Adam Farhan bin Mohd Noor v Public Prosecutor [2022] MLJU 902

Malayan Law Journal Unreported

HIGH COURT (MUAR)

AWG ARMADAJAYA AWG MAHMUD JC

CRIMINAL APPLICATION NO JB-44-15-12 OF 2021

28 March 2022

Luqman bin Mazlan (Mohd Irzan Iswatt bin Mohd Noor with him) (Luqman Iswatt & Partners) for the appellant.
Muhammad Azfar Mahmood (Deputy Public Prosecutor) for the respondent.

Awg Armadajaya Awg Mahmud JC:

JUDGMENTINTRODUCTION

[1]This is a Notice of Motion filed by the applicant, Adam Farhan for the following Orders:

i. A Declaration that the Applicant's case in under the jurisdiction of the Sessions Court.
ii. That the trial of the Applicant's case be transmitted and heard in the Sessions Court.
iii. That the Applicant be given bail under section 388 Criminal Procedure Code or that the Applicant.
iv. Any other Order that the Court deems fit and just.

[2]The reasons for the application are as follows:

i. The trial of the applicant's case is within the legal jurisdiction of the Sessions Court.
ii. The case of the applicant should be transferred and tried before the Sessions Court.
iii. The applicant be released on bail pursuant to section 388 Criminal Procedure Code or section 13(2)(b) or (c) Special Offences (Preventive Measures) Act 2012.
iv. the High Court has the jurisdiction to grant bail to the Applicant under section 388 Criminal Procedure Code.

v. in the alternative, the applicant is be releases on bail under section 13(2)(c) Special Offences (Preventive Measures) Act 2012 since he has Anxiety Depression disorder since adolescence which may lead to a mental breakdown because the Applicant may not be placed under oppressive and / or detention.

vi. Health conditions of the applicant had caused him to be frequently admitted into hospital wards and / or obtained treatment from doctors / medical specialists in hospitals since adolescence.

vii. The detention since his remand has aggravated his health conditions that may cause his death or severe injuries.

[3]The cause papers are as follows:

i. Notice of Motion (enclosure 1).

ii. Affidavit-in-support (enclosure 3).

iii. Affidavit-in-reply (enclosure 4).

BACKGROUND FACTS

[4]The applicant was charged, at the instance of the Public Prosecutor on 20 October 2021 before the Sessions Court in Muar and the Charge reads as follows:

(English Translation)

> ***That you, on 22 September 2021 at about 6.45 am, at Fisherman's Jetty, Parit Karang, Sungai Mati, in the District of Tangkak, in the State of Johore committed smuggling of 2 Indonesian Migrants who are :***
>
> i. ***Winarno (Passport Number: C3490902, aged 42 years old***
>
> ii. ***Diki Ramadani Hasibuan (Passport Number C3490946 aged 25 years old)***
>
> ***And that you have committed an offence under*** section 26A Anti Trafficking in Persons and Anti Smuggling of Migrants Act 2007***. ("the said Charge").***

[5]The Applicant pleaded not guilty to the said Charge and asked to be tried. 2 Counsels who were representing the applicant made an oral applicant for bail. The Learned Sessions Court Judge refused the bail and the decision was handed down on 24 November 2021. On 8 December 2021, upon application by the Public Prosecutor, the case was transferred to the High Court. An application vide this Notice of Motion was made.

THE ISSUES IN THIS APPLICATION

i. Whether the Learned Counsel may affirm an affidavit on behalf of the applicant.

ii. Whether the High Court has legal and local (territorial) jurisdiction to try the applicant's case

iii. Whether section 13 Special Offences (Preventive Measures) Act 2012 allows for bail.

iv. Whether section 13 Special Offences (Preventive Measures) Act 2012 is unconstitutional.

I shall deal with the issues accordingly.

i. Whether the Learned Counsel may affirm an affidavit on behalf of the applicant.

[6]This Court takes note that Enclosure 3 which is the affidavit-in-support was affirmed by Mohd Irzan Iswatt bin Mohd Noor, an advocate practising in the High Court of Malaya and not by the applicant himself.

[7]We come to the issue of solicitors affirming affidavits in behalf of their client. And this brings us to Rule 28 Legal Profession (Practice and Etiquette) Rules 1978 which stipulates as follows:

> *28. Advocate and solicitor not to appear in a case where he is a witness*
>
> (a) *An advocate and solicitor shall not appear in Court or in chambers in any case in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact, and if while appearing in a case it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardising his client's interests.*
>
> (b) ***An advocate and solicitor shall not appear before an appellate tribunal if in the case under appeal he has been a witness on a material and disputed question of fact in the Court below.***
>
> (c) *This rule* ***does not prevent an advocate and solicitor from swearing or affirming an affidavit as to formal or undisputed facts*** *in matters in which he acts or appears.*

[8]In *LEE KAM SUN v. HO SAU LIN & ANOR* [1999] 4 CLJ 507; [1999] 4 MLJ 509, the court allowed the preliminary objection that the firm of Messrs Cheah Teh & Su should be disqualified from acting for the plaintiff in the civil action as they were the solicitors for the plaintiff in drawing up of the agreement and were involved in the transaction. His Lordship, Justice James Foong (as he then was) held at p. 509 (CLJ); pp. 513-514 (MLJ):

> ***It is a well-established principle that lawyers should not act as counsel and witnesses in the same proceedings****. The reason, as expounded by Beaumont CJ in EMPEROR v. DADU RAMU* [1939] AIR Bom 150, *is:* ***"An advocate cannot cross-examine himself, nor can he usefully address the Court as to the credibility of his own testimony, and a Court may feel that justice will not be done if the advocate continues to appear".*** *This rule is expressly accepted by the Federal Court in WONG SIN CHONG & ANOR v. BHAGWAN SINGH & ANOR* [1993] 4 CLJ 345; [1993] 2 AMR 3351; [1993] 3 MLJ 679 *at 678*.

