TANASILAN NAKETHIRAN

v.

PP & ORS

High Court Malaya, Kuala Lumpur
Noorin Badaruddin J
[Criminal Application No: WA-44-159-06-2021]
11 May 2023

Constitutional Law: *Legislation — Whether s 4(5) of the Security Offences (Special Measures) Act 2012 contravened art 121 of the Federal Constitution and thus, was unconstitutional*

The applicant was detained under s 4(5) of the Security Offences (Special Measures) Act 2012 (SOSMA), and the High Court upon hearing the applicant's *Habeas Corpus* application, ruled that there had been a procedural non-compliance with s 4(2) of the SOSMA. However, no writ of *Habeas Corpus* was issued as the applicant was remanded pending trial on a charge under s 130V of the Penal Code. A constitutional issue arose in the appellant's appeal to the Federal Court namely, whether s 4(5) of SOSMA was in contravention of art 121 of the Federal Constitution (Constitution) and thus was unconstitutional. The High Court was directed by the Federal Court to hear the said constitutional issue. The applicant contended that s 4(5) of SOSMA was a nullity as it took away the judicial power of the judiciary and cut across the doctrine of separation of powers which was part of the basic structure of the Constitution. It was submitted that such usurpation of judicial power infringed the sanctity of the doctrine of separation of powers, violated the basic structure of the Constitution and was therefore unconstitutional. The respondents however argued that although it could not be disputed that the remand process was a power vested with the judiciary, SOSMA however, was enacted with the intention of empowering the Executive to detain a person for the purpose of conducting an investigation in a manner pursuant to s 4(5) of SOSMA. It was further argued that SOSMA was a specific law with the core purpose to suit the objective of art 149 of the Constitution involving special measures relating to security offences to maintain public order and that the Courts had recognised that security issues were matters vested within the purview of the Executive which the Courts would not interfere with.

Held (Section 4(5) SOSMA not unconstitutional):

(1) Unlike the Dangerous Drugs (Special Preventive Measures) Act 1985, SOSMA was not a law that allowed for detention without trial. Given that it was a special law that was enacted to provide for special measures related to security offences for the purpose of maintaining public order and security and

all connected matters as per the title and preamble, the Executive was therefore legally authorised by SOSMA to exercise the power of detention for purposes of investigation. Hence it could not be gainsaid that the executive detention under s 4(5) of SOSMA lacked legal authorisation and was prohibited because there were in existence such powers as clearly prescribed under the law i.e. SOSMA, which was enacted pursuant to art 149 of the Constitution. (para 25)

(2) The answer to the question of whether the power given to the Executive under s 4(5) of SOSMA encroached/trespassed the judicial power, was in the negative. Unlike bail, where it was well established that the power to grant or deny bail was in a nature of a power inherently vested in the Courts, detention could not be strictly said to be a judicial power. (para 29)

(3) The fact that the Executive was given quasi-judicial power did not mean that there was a usurpation of judicial power by the Executive, albeit it had some of the attributes or trappings of judicial functions, but not all. Usurpation of judicial power happened only when there was a discharge of clear judicial power by non-qualified person/s and not by Judges or official officers or non-judicial personages which rendered the said exercise to be *ultra vires* art 121 of the Constitution. (para 30)

(4) There was no bar to judicial scrutiny under SOSMA. The right to question the legality of the detention under s 4(5) of SOSMA was neither taken away nor suspended. This was in line with the constitutionally embedded right under art 5(2) of the Constitution. The constitutional guarantee of a detainee's right under art 5(2) of the Constitution could not be said to be abrogated totally although SOSMA was enacted under art 149 of the Constitution. A detainee preventively detained under SOSMA could therefore apply for release under the provisions of art 5(2) of the Constitution. (para 32)

(5) It was incumbent upon a High Court to inquire into the legality of the detention once the remedy of a Writ of *Habeas Corpus* was available by reason of art 5(2) of the Constitution. Liberty and security were therefore reconcilable within the constitutional order that upheld the rule of law. There was an element of accountability in detaining a subject under s 4(5) of SOSMA for purposes of investigation. The need for a check and balance mechanism by the Courts as the final arbiter between the individual and the State to avoid the risk of abuse by the Executives and to ensure that the rights and personal liberty of an individual were safeguarded was in tandem with the rights and interest of the public and could not be said to have been taken away by s 4(5) of SOSMA. (para 34)

(6) In the premise, s 4(5) of SOSMA did not involve usurpation and infringement by the Legislature of judicial power and could not be said to be inconsistent with the Constitution. The doctrine of separation of powers was well preserved and intact as far as s 4(5) of SOSMA was concerned. (para 35)

