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Jayaganesan a/l Ramakrishnan v Timbalan Menteri Dalam Negeri, Malaysia & Ors

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FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05(HC)-237–10 OF 2018(B)
DAVID WONG CJ (SABAH AND SARAWAK), BALIA YUSOF, TENGKU MAIMUN, ABANG ISKANDAR AND NALLINI PATHMANATHAN FCJJ

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17 JUNE 2019

Administrative Law — Exercise of administrative powers — Detention — Detainee under Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act') challenged detention on ground he was not given chance to make representations before Advisory Board ('Board') — Detainee's right to make representations to Board mandatory — Detainee alleged he was not informed of hearing date before Board — Warden of detention centre deposed affidavit that he did notify detainee of hearing date on two occasions — Dates of both occasions were well after hearing date before Board had passed — No corrective affidavit filed to explain or rectify glaring 'error' in warden's affidavit — Whether insufficient for counsel for detaining authorities to merely contend before court that dates stated in warden's affidavit typographical errors — Whether warden's affidavit sufficed to show mandatory requirements of law not complied with — Whether detaining authorities failed to discharge burden of showing detainee's detention was lawful

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Following the appellant's arrest on suspicion of being involved in drug trafficking activities, he was ordered to be detained for two years at the second respondent's rehabilitation center pursuant to an order issued by the first respondent under s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act'). The appellant challenged the legality of his detention before the High Court saying that he was not given the opportunity to exercise his mandatory right under the Act to make representations to the Advisory Board ('the Board'). The High Court dismissed the challenge holding that the detaining authorities were not guilty of any procedural non-compliance. In his instant appeal against the decision, the appellant submitted that the Board had fixed 7 June 2017 as the date for him to appear before it to make his representations and a notice to that effect dated 22 May 2017 ('the notice') was issued. The appellant claimed that he was never served with the notice nor taken before the Board to make his representations. The warden of the center where the appellant was detained filed an affidavit in which he contended that he did inform the appellant of the hearing date before the Board and that the appellant had understood what was explained to him 'on 27 September 2017

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and 10 October 2017'. The appellant submitted that the mention of these two dates in the warden's deposition itself showed that he was only informed about the 7 June 2017 hearing date months after that date had passed. At the appeal hearing, the respondents' counsel contended from the Bar table that the September and October dates stated in the warden's affidavit were 'typographical errors'. However, no corrective affidavit was filed by the respondents to explain or rectify the 'mistake'.

Held, allowing the appeal, setting aside the High Court's decision, and ordering that the appellant be released from detention forthwith:

(1) The detaining authority failed to discharge its burden of satisfying the court that the strict requirements of the law had been met, thereby rendering the appellant's detention unlawful. A writ of habeas corpus had to be issued as of right if the court found that a detainee was illegally or improperly detained. It was not a discretionary remedy (see paras 10 & 23).

(2) Taking the dates mentioned in the warden's affidavit at their face value, it was clear that the appellant was not served with the notice of hearing before the Board before it took place. The use of the word 'shall' in the procedure governing the hearing of representations before the Board as outlined in r 5(1) of the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 showed that compliance with the statutory requirements was mandatory and that non-compliance would render the detention illegal. The appellant's right to make representations was not superfluous, meaningless or a mere façade. The failure to serve him with the notice of hearing meant he could not make any representations before the Board. The appellant was entitled to take advantage of any technical defect that would invalidate his detention (see paras 13–16 & 21).

(3) The respondents' only response was a statement from their counsel from the Bar table that the dates stated in the warden's affidavit were typographical errors. No corrective affidavit was filed to state that those dates were a mistake. Based on the warden's affidavit alone, there was plain non-compliance with the mandatory provisions of the law warranting the issue of a writ of habeas corpus in the appellant's favour. The contention that the dates in the warden's affidavit were typographical errors was hard to believe given that they were very specific dates which were some two to three months after the 7 June 2017 hearing date. A 'mistake' as grave as this warranted a corrective affidavit to explain the glaring 'error' (see paras 17–20).

