s 317 of the Criminal Procedure Code gives a discretion to the Judge in hearing any appeal to allow additional evidence if he thinks such is necessary. In considering such application the appellate Court has always adopted the attitude that **it is only in the most exceptional circumstances**, and subject to what may be described **as exceptional conditions**, that the Court is ever willing to listen to additional evidence. (*Mohamed Bin Jamal v. Public Prosecutor* [1964] 1 MLRA 588, per Thomson LP, quoting Hallett J in the case of *R v. Jordan* [1956] 40 Cr App R 152, 154). It is clear, therefore, **that not only the circumstances must be most exceptional but** the subject which is proposed to be adduced by further evidence **is subject to exceptional conditions**. It becomes necessary only if a failure of justice would result if such additional evidence was not taken and allowed when additional facts have come to light since the date of trial. **The matter is left entirely to the discretion of the Court.** The principles which the Courts have decided in the course of years may be summarised according to the passage from the judgment of Lord Parker CJ in the case of *R v. Parks* [1961] 3 All ER 633, 634:
>
> (i) the evidence sought to be called must be evidence which was not available at the trial;

(ii) the evidence must be relevant to the issues;

(iii) it must be credible evidence in the sense of being well capable of belief; and

(iv) the Court will, after considering that evidence, go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.

...

It should be observed that **the conditions propounded in *R v. Parks supra* are cumulative and not in the alternative**. It is for the appellant to satisfy this court that all the four conditions are fulfilled. Having failed to do so, I have no alternative but to dismiss the motion."

[Emphasis Added]

[11] Further, the law pertaining to adducing additional evidence in a criminal appeal at the appellate court is codified in s 61 of the CJA (additional evidence at the Court of Appeal) and s 317 of the CPC (additional evidence in an appeal to the high court from the subordinate court). Section 61 of CJA and s 317 of the CPC are identical. Section 61 of the CJA provides as follows:

"Additional evidence

61. (1) In dealing with any appeal in a criminal case, the Court of Appeal **may, if it thinks additional evidence to be necessary**, either take such evidence itself or direct it to be taken by the trial court.

(2) When the additional evidence is taken by the trial court, it shall certify the evidence, with a statement of its opinion on the case considered with regard to the additional evidence, to the Court of Appeal, and the Court of Appeal shall thereupon proceed to dispose of the appeal.

(3) The parties to the appeal shall be present when additional evidence is taken.

(4) In dealing with any appeal in a criminal case, the Court of Appeal may also, if it thinks fit, call for and receive from the trial court a report of any matter connected with the trial."

[Emphasis Added]

[12] The scope of s 61 of the CJA has been explained in numerous cases. The Court of Appeal in *Dato' Seri Anwar Ibrahim v. PP* [2014] 4 MLRA 331 made the following pertinent observation:

"[8] A plain reading of s 61(1) of the CJA reveals that wide powers have been invested with the Court of Appeal to receive additional evidence. **All that is required to be satisfied is that the additional evidence is necessary.** (See *Phung Geok Hoay lwn. Pendakwa Raya* [2012] MLRAU

532). However, it is pertinent to note **this section should be invoked as an exception more than a rule**. This is because an appeal must be decided on the evidence, which was before the trial court. An exceptional power such as this **must be exercised judiciously and not capriciously or arbitrarily** having regards to the justice of the case. Any improper or capricious exercise of such power may lead to an undesirable result.

[9] **The underlying reason why additional or fresh evidence is generally not allowed on appeal is simple. A litigation must come to an end as a matter of public policy** - interest reipublicae ut sit finis litium (it is in the interest of the society as a whole that there be an end to litigation). In *Leng Lan (F) v. S M Yesudian* [1937] 1 MLRH 684, Aitken J remarked that "the courts are very unwilling to allow (a completed case) to be reopened for the purpose of hearing new evidence except for good and substantial cause.".

[10] There is a long list of authority in major common law jurisdictions in support of this public policy. Lord Wilberforce in *The Ampthill Peerage Case* [1976] 2 All ER 411 (HL) at pp 417h to 418c said that limits must be placed on citizens to open and reopen disputes. The same point was made by the Court of Appeal in *Taylor v. Lawrence* [2002] 2 All ER 353 (CA) and further reaffirmed by the Court of Appeal in *Re Uddin* [2005] 3 All ER 550 (CA). Similar voice was echoed in the Canadian case of *Brown v. The Queen* [1993] 16 CRR (2nd) 290 (SC) at pp 293-294...

