PUBLIC PROSECUTOR

v.

CHEAH BENG POH, LOUIS & ORS. & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
HASHIM YEOP SANI FJ
[CRIMINAL APPEAL NO. 16 OF 1983]
8 SEPTEMBER 1983

CRIMINAL LAW AND PROCEDURE: *Charge under s. 27(5), Police Act - Whether defective - "Unlawful assembly" - Meaning of - Persons who may be charged - Burden of proof - Participation - Licence - Finding of fact; identification - Whether satisfactory - Police Act 1967, s. 27 - Criminal Procedure Code, s. 173A(ii)(a) - Penal Code s. 141.*

STATUTORY INTERPRETATION: *"Unlawful assembly" - Construction - Legislative purpose.*
EVIDENCE: *Finding of fact - Identification.*

Forty-two lawyers were charged before the President of Sessions Court, Kuala Lumpur, for an offence under s. 27(5) of the Police Act 1967, ("the Act"), that they had taken part in an unlawful assembly in a public place for which no licence had been issued under that section. Three of the lawyers had their case deferred. The rest were found guilty of the offence charged. They were admonished and discharged under s. 173 (ii) (a) of the Criminal Procedure Code. The Public Prosecutor appealed against the sentence and the lawyers against the finding of guilt. The High Court dealt first with the appeal against the finding of guilt.

Held:

[1] The charge was not defective. There was no merit in the argument that the appellants misunderstood the charge or were misled by it or were in any way prejudiced by it. There was no element extraneous to s. 27(5) of the Act present in the charge and no element omitted from that subsection. An assembly, meeting or procession which takes place without a licence is deemed to be unlawful and all persons who take part in such an assembly can be convicted under s. 27(5) of the Act. The onus is on the defendants to show e.g. that either that a licence has been issued or otherwise that there was no evidence of participation or that it was not a public place. Where the words of a statute are clear the Court should not deny the statute even if the result be unjust but inevitable. Interpretation of any statute must be such that it meets with the legislative purpose of the enactment, which purpose is gathered by reading the language of the statute in what seems to be its natural sense. *(Duport Steels Ltd. v. Sirs* [1980] 1 All ER 529; *Vacher & Sons Ltd. v. London Society of Compositors* [1913] AC 107; *PP v. Ismail & Ors.* [1976] 1 MLJ 183; *PP v. Sihabudin & Anor.* [1980] 2 MLJ 275).

[2] There was a clear finding of participation, that all the accused persons had taken part in the assembly.

[3] The President applied the correct test in the evaluation of the evidence when he found as a fact that there was no licence. The prosecution was not dependent on s. 106 of the Evidence Act 1950, only.

[4] The President was bound to follow *Ragunathan v. PP* [1982] 1 MLJ 141 and had correctly done so.

[5] The words "pre-meditation" and "impulse" used by the President had been used loosely and only when the sentence was being considered.

[6] The judgment clearly showed that the evidence of identification had been considered and weighed and that the accused persons had been found to be satisfactorily identified.

[7] The prosecution had proved a *prima facie* case against all the appellants and the appellants were correctly called upon to make their defence.

[*Appeal against the finding of guilt dismissed.]*

Cases referred to:
R. v. Graham and Burns [1888] 4 TLR 212
Ragunathan v. PP [1982] 1 MLJ 141
PP v. Ismail & Ors. [1976] 1 MLJ 183
Duport Steels Ltd. v. Sirs [1980] 1 All ER 529
Vacher & Sons Ltd. v. London Society of Compositors [1913] AC 107
PP v. Sihabduin & Anor. [1980] 2 MLJ 275; [1981] CLJ (Rep) 82

Legislation referred to:
Police Act 1967, ss. 27, (2), (5)(b)
Criminal Procedure Code, s. 173A (ii)(a)
Evidence Act 1950, s. 106
Penal Code, s. 141
Police Ordinance 1952, s. 39(2), (5)
General Police Act 2 & 3 Vic C47 [UK], s. 52

Other sources referred to:
Brownlie's Law of Public Order and National Security 2nd ed. p. 31

For the appellant/respondent - Mohtar Abdullah
For the respondents/appellants - Lim Kean Chye
Ng Ek Tiong with
R.T.S. Khoo
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JUDGMENT

Hashim Yeop Sani FJ:

On 19 June 1982, 42 lawyers were brought before the President of Sessions Court Kuala Lumpur sitting as Magistrate charged for an offence under s. 27(5) of the Police Act 1967. The charge was that on 7 April 1981 they had taken part in an unlawful assembly in a public place for which no licence had been issued under that section of the Police Act. They all claimed trial. Three lawyers had their case deferred. The case against the 39 was eventually heard and finally disposed of on 9 February 1983. What the learned President did on 9 February 1983 was to call upon the appellants to make their defence after the close of the prosecution case. All the appellants elected to remain silent. The learned President then recorded that the charge had been proved. After hearing submissions from all the defence Counsel and the DPP, the learned President admonished and discharged the appellants under s. 173A (ii)(a) of the Criminal Procedure Code. The Public Prosecutor appealed against the sentence and the lawyers appealed against the finding that the charge had been proved. Both notices of appeal were filed on the same date on the last day for the notice to be filed.