[9]The first principle relating to r. 28 of the Legal Profession (Practice and Etiquette) Rules 1978 that was laid down by His Lordship Justice Wan Yahya in *WEE CHOO KEONG v. PP* [1990] 1 CLJ 1015; [1990] 3 CLJ (Rep) 346, whereby His Lordship decided it was never the intention of r. 28 of the Legal Profession (Practice and Etiquette) Rules 1978 that an advocate and solicitor automatically must be precluded as a solicitor as soon as he becomes aware that he would be a potential witness. His Lordship's remarks were as follows:

(1) ***Rule 28 of the Legal Profession (Practice and Etiquette) Rules 1978 does not envisage that an advocate and solicitor is ipso facto excluded from appearing as such in Court, the moment he believes that he will be a witness. That ethical restriction will only arise if he is likely to be a witness of any material or disputed fact. Rule 28 is a rule of ethics and the magistrate should not have applied it totally with the stringency of the force of law.***

(2) ***The only matter which appears to be in conflict with the petitioner's presence is the allegation that he and not the deceased's son wrote the police report. The problem could be fairly solved by confining the magistrate's order only to that stage of the proceeding if and when the deceased's son is about to give evidence.***

[10]*WEE CHOO KEONG* (supra) was followed by His Lordship Justice Ramli Ali) in *HONGKONG BANK MALAYSIA BHD v. MOHAMMED NOOR TAMLIHO* [2002] 3 CLJ 139.

[11]The second and most crucial principle pertaining to r. 28 that was laid down by the Court of Appeal in *QUAH POH KEAT & ORS v. RANJIT SINGH TARAM SINGH* [2009] 4 CLJ 316; [2009] 4 MLJ 293. That was when the Court of Appeal agreed with the High Court to invoke r. 28(a) to disqualify the legal firm Messrs Lee Hishamuddin (the firm of which both Lim Heng Seng and Dato' Naban served as partners) to avoid the embarrassment during trial and to "eliminate any possible conflict of interest surfacing on the solicitors' part and simultaneously ensured that the interests of the contesting parties were not compromised." His Lordship, Justice of the Court of Appeal Suriyadi Halim Omar (speaking for the Court of Appeal) in delivering the judgment of the Court of Appeal said the following:

> ***It would be unlikely that Datuk Naban would suggest to the respondent to "pack his bags and go" if the conclusion of the meeting had not been consonant with his or the firm's legal views. If he had held a differing view, it was more than likely that the unpleasant duty of transmitting the bad news would have fallen on a KPMG official or some other person. By all accounts, this finding of guilt of the respondent of gross misconduct, followed by the instruction to "pack his bags and go", were material issues as there was total denial of the charges by the respondent. With the demands of r. 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978 having been completely complied with, in particular the existence of the statutory requirements of material or disputed facts, any reasonable man armed with those facts would anticipate the calling of those two solicitors as witnesses. Thus, the High Court judge's ruling had eliminated any possible conflict of interest surfacing on the solicitors' part and simultaneously ensured that the interests of the contesting parties were not compromised.***

[12]To address this issue, the starting point is O. 41 r. 5 of the Rules of Court:

> *Order 41 - Affidavits*
>
> *...*
>
> *Rule 5 - Contents of affidavit* (O. 41 r. 5)
>
> (1) ***Subject to*** Order 14, rules 2(2) and 4(2)***, to paragraph (2) of this rule and to any order made under*** Order 38, rule 3***, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.***
>
> (2) ***An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information of belief with the sources and grounds hereof.***

[13]The general rule that an advocate and solicitor is not allowed to affirm an affidavit is rooted in r. 28 of the Legal Profession (Practice and Etiquette) Rules 1978. This general rule stem from the fact that any deponent of affidavits may be cross-examined by the adversary (subject to leave of court).

[14]There are, however, exceptions to this rule. In the case of *MALAYAN BANKING BHD v. CHARTEREFIELD CORPORATION SDN BHD* [2001] 6 CLJ 407 (which was subsequently adopted by His Lordship Justice RK Nathan in *SIVANANTHAN v. JAGANATHAN v. TEH YEE FUN & ANOR* [2003] 4 CLJ 551; [2003] 3 AMR 584) His Lordship, Judicial Commissioner Ramly Ali (as he then was) in the following paragraphs, summed up the situation where an advocate and solicitor is allowed to depose an affidavit on behalf of the litigant:

... I am of the view that a solicitor may depose an affidavit on behalf of the litigant if all the following conditions are fulfilled:

(i) ***the facts to be deposed must not be contentious or disputed question of facts;***

(ii) ***the facts to be deposed must be from his knowledge (if the affidavit is for the purpose of being used in interlocutory proceedings, it may contain statements of information or belief with sources and grounds thereof); and***

(iii) ***he is authorised to depose the affidavit by the litigant.***

[15]It is clear that O. 41 r. 5 stipulates **"(1) subject to** O. 14 rr. 2(2) and 4(2), to para. (2) of this rule and to any order made under O. 38 r. 3**, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove. (2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information of belief with the sources and grounds hereof."**

[16]In enclosure 3, there are plenty of averments that could not have come from personal knowledge. Given that the Respondent disputed the averments, the Applicant or his family member or anyone having personal knowledge of the facts averred to depose in an affidavit-in-support.

[17]Having scrutinised the affidavit affirmed by the learned solicitor vide Enclosure 3, I found it does not fall within any of this exceptions.
ii. Whether the High Court has legal and local (territorial) jurisdiction to try the applicant's case.

[18]The jurisdiction of the High Court springs from Article 121 which stipulates:

121 Judicial power of the Federation

(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely -

(a) ***one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and***

(b) *one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di- Pertuan Agong may determine;*

(c) *(Repealed),*

and such inferior courts as may be provided by federal law and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

[19]The criminal jurisdiction of the High Court is further explained by section 22, Courts of Judicature Act 1964

22 Criminal Jurisdiction

(1) ***The High Court shall have jurisdiction to try -***

(a) ***all offences committed -***

(i) ***within its local jurisdiction;***

(ii) *on the high seas on board any ship or on any aircraft registered in Malaysia;*

(iii) *by any citizen or any permanent resident on the high seas on board any ship or on any aircraft;*

(iv) *by any person on the high seas where the offence is piracy by the law of nations; and*

(b) *offences under Chapters VI and VIA of the Penal Code, and under any of the written laws specified in the Schedule to the Extra-Territorial Offences Act 1976, or offences under any other written law the commission of which is certified by the Attorney General to affect the security of Malaysia committed, as the case may be -*

(i) *on the high seas on board any ship or on any aircraft registered in Malaysia;*

(ii) *by any citizen or any permanent resident on the high seas on board any ship or on any aircraft;*