Case(s) referred to:

Alma Nudo Atenza v. PP & Another Appeal [2019] 3 MLRA 1 (folld)

Datuk Seri Samy Vellu v. S Nadarajah [2000] 3 MLRH 111 (refd)

Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah & Ors [2022] 4 MLRA 452 (folld)

Indira Gandhi Mutho v. Ketua Polis Negara [2016] 3 MLRA 356 (folld)

Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor [2021] 3 MLRA 1 (refd)

Nivesh Nair Mohan v. Dato' Abdul Razak Musa & Ors [2021] 6 MLRA 128 (folld)

PP v. Dato' Yap Peng [1987] 1 MLRA 103 (refd)

PP v. Karpal Singh & Another Case [1988] 1 MLRA 122 (refd)

Selva Vinayagam Sures v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2021] 1 MLRA 83 (refd)

Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 4 MLRA 554 (folld)

Tenaga Nasional Bhd v. Bandar Nusajaya Development Sdn Bhd [2016] 6 MLRA 103 (refd)

Zaidi Kanapiah v. ASP Khairul Fairoz Rodzuan & Ors And Other Appeals [2021] 4 MLRA 518 (refd)

Legislation referred to:

Criminal Procedure Code, s 117

Federal Constitution, arts 4(1), 5(2), (4), 8, 9, 10, 13, 121, 149(1)

Land Acquisition Act 1960, s 40D

Penal Code, s 130V(1)

Prevention of Crime Act 1959, ss 4, 15B

Security Offences (Special Measures) Act 2012, s 4(2), (4), (5), (10), (11)

Counsel:

For the appellant: Rajpal Singh (Jayarubbiny Jayaraj & Jay Moy Wei Jiun with him); M/s Jay & Jay

For the respondents: Ermadieyani Ismadi; FC

JUDGMENT

Noorin Badaruddin J:

[1] The Applicant was arrested on 20 June 2021 and subsequently detained under subsection 4(5) of the Security Offences (Special Measures) Act 2012 ("SOSMA") from 20 June 2021 to 13 July 2021.

[2] On 28 June 2021, the Applicant filed a Writ of *Habeas Corpus* against the 28 days of his detention under SOSMA at the Kuala Lumpur High Court.

[3] On 13 July 2021, the Applicant was charged under s 130V(1) of the Penal Code before the Sessions Court in Kuala Lumpur.

[4] The High Court then dismissed the Applicant's Writ of *Habeas Corpus* application on the ground that the application has been rendered academic. The Applicant appealed to the Federal Court.

[5] On 11 January 2022, the Federal Court heard the appeal and remitted the case to the High Court and directed the *Habeas Corpus* application to be heard on its merits.

[6] The *Habeas Corpus* application was heard on its merits and on 8 June 2022, the High Court ruled that there has been a procedural noncompliance with subsection 4(2) of SOSMA but no Writ of *Habeas Corpus* was issued as the Applicant is now in remand pending trial for a charge under s 130V of the Penal Code.

[7] On 8 November 2022, the Applicant filed a second appeal before the Federal Court. A constitutional issue arose in the second appeal and the Federal Court directed that the constitutional issue be heard before the High Court.

[8] The only constitutional issue to be heard is "Whether subsection 4(5) of SOSMA is in contravention of art 121 of the Federal Constitution ("FC") and thus unconstitutional".

The Crux of Arguments

[9] The Applicant takes the position that subsection 4(5) of SOSMA is unconstitutional as it violates art 121 of the FC. The Applicant contends that the 28-day detention period under subsection 4(5) of SOSMA essentially constitutes a remand procedure and that a remand process is a judicial power of the judiciary. Hence, subsection 4(5) of SOSMA is argued to be a nullity as it takes away the judicial power and cuts across the doctrine of separation of powers which is part of the basic structure of the Constitution. The Applicant submits that this usurpation of judicial power infringes the sanctity of the doctrine of separation of powers, violates the basic structure of the FC and is therefore unconstitutional.

[10] The Respondents on the other hand argue that although it cannot be disputed that remand process is a power vested with the judiciary, SOSMA however is enacted with the intention of empowering the executive to detain a person for the purpose of conducting investigation in a manner pursuant to subsection 4(5) of SOSMA. SOSMA is argued to be a specific law with the core purpose to suit the objective of art 149 of the FC involving special measures relating to security offences to maintain public order. The Respondents argue that the Courts have recognised that security issues are matters vested within the purview of the executive which the Courts do not interfere with.

