DATO' SRI MOHD NAJIB ABD RAZAK
v.
PP & OTHER APPEALS (NO 3)

Federal Court, Putrajaya
Tengku Maimun Tuan Mat CJ, Abang Iskandar Abang Hashim CJSS, Nallini Pathmanathan, Mary Lim Thiam Suan, Mohamad Zabidin Mohd Diah FCJJ
[Criminal Appeal Nos: 05(L)-289-12-2021(W), 05(L)-290-12-2021(W) & 05(L)-291-12-2021(W)]
23 August 2022

Criminal Procedure: *Judge — Recusal — Application by appellant to recuse Chief Justice from hearing appeals and for appeals to be reheard before a different panel — Real danger of bias test — Recusal by other Judges — Whether application lacked in bona fides*

The appellant, during the course of the hearing of these appeals, had filed an application in encl 300 to recuse the Chief Justice ("CJ") from hearing these appeals and for the appeals to be reheard before a different panel. The grounds in support of the application were, firstly, a Facebook post dated 11 May 2018 by the CJ's husband and, secondly, a letter from the Bar Council of Malaysia which stated that the CJ had no objection if lawyers would apply for adjournments to attend an event called Walk of Justice on 17 June 2022 related to Justice Nazlan. The respondent submitted that this application was *mala fide* and filed deliberately to scuttle the progress of these appeals as the two grounds relied by the appellant were related to events that happened four years and three months ago respectively.

Held (unanimously dismissing encl 300):

(1) In proving the real danger of bias test, it ought to be shown that the views expressed by a third party, in this case, the spouse, actually impacted the views of the Judge sought to be recused, as opposed to simply presupposing that just because certain general views were expressed as a citizen, they were automatically the views of the Judge presiding. In other words, the fact of a 'spousal relationship' was not by itself a reason to ascribe the spouse's views to the Judge. Applying the Federal Court of Australia's case of *Kaycliff Pty Ltd v. Australian Broadcasting Tribunal and Another* to encl 300, it followed that: (a) the fact of spousal connection in itself did not give rise to either actual or apparent bias; and (b) there was no nexus between the Facebook posting and the subject matter of these appeals. The Facebook posting occurred four years ago when this case was not even in existence. Simply put, there was absolutely no nexus between the Facebook post and the present appeals. (paras 11-13)

(2) The second ground, the letter, was a non-starter. The letter clearly stated that the CJ had no objection should lawyers seek to apply for the adjournments of their cases from the panels hearing their cases. This was not a blanket grant of adjournments. It was simply to say that the different panels and different chairs retained their discretion to grant or refuse adjournments. It was a standard letter and did not disclose any fear or real danger of bias that was sufficient to recuse the CJ. (para 14)

(3) Finally, the fact that certain other judges recused themselves in cases involving the appellant would not itself present a reason for the CJ to recuse herself in this case. (para 15)

(4) This application in encl 300 was lacking in *bona fides*, given the series of applications filed in instalments and the staggered timing. Therefore, there were no merits whatsoever in the application. (para 18)

Case(s) referred to:

Kaycliff Pty Ltd v. Australian Broadcasting Tribunal and Another [1989] 18 ALD 782 (folld)

Locabail (UK) Ltd v. Bayfield Properties Ltd [2000] 1 All ER 65 (refd)

PP v. Tengku Adnan Tengku Mansor [2020] 4 MLRA 730 (refd)

United Cabbies Group (London) Ltd v. Westminster Magistrates' Court [2019] EWHC 409 (Admin) (refd)

Counsel:

For the appellant: Hisyam Abdullah @ Teh Poh Teik (Lead Counsel) (Kee Wei Lon & Low Wei Loke (Assisting Counsel) with him); M/s Hisyam Teh

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

Watching Brief for Bar Council: Tiu Foo Woei; M/s Azri, Lee Swee Seng & Co

DECISION ON ENCLOSURE 300

(Recusal)

Tengku Maimun Tuan Mat CJ:

[1] The appellant, during the course of the hearing of these appeals, has filed an application to recuse me from hearing these appeals and for the appeals to be reheard before a different panel. The application is presented in encl 300.

[2] The grounds in support of the application are firstly, a Facebook post dated 11 May 2018 by my husband, Zamani bin Ibrahim and secondly, a letter from the Bar Council of Malaysia stating that I, as Chief Justice, had no objection if lawyers would apply for adjournments to attend an event called Walk of Justice on 17 June 2022 relating to Justice Nazlan.

[3] The respondent submits that this application is *mala fide* and filed deliberately to scuttle the progress of these appeals as the two grounds relied by the appellant relate to events that happened four years and three months ago respectively.

[4] It was contended by the appellant that since no affidavit in reply was filed, the truth of the contents of the exhibits are not in dispute. In my view, that does not mean that the legal threshold for bias and recusal has been met. The absence of an affidavit in reply is immaterial because recusal is essentially a question of law.