[Bahasa Malaysia summary

Berikutan tangkapan perayu atas syak wasangka terlibat dengan kegiatan pengedaran dadah, dia telah diperintahkan untuk ditahan selama dua tahun di pusat pemulihan responden kedua berikutan perintah yang dikeluarkan oleh responden pertama di bawah s 6(1) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 ('Akta'). Perayu mencabar kesahihan penahanannya di hadapan Mahkamah Tinggi dengan mengatakan bahawa dia tidak diberi peluang untuk melaksanakan hak mandatori di bawah Akta untuk membuat representasi kepada Lembaga Penasihat ('Lembaga'). Mahkamah Tinggi menolak cabaran itu dengan memutuskan bahawa pihak berkuasa yang menahan tidak bersalah atas sebarang ketidakpatuhan prosedur. Dalam rayuannya ini terhadap keputusan itu, perayu mengemukakan bahawa Lembaga telah menetapkan 7 Jun 2017 sebagai tarikh baginya untuk hadir di hadapan Lembaga bagi membuat representasinya dan notis yang berkenaan bertarikh 22 Mei 2017 ('notis') dikeluarkan. Perayu mendakwa bahawa dia tidak pernah disampaikan dengan notis itu dan tidak dibawa ke hadapan Lembaga untuk membuat perwakilannya. Warden pusat tersebut di mana perayu ditahan telah memfailkan afidavit yang mana dia menegaskan bahawa dia telah memaklumkan perayu tentang tarikh pericaraan di hadapan Lembaga dan bahawa perayu telah memahami apa yang dijelaskan kepadanya 'on 27 September 2017 and 10 October 2017'. Perayu berhujah bahawa kedua-dua tarikh tersebut dalam deposisi warden itu sendiri menunjukkan bahawa dia hanya dimaklumkan mengenai tarikh pendengaran 7 Jun 2017 selepas tarikh itu telah berlalu. Semasa perbicaraan rayuan itu, peguam responden-responden menegaskan dari pihak Majlis bahawa tarikh-tarikh bulan September dan Oktober yang dinyatakan dalam afidavit warden adalah 'typographical errors'. Walau bagaimanapun, tiada afidavit pembetulan telah difailkan oleh responden untuk menjelaskan atau membetulkan 'mistake' itu.

Diputuskan, membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi, dan memerintahkan supaya perayu dikeluarkan dari tahanan dengan segera

(1) Pihak berkuasa menahan gagal menunaikan bebannya untuk memuaskan hati mahkamah bahawa syarat-syarat ketat undang-undang telah dipenuhi, dan dengan demikian menjadikan penahanan perayu melanggar hukum. Writ habeas corpus harus dikeluarkan sebagai hak jika mahkamah mendapati bahawa seseorang tahanan ditahan secara tidak sah atau tidak tepat. Ia bukan ubat budi bicara (lihat perenggan 10 & 23).

(2) Mengambil tarikh-tarikh yang disebut dalam afidavit warden atas nilai dasarnya, adalah jelas bahawa perayu tidak disampaikan dengan notis perbicaraan di hadapan Lembaga sebelum ia berlaku. Penggunaan perkataan 'shall' dalam prosedur yang mengawal perbicaraan representasi

di hadapan Lembaga seperti yang digariskan dalam k 5(1) Kaedah-Kaedah Dadah Berbahaya (Langkah-langkah Pencegahan Khas) (Prosedur Penasihat Lembaga) 1987 menunjukkan bahawa pematuhan terhadap keperluan statutori adalah mandatori dan ketidakpatuhan akan menyebabkan penahanan itu menyalahi undang-undang. Hak perayu untuk membuat representasi tidaklah berlebihan, tidak bermakna atau sekadar rupa. Kegagalan untuk menyampaikan kepadanya notis perbicaraan bermakna dia tidak boleh membuat apa-apa representasi di hadapan Lembaga. Perayu berhak mengambil kesempatan daripada apa-apa kecacatan teknikal yang akan membatalkan penahanannya (lihat perenggan 13–16 & 21).

(3) Jawapan responden-responden hanyalah kenyataan daripada peguam mereka dari Majlis bahawa tarikh yang dinyatakan dalam afidavit warden adalah kesilapan tipografi. Tiada afidavit pembetulan telah difailkan untuk menyatakan bahawa tarikh itu adalah kesilapan. Berdasarkan afidavit warden sahaja, terdapat ketidakpatuhan biasa dengan peruntukan mandatori undang-undang yang mewajarkan isu writ habeas corpus menyebelahi perayu. Hujah bahawa tarikh dalam afidavit warden adalah kesalahan tipografi sukar untuk dipercayai kerana ia adalah tarikh yang sangat spesifik iaitu dua hingga tiga bulan selepas tarikh perbicaraan 7 Jun 2017. Suatu 'mistake' seperti ini mewajarkan afidavit pembetulan untuk menjelaskan 'error' yang nyata itu (lihat perenggan 17–20).]