For convenience, I will deal first with the appeal against the finding of guilt.

The grounds of appeal including the additional grounds allowed before the commencement of the hearing on the appeal may be classified broadly as follows:-

(1) Defects in the charge;

(2) Grounds against specific findings made by the learned President;

(3) The application of *Ragunathan v. PP* [1982] 1 MLJ 141 and *PP v. Ismail & Ors.* [1976] 1 MLJ 183; and

(4) The proper construction to be given to s. 27 of the Police Act, 1967.

Since the crux of this appeal is really the construction of s. 27 of the Police Act, I propose to deal with this ground first. In connection with this ground the following questions have to be answered:

(1) What was the general law relating to unlawful assemblies when the Police Act was enacted? This will assist in ascertaining the intention of the legislature in enacting s. 27 of the Police Act.

(2) Who may be charged under s. 2(5) of the Police Act and what are the ingredients required to be proved? This will determine the scope of s. 27(5) of the 1967 Act.

The power to interpret implies a discretion in the choice of interpretation. But the Judge is not at liberty to choose any interpretation on his whims and fancies. The interpretation must be such that it meets the legislative purpose of the enactment. See *Duport Steels Ltd. v. Sirs* [1980] 1 All ER 529.

The Court as guardian of the rights and liberties enshrined in the constitution is always jealous of any attempt to tamper with rights and liberties. But the right in issue here i.e. the right to assemble peaceably without arms is not absolute for the Constitution allows Parliament to impose by law such restrictions as it deems necessary in the interest of security and public order. In my view, what the Court must ensure is only that any such restrictions may not amount to a total prohibition of the basic right so as to nullify or render meaningless the right guaranteed by the Constitution.

In the construction of statutes the "golden rule" approach says that the only safe course in the interpretation of statute is to read the language of the statute in what seems to be its natural sense. In *Vacher & Sons Ltd. v. London Society of Compositors* [1913] AC 107 Viscount Haldane LC said:

> ... I think that the only safe course is to read the language of the statute in what seems to be its natural sense.

What was the general law on unlawful assembly before Parliament enacted the Police Act, 1967? The general law can be found in the Criminal Procedure Code, the Penal Code, the Police Ordinance 1952 and the Public Order (Preservation) Ordinance 1958.

The Police Act 1967 was a consolidated legislation and as the long title suggests, it was "to consolidate and amend the law relating to the organisation, discipline, powers and duties" of the Royal Malaysian Police.

In the Criminal Procedure Code, Chapter VIII then (before the amendment by Act 324 with effect from 10 January 1976) provided for powers of Magistrates and gazetted police officers to disperse an assembly and the duty of members of such assembly to comply with the order. The rest of the provisions in the Criminal Procedure Code then dealt with consequent powers of the authorities to use such force as may be deemed necessary. In the Penal Code,

Chapter VIII remains intact to this day and deals with offences against public tranquility. Under s. 141 of the Penal Code an "unlawful assembly" means an assembly of five more persons with any of the "common objects" (all of which are unlawful) referred to in that section.

Under the Public Order (Preservation) Ordinance 1958 provisions are made for declaring an area a "proclaimed area" where the authority is of the opinion that it is necessary for the purpose of maintaining public order. In any proclaimed area the police may by order prohibit absolutely or subject to conditions any assembly, meeting or procession of five or more persons in a public place.

Under the Police Ordinance 1952 there was s. 39(2) couched in almost identical terms as s. 27(2) of the Police Act 1967. Except for the penalty clause the provision of s. 39(5) of the 1952 Ordinance has been carried almost word for word in the present s. 27(5) of the 1967 Act.

At common law unlawful assembly is a misdemeanour committed where three or more persons gather together for the purpose of committing or preparing to commit a crime involving the use of violence or in order to carry out a lawful or unlawful purpose in a unlawful way in such a manner as to give firm and reasonable bystanders cause to apprehend a breach of the peace. The gist of the offence at common law is conduct which will or may lead to a breach of the peace.