[11] In citing the decisions of the Apex Courts in *Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah & Ors* [2022] 4 MLRA 452, *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor* [2021] 3 MLRA 1 and *PP v. Karpal Singh & Another Case* [1988] 1 MLRA 122, the Respondents argue that the Courts have chosen not to interfere with any matters falling within the purview of the other branches especially matters on policy because the Courts are not equipped to deal with such matters.

Analysis of This Court

[12] It is critical to note that subsection 4(5) of SOSMA presents itself in that it has not provided the judicial powers to determine the grant of the extension of detention. Unlike in the United Kingdom legislation and our Criminal Procedure Code, subsection 4(5) of SOSMA does not provide for a judicial authority, like a Magistrate, to be satisfied that an extension of the period of detention is necessary. Subsections 4(4) and 4(5) of SOSMA are essential to be reproduced to fully appreciate the constitutional question herein. The provisions read:

> "4. Power of arrest and detention
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> (4) The person arrested and detained under subsection (1) may be detained for a period of twenty-four hours for the purpose of investigation.
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> (5) Notwithstanding subsection (4), a police officer of or above the rank of Superintendent of Police may extend the period of detention for a period of not more than twenty-eight days, for the purpose of investigation."

[13] It is therefore clear from the provisions that the fundamental liberties enshrined in art 5(4) of the FC which requires any person arrested to be brought before a Magistrate within 24 hours and not be further detained in custody without the Magistrate's authority is not provided for on the grounds that SOSMA was enacted by Parliament under art 149 of the FC. Subsection 4(10) of SOSMA for that matter specifically states that the Act shall have effect notwithstanding anything inconsistent with arts 5 and 9 of the FC and s 117 of the Criminal Procedure Code.

[14] Article 149 gives power to the Parliament to pass special laws to stop or prevent any actual or threatened action by a large body of persons which the Parliament believes to be prejudicial to public order, promoting hostility between races and so on. Such laws do not have to be consistent with the fundamental liberties under arts 5 (Right to Life and Personal Liberty), 9 (No Banishment from Malaysia and Freedom of movement within Malaysia), 10 (Freedom of Speech, Assembly and Association) or 13 (Rights to Property) of the FC. The relevant parts of art 149 of the FC which produced SOSMA read:

"149(1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation:

(a) to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property; or

(b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or

(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or

(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or

(e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or

(f) which is prejudicial to public order in, or the security of, the Federation or any part thereof, any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of arts 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament; and art 79 shall not apply to a Bill for such an Act or any amendment to such a Bill."

[15] It cannot be disputed that SOSMA is indeed a specific law enacted with the core purpose to suit the objective of art 149 of the FC as it involves special measures relating to security offences to maintain public order.

[16] The Apex Courts have consistently reminded that in matters relating to the security of the nations, it is best left with the executive as part of the policy of the Government and the intention is then translated by the legislative *via* the FC. In *PP v. Karpal Singh & Another Case* [1988] 1 MLRA 122, the Supreme Court had held that it is the authority which has the charge of security on who is the best judge of what national security is. The Supreme Court held:

"As to his other grounds for granting the order of *habeas corpus* they can be answered by going back to first principles. Since *The Zamora* [1916] 2 AC 71 Courts have come to accept that the best judge of what national security is, is the authority which has charge of security ie the Government. Lord Parker said in that case:

Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a Court of law or otherwise discussed in public."

[17] SOSMA is a special measure to cater to specific offences. Its First Schedule lists down the type of offences involved and which grants the rights to the executive body ie the Royal Malaysian Police the right to detain subjects for

up to 28 days for purposes of investigation. It is highlighted to the Court that SOSMA is a module from the Essential Security Cases Regulation (ESCAR) that deals with security measures on organised notorious offences. As such, an uninterrupted investigation is intended. It is further highlighted by the Respondents that contrary to procedures for general offences, the police aim in finding evidence to fulfil the elements of charges. The Respondents submit that investigation under SOSMA is delicate as the executive has to penetrate the group by identifying the network and gathering evidence to paralyse the group's/gang's activity. According to the Respondents, to paralyse the group's/gang's activity, it involves strategic, bigger scale and high-risk planning and as such confidentiality of the investigation must be ensured and not compromised. In other words, the Respondents say that any involvement of any parties at the investigation stage eg, reporting of the status of investigation in the media will jeopardise greatly the investigation strategy of the police force.