[5] The Federal Court, in *PP v. Tengku Adnan Tengku Mansor* [2020] 4 MLRA 730, has recently affirmed that in order to recuse a judge, the test is the 'real danger of bias test'.

[6] The question is whether the grounds of the application to recuse successfully raises a real danger of bias. It is my view, based on decided cases, that the test has not been established.

[7] The first ground seeks to associate the views of my husband made four years ago in his Facebook such that it has now raised the alarms of a real danger of bias. There is a case directly on this point, that is, the judgment of the Federal Court of Australia in *Kaycliff Pty Ltd v. Australian Broadcasting Tribunal and Another* [1989] 18 ALD 782 ('*Kaycliff*'). This case stands for the proposition that the views of a spouse of a judge cannot in itself be used as a ground for recusal.

[8] In that case, it was argued, among other things, that the chairman of the tribunal in that case ought to have been recused because of certain views expressed by her husband publicly elsewhere. The Federal Court unanimously held that this did not raise any suspicion of bias and in so holding, said as follows:

> ""The primary Judge expressed the view that: "... it would be wrong to conclude that a casual statement by a husband of his views on a matter under consideration by a tribunal of which his wife is a member gives rise to a reasonable apprehension that the husband's views might have been formed after discussion with his wife, or might be communicated to his wife."
>
> We agree. Although we have found no authority directly bearing on the point, it appears to us that statements made outside and without the authority of a court or a tribunal by persons who are not its members, cannot, in general, disqualify it from proceeding. Persons of considerable public credibility may on occasions make gratuitous statements as to a court's or a tribunal's established attitudes, perhaps even as a stratagem to create embarrassment. We think there are dangers in accepting the doctrine that statements of that kind can prejudice the right or affect the duty of a judge or tribunal member to sit."

[9] In another case called *Locabail (UK) Ltd v. Bayfield Properties Ltd* [2000] 1 All ER 65, the English Court of Appeal, in considering the 'real danger of bias test', noted as follows:

> "10.... In any case where the Judge's interest is said to derive from the interest of a spouse, partner or other family members the link must be so close and direct as to render the interest of that other person, for all practical purposes, indistinguishable from an interest of the Judge himself."

[10] See also: *United Cabbies Group (London) Ltd v. Westminster Magistrates' Court* [2019] EWHC 409 (Admin).

[11] Thus, in proving the real danger of bias test, it must be shown that the views expressed by third party, in this case, the spouse, actually impacted on the views of the Judge sought to be recused as opposed to simply presupposing that just because certain general views were expressed as a citizen they are automatically the views of the Judge presiding. In other words, the fact of a 'spousal relationship' is not by itself a reason to ascribe the spouse's views to the Judge.

[12] Applying *Kaycliff* to encl 300, it follows that (a) the fact of spousal connection in itself does not give rise to either actual or apparent bias, (b) there is no nexus between the Facebook posting and the subject matter of these appeals.

[13] Again, it is reiterated that the Facebook posting occurred four years ago when this case was not even in existence. Simply put there is absolutely no nexus between the Facebook post and the present appeals.

[14] The second ground, the letter, is a non-starter. The letter clearly states that I had no objection should lawyers seek to apply for the adjournments of their cases from the panels hearing their cases. This was not a blanket grant of adjournments. It was simply to say that the different panels and different chairs retain their discretions to grant or refuse adjournments. It was a standard letter. I do not see how this discloses any fear or real danger of bias sufficient to recuse me.

[15] Finally, the fact that certain other judges recused themselves in cases involving the appellant in this case does not itself present a reason for me to recuse myself in this case.

[16] In the circumstances, encl 300 is without merit and is dismissed.

Abang Iskandar Abang Hashim CJSS, Nallini Pathmanathan, Mary Lim Thiam Suan & Mohamad Zabidin Mohd Diah FCJJ (Supporting):

[17] Following on from what was just stated by the learned Chief Justice, on behalf of myself and the other members of the coram, we concur and wish to just reiterate the following. The event complained of in the first ground in encl 300, in particular, happened four years ago. And there was no live case at the

time of the Facebook post. The appellant had not even been charged. There can therefore be no nexus between that posting and the current appeals.

[18] We further agree with the respondent's submission, for the reasons advanced, that this application in encl 300 is lacking in *bona fides*, given the series of applications filed in instalments and the staggered timing. We therefore reiterate that there are no merits whatsoever in the application and we would also dismiss encl 300.