In an old case *R. v. Graham and Burns* [1888] 4 TLR 212 the following definition of unlawful assembly was attempted:-

> An unlawful assemblage ... is an assemblage which attempts to carry out any common purpose, lawful or unlawful, in such a manner as to give other persons reason to fear a disturbance of the peace.

Four important features need to be observed in the legislation:-

(1) An assembly under the Penal Code which is not unlawful may subsequently become unlawful. Similarly a lawful assembly may become an unlawful assembly under the Police Ordinance 1952 and the Police Act 1967.

(2) The statutes are in effect an extension of the common law principle.

(3) One feature under the Penal Code which is central throughout that chapter is knowledge and intention. There is a no expressed reference to knowledge or intention in s. 39(5) of the Police Ordinance 1952 or s. 27(5) of the Police Act 1967.

(4) Both sub-sections in the Police Ordinance 1952 and the Police Act 1967 carry the same deeming provision that an assembly, meeting or procession without a licence shall be deemed to be an unlawful assembly, meeting or procession.

As far as can be gathered from the language of s. 27 of the Police Act 1967 the scheme of legislation in the section seems to be as follows. There is a general power given by law to senior police officers to direct the conduct of assemblies, meetings and processions and in the case of processions to prescribe the route etc. Any person who intends to convene an assembly or meeting or to form a procession in a public place is required to apply to the OCPD of the area for a licence. It would appear that the OCPD must issue the licence in ordinary cases and he can only refuse to issue the licence if he is not satisfied that the assembly, meeting or procession is not likely to be prejudicial to the security or to excite a disturbance of the peace. After he issues the licence the OCPD can cancel the licence if

subsequently he is not satisfied that the assembly, meeting or procession is not likely to be prejudicial in the interest of security or that he is not satisfied that it is not likely to excite a disturbance of the peace. Police officers are also given powers to stop any assembly, meeting or procession held without a licence and to order members of the assembly, meeting or procession to disperse. It is an offence to disobey any direction or order of a police officer. As assembly, meeting or procession is deemed in law to be "unlawful assembly" if three or more persons taking part disobey any order of the police officer to disperse. An assembly, meeting or procession is also deemed to be an unlawful assembly in law if it takes place without a licence. Every offence under s. 27 is arrestable without warrant.

The word "assembly" is not defined in the Act. *PP v. Ismail & Ors.* adopted the dictionary meaning: the coming together of persons or a gathering of persons.

Brownlie's Law of Public Order and National Security, 2nd Ed. at pg. 31, defines "assembly" as follows:-

> The concept is obviously closely akin to that of a 'meeting'. However, the term 'meeting' connotes prior or contemporaneous organisation, with an order of business however informal and the transaction of business including delivery of speeches and the passing of resolutions. The concept of assembly is probably **wider** and **includes any coming together of persons.** Thus it includes processions, political vigils, prayer meetings, demonstrations, a group at a cenotaph ceremony, families watching the changing of the guard, flag sellers acting in concert, sandwich-board men walking in a line, an a cycling club en route. **An assembly is complete, as it were, by collection or aggragation: no form or object in coming together is required.**

I think this is a clearer definition.

Therefore the situation under s. 39(5) of the repealed law and s. 27(5) of the 1967 Police Act would seem to be that an assembly, meeting or procession which takes place without a licence becomes unlawful and all persons who take part in such an assembly can be convicted under that sub-section. It is a matter of evidence whether the trial Court is of the view that there is participation. For this purpose the trial Court is entitled to look at the evidence as a whole. In short, it is a question of fact whether there is participation.

It was strenuously argued that s. 27(5) of the Act creates uncertainty and puts innocent individuals in fear of being arrested for being members of an unlawful assembly if they assemble in a public place for a lawful object. Examples were made of family outings consisting of three or more members of the family patronising a laksa stall. Another illustration given was that of a snake charmer gathering a crowd for his show. With respect all these illustrations reflect in my view too naive an approach to ordinary human affairs. In my view s. 27(5) of the Police Act should not be read in isolation. It should be read not only in the context of all the provisions carried under s. 27 itself but also the other provisions relating to unlawful assembly carried in the general law. Section 27 itself is under Part VII dealing with powers and duties of police officers. The legislature has throughout the history of its treatment of the problem of unlawful assemblies conferred on police officers (amongst others) powers to control an assembly. In the context of all these provisions s. 27(5)(b) of the Police Act clearly shows that the law does not prevent members of the public from exercising their basic right to assemble peaceably without arms but merely seeks to control or regulate the manner in which such assembly may be conducted or carried out. For this purpose s. 27(2) requires an assembly, meeting or procession to be covered by a licence. Thus the provisions requiring the convenor to apply for a licence is only one of the modes of regulating an assembly, meeting or procession. A breach of this provision creates an offence.