...

[12] In sum, we can safely conclude that public policy demands that the principle of finality in litigation should be preserved. The appellate court should not travel outside the record of the lower court and not take evidence in appeal. Consequently, **additional or fresh evidence may only be admitted in exceptional circumstances where such evidence is essential to the just decision of the case.**

...

[23] We are of the view that s 61 of the CJA **does not permit a party to simply request a particular witness be recalled to further testify at the appellate stage without the party providing to court the precise nature of the intended or proffered evidence sought to be admitted.**

Conclusion

[24] The authorities show quite clearly that while under s 61 of the CJA, the court is given a general **discretion to admit evidence** of matters that have occurred since the date of the judgment, that discretion **must**

be exercised sparingly having regard to the important principle that there should be finality in judgment."

[Emphasis Added]

[13] The Federal Court in *PP v. Dato' Seri Anwar Ibrahim* [2014] 4 MLRA 97 held as follows:

"[14] Section 61 requires a subjective deliberation of the Court of Appeal's mind, **whether the additional evidence would be necessary**, and thereafter decide whether such additional evidence would be taken down by itself or by the trial court. Necessary means that **unless additional evidence is admitted, a miscarriage of justice would result** or its reception is expedient in the interest of justice (*Khamis v. Public Prosecutor* [1971] 1 MLRH 374; *Phung Geok Hoay lwn. Pendakwa Raya* [2012] MLRAU 532)."

[Emphasis Added]

[14] This Court in the case of *Murugayah v.PP* [2004] 1 MLRA 280 in adopting *R v. Parks* and the earlier decided cases mentioned above went on further to observe as regards to the contents of the affidavit in support of the application. The Court stated as follows:

"The first observation to be made is that even though it is desirable for there to be an affidavit of the proposed evidence it is not necessary in every instance when additional evidence is to be called as it may not be possible to file an affidavit in certain cases. However, what is essential is that **the affidavit that has been filed in support of the application must state exactly what witness would be called, exactly what that witness would be prepared to say or prove**, or of what inquiries had been made before the trial, **or what subsequent inquiries had resulted in the disclosure of the evidence** (see *Wollongong Corporation v. Cowan* [1955] 93 CLR 435). On the facts of this case, the absence of an affidavit from Kantharupan is understandable in view of his reluctance to attend court. It is therefore not fatal. The ruling that the proposed evidence of the accused is hearsay without being supported by the testimony of Kantharupan is pre-mature. It must be remembered that the accused is applying for leave to call Kantharupan as a witness precisely for the very purpose of proving the statement. A ruling as to whether the evidence is hearsay or not or is to be believed or not can only be made after attempts have been made for Kantharupan to testify, and upon a consideration of his testimony if he testifies, and not at this stage. As clearly explained in the third condition enunciated in *R v. Parks* [1961] 2 All ER 633, it is not the task of the court to decide whether the proposed evidence is to be believed or not. At this stage, **the function of the court is only to determine whether the proposed evidence, if given, is capable of belief**. The proposed evidence assumes significance in view of the testimony of Kantharupan elicited during his cross-examination."

[Emphasis Added]

[15] Based on the above-cited cases, the appellant must cumulatively satisfy all the four requirements propounded in *R v. Parks* and the prerequisite in s 61

of the CJA that it is necessary for the justice of the case in order to be allowed to adduce the additional evidence. Further, only in the most exceptional circumstances will the court receive additional evidence, and the matter is left entirely to the discretion of the appellate court if necessary in the interest of justice.

[16] Hence, admission of additional evidence at an appellate stage would only be allowed when in the opinion of the Court such evidence is relevant and necessary for the justice of the case and not as a matter of practice.