[18] As stated earlier, the Applicant on the other hand takes the position that the extension of the detention period up to 28 days under subsection 4(5) of SOSMA essentially constitutes a remand procedure and that remand process is a judicial power of the judiciary. The Applicant submits that in empowering the police instead of the judiciary to detain a subject for purposes of investigation up to 28 days, subsection 4(5) of SOSMA cuts across the doctrine of separation of powers which forms part of the basic structure of the Constitution as it is trite law that the judicial power lies in the judiciary.

[19] The Applicant relies on art 121 of the FC and the authoritative landmark decisions of the Federal Court in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 4 MLRA 554 which had reviewed a number of local and Commonwealth authorities and examined the concepts of separation of powers, basic structure and judicial power. This Court is indeed bound by the decisions in *Semenyih Jaya Sdn Bhd (supra)*; *Indira Gandhi Mutho v. Ketua Polis Negara* [2016] 3 MLRA 356, *Alma Nudo Atenza v. PP & Another Appeal* [2019] 3 MLRA 1, *Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah & Ors* [2022] 4 MLRA 452 and *Nivesh Nair Mohan v. Dato' Abdul Razak Musa & Ors* [2021] 6 MLRA 128 wherein the illuminating judgments of the Federal Court, the supremacy clause ie, art 4(1) of the FC as the *vires* clause was upheld and subjected all other provisions as being subordinate to the Constitution.

[20] However, the question herein is whether the power to detain a subject can only be a judicial power and can only be conferred upon the judiciary. If the answer is in the affirmative, then subsection 4(5) of SOSMA would cut across the doctrine of separation of powers which is part of the basic structure of the Constitution.

[21] The fact that SOSMA and other preventive laws such as the repealed Internal Security Act 1960, the Dangerous Drugs (Special Preventive Measures) Act 1985 did not make any provision on remand by a Magistrate but instead strictly provide for executive acts to be exercised by Minister or

other enforcement body was observed by Her Ladyship Tun Tengku Maimun Tuan Mat, CJ in *Zaidi Kanapiah v. ASP Khairul Fairoz Rodzuan & Ors And Other Appeals* [2021] 4 MLRA 518. Her Ladyship stated as follows:

> "[296] Remand is a judicial order and a Magistrate making such an order performs a judicial act (see generally *Hassan Marsom & Ors v. Mohd Hady Ya'akop* [2018] 5 MLRA 263). The fact that it was ordered under a preventive law, in my view does not change the judicial character of the remand order. At this juncture, **I wish to record my observation that neither the now repealed Internal Security Act 1960, the Dangerous Drugs (Special Preventive Measures) Act 1985 nor the Security Offences (Special Measures) Act 2012 make any provision on remand by a Magistrate. These preventive laws strictly provide for Executive acts to be exercised by the Minister or other enforcement body**. POCA 1959 however, provides for remand by a Magistrate and under s 4 of POCA 1959, the Magistrate is clearly bound to act upon the dictates of the police and the Public Prosecutor by use of the imperative word "shall". There are two cases to illustrate that this form of "law" seeking to direct the Judiciary or a judicial body to do or omit from doing something upon the dictates of an Executive body without any choice, is a violation of separation of powers."
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> [Emphasis Added]

[22] The issue before the Federal Court in *Zaidi Kanapiah (supra)* relates to the constitutionality of the Prevention of Crime Act 1959 (POCA) and its s 4. It can be gleaned from the observation made by Her Ladyship Tun Tengku Maimun Tuan Mat CJ in that case, after having affirmed remand is a judicial order and the Magistrate making such order performs a judicial act notwithstanding it was ordered under a preventive law, the other type of detention is recognised ie the executive detention such as the 28-day detention under subsection 4(5) of SOSMA.

[23] Executive detention is not an unfamiliar term. In *Selva Vinayagam Sures v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2021] 1 MLRA 83, wherein the statute in issue is the Dangerous Drugs (Special Preventive Measures) Act 1985, a special specie of enactment on preventive detention enacted pursuant to art 149 of the FC under which the fundamental liberties prescribed under arts 5, 9, 10 and 13 of the FC may be circumscribed, the Federal Court recognised the detention by the executive and explained as follows:

> "[22].. Executive detention is detention at the instance of the executive for an indefinite period without charge and without trial. It is typically imposed as a result of an administrative decision, taken in private, by Government officials. Executive detention is designed to be employed in advance- as a preventive measure. Therefore, a detenu is detained not for what he has done, but for what he might do in the future if he remained at liberty."