A common thread that weaves itself in all the legislations is the determination of the boundary beyond which there may be likelihood of breach of the peace or likelihood of public disorder. The police, as guardian of security and public order are given control of the conduct of an assembly, meeting or procession and they are obliged to use their discretion in the interest of security and public order so long as they carry out their duties responsibly and act within the bounds of the law.

The conflict between the individual's freedom of assembly and the convenience of the public and public order is not new. Nearly a hundred years ago the same conflict appeared in *R. v. Graham and Burns* (*supra*). Graham and Burns were charged among other things with an offence of taking part in an unlawful assembly in Trafalgar Square. It was the prosecution's case that by the general powers conferred on the police by the General Police Act 2 & 3 Vic C47, s. 52 the Commissioner of Police may from time to time make regulations to control public processions, meetings and assemblies. The Attorney-General in opening the case contended that the powers vested in the police were in the nature of a duty as guardian of the public peace. Graham and Burns were convicted by the jury and Charles J remarked that the law "was admirable good sense" because it does not admit of all persons seeking redress for private grievance by a disturbance of the public peace.

It was also strenuously argued that the assembly referred to in s. 27(5) is an assembly which is "convened". In other words the sub-section is restricted to an assembly, meeting or procession which is somehow organised by some person or persons. On that argument s. 27(5) cannot therefore include a spontaneous gathering of persons in a public place especially if they are there for a lawful object. It was urged that support for this view is to be found in the words "licence issued under the provisions of sub-section (2)" and therefore the construction of s. 27(5) must be related back to s. 27(2) which provides for any person intending to convene or collect an assembly, meeting or procession to apply for a licence. In my opinion that approach to the construction of s. 27(5) is reading too much into that sub-section. What that sub-section means is simply that an assembly, meeting or procession which takes place without a licence shall be deemed to be an unlawful assembly. I do not think that there can be any clearer language than that.

Where the language is clear the Court is only to see whether the offence is within the words of the enactment and within the spirit of the enactment. Where the words are clear the Court should not deny the statute. In the course of setting out the basic principles to be observed by a Judge in construing a statute Suffian LP gave a clear guideline in *PP v. Sihabduin & Anor*. [1981] CLJ (Rep) 82 where he said:

> Even if the result be unjust but inevitable he must not deny the statute; unpalatable statute law may not be disregarded or rejected simply because it is unpalatable; the Judge's duty is to interpret and apply.

To summarise, s. 27 of the Police Act 1967 is only a re-enactment of s. 39 of the repealed Police Ordinance 1952. In other words the provision of s. 27 of the new Act was already part of the general law before the passing of the Police Act 1967. Therefore no change in the law was intended by Parliament.

Secondly, the language of s. 27(5) of the Act is clear enough to show the two classes of person who may be charged under that sub-section: they are the convenors of the assembly, meeting or procession and persons who take part in such assembly, meeting or procession.

Thirdly, because of the deeming provision in s. 27(5) of the Act all the prosecution has to prove in the first instance is as set out in *PP v. Ismail & Ors.* that there was an assembly,

that no licence had been issued in respect of the assembly and that the accused persons took part in the assembly. That will be sufficient to invoke the deeming provision. Since the presumption is rebuttable the onus is then cast on the defendants to show e.g. either that a licence has been issued or if no licence has been issued there was no evidence of participation or that it is not a public place.

Now I will deal with the alleged defects in the charge. The charge reads as follows:

> That you, on the 7 April 1981 at about between 5.50 p.m. and 6.50 p.m at the Main Gate to the Parliament House, Jalan Parliament, in the Federal Territory, in the City of Kuala Lumpur, did take part in an unlawful assembly, to wit, an assembly in a public place for which no licence had been issued under the provisions of s. 27(2) of the Police Act (No. 41 of 1967), and that you have thereby committed an offence under s. 27(5)(a) punishable under s. 27(8) of the said Act.

It will be noticed that the charge follows closely the words of s. 27(5) of the Act. As stated earlier the offence section is straight forward. A perusal of the charge reveals that there is no element extraneous to s. 27(5) of the Act present in the charge and there is no element omitted from s. 27(5) of the Act. With respect I am of the view that there is no merit in the argument that the appellants misunderstood the charge or were mislead by the charge or were in any way prejudiced by the charge.