Our Decision

[17] The appellant sought to adduce this additional evidence to deny his knowledge of the RM42 million transactions into his personal accounts and to support his contention that he had been deceived by Jho Low, TS Zeti, Nik Faisal, and others. On this matter, the learned trial judge in paras 1821, 1822 and 2397 of his judgment had addressed as follows:

> "[1821] No one in this country - not even Jho Low of all people - could have deceived or denied the accused, then the Prime Minister and Finance Minister of the nation, from having access to his own bank statements, if the accused wished access to the same. The question of Jho Low concealing the bank statements from the accused is very superficial and does not arise.
>
> [1822] It seems quite plain that it was the accused who wished to distance himself from his own bank statements so that he could claim (as he now does) no knowledge of the bank statements, the bank balance, and the RM42 million credited into his own accounts from SRC. On the contrary, as he himself had tasked the three to manage his accounts and ensure sufficiency of funds, and given the other evidence referred to earlier, the defence has not been able to raise any reasonable doubt that the accused knew about the account balance and the transfer of a total of RM42 million from SRC to his own Account 880 and Account 906. As has been stated earlier, the accused cannot deny knowledge of the contents of the bank statements when he himself authorized Nik Faisal to deal with the same. Matters dealt with by the appointed agent does not absolve the principal of liability. Furthermore, Nik Faisal, under his mandate, could only conduct inter-account transactions under the mandate. It does not extend to dealing with transactions involving the transfer of funds from outside sources to said accounts of the accused, which could only be undertaken by the accused, for which purpose knowledge of his bank accounts balances would have been essential. In any event, as has been stated earlier, an account holder is accountable for the transactions effected by a person appointed by the former for the purpose (see the Court of Appeal decision in *Yap Khay Cheong Sdn Bhd v. Susan George TM George* [2018] 4 MLRA 326).
>
> ...
>
> [2397] It is way too far-fetched and self-serving for the accused to claim that he was deceived and defrauded by Jho Low. Or how the defence described the accused as being a victim of a scam orchestrated by Jho Low. For evidence

plainly shows that Jho Low had performed the task required of him by the accused with unmatched distinction, by channelling the large sums of funds into the personal accounts of the accused, and the accused had benefitted by the ability of making payments in the amount of almost RM1 billion during the period. The accused, despite claims of being scammed, agreed that he did not lose any money. Instead, he benefitted immensely by the remittances of huge sums of monies into his accounts."

Whether The Evidence Sought To Be Adduced Were Not Available At Trial?

[18] We must consider whether the evidence sought to be adduced was not available at trial in the high court. The trial at the high court commenced on 3 April 2019, and the appellant was convicted on 28 July 2020. This application was filed on 2 December 2021. Based on the appeal record and upon reading the judgment of the learned trial judge, we find that all available evidence was before the trial court and the Court of Appeal for determination of the appeals. TS Zeti was offered to the appellant at the end of the prosecution case to be called as a defence witness. However, the appellant elected not to call or interview TS Zeti to testify to establish the defence case. The defence had also questioned the AmBank officers on BNM's involvement, but they chose not to interview TS Zeti. On the allegation against Tan Sri Nor Mohamed Yaacop that he received RM85 million from 1MDB Bonds issue, they interviewed him as an offered witness but the appellant also elected not to call him as a defence witness. This shows that the fresh evidence that the appellant seeks to adduce was available at trial and both TS Zeti and Tan Sri Nor Mohamed Yaacop were available to be called as witnesses. Therefore, the appellant had failed even the first requirement of *R v. Parks*.

Whether The Alleged Additional Evidence Relevant To The Appeals?

[19] We also find that the evidence sought to be adduced in the appellant's affidavit (encl 278) and further affidavit (encl 280) are not relevant as no nexus exists between the additional evidence sought and the charges against the appellant. A *fortiori*, the additional evidence is not necessary for the interest of justice and fair disposal of the appeals. Our findings are based on the following:

(i) On the allegation against Tan Sri Nor Mohammed Yaacop that he received some portions of the proceeds of the 1MDB Bonds issue, it must be noted that it was in 2009, which was well before the incorporation of the SRC in 2010. Clearly, this evidence is irrelevant to the charges against the appellant, which is related to the SRC fund in 2014.