(iii) *by any citizen or any permanent resident in any place without and beyond the limits of Malaysia;*

(iv) *by any person against a citizen of Malaysia;*

(v) *by any person against property belonging to the Government of Malaysia or the Government of any State in Malaysia located outside Malaysia, including diplomatic or consular premises of Malaysia;*

(vi) *by any person to compel the Government of Malaysia or the Government of any State in Malaysia to do or refrain from doing any act;*

(vii) *by any stateless person who has his habitual residence in Malaysia;*

(viii) *by any person against or on board a fixed platform while it is located on the continental shelf of Malaysia; or*

(ix) *by any person who after the commission of the offence is present in Malaysia.*

(2) ***The High Court may pass any sentence allowed by law.***

[20]Article 121(1) clearly states that the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

[21]Section 22(1)(a) confers jurisdiction and powers on the High Court to try all offences committed within its local jurisdiction and subsection (2) confers powers to pass any sentence allowed by law.

[22]The principle of law is that the High Court may hear, try and decide on all offences for so long as it is within section 22 Courts of the Judicature Act 1964.

[23]The Common Law principle is that all crimes are local and are justiciable by local courts within whose jurisdiction they were committed. This is embodied in section 121 of the CPC**. Therefore, the competency of the court to take cognisance of or try an offence is determined by the place where the offence has been committed.** (see **The Criminal Procedure Code A Commentary** 2nd Edition by Srimurugan Alagan).

[24]In **Sohoni's Code of Criminal Procedure**, 1973, 22nd edn, 2018, vol. 2, pp. 2331 & 2332 it is written (the equivalent section in the Indian Code of Criminal Procedure, 1973 is s. 177):

> ***Crime is in its essential nature local, and the section adopts the common law of England that all crimes are local and justiciable only by the local courts within whose jurisdiction they are committed*** *(See MOHD YUSUFUDDIN V. QUEEN- EMPRESS* [1898] ILR 25 Cal 20 *(PC).*

[25]The Federal Court in *PP v. KOK WAH KUAN* [2007] 6 CLJ 341 has this to say, inter alia,

[37] *At any rate I am unable to accede to the proposition that with the amendment of* art. 121(1) of the Federal Constitution *(the amendment) the Courts in Malaysia can only function in accordance with what have been assigned to them by federal laws. Accepting such proposition is contrary to the democratic system of government wherein the courts form the third branch of the government and they function to ensure that there is 'check and balance' in the system including the crucial duty to dispense justice according to law for those who come before them.*

[38] *The amendment which states that* ***"the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law"*** *should by no means be read to mean that the doctrines of separation of powers and independence of the Judiciary are now no more the basic features of our Federal Constitution. I do not think that as a result of the amendment our courts have now become servile agents of a federal Act of Parliament and that the courts are now only to perform mechanically any command or bidding of a federal law.*

[39] It must be remembered that the courts, especially the Superior Courts of this country, are a separate and independent pillar of the Federal Constitution and not mere agents of the federal legislature. In the performance of their function they perform a myriad of roles and interpret and enforce a myriad of laws. Article 121(1) ***is not, and cannot be, the whole and sole repository of the judicial role in this country for the following reasons:***

(i) *The amendment seeks to limit the jurisdiction and powers of the High Courts and inferior courts to whatever "may be conferred by or under federal law". The words "federal law" are defined in* art. 160(2) *as follows:*

> *Federal law means:*
>
> (a) *any existing law relating to a matter with respect to which Parliament has power to make laws, being a law continued in operation under Part XIII; and*
>
> (b) *any Act of Parliament;*

(ii) ***The courts cannot obviously be confined to "federal law". Their role is to be servants of the law as a whole. Law as a whole in this country is defined in*** art. 160(2) ***to include "written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof". Further, "written law" is defined in*** art. 160(2) ***to include "this Constitution and the Constitution of any State". It is obvious, therefore, despite the amendment, the courts have to remain involved in the interpretation and enforcement of all laws that operate in this country, including the Federal Constitution, State Constitutions and any other source of law recognized by our legal system. The jurisdiction and powers of the courts cannot be confined to federal law.***

(iii) *Moreover, the Federal Constitution is superior to federal law. The amendment cannot be said to have taken away the powers of the courts to examine issues of constitutionality. In my view it is not legally possible in a country with a supreme Constitution and with provision for judicial review to prevent the courts from examining constitutional questions. Along with* arts. 4(1), 162(6), 128(1) and 128(2)*, there is the judicial oath in the Sixth Schedule "to preserve, protect and defend (the) Constitution".*

(iv) *With respect I do not think the amendment should be read to destroy the courts' common law powers. In* art. 160(2) *the term "law" includes "common law". This means that, despite the amendment, the common law powers of the courts are intact. (See*: *NGAN TUCK SENG V. NGAN YIN GROUNDNUT FACTORY SDN BHD* [1999] 3 CLJ 26). *The inherent powers are a separate and distinct source of jurisdiction. They are independent of any enabling statute passed by the legislature. On Malaysia Day when the High Courts came into existence by virtue of* art. 121, ***"they came invested with a reserve fund of powers necessary to fulfill their function as Superior Courts of Malaysia"****. Similar sentiments were expressed in R RAMA CHANDRAN V. INDUSTRIAL COURT OF MALAYSIA & ANOR* [1997] 1 CLJ 147.

(v) *The amendment in my view cannot prevent the courts from interpreting the law creatively. It is now universally recognized that the role of a judge is not simply to discover what is already existing. The formal law is so full of ambiguities, gaps and conflicts that often a judge has to reach out beyond formal rules to seek a solution to the problem at hand. In a novel situation a judge has to reach out where the light of 'judicial precedent fades and flicker and extract from there some raw materials with which to fashion a signpost to guide the law'. When rules*

run out, as they often do, a judge has to rely on principles, doctrines and standards to assist in the decision. When the declared law leads to unjust result or raises issues of public policy or public interest, judges would try to find ways of adding moral colours or public policy so as to complete the picture and do what is just in the circumstances.