[24] The Federal Court in *Selva Vinayagam Sures (supra)* in acknowledging the executive detention and that the personal liberty of a person is at stake upon being detained by the executive, went on to state that the existence of such

powers ie, the executive detention must be clearly prescribed by the law. Vernon Ong FJ (as he then was) speaking on behalf of the Federal Court states:

> "[27] It must, however, be appreciated that the guaranteed right to personal liberty is not freedom from executive detention as described in para [22] above, but to freedom from executive detention not authorised by law. It is the lack of legal authorisation which is the subject of prohibition. What is important is that the existence of such powers and its exercise must be clearly prescribed under the law."

[25] It is apposite to note that unlike the Dangerous Drugs (Special Preventive Measures) Act 1985, SOSMA is not a law that allows for detention without trial. Pursuant to subsection 4(5) of SOSMA, the detenu must either be brought to Court for a charge to be preferred against him or be released within 28 days. Nonetheless, given that it is a special law that is enacted to provide for special measures relating to security offences for the purpose of maintaining public order and security and all connected matters as per the title and preamble, the executive is legally authorised by SOSMA to exercise the power of detention for purposes of investigation. So, it cannot be gainsaid that the executive detention under subsection 4(5) of SOSMA lacks legal authorisation and therefore prohibited because there is in existence such powers clearly prescribed under the law ie, SOSMA, which is enacted pursuant to art 149 of the FC.

[26] In searching whether to grant detention or the extension of the detention is solely a judicial power, this Court is of course assisted by binding precedents. What judicial power is, has been elucidated in the case of *PP v. Dato' Yap Peng* [1987] 1 MLRA 103 where the Supreme Court had affirmed the judgment of Zakaria Yatim J (as he then was) who had explained in the following terms:

> "The question that arises here is what is meant by the "judicial power of the Federation," which is vested in the two High Courts and in the Subordinate Courts, including the Sessions Court.
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> In Australia, the words "judicial power" appearing in s 71 of the Australian Constitution have been defined by the Australian High Court. In *Huddart Parker and Co Proprietary Ltd v. Moore head* (1908-1909) 8 CLR 330, Griffith C.J., in his judgment at p 357, said:
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> > "... I am of the opinion that the words judicial power' as used in s 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision... is called upon to take action."
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> This passage was quoted with approval by the Privy Council in *Shell Company of Australia Ltd v. Federal Commissioner of Taxation* [1931] AC 275 295 296.

Under our Constitution the words "judicial power of the Federation" have been defined to mean "that the Court has power to adjudicate in civil and criminal matters which are brought before the Court. In criminal trials the High Court is empowered to pass sentence according to law..." See judgment of Ajaib Singh J in *PP v. Yee Kim Seng [1982] 1 MLRH 418*. Similarly, Tun Mohamed Suffian, in his book, *An Introduction to the Constitution of Malaysia*, 2nd. Edn. at p 97, states, "(c) its judicial power (ie the power to hear and determine disputes and to try offences and punish offenders) which is vested by art 121(1)..." In my opinion both the definitions given above are too restrictive. In *Minister of Home Affairs v. Fisher* [1980] AC 319 329, the Privy Council held that the Constitution should be interpreted with less rigidity and greater generosity than other acts of Parliament. The Constitution must not be construed in any narrow and pedantic sense. See decision of the Privy Council in *James v. Commonwealth of Australia* [1936] AC 578 614. The principles of constitutional interpretation as enunciated by the Privy Council in the two cases just cited have been applied in *Merdeka University Bhd v. Government of Malaysia* [1981] 1 MLRH 75. Bearing in mind the principles of constitutional interpretation as laid down in those cases, it is proposed to state the meaning of the words "judicial power of the Federation" as contained in art 121(1) of the Constitution.

In my opinion, the term "judicial power" used in art 121(1) means, to borrow the words of Griffith C.J. in the *Huddart* 's case*, supra*., "... the power which every sovereign authority must of necessity have to decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin..." until the Court, which has the power to give a binding and authoritative decision is called upon to take action. In the context of criminal law, the Court possesses the judicial power to try a person for an offence committed by him and to pass sentence against him if he is found guilty. Judicial power includes:

(1) **the power to accept a plea of guilty after the charge has been explained to the accused and he understood it**, *Heng Kim Khoon v. PP* [1971] 1 MLRH 355; *Munandu v. Public Prosecutor* [1984] 1 MLRH 167; *Wong Sin Yeow v. Public Prosecutor* [1968] 1 MLRH 207; and *Public Prosecutor v. Jamalul Khair* [1984] 2 MLRH 216;

(2) **the power to allow or refuse a plea to be retracted and that power must be exercised judicially**, *Yeoh Eng Hock v. Public Prosecutor* [1967] 1 MLRH 382;

(3) **the power to grant or refuse bail to an accused person**, *Chinnakarappan v. Public Prosecutor* [1962] 1 MLRH 363 and *Public Prosecutor v. Latchemy* [1967] 1 MLRH 89

(4) **the power to grant or refuse a postponement**, *Tan Foo Su v. PP* [1967] 1 MLRH 272, and

(5) **the power to transfer any proceedings to any other Court or to or from any subordinate Court**. See item 12, Schedule to Courts of Judicature Act, 1964."