Notes

For cases on detention, see 1(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 79–88.

Cases referred to

Lui Ah Yong v Superintendent of Prisons, Penang [1977] 2 MLJ 226 (refd)

Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri & 1 Lagi [1994] 3 MLJ 285; [1994] 4 CLJ 47, SC (refd)

Overseas Investment Pte Ltd v Anthony William Obrien [1988] 3 MLJ 332, HC (refd)

Datuk James Wong Kim Min, Re [1976] 2 MLJ 245, FC (refd)

Roshidi bin Mohamed, Re [1988] 2 MLJ 193 (refd)

SK Tangakaliswaran a/l Krishnan v Menteri Dalam Negeri, Malaysia & Ors [2010] 1 MLJ 149; [2009] 6 CLJ 705, FC (refd)

Yeap Hock Seng @ Ah Seng v Minister of Home Affairs, Malaysia & Ors [1975] 2 MLJ 279 (refd)

Legislation referred to

Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 r 5(1)

Dangerous Drugs (Special Preventive Measures) Act 1985 ss 6(1), 9(1)

Sivananthan Nithyanantham (Jay Moy Wei Jiun with him) (Sivananthan) for the appellant.
Muhammad bin Sinti (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

David Wong CJ (Sabah and Sarawak) (delivering judgment of the court):

INTRODUCTION

[1] This appeal stemmed from the decision of the High Court refusing to issue the appellant a writ of habeas corpus. We heard the appeal on 12 February 2019 and after careful consideration, unanimously allowed it. We set aside the order of the High Court, allowed the appellant's application for a writ of habeas corpus and ordered that he be released from detention with immediate effect. These are our written reasons.

BACKGROUND

[2] The appellant was arrested on 3 March 2017 on the allegation that he was involved in activity relating to the trafficking of dangerous drugs. He was detained under the provisions of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act').

[3] Having completed investigations sometime after 18 April 2017, the first respondent studied the relevant investigation reports and exercised his discretion to detain the appellant under s 6(1) of the Act. To this effect, he issued a detention order dated 27 April 2017 ('detention order') which took immediate effect for a period of two years. The appellant was accordingly detained at Pusat Pemulihan Akhlak Machang, Kelantan.

[4] At the High Court, the appellant claimed that his detention was illegal on three grounds. The High Court did not agree with him on any of those grounds.

[5] Before us however, the appellant only canvassed one issue. In gist, he argued that the service of the notice dated 22 May 2017 ('notice') ie notifying him of the hearing before the advisory board ('the board'), on him was irregular. His hearing before the board was fixed on 7 June 2017. The appellant claims that he was never taken before the board to make his representations. He claimed, he was never served with the notice to attend the 7 June 2017 hearing.

[6] On this issue, the warden, deposed that on 22 May 2017, he was assigned to explain the said notice to the appellant. In his affidavit, he narrated that he did in fact explain to the appellant that the hearing was to take place on 7 June

2017 at 9am. In concluding the relevant part of his affidavit explaining this matter, the warden said that the appellant understood what was explained to him on 27 September 2017 and 10 October 2017.

[7] The appellant therefore argued that on the face of the warden's affidavit, there had been clear procedural non-compliance as the date of the board hearing was explained to the appellant after the hearing on 7 June 2017 took place.

[8] In response, the respondents argued that this was a typographical error. Critical to note however, is that there was no corrective affidavit filed on record rectifying or explaining this alleged mistake.

THE DECISION OF THE HIGH COURT

[9] On the above point, the High Court observed that there was no procedural non-compliance. The gist of the High Court's judgment reads as follows:

> [55] Mahkamah ini menerima perenggan 7 Afidavit Jawapan Mohd Ilham bin Abdullah, warden penjara yang diikrarkan pada 19 April 2018 yang menyatakan seperti berikut:
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> > 7. Sesungguhnya, tiada pelanggaran terhadap Kaedah-Kaedah tersebut dan proses penyerahan Borang II tersebut telah dibuat dengan suci hati dan semua prosedur dan peruntukan undang-undang telah dipatuhi dengan sempurna.
>
> [56] Justeru, berdasarkan alasan-alasan yang dinyatakan di atgtas, isu pertama yang dibangkitkan oleh peguam pemohon adalah ditolak.