(ii) The evidence as alleged in encls 278 and 280 does not prove that TS Zeti was collaborating with Jho Low to facilitate any of the affairs of SRC. The appellant's pure conjecture is anchored on hearsay information obtained from online publications. The evidence adduced by the prosecution and admitted by the appellant himself at the trial showed that Jho Low, Nik Faisal, and the late Dato'

Azlin acted on the appellant's instructions concerning his bank accounts. The prosecution also established that the appellant knew that the RM42 million deposited into his account was from SRC and not from 1MDB. The appellant's knowledge is further reinforced by the evidence of PW37 and PW49, who told him that they had caused the SRC funds to be transferred into his personal bank accounts, but he did nothing about it.

(iii) The contents of paras 23 to 32 of the said affidavit do not show any complicity of TS Zeti in any devious schemes orchestrated by Jho Low against the appellant. It does not support the appellant's contention that TS Zeti assisted or facilitated Jho Low's alleged schemes by concealing irregularities in the appellant's accounts. In our view, whether Tawfik Ayman, Alif Ayman, and Abdul Aziz being family members of TS Zeti, received monies from 1MDB has no bearing to the subject matter of the charges against the appellant concerning monies belonging to SRC which were in the appellant's personal bank accounts. It also has no relevance at all as to whether the appellant had abused his position or committed criminal breach of trust of SRC funds. In this respect, the trial judge had found that the money belonging to SRC went into the appellant's account, and he had misappropriated it.

(iv) On the alleged Arab Royal family's donations, as stated in para 34 of the affidavit, the appellant is re-arguing the appeals. The evidence and the narrative of the alleged Arab Royal family's donations were already before the trial court and were dealt with exhaustively by the learned trial judge in his judgment.

(v) The explanation by the Law Minister and the former Attorney General, Tan Sri Tommy Thomas, does not support the argument that the prosecution had actively concealed favourable defence materials at the trial or the appeals. The explanation by the Law Minister and Tan Sri Tommy Thomas relates to the recovery of 1MDB funds from Nik Faisal. The receipt of 1MDB funds by Nik Faisal is irrelevant to the SRC case. It has no relevance to the SRC funds that form the subject matter of the charges against the appellant at the trial and the appeals.

(vi) On the contents of MACC's press release (DSN-2), we find there is no nexus to the charges against the appellant. The press release is about the recovery of funds on assets of 1MDB in Singapore and has nothing to do with the assets of SRC.

(vii) The subject matter of the charges against the appellant is monies owned by SRC and not 1MDB. Whether Nik Faisal received money from 1MDB or benefited from it does not have any relevance to the prosecution case against the appellant that he

knowingly received the RM42 million into his bank accounts and its subsequent utilization thereof. In any event, this revelation does not alter the fact that Nik Faisal remained as a signatory of SRC's accounts and the appellant's personal account mandate holder.

(viii) The appellant failed to show the nexus, and the relevancy of the evidence sought to be adduced by the *viva voce* evidence of Datuk Seri Azam Baki and PW57. It appears, *inter alia*, that the evidence sought to be adduced relates to monies originating from 1MDB and received by Tawfiq Ayman, Alif Ayman, and Abdul Aziz and a company Cutting-Edge Industries Ltd (CEIL) which involves transactions of 1MDB with no relation to SRC.

[20] In light of the foregoing, we find this application devoid of merit. The appellant had failed to convince this Court to exercise its discretionary power to allow additional evidence premised on *R v. Parks supra* and the provision of s 61 of the CJA. Not only had the appellant failed to meet the first and second requirements, but he had, in fact, failed to satisfy all the four cumulative requirements of *R v. Parks*.

[21] The application of s 61 of CJA has been explained by this Court in *Dato' Seri Anwar Ibrahim v. PP supra*. While the Court of Appeal is empowered to receive additional evidence, it must be satisfied that such an occasion is necessary. Necessary means that unless additional evidence is admitted, a miscarriage of justice would result, or its reception is expedient in the interest of justice. Hence, admission of additional evidence at the appellate stage would only be resorted to where in the opinion of the Court such evidence is necessary for the justice of the case and not as a matter of practice. This section should be invoked as an exception rather than as a rule. This is because an appeal must be decided on the evidence, which was before the trial court. An exceptional power such as this must be exercised judiciously and not capriciously or arbitrarily having regards to the justice of the case. An improper or capricious exercise of such power may lead to an undesirable result. In the application before us, the subject matter sought in the appellant's application to adduce additional evidence had no bearing on the trial or the appeals. There is no nexus between the additional evidence sought and the charges against the appellant as we have stated in para [19] above.