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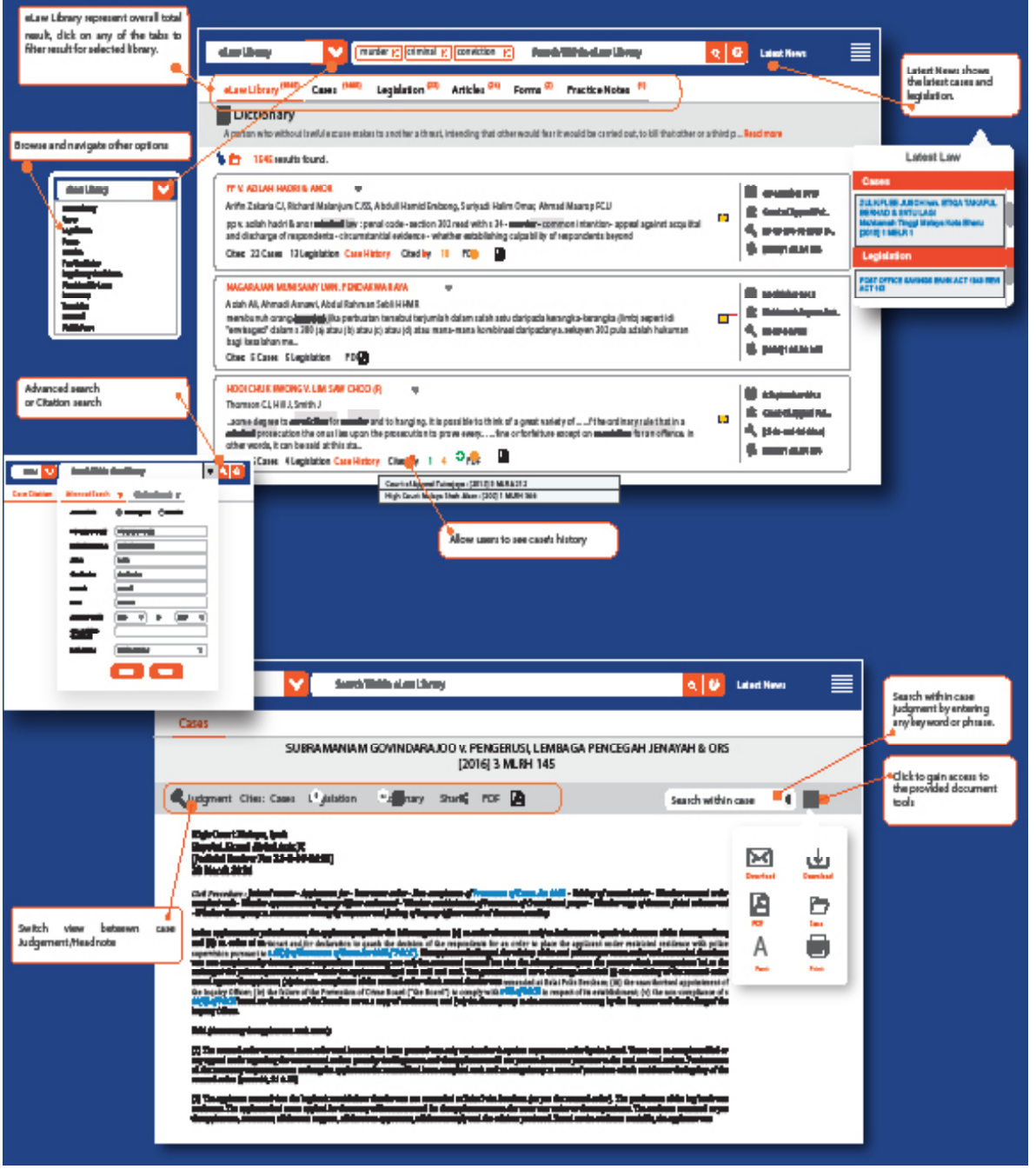

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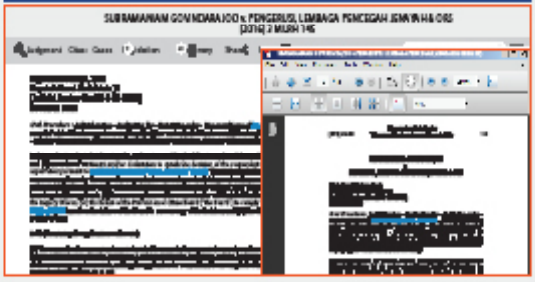

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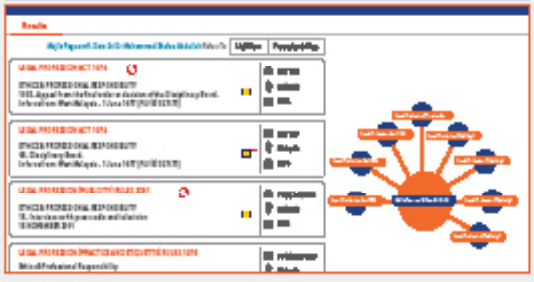

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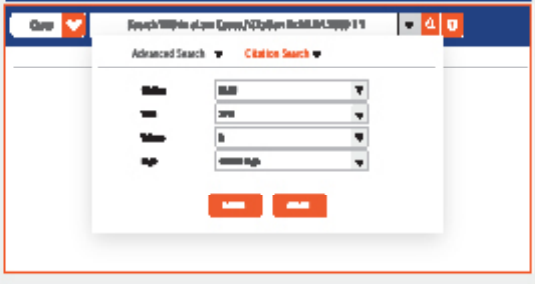

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