(vi) *Statutes enacted in one age have to be applied in a time frame of problems of another age. A present time-frame interpretation to a past time framed statute invariably involves a judge having to consider the circumstances of the past to the present. He has to cause the statute to 'leapfrog' decades or centuries in order to apply it to the necessities of the times.*

(vii) *Further, in interpreting constitutional provisions, a judge cannot afford to be too literal. He is justified in giving effect to what is implicit in the basic law and to crystallize what is inherent. His task is creative and not passive. This is necessary to enable the constitutional provisions to be the guardian of people's rights and the source of their freedom. (See: DEWAN UNDANGAN NEGERI KELANTAN & ANOR. V. NORDIN BIN SALLEH & ANOR* [1992] 1 MLJ 697; *MAMAT BIN DAUD & ORS V GOVERNMENT OF MALAYSIA & ANOR* [1988] 1 CLJ 11; [1988] 1 CLJ (Rep) 197).

(viii) ***Though there is much truth in the traditionalist assertion that the primary function of the courts is to faithfully interpret and apply laws framed by the elected legislatures, there are, nevertheless, a host of circumstances in which the role of a judge is not just to deliver what is already there. The role is constitutive and creative and goes far beyond a mechanical interpretation of pre-existing law. It extends to direct or indirect law making in the following ways:***

[26]Some authorities seemed to suggest that *PP v. KOK WAH KUAN* [2007] 6 CLJ 341 had emasculated the Courts and deprived the judiciary of it inherent jurisdiction. With the greatest respect, such understanding of this authority is misplaced and does not do it justice. Their Lordships made it clear that **"Though there is much truth in the traditionalist assertion that the primary function of the courts is to faithfully interpret and apply laws framed by the elected legislatures, there are, nevertheless, a host of circumstances in which the role of a judge is not just to deliver what is already there. The role is constitutive and creative and goes far beyond a mechanical interpretation of pre-existing law".**

[27]In my view, *PP v. KOK WAH KUAN* [2007] 6 CLJ 341 is still good law.

[28]Coming back to the facts of our instant case, it was submitted by the Learned Counsel for the Applicant that this case should be heard by the Sessions Court and not the High Court. This preposition is unsupported by both legislations or judicial pronouncements. In my view, there is absolutely nothing wrong for the High Court to hear a smuggling of migrants' case and it has the jurisdiction and power to do so and to pass any sentence allowed by law.
iii. Whether section 13 Special Offences (Preventive Measures) Act 2012 allows for bail.

[29]To begin with, section 13 reads as follows:

13 Bail

(1) Bail shall not be granted to a person who has been charged with a security offence.

(2) Notwithstanding subsection (1)-

(a) ***a person below the age of eighteen years;***

(b) ***a woman; or***

(c) ***a sick or an infirm person,***

charged with a security offence, other than an offence under Chapter VIA of the Penal Code [Act 574] and the Special Measures Against Terrorism in Foreign Countries Act 2015 [Act 770], may be released on bail subject to an application by the Public Prosecutor that the person be attached with an electronic monitoring device in accordance with the Criminal Procedure Code.

[30]Sub section (1) stipulates that bail shall not be granted to a person who has been charged with a security offence.

[31]This is undoubtedly a departure from section 388 Criminal Procedure Code which stipulates **"When any person accused of any non-bailable offence is arrested or detained without warrant by a police officer or appears or is brought before a Court, he may be released on bail by the officer in charge of the police district or by that Court, but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life:**

[32]Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail."

[33]This is not new in legislative history. Section 41B Dangerous Drugs Act 1952 which came into being by virtue of Dangerous Drugs Act (Amendment) Act 1978 which is Act A426 where the Royal Assent was given on 22 February 1978 and the amendment came into force on 10 March 1978 after being gazetted on 2 March 1978.

[34]It reads-

41B No bail to be granted in respect of certain offences

(1) *(1)* ***Bail shall not be granted to an accused person charged with an offence under this Act:***

(a) ***where the offence is punishable with death; or***

(b) ***where the offence is punishable with imprisonment for more than five years; or***

(c) *where the offence is punishable with imprisonment for five years or less and the Public Prosecutor certifies in writing that it is not in the public interest to grant bail to the accused person.*

(2) *Subsection (1) shall have effect notwithstanding any other written law or any rule of law to the contrary.*

[35]There are two points that must be emphasised which are:

(i) Bail shall not be granted to an accused person charged with an offence under this Act, where the offence is punishable with imprisonment for more than five years;

(ii) Subsection (1) to s. 41B shall have effect notwithstanding any other written law or any rule of law to the contrary.

[36]Sub-section (2) is the operational form of the maxim "*generalia specialibus non derogant*".

[37]In *PP v. Leong Ying Ming* [1993] 2 CLJ 143, the respondent was charged for an offence under s. 39A(2) Dangerous Drugs Act 1952 (the Act). The respondent applied for bail which was refused by the Sessions Court Judge, he being of the view that the offence was not bailable under s. 41B of the Act. The respondent made an application for bail to the Kuantan High Court

pursuant to s. 389 of the Criminal Procedure Code and the learned judge allowed his application and granted bail. The Public Prosecutor appealed. The Supreme Court held that:

> ***We have perused the notes of proceedings recorded in the court below and note that unfortunately the Federal Court case of*** *PUBLIC PROSECUTOR V. CHEW SIEW LUAN* [1982] CLJ 354; [1982] CLJ (Rep) 285; [1982] 2 MLJ 119 ***was not brought to the learned Judge's attention. Otherwise he would have been aware of the judgment in that case. In any case, we are of the view that the words used in*** s. 41B(1)(b) ***are clear and that the words "punishable with imprisonment for more than five years" mean imprisonment from five years and one day upwards up to imprisonment for life. Then, when we turn to*** s. 39A(2)***, we consider that the words "be punished with imprisonment for life or for a term which shall not be less than five years" are also clear and unequivocal and mean that the offence is punishable with imprisonment for more than five years, i.e. five years and one day up to a maximum of imprisonment for life.***
>
> ***That being so, an offence under*** s. 39A(2) ***of the Act clearly comes within the ban imposed by*** s. 41B(1)(b) *of the Act* ***and therefore no bail can be granted in respect of such an offence. It follows that in this case the offence for which the respondent was charged was not bailable under the specific provisions of the Act and that the learned Judge should not have granted bail in this case.***

[38]In the classical case of *PP V. CHEW SIEW LUAN* [1982] CLJ 354; [1982] CLJ (Rep) 285, where His Lordship, Chief Justice (Malaya) Raja Azlan Shah (as His Majesty then was) had to decide whether a pregnant woman charged for trafficking in drugs could and should be granted bail. This is what His Lordship said at pp. 286 & 287:

> ***In other words, the Act is in substance a special law passed by Parliament in derogation of the rights of a person concerning the granting of bail in an otherwise ordinary case. We further note in particular that*** s. 41B ***of the Act is an entirely new section introduced by the Dangerous Drugs (Amendment) Act, 1978 (Act A426) and became operative on 10 March 1978. Generalibus Specialia Derogant is a cardinal principle of interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law.***

[39]And at p. 287, His Lordship had this to say:

> ***The provisions regulating the granting of bail under the Dangerous Drugs Act must be construed in the context of that Act and not in that of the Criminal Procedure Code and to that extent the general provisions of the Criminal Procedure Code must ex necessitate yield to the specific provisions of*** s. 41B of the Dangerous Drugs Act ***in that regard.***

[40]His Lordship Justice Wan Yahya in *Loy Chin Hei v. PP* [1981] CLJ 177; [1981] CLJ (Rep) 178 discussed s. 41B Dangerous Drugs Act 1952. The accused was refused bail by the Sessions Court Judge and he applied to the High Court for bail pending the disposal of the charge against him. The issues before the court were (1) whether s. 41B of the Dangerous Drug Act would make the offence non-bailable and (2) whether the High Court was precluded from exercising its discretionary powers over bail.

> *At the commencement of hearing before this court his counsel, Mr. Hilary D'Cruz, with his usual precision, laid down two points for consideration of appeal, as follows:*
>
> (i) *Whether* s. 41B of the Dangerous Drugs Act *would make the offence non-bailable or preclude bail: and*
>
> (ii) *In either of these two events whether the High Court is precluded from exercising its discretionary powers over bail.*
>
> *Counsel first drew the subtle distinction between a non-bailable offence and an unbailable offence. He contends that non-bailable offences, as defined under "bailable offence" in* s. 2 of the Criminal Procedure Code *include all offences, including*

those outside the Code, should be either bailable or unbailable offences. Following this reasoning, counsel argued, the offence under s. 6B(1)(a) *of the Dangerous Drugs Ordinance would therefore fall under "non-bailable offence."*

It is of particular interest to note that, although the Criminal Procedure Code makes a specific definition of "bailable offence" the draftsman deliberately avoided the use of that term in s. 387 of the Code and instead employs the words "person other than a person accused of a non-bailable offence" as those entitled to be released in bail. It would seem that the intention of the legislature is not only to confine this right to bail to bailable cases of the Penal Code only but to extend it to offences against other statutes as well. This, at first sight, may lend some support to counsel's argument. I accept the view that where any statutory offence other than the Penal Code is silent or makes no provision as to bail, then the First Schedule to the Criminal Procedure Code will apply and the offences can be classified either as bailable or non-bailable according to the provisions of the Schedule. However, the provisions only apply to cases where the particular statute creating the offence is silent on the question of bail.

In my view, if provision is made in a later legislation, then the later provision will prevail over the provisions of the Criminal Procedure Code. The Code is not enacted with the absolute purpose of laying down a singularly mandatory procedure for all criminal offences but is intended for application to offences in which no provision for procedure is laid down. *This intention is clear from* s. 3 of the Criminal Procedure Code*, which reads:*

> ***All offence under the Penal Code shall be required into the tried according to the provisions hereinafter contained, and all offences under any other law shall be inquired into the tried according to the same provisions; subject however to any written law for the time being in force regulating the manner or place of inquiring into or trying such offences.***
>
> *A non-bailable offence is no doubt an offence in respect of which the accused may be refused bail, but it is not an absolutely unbailable offence because the court has been given the discretionary power to grant bail in certain circumstances and, in the case of offences punishable with life imprisonment or death, for special reasons. The High Court, it would appear by s. 394, has absolute power to grant bail. However this discretion is, as indicated earlier, only exercisable where no specific provision exists in the statute creating the offence. In our present case the provision for bail does exist.* ***Section 41B has the effect of making the offence under the dangerous Drugs Act an absolutely unbailable offence.***
>
> *Mr D'Cruz's next argument is that even if* s. 41B of the Dangerous Drugs *ordinance has the effect of rendering the offence absolutely unbailable, the section was intended to restrict the discretionary power of bail by the court having original jurisdiction only and in this case the Sessions Court and not the High Court. He made particular reference to the case of SULAIMAN KADIR V. PP* [1975] 1 LNS 171*L but I am unable to see how it could be of much assistance here. Perhaps counsel's intention is to illustrate from the obiter of Harun J. at p. 38 to the effect that when a statute creates an offence it should also include provision for bail and that the power to grant bail should properly be conferred on the particular court given jurisdiction to try it. Both points, to mind, do not suggest the confinement of such power to the trial court only.*
>
> *It has also been urged upon me to adopt the course taken in the case of the CHE SU BINTE DAUD V. PP* [1978] MLJ 162, *where Gunn Chit Tuan J., apparently in exercise of the powers under* s. 38 and 389 of the Criminal Procedure Code*, admitted to bail an accused person charged under* s. 39B(2) of the Dangerous Drugs Act*, an offence punishable with death or life imprisonment.* ***Judgment in CHE SU case was given barely 4 days after*** s. 41B of the Dangerous Drugs Act *came into effect. This and the obvious absence of reference to, or even any mention made of,* s. 41 *by the learned judge in his judgment, points out strongly to the possibility that the matter was missed and was neither raised nor discussed by the parties before the learned judge. I am convinced that had the learned judge's attention been drawn to the provision of this newly enacted law, his decision would have been entirely different.*
>
> *I have had several occasions to look at* s. 41B of the Dangerous Drugs Act *and it appears to me that the section contains not only express provisions which make the offence absolutely unbailable but also expresses in unequivocal language the intention of the legislature to restrict the judicial discretion as contained in the Criminal Procedure Code and other judge made laws.* ***The expression "notwithstanding any written law or any rule of law" to my mind, would include the provisions of the Criminal Procedure Code and also judge made laws or judicial precedents***