[22] We also find that most of the grounds deposed in the appellant's affidavits are related to 1MDB and none related to SRC. Ultimately, the appellant has to show how the evidence he wants to adduce is relevant to the charges he faced before the trial court, and how it would affect the outcome. The appellant had failed to do so. By and large, the evidence sought by the appellant has no relevance and has no probative value such that the outcome of the trial would be different.

Conclusion

[23] Based on the above, we find that the appellant has failed to meet the four cumulative requirements enunciated in *R v. Parks* for this Court to exercise the discretion under s 61 of CJA. Consequently, the application in encl 277 is dismissed.

The Legal Review
The Definitive Alternative

The Legal Review Sdn. Bhd. (961275-P)
B-5-8 Plaza Mont' Kiara,
No. 2 Jalan Mont' Kiara, Mont' Kiara,
50480 Kuala Lumpur, Malaysia
Phone: **+603 2775 7700** Fax: **+603 4108 3337**
www.malaysianlawreview.com

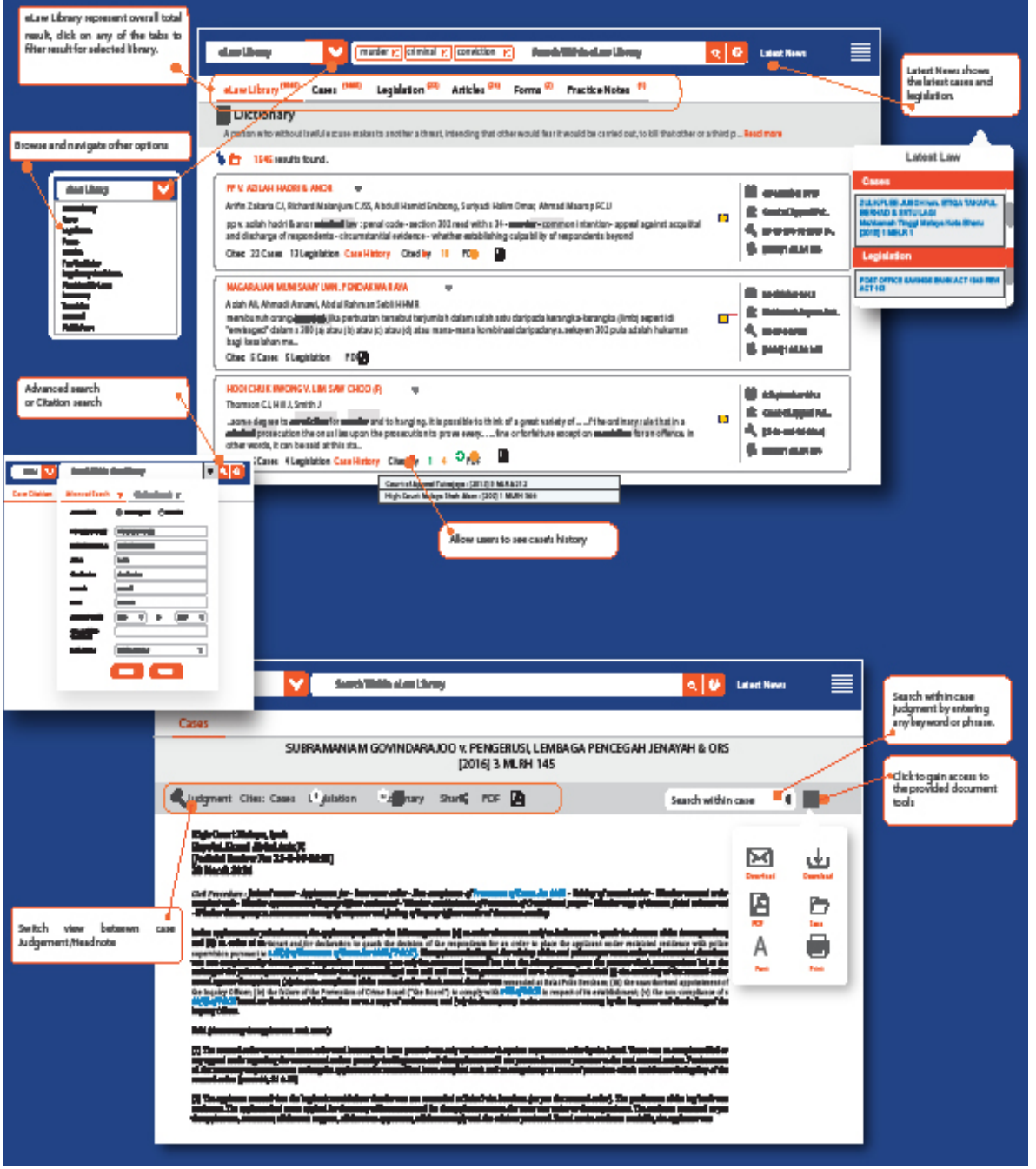
eLaw.my
The Digital Library

Introducing eLaw

Experience the difference today

eLaw.my is Malaysia's largest database of court judgments and legislation, that can be cross-searched and mined by a feature-rich and user-friendly search engine—clearly the most efficient search tool for busy legal professionals like you.

A Snapshot of Highlights

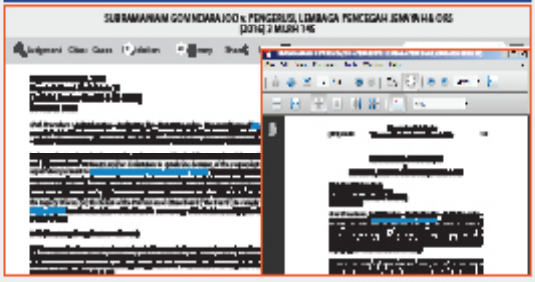


Our Features

Search Engine

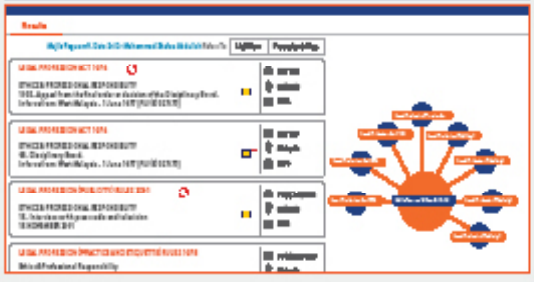