OUR DECISION

[10] The law on habeas corpus is trite. It is not a discretionary remedy. The writ must be issued if the court finds that the detenu is illegally or improperly detained. See *Yeap Hock Seng @ Ah Seng v Minister of Home Affairs, Malaysia & Ors* [1975] 2 MLJ 279 where at p 281, Abdoolcader J (as he then was) said as follows:

> The grant of habeas corpus is as of right and not in the discretion of the court as in the case of such extraordinary legal remedies as certiorari, prohibition and mandamus. It is a writ of right against which no privilege of person or place can be of any avail (*R v Pell And Offly* 84 ER 720). The heavy musketry of the law will always be brought to bear upon any suggestion of unlawful invasion or infringement of the persona/liberty of an individual in the form of habeas corpus and kindred orders where necessary to grant relief when warranted. It was aptly put in the American case of *State ex ref Evans v Broaddus* 245 Mo 123 140 that at least in times of peace every human power must give way to the writ of habeas corpus and

no prison door is stout enough to stand in its way.

[11] Where a detainee challenges his detention as being illegal, the burden lies on the detaining authority to show that the detention is legal. In *SK Tangakaliswaran a/l Krishnan v Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 MLJ 149; [2009] 6 CLJ 705 Gopal Sri Ram FCJ held as follows at para 5:

> It is settled law that on an application for habeas corpus the burden of satisfying the court that the detention is lawful lies throughout on the detaining authority. See, *Chng Suan Tze v The Minister of Home Affairs & Ors and other appeals* [1988] 1 LNS 162. In *Mohinuddin @ Moin Master vs District Magistrate, Beed & Ors* 1987 AIR 1977, the Supreme Court of India observed as follows in the context of art 22 of the Indian Constitution from which is drawn our art 151:
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> > It is enough for the detenu to say that he is under wrongful detention, and the burden lies on the detaining authority to satisfy the Court that the detention is not illegal or wrongful and that the petitioner is not entitled to the relief claimed. This Court on more occasions than one has dealt with the question and it is now well-settled that it is incumbent on the State to satisfy the Court that the detention of the petitionerldetenu was legal and in conformity not only with the mandatory provisions of the Act but also strictly in accord with the constitutional safeguards embodied in Art 22(5).

[12] Even if a detention was originally made in exercise of valid legal power, said detention may subsequently become invalid over a passage of time. See *Lui Ah Yong v Superintendent of Prisons, Penang* [1977] 2 MLJ 226 where at pp 227–228 Arulanandom J said:

> The second limb of the argument merits greater consideration, ie whether a detention which at its inception was legal could become illegal as a result of passage of time or for other reasons. The answer to this question will necessarily determine the result of this application ... In view of this it is quite obvious that the authorities have exhausted all avenues and are unable to remove the applicant to his place of embarkation or his country of citizenship. The powers of detention under section 34(1) are clearly and unambiguously limited to detention for the purposes of removal to one of two places, ie the place of embarkation or country of citizenship and therefore the moment the detaining authorities have failed or found themselves in a position where the object of detention cannot be fulfilled, then it cannot be argued that further detention remains lawful. The purpose of the detention having been frustrated, continued detention a fortiori becomes unlawful.

[13] Further, the applicant is entitled to take advantage of any technical defect which has the effect of invalidating the detention. See *Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri & 1 Lagi* [1994] 3 MLJ 285; [1994] 4 CLJ 47 where at p 55, Wan Yahya SCJ held as follows:

> [I]n cases of this nature the appellant is nevertheless entitled to take advantage of any technical imperfection which has the effect of invalidating the restrictive order;

or to use the precise words of Regby J in *Ex Parte Johannes Choeldi & Ors* [1960] 26 MLJ 184 at p 186:

> The distinction, no doubt, is a highly artificial one. But this is an application for a writ of habeas corpus, and the applicants in matters which concern their personal liberty, are entitled to avail themselves of any technical defects which may invalidate the order which deprives them of that liberty.