> ***on bail.*** Section 41B of the Dangerous Drugs Act*, being a particular subsequent legislation, must be construed as having curtailed the discretion to grant bail in drug offences punishable with death or life imprisonment previously vested in the courts by an earlier general legislation, i.e., the Criminal Procedure Code. When an Act enacts something in general items and afterwards another Act on a particular subject introduces in express terms special restriction on that subject, then the rule of construction demands that the provisions in the subsequent particular legislation should prevail and the provisions of the earlier legislation deemed curtailed or restricted to the extent of its inconsistency with the later legislation but not necessarily repealed.*
>
> ***The discretion as generally given by*** s. 388,389 & 394 of the Criminal Procedure Code *has been effectively taken away from the courts, both the subordinate and High Courts, by* s. 41B of the Dangerous Drugs Act*. Disconcerting as it may be for us to witness the power of the courts, both the Sub Dangerous Drugs Act. Disconcerting as it may be those relating to the liberty of the subject who is accused but yet to be proven guilty, being gradually whittled away by statute, yet when Parliament has expressed in unequivocal language its intention to curtail this discretionary power, the courts are not free to question its wisdom in providing for a deterrent procedure for an obviously baneful mischief to society, but must interpret and give effect to the law as it stands.*
>
> ***The restriction on bail under*** s. 41B of the Dangerous Drugs Act *is absolute. Neither the courts below, nor this court, now possess the power to admit to bail any person charged thereunder with any offence punishable with death or more than five years' imprisonment, or even for lesser terms when the Public Prosecutor certifies that it is against public interest to allow bail.*
>
> *The application for bail is therefore refused.*

[41]His Lordship paid special attention to s. 3 Criminal Procedure Code that **"All offence under the Penal Code shall be required into the tried according to the provisions hereinafter contained, and all offences under any other law shall be inquired into the tried according to the same provisions; subject however to any written law for the time being in force regulating the manner or place of inquiring into or trying such offences."**

[42]In **LOY CHIN HEI** (*supra*) after referring to **CHE SU DAUD** (*supra*) has this to say:

> ***... it appears to me that the section contains not only express provisions which make the offence absolutely unbailable but also expresses in unequivocal language the intention of the legislature to restrict the judicial discretion as contained in the Criminal Procedure Code and other judge made laws. The expression "notwithstanding any written law or any rule of law", to my mind, would include the provisions of the Criminal Procedure Code and also judge made laws or judicial precedents on bail.***

[43]Further down the page, His Lordship said:

> ***Where an Act enacts something in general terms and afterwards another Act on a particular subject introduces in express terms special restrictions on that subject, then the rule of construction demands that the provisions in the subsequent legislation should prevail and the provisions of the earlier legislation deemed curtailed or restricted to the extent of its inconsistency with the later legislation but not necessarily repealed.***

[44]His Lordship further said at p. 180:

> ***The discretion as generally given by ss. 388, 389 and 394 of the Criminal Procedure Code has been effectively taken away from the courts, both the Subordinate and High Courts, by*** s. 41B of the Dangerous Drugs Act***. Disconcerting as it may be for us to witness the power of the Courts, especially those relating to the liberty of the subject who is Accused but yet to be proven guilty, being gradually whittled away by statute, yet when Parliament has expressed in unequivocal language its intention to curtail this discretionary power, the courts are not free to***

question its wisdom in providing for a deterrent procedure for an obviously baneful mischief to society, but must interpret and give effect to the law as it stands.

[45]The same issue brings us to judicial interpretation where in the Federal Court in *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v. Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* [2020] 7 CLJ 561; [2020] 4 MLJ 721, speaking through his Lordship, Federal Court Justice Vernon Ong explained,

"Statutory interpretation

[28] At common law, there are three judicial rules of statutory interpretation. They are: (i) the literal rule; (ii) the golden rule; and (iii) the mischief rule. According to the literal rule, the statute is read by its natural and ordinary, meaning of the words, the assumption being that Parliament has said what it means. However, this can lead to absurd outcomes or in other instances the literal interpretation may appear to be contrary to Parliament's intentions. If the literal rule yields an absurd outcome, the court will apply the golden rule. When the usual meaning of a word causes unjust outcomes, the courts interpret the offending word to reduce the absurdity. The golden rule is applied narrowly where there is more than one meaning of a word, the court may chose the meaning that avoids an absurdity. Where there is only one meaning but the literal rule would lead to an absurd or repugnant situation, the court will modify the meaning of the words or phrases to avoid the absurd result. If the literal and golden rules have failed to achieve a just result, the court will apply the mischief rule to ascertain the wrong (or mischief) that Parliament was trying to remedy and interpret the statute in accordance with Parliament's intention; in essence the purposive approach to statutory interpretation. This approach requires the court to examine the object of the statute in question and to construe the doubtful phrases or words in accordance with that purpose." (Emphasis added)

[46]His Lordship summarise the principles governing statutory interpretation as follows:

"[30] In our opinion, the rules governing statutory interpretation may be summarised as follows. First, in construing a statute effect must be given to the object and intent of the Legislature in enacting the statute. Accordingly, the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. The court will not read words into a statute unless clear reason for it is to be found in the statute itself. Therefore, in construing any statute, the court will look at the words in the statute and apply the plain and ordinary meaning of the words in the statute. Second, if, however the words employed are not clear, then the court may adopt the purposive approach in construing the meaning of the words used. Section 17A of the Interpretation Acts 1948 and 1967 ***provides for a purposive approach in the interpretation of statutes. Therefore, where the words of a statute are unambiguous, plain and clear, they must be given their natural and ordinary meaning. The statute should be construed as a whole and the words used in a section must be given their plain grammatical meaning. It is not the province of the court to add or subtract any word; the duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in the gaps disclosed. Even if the words in a statute may be ambiguous, the power and duty of the court 'to travel outside them on a voyage of discovery are strictly limited'. Third, the relevant provisions of an enactment must be read in accordance with the legislative purpose and applies especially where the literal meaning is clear and reflects the purposes of the enactment. This is done by reference to the words used in the provision; where it becomes necessary to consider every word in each section and give its widest significance. An interpretation which would advance the object and purpose of the enactment must be the prime consideration of the court, so as to give full meaning and effect to it in the achievement to the declared objective. As such, in taking a purposive approach, the court is prepared to look at much extraneous materials that bears on the background against which the legislation was enacted. It follows that a statute has to be read in the correct context and that as such the court is permitted to read additional words into a statutory provision where clear reasons for doing so are to be found in the statute itself." (Emphasis added)***

[47]The only permissible exceptions to the general rule that no bail is allowed for offences under the SOSMA is a person under the age of eighteen years of age, a woman or a sick and infirm

person who are not charged under Chapter VIA of the Penal Code [Act 574], or under the Special Measures Against Terrorism in Foreign Countries Act 2015 [Act 770]. (see *RAVINDRAN ANEMALAI v. PP* [2022] 1 LNS 125).