[Emphasis Added]

[27] It is therefore clear that judicial power comes into existence once it is being called upon to take action. As stated by the Federal Court in *Semenyih Jaya (supra)*:

> "[67] The legal consequence is that art 121(1) of the FC states that judicial power or the power to adjudicate in civil and criminal matters brought to the Court is vested only in the Court "

[28] *Dato' Yap Peng (supra)* together with *Semenyih Jaya (supra)* have made it clear that anything that trespasses upon the separation of powers by taking away the power of the Court, is a trespass in judicial power.

[29] The question now is, does the power given to the executive under subsection 4(5) encroach/trespass the judicial power? This Court is of the considered view that the answer is in the negative. In the first place, the Court is not called upon to take action at the investigation stage under the provision. Unlike bail, where it is well established that the power to grant or deny bail is in the nature of a power inherently vested in the Courts, detention cannot be strictly said to be a judicial power. Even in the case of *Datuk Seri Samy Vellu v. S Nadarajah* [2000] 3 MLRH 111 cited by the Appellant in support of his contention, by stating that the powers of inquiry, in the same way as powers of remand etc. are not strictly executive powers, neither does the court in that case stated that it is strictly or inherently a judicial power. According to the High Court in that case, powers of remand are best described as quasi-judicial. What is significant about quasi-judicial power is that it can be exercised by the executives. In the case of *Tenaga Nasional Bhd v. Bandar Nusajaya Development Sdn Bhd* [2016] 6 MLRA 103, the Federal Court had the opportunity to explain the meaning of quasi-judicial function as follows:

> "[41] A quasi-judicial function stands in between a judicial and administrative function. A quasi-judicial decision consists of findings of facts and applying administrative policy. Where a statutory authority is empowered under a statute to do any act which affects the rights of individuals, the authority is exercising a quasi-judicial function and is thus required to act judicially.
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> [42] This principle is lucidly expressed by Abdoolcader J (as His Lordship then was) in *Mak Sik Kwong v. Minister of Home Affairs, Malaysia* [1975] 1 MLRH 640 when His Lordship said that:
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> > "I think it is clear that an act or decision may be held to be of a judicial character if it imposes obligations upon or affects the rights of individuals. These rights or duties need not be in any sense private rights or duties of the individuals affected; it is sufficient that their rights as citizens should be in jeopardy.
> >
> > A purely administrative or executive function is one where there is no duty to afford a hearing to the parties interested, and where the decision can be made on the basis of policy considerations only.
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> > Even in arriving at an administrative decision, there may be a judicial or quasi-judiciai interlude, and at that stage the deciding authority will have

> to act in a quasi-judicial manner − a situation resolving in effect into a hybrid mixture of administrative and quasi-judicial functions where the two elements are intermingled closely."
>
> [43] Whether an administrative body or a tribunal is exercising a quasi-judicial function is governed by the provisions in the empowering statute. In MP Jain & SN Jain's *Principles of Administrative Law* − An exhaustive commentary on the subject with case law references (Indian & Foreign) Vol 1 (6th Ed-reprint 2010), at p 310 the authors expressed the view that:
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> > **A quasi-judicial function has been termed to be one which stands midway a judicial and an administrative function**. The primary test is as to whether the authority alleged to be a quasi-judicial one, has any express statutory duty to act judicially in arriving at the decision in question. If the reply is in the affirmative, the authority would be deemed to be quasi-judicial, and if the reply is in the negative, it would not be. **The dictionary meaning of the word 'quasi' is 'not exactly'. It follows, therefore, that an authority is described as quasi-judicial when it has some of the attributes or trappings of judicial functions, but not all**."
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> [Emphasis Added]

[30] It can be deduced from the explanation given by the Federal Court in that case, the fact that the executives are given a quasi-judicial power, does not mean that there is a usurpation of judicial power by the executives albeit it has some of the attributes or trappings of judicial functions, but not all. Usurpation of powers of judicial power happens only when there is a discharge of clear judicial power by non-qualified person/s and not by Judges or official officers or non-judicial personages which will render the said exercise to be *ultra vires* art 121 of the FC. A clear example of usurpation of judicial powers is demonstrated and elucidated by Zainun Ali FCJ (as she then was) in *Semenyih Jaya (supra)*. In that case, s 40D of the Land Acquisition Act 1960 was found to effectively usurp the power of the Court in allowing a person other than the Judge to decide on the reference before it. To borrow the words of Zainun Ali FCJ (as she then was), the judicial power to award compensation has been whittled away from the High Court Judge to the assessors in breach of art 121 of the FC because the power to award compensation in land reference proceedings is a judicial power that should rightly be exercised by a Judge and no other.