As regard the specific findings of the learned President it would appear that he divided the accused persons before him into three groups before arriving at his finding. He did this presumably for the purpose of his own analysis of the evidence before him. The first group he classified was the 12 accused who gave statements referred to in his judgment as Accused Nos. 4, 5, 6, 7, 11 , 13, 16, 22, 23, 28, 41 and 42 with their statements P23, P24, P25, P17, P19, D5, D6, P28, P27, D13, P26 and P10. It is the contention of the appellants that the learned President made a wrong finding that these 12 were "convenors". I think there is either an unfortunate choice of words used in the judgment or a misunderstanding of the meaning of the word "collect". In any case the finding of the learned President is clear in paragraph 54 and 61 of his judgment which read as follows:

> 54. Bearing in mind the advice of the Bar Council to remain at the Lake Club on going through the thirty statements I find at least twelve of the Accused persons Nos. 4, 5, 6, 7, 11, 13, 16, 22, 23, 28, 41, 42 as can be seen from their statements P23, P24, P25, P17, P19, D5, D6, P28, P27, P13, P27, P10 respectively set out from the Lake Club for Parliament house, though not necessarily all together, but in expedition, *posse comitatus.*
>
> 61. Thus *prima facie* these twelve Accused persons collected the assembly in question without a licence under s. 27(2) and hence an offence under s. 2(75)(a) of the Act.

The above finding shows that the 12 accused persons took part in the assembly and they were found as a fact to be participants not convenors.

The learned President then classified 18 other accused persons into another group. This group he found as persons who "gave various reasons" for being at the gate of Parliament at the material time. In my view it does not matter if the 18 accused persons went to the gate of Parliament for "various reasons" for if they went there to assemble or with the intention of joining the assembly already formed and remained there then they were in law taking part in the assembly. They were not mere passers-by or causal bystanders. The learned President in fact said in his judgment that he found that these 18 people went and joined the assembly and remained there. This in my opinion is a clear finding of participation for the purpose of

s. 27(5) of the Act.

In respect of the remaining nine accused persons it would also seem clear that there was a finding of fact that they went to the gate and remained there although there was no reason given as to why they went since no statement was produced. This is also in my view a clear finding of participation.

Then there is the question of the application of s. 106 of the Evidence Act, 1950. The learned President in my view took the correct approach in the evaluation of the evidence when he found as a fact that there was no licence. His evaluation of the evidence appears at pg. 206 of the record:-

> In any event as submitted by the DPP with which with respect I agree the Prosecution was not merely dependent on section 106; the Prosecution had adduced ample evidence with the evidence of Mr. T.S. Sidhu (PW.3), the then President Bar Council, Supt. Abdul Aziz bin Harun (PW.7) the then Officer-in-charge of Police District, the relevant Police District of Sentul, ASP Mohd. Abdullah PW.8), the then Licensing Officer, Kuala Lumpur Police Contingent which covers the Police Districts of Sentul, Ceras, Brickfields and Jalan Campbell, and as stated by Accused No. 2, the then and current Hon. Secretary Bar Council in his statement (P22) and as stated by Accused No.8, a then and current member Bar in his statement (P18), all of whom stated there was no licence for the assembly in question.

As regards application of *Ragunathan* the learned President in my view applied the correct test at the close of the prosecution case in para. 76 as follows:

> With utmost respect the present case is, having regard to all the facts, all the surrounding circumstances, to the law and the totality of the evidence more than 'not strong,' more than 'dependent on rather thin circumstantial evidence' and with respect I find that Prosecution has made out a *prima facie* case against all Accused persons as in the charge, has made out a case against all Accused persons as in the charge, which if unrebutted by them would warrant their conviction as in the charge.

The learned President was bound to follow *Ragunathan* and correctly did so.

The appellants also complained about the words "premeditation" and "impulse". These words were with respect used loosely by the learned President in drawing the distinction between the unlawful assembly of the politicians and the unlawful assembly of the lawyers when he was considering what sentence to impose not when he was making his finding.

Finally I do not see any ground for not accepting DSP Shinggara Singh's (PW5) evidence or Insp. Lee's (PW25) evidence of identification as admissible. Only the weight should be in issue. The judgment clearly shows that the learned President had considered and weighed the evidence of identification and found that the accused persons were satisfactorily identified.

Therefore there is in my view no question that the prosecution had proved a *prima facie* case against all the applellants and that they were correctly called upon to make their defence. Accordingly the appeal against the finding of guilt is dismissed.

Also found at [1984] 1 CLJ 117