- Easier
- Smarter
- Faster Results.

Judgments Library



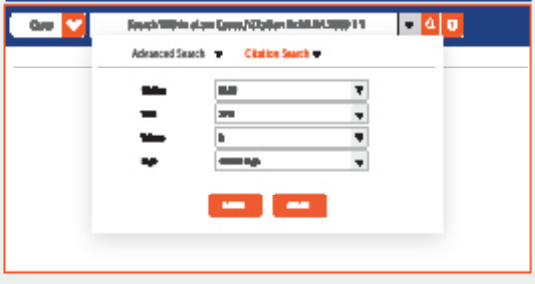
eLaw has more than 80,000 judgments from Federal/ Supreme Court, Court of Appeal, High Court, Industrial Court and Syariah Court, dating back to the 1900s.

Find Overruled Cases



The relationships between referred cases can be viewed via precedent map diagram or a list — e.g. Followed, referred, distinguished or overruled.

Multi-Journal Case Citator



You can extract judgments based on the citations of the various local legal journals.*

Legislation Library

You can cross-reference & print updated Federal and State Legislation including municipal by-laws and view amendments in a timeline format.

Main legislation are also annotated with explanations, cross-references, and cases.

Dictionary/Translator

eLaw has tools such as a law dictionary and a English - Malay translator to assist your research.

Clarification: Please note that eLaw's multi-journal case citator will retrieve the corresponding judgment for you, in the version and format of The Legal Review's publications, with an affixed MLR citation. No other publisher's version of the judgment will be retrieved & exhibited. The printed judgment in pdf from The Legal Review may then be submitted in Court, should you so require.

Please note that The Legal Review Sdn Bhd (is the content provider) and has no other business association with any other publisher.

Start searching today!

www.elaw.my