[31] In *Dinesh Tanaphll*, the impugned provision is s 15B of the Prevention of Crime Act 1959 (POCA) where the Federal Court ruled that the provision cannot operate to immunise all decisions made under POCA by use of the ouster clause therein. The ouster clause in that case, seeks to oust the clear jurisdiction of the Court in relation to judicial scrutiny of preventive detention proceedings to acts of the Prevention of Crime Board constituted under the Act (save for failure to comply with procedural requirements thereof). In examining the provision, the Federal Court found that the rigidity of the ouster clause is borne out by the fact that, on a literal reading, it even purports to exclude *habeas*

corpus notwithstanding the express safeguards housed in arts 4 and 5(2) of the FC. It purports to strip the Court of its constitutionally entrenched supervisory judicial function and is thus unconstitutional, void and of no effect (see: abstract of the case reported in [2022] 4 MLRA 452).

[32] Unlike POCA, there is no bar to judicial scrutiny under SOSMA. Under SOSMA, the right to question the legality of such detention under subsection 4(5) is neither taken away nor suspended. This is in line with the constitutionally embedded right under art 5(2) of the FC. The fundamental characteristics or features, or basic structure of the FC is being complied with, as should the doctrines of proportionality and equality embodied in art 8 of the FC which also agnates with international law on according all detainees the right of judicial redress. In fact, the constitutional guarantee of the detainee's right under art 5(2) of the FC cannot be said to be abrogated totally although SOSMA is enacted under art 149 of the FC. As such, a detainee preventively detained under SOSMA could apply for release under the provisions of art 5(2) of the FC.

[33] In addition, under subsection 4(11) of SOSMA, a clause popularly known as a sunset clause is provided which states that – "subsection 4(5) shall be reviewed every five years and shall cease to have effect unless, upon the review, a resolution is passed by both Houses of Parliament to extend the period of operation of the provision". The provision of a sunset clause in SOSMA is critical. It forces Parliament to review the application of the statute periodically.

[34] Once the remedy of the Writ of *Habeas Corpus* is available by reason of art 5(2) of the FC it is incumbent upon a High Court to inquire into the legality of the detention. Liberty and security are therefore reconcilable within the constitutional order that upholds the rule of law. There is an element of accountability in detaining a subject under subsection 4(5) of SOSMA for purposes of investigation. The need for a check and balance mechanism by the Courts as the final arbiter between the individual and the state to avoid the risk of abuse by the executives and to ensure that the rights and personal liberty of an individual are safeguarded in tandem with the rights and interest of the public cannot be said to have been taken away by subsection 4(5) of SOSMA.

Conclusion

[35] Premised on the analysis above, this Court is of the considered view that the impugned provision ie subsection 4(5) of SOSMA does not involve usurpation and infringement by the Legislature of judicial power and cannot be gainsaid to be inconsistent with the Constitution. The doctrine of separation of powers is well preserved and intact as far as subsection 4(5) of SOSMA is concerned.