[48]Chapter VIA of the Penal Code all relate to offences of terrorism while the Special Measures Against Terrorism in Foreign Countries Act 2015 is also aimed at curtailing terrorism. (see *RAVINDRAN ANEMALAI v. PP* [2022] 1 LNS 125).

[49]The intention of Parliament was to, therefore, deny bail to persons charged with these offences. The permissible stated categories entitled to bail was therefore made subject to those not charged with offences relating to terrorism under Chapter VIA of the Penal Code or under the Special Measures Against Terrorism in Foreign Countries Act 2015. (see *RAVINDRAN ANEMALAI v. PP* [2022] 1 LNS 125).

[50]It was submitted by the Learned Counsel for the applicant that in *ENTIRAN DURASAMY & OTHER APPLICATIONS v. PP* [2021] 10 CLJ 902, his Lordship Justice Su Tiang Joo ruled that **"There is no intelligible differentia as to why women but not men may be allowed bail when charged with a security offence under s. 13 of SOSMA. Such a blanket exception in favour of women is not only discriminatory and devoid of any rationale or reasonable classification or differentiation but goes against the non-gender discrimination or equality provision in art. 8 of the FC. The word 'women' in s. 13(2)(b), hence, must be defined as including 'men'. It follows that the applicants must be entitled to be considered for bail."**

[51]His Lordship Justice Collin Sequerah differ in his Lordship's view on this point. In *RAVINDRAN ANEMALAI v. PP* [2022] 1 LNS 125, his Lordship held that,

> ***[39] What emerges from the foregoing is that the equality provision in Article 8 is not absolute.***
>
> ***[40] It is also clear that discriminatory law is good law if it is based on 'reasonable' or 'permissible' classification and it must also be proportionate to the object sought to be achieved also referred to as the doctrine of rational nexus.***
>
> ***[41] It is not open for Courts to second guess the intention of Parliament where the manifest intention is clearly stated.***
>
> ***[42] Since the equality provisions are not absolute and based upon reasonable classification, one can surmise that the intention of Parliament was to place women in a category of their own when it came to the categories of persons entitled to bail under the SOSMA.***
>
> ***[43] The classification was both reasonable and proportionate and thus permissible.***
>
> ***[44] The said provision in Section 13(2) SOSMA categorising a "woman" as being entitled to bail to the exclusion of "man" was, therefore, constitutionally valid.***
>
> ***[45] The relevant policy reasons or otherwise for so doing falls outside the remit of this Court.***
>
> ***[46] The Latin maxim of "expressio unius est exclusio alterius" meaning that the expression of one thing excludes others, would also come into play to exclude altogether the notion that Parliament had meant women to also include men.***

[47] It is also trite that had Parliament intended that women included men, it would have expressly said so. Equally trite is the maxim that Parliament does not legislate in vain.

[48] In the premises, I am constrained to respectfully differ from the decision of my Learned brother in ENTIRAN A/L DURASAMY.

[52]I am aware of section 4(2) Interpretation Act 1948/67 which stipulates **"(2) Words and expressions importing the masculine gender include females."**

[53]But it must be understood if gender is not a discerning factor, Parliament would not have waste for words. The very existence of the word "women" showed a clear intention to distinguish it from "men".

[54]For the reasons I have stated and more, I agree with the views of his Lordship Justice Collin.
iv. Whether section 13 Special Offences (Preventive Measures) Act 2012 is unconstitutional.

[55]It has been submitted that section 13(1) is discriminatory against men and hence it is unconstitutional.

[56]In *MANDONG TRANSPORT & TRADING SDN BHD v. PERTUBUHAN KESELAMATAN SOSIAL* [2020] 1 LNS 412, there was a challenge against the constitutionality of section13(1) and the High Court made a few observations,

i. ***It is established law that the proper approach to interpreting the Constitution is that there is always a presumption in favour of constitutionality of an enactment and the burden is on him who attacks the enactment to show that there has been a clear transgression of the constitutional principles*** -

> *(see PUBLIC PROSECUTOR v. SU LIANG YU* [1976] 1 LNS 113; [1976] 2 MLJ 128; *OOI KEAN THONG & ANOR v. PP* [2006] 2 CLJ 701; *PIHAK BERKUASA NEGERI SABAH v. SUGUMAR BALAKRISHNAN* [2002] 4 CLJ 105; [2002] 3 MLJ 72).
>
> ***In constitutional law, the presumption of constitutionality is the legal principle that the judiciary should presume statutes enacted by the legislature to be constitutional, unless the law is clearly unconstitutional or a fundamental right is implicated****. (Gillian E. Metzger & Trevor W. Morrison, "The Presumption of Constitutionality and the Individual Mandate" in The Health Care Case: The Supreme Court's Decision and Its Implications (eds. Nathaniel Persily, Gillian E. Metzger & Trevor W. Morrison: Oxford University Press, 2013), p. 136.)*
>
> *The same principle is applicable in Singapore (Jack Tsen-Ta Lee, "Rethinking the Presumption of Constitutionality" in Constitutional Interpretation in Singapore: Theory and Practice (ed. Jaclyn L. Neo: Routledge, 2017).*
>
> *This principle was also clarified by the Court of Appeal in the case of TAN TEK SENG V. SURUHANJAYA PERKHIDMATAN PENDIDIKAN & ANOR* [1996] 2 CLJ 771; [1996] 1 MLJ 261 *where Court of Appeal Justice Gopal Sri Ram quoted at page 285 - 286 the following excerpt from the case of which is as follows:*
>
> ***"Although we are to interpret the words of the constitution on the same principles of interpretation as***

> ***we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting, - to remember that it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be. Especially is this true of a federal constitution, with its nice balance of jurisdiction. I conceive that a broad and liberal spirit should inspire those whose duty it is to interpret it; but I do not imply by this that they are free to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory, or even for the purpose of supplying omissions or of correcting supposed errors."*** *[emphasis added]*