[14] We thus turned to consider the salient provisions of the Act. Section 9(1) of the Act mandatorily entitles any detainee the right to make representations before the board. Rule 5(1) of the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 ('1987 Rules') stipulates the procedure in the event the board receives a representation. It reads:

> Subject to the provisions of this Act, when any representation is received by the Secretary, the Chairman shall appoint a time and place for the consideration of the representation by the Board and shall cause a notice thereof in Form II in the Schedule to be served on the detained person and his advocate if such advocate is named in Form I.

[15] The words 'shall' as emphasised indicates that compliance with this statutory requirement is mandatory. Non-compliance with mandatory provisions generally renders the detention illegal. See *Re Datuk James Wong Kim Min* [1976] 2 MLJ 245 where at p 251, Lee Hun Hoe (CJ Borneo) said this:

> Preventive detention is, therefore, a serious invasion of personal liberty. Whatever safeguard that is provided by law against the improper exercise of such power must be zealously watched and enforced by the court. In a matter so fundamental and important as the liberty of the subject, *strict compliance with statutory requirements must be observed in depriving a person of his liberty*. The material provisions of the law authorising detention without trial must be strictly construed and safeguards which the law deliberately provides for the protection of any citizen must be liberally interpreted. *Where the detention cannot be held to be in accordance with the procedure established by the law, the detention is bad and the person detained is entitled to be released forthwith.* Where personal liberty is concerned an applicant in applying for a writ of habeas corpus is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty. See *Ex parte Johannes Choeldi & Ors* [1960] MLJ 184.

[16] All the more, we were of the view that the appellant's right to make representations cannot be superfluous, meaningless, or a mere facade. Thus, the failure to serve the said notice on the appellant, as was apparent from the dates in the warden's affidavit, meant that that the appellant was unable to make any representations before the board. See generally: *Re Roshidi bin Mohamed* [1988] 2 MLJ 193 at p 196.

[17] The only response the respondents could offer us was that the dates indicated in the warden's affidavit were typographical errors. Now, when it comes to affidavits the trite and tested rule regarding how they work, was explained by Shankar J in *Overseas Investment Pte Ltd v Anthony William Obrien* [1988] 3 MLJ 332 at pp 333–334:

> [W]hat evidence was there to support that contention? None whatsoever except the say-so of the plaintiff's solicitors in the writ of seizure and sale. The plaintiff did not file any affidavit to contradict the affidavits filed by the claimant. *Where a case is to be decided on a contest of affidavits, the rule is clear. Material allegations which are not contradicted are deemed to be admitted.* (Emphasis added.)

[18] The case here was plainer than the analogy in the above paragraph. The allegation by the appellant was that he was never brought before the board. The respondents aver through the warden, that the appellant was served. But, the said affidavit markedly indicates that the appellant was served well past the 7 June 2017 hearing date. Their counsel denied this by making a statement from the bar alleging those erroneous dates as being typos. No corrective affidavit was put before us by the respondents indicating that the dates stated in the warden's affidavit were a mistake.

[19] Therefore, taking the respondents on their own warden's averment, there was plain non-compliance with the mandatory provisions of the law. We considered this in itself warranted the appellant to a writ of habeas corpus.

[20] Further, we noted as a passing remark, that we found this typo story to be rather curious. The warden's affidavit indicated two erroneous dates to wit, 27 September 2017 and 10 October 2017. These were very specific dates which were some two to three months after the board hearing on 7 June 2017. It is not to say that the deponent or even the typist simply mistyped the dates. Rather, they specifically inserted two entirely different and comparatively unrelated dates. This, to us, made the typo story harder to believe. We thought that a mistake as grave as this would have necessarily called for a corrective affidavit explaining this alleged glaring error.

[21] In this sense, constrained by the law and the facts of this case, we took the dates as we found them. With that, it was clear to us that the strict requirements of the law were not complied with. Taking the dates at the face value it was clear that the appellant was not served with the said notice before his hearing before the board. We therefore arrived at the view that the respondents plainly failed to meet their burden to justify the legality of the appellant's detention.

[22] As a corollary, and for the reasons aforementioned, we opined that the court below erred in arriving at the conclusion that it did. In the result, we

considered this an appropriate case for appellate intervention.

[23] Thus, in our considered view, as the detaining authority was unable to meet its burden to satisfy us that the strict requirements of the law were met, we arrived at the view that the detention was unlawful and we thereby allowed the appeal. We accordingly issued a writ of habeas corpus and ordered the appellant be released forthwith.

Appeal allowed.

Reported by Ashok Kumar