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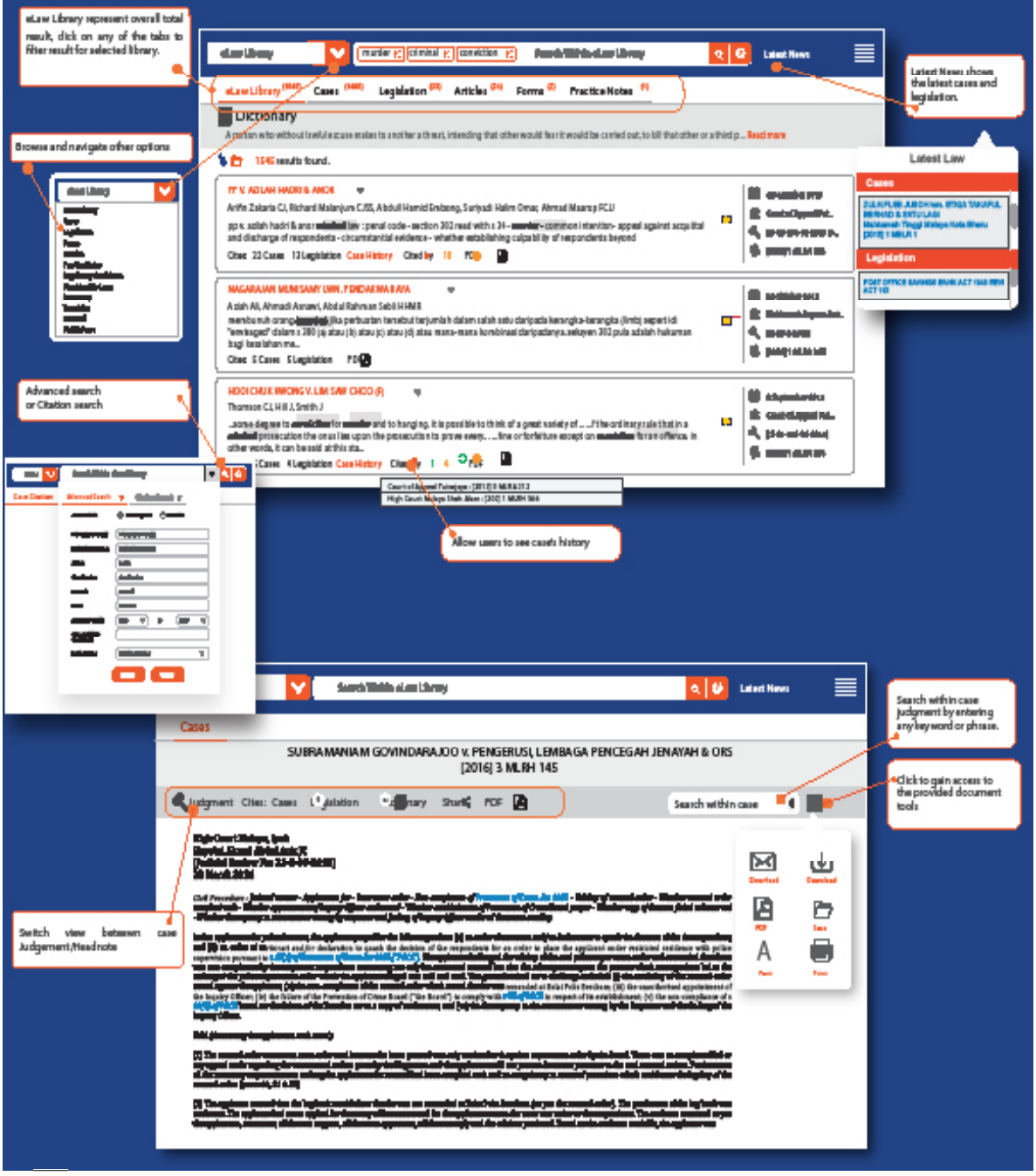

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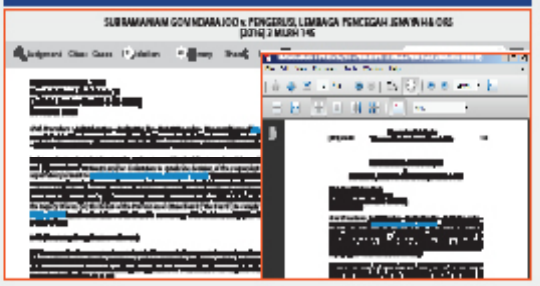

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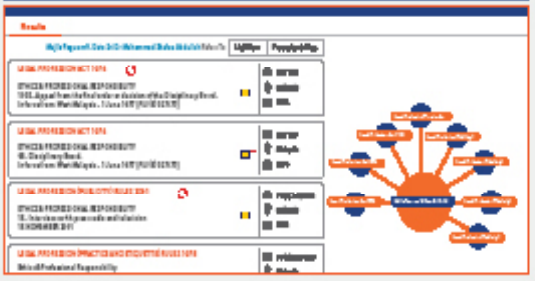

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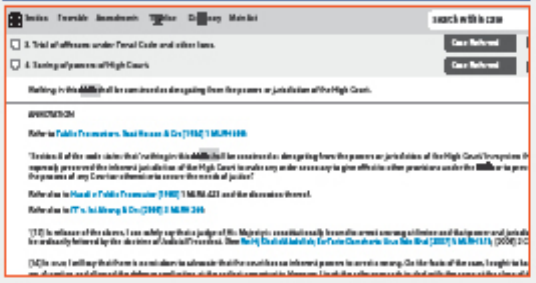

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