In the case of PIHAK BERKUASA NEGERI SABAH v. SUGUMAR BALAKRISHNAN (supra), the Federal Court pointed out the same principle at page 103 where the Court quoted the case of PUBLIC PROSECUTOR P v. DATUK HARUN BIN HAJI IDRIS & ORS [1976] 1 LNS 180; [1976] 2 MLJ 116 *[TAB 7], his Lordship Federal Court Justice Mohammad Dzaiddin said as follows:*

> ***"It should be borne in mind that there is a strong presumption of the constitutional validity of an enactment or the impugned section with the burden of proof on whoever alleges otherwise"***

ii. ***It must be presumed that the legislature understands and correctly appreciates the need of its own people -***

> *(see PUBLIC PROSECUTOR v. SU LIANG YU (supra); YII HUNG SIONG v. PP* [2005] 4 CLJ 158; *PUBLIC PROSECUTOR v. PUNG CHEN CHOON* [1994] 1 LNS 208; [1994] 1 MLJ 566; *SAID MIR BAHRAMI v. PENGARAH PENJARA SUNGAI BULOH, SELANGOR* [2013] 5 CLJ 447; [2013] 2 MLJ 478.)
>
> *.....*

iii. *In YII HUNG SIONG v. PP (supra), the court at page 164 stated as follows:*

> ***"There is always a presumption that Parliament understands and correctly appreciates the needs of its people, that its laws are directed to problems made manifest by experience and that its discrimination are based on adequate grounds*** [*RAM PRASAD V. STATE OF BIHAR AIR* [1953] SC 215]*." (Emphasis added)*

iv. *And moreover, the Supreme Court in PUBLIC PROSECUTOR v. PUNG CHEN CHOON (supra), at page 576-577 had this to say:*

> ***"It is clear law that there is a presumption - perhaps even a strong presumption - of the constitutional validity of the impugned section and so the burden of proof lies on the party seeking to establish the contrary. Secondly, we endorse the proposition that, where a law purports to authorize restrictions in language wide enough to cover restrictions both within and without the permissible limits of legislative action, it cannot be upheld, not even so far as it is applied within the constitutional limits, for it is impossible to apply the principle of severability****. But we hasten to add that we adhere to the principle enunciated by the Supreme Court of India in KADER NATH SINGH V. BIHAR 16, that* ***it is well settled that if certain provisions of law construed in one way would make them consistent with the Constitution and another interpretation would render them unconstitutional, the court would lean in favour of the former construction".*** *(Emphasis added)*

v. *This principle was also clarified by the Court of Appeal in the case of TAN TEK SENG v. SURUHANJAYA PERKHIDMATAN PENDIDIKAN & ANOR* [1996] 2 CLJ 771; [1996] 1 MLJ 261 *where his Lordship Court of Appeal Justice Gopal Sri Ram (as he then was) quoted at page 285-286 the following excerpt from the case of RE CENTRAL*

PROVINCES & BERAR SALES OF MOTOR SPIRIT & LUBRICANTS TAXATION ACT AIR 1939 FC 1 which is as follows:

> ***"Although we are to interpret the words of the constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting, - to remember that it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be. Especially is this true of a federal constitution, with its nice balance of jurisdiction. I conceive that a broad and liberal spirit should inspire those whose duty it is to interpret it; but I do not imply by this that they are free to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory, or even for the purpose of supplying omissions or of correcting supposed errors****." (Emphasis added)*

vi. ***When there are differing constructions which are possible, the judge must choose the construction which in his judgment best meets the purpose of the enactment***- *PUBLIC PROSECUTOR v. SIHABDUIN BIN HAJI SALLEH & ANOR* [1981] CLJ Rep 82; [1980] 2 MLJ 273*.*

vii. ***Furthermore, when the court is faced with the issue of constitutionality of a provision of a statute, the court should be slow in striking down the impugned provision for being unconstitutional. The court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain - this is clearly enunciated by the Federal Court in the case of*** *BATO BAGI & ORS v. KERAJAAN NEGERI SARAWAK & ANOTHER APPEAL* [2011] 8 CLJ 766*. This demonstrates the apex court's position on the approach to be taken when the issue of constitutional challenge is before the courts.*

viii. ***In construing the Federal Constitution, another equally important principle that should be borne in mind, in that the rule of harmonious construction should also be applied -***

> *(see PHANG CHIN HOCK v. PUBLIC PROSECUTOR* [1979] 1 LNS 67; [1980] 1 MLJ 70; *SUKMA DARMAWAN SADMITAAT MADJA v. KETUA PENGARAH PENJARA MALAYSIA & ANOR* [1999] 1 CLJ 481; *PP v. AZMI SHAROM* [2015] 8 CLJ 921 *ZI PUBLICATIONS SDN BHD & ANOR v. KERAJAAN NEGERI SELANGOR, KERAJAAN MALAYSIA & ANOR (INTERVENER)* [2015] 8 CLJ 621.)

[57]By merely comparing section 388 Criminal Procedure Coder and section 13(1) Security Offences (Special Measures) Act 2014 is not a way to challenge constitutionality of a law.

[58]It is not lost on this court the following principles of law:

(i) there is a presumption - perhaps even a strong presumption - of the constitutional validity of the impugned section.

(ii) the burden of proof lies on the party seeking to establish the contrary.

(iii) where a law purports to authorise restrictions in language wide enough to cover restrictions both within and without the permissible limits of legislative action, it cannot be upheld, not even so far as it is applied within the constitutional limits.

(iv) it is impossible to apply the principle of severability.

(v) if certain provisions of law construed in one way would make them consistent with the Constitution and another interpretation would render them unconstitutional, the court would lean in favour of the former construction.

[59]The invitation by the Learned Counsel to struck down 13(1) Security Offences (Special Measures) Act 2014 as constitutional is respectfully declined.
CONCLUSION

[60]I have perused over the cause papers, the written submissions and heard parties.

[61]Although I have ruled Enclosure 3 is inadmissible, if for the sake of the arguments, I consider it, I did not find the alleged illness and mental health issues beyond the Malaysian Public Health Care System to cater for.

[62]The Prison Department has their own trained counsellors and psychological officers as well as medical officers to cater for the needs of detainees.

[63]For the reasons I stated above, I dismissed the application pursuant to Enclosure 1.

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