IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)
CRIMINAL APPEAL NO. 05(L)-289-12/2021

Between

Dato' Sri Mohd Najib bin Hj Abd Razak ... Appellant

And

Pendakwa Raya ... Respondent

(HEARD TOGETHER WITH)

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And

Pendakwa Raya … Respondent

Coram:

Tengku Maimun binti Tuan Mat, CJ
Abang Iskandar bin Abang Hashim, CJSS
Nallini Pathmanathan, FCJ
Mary Lim Thiam Suan, FCJ
Mohamad Zabidin bin Mohd Diah, FCJ

BROAD GROUNDS

(*Motions to Adduce Additional/Further Evidence*)

INTRODUCTION

[1] There are three motions before us in Enclosure 210 (in appeal 289), Enclosure 31 (in appeal 290) and Enclosure 32 (in Appeal 291) filed by the appellant-applicant to adduce additional or fresh evidence pending the main appeals before the Federal Court from the decision of the Court of Appeal which affirmed the High Court's decision to convict him on all seven (7) charges and to sentence him accordingly. As the three motions are identical in substance, we shall treat the three motions in Enclosures 210, 31 and 32 collectively as one single motion and refer to it as '**the Motion**'.

[2] The applicant, after filing the Motion, filed three further yet identical motions to amend the Motion via Enclosure 229 (in Appeal 289), Enclosure 228 (in appeal 290) and Enclosure 218 (in appeal 291).

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[3] At the outset of the hearing yesterday, we noted that both parties' written submissions on the Motion had been prepared on the assumption that the Motion was amended. In the circumstances, we had allowed the amendments to the Motion and had ordered in terms of Enclosures 229, 228 and 218 but with the caveat that we were not making any determination on the substantive merits of the amended Motion and the order to amend was without prejudice to the respondent's objections on privilege and other related issues.

[4] We have read the Motion (as amended) and pored through the affidavits filed in relation to it, including the affidavits on the amended Motion. We have also carefully considered parties' submissions – written and oral and after careful and considered deliberation, this is our unanimous decision on the Motion.

[5] We must state at the outset that in considering the Motion, we paid no heed, at this stage, to the substantive question or merits on the issues relating to the lower Courts' concurrent findings of guilt on the part of the applicant in the main appeals. In other words, the main appeals are a separate matter entirely and our determination of the merits of the Motion have absolutely no bearing to our consideration on the merits of the main appeals in the event that the Motion is dismissed.

BACKGROUND

[6] The primary purpose of the Motion is to seek leave of this Court to adduce additional or fresh evidence to establish a conflict of interest giving rise to bias on the part of the learned trial Judge, Justice Mohd Nazlan bin Mohd Ghazali ('Justice Nazlan') and on that ground, declare that the entire

trial in the High Court in this SRC case null and void and for this Court to consider further relief(s), including an order for a retrial.

[7] The argument in support of the Motion is that the additional evidence, which constitutes documentary and *viva voce* evidence of certain witnesses will, when adduced, seek to establish the fact of conflict and/or bias on the part of Justice Nazlan on account of his role as Group Counsel ('GS') and Group Company Secretary ('GSC') of the Maybank Group of Companies including Maybank Investment Berhad circa the time material to the seven (7) charges against the applicant.

[8] Learned counsel for the applicant, Tuan Haji Hisyam Teh argues that the various documentary and *vica voce* evidence will be able to establish Justice Nazlan's involvement with Maybank, and thereby establish a 'real danger of bias' on his part, in three material respects, as follows:

(i) Firstly, Maybank Investment Berhad ('MIB') and by extension, Justice Nazlan's role in the establishment of SRC International Sdn Bhd ('SRC');

(ii) Secondly, according to the applicant, Malayan Banking Berhad ('Maybank') and Justice Nazlan's role relating to the RM140 million loan to Putra Perdana Development ('PPD') which was credited to SRC and wherefrom RM42 million found its way into the applicant's personal AmIslamic Bank accounts, namely Accounts 880 and 906.

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(iii) Thirdly, Maybank's loan of RM4.17 billion to 1 Malaysia Development Berhad ('1MDB') and its subsequent possible default and Justice Nazlan's role therein.

[9] The learned Tuan Haji Hisyam submits that the proposed additional evidence, both documentary and *viva voce* have crossed the threshold set by section 93 of the Courts of Judicature Act 1964 ('CJA 1964') and the common law rules applied in Malaysia derived foremost from the decision of the English Court of Appeal in *R v Parks* [1961] 3 All ER 633 ('Parks').

[10] The respondent resists the Motion. The basis of their objection is that essentially, section 93 of the CJA 1964 has not been met. Allowing the additional evidence to be taken would run afoul of the important concept of finality of litigation and in any event, the evidence sought to be adduced is hearsay and thus incredible. The respondent also submits that the proposed *viva voce* evidence of certain MACC Officers is privileged.

DECISION/ANALYSIS

The Law on The Admission of Additional Evidence

[11] The law on the admission of additional evidence is contained within section 93 of the CJA 1964. The section, in material part, reads thus:

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"**Additional evidence**

93. (1) In dealing with any appeal in a criminal case the Federal Court may, if it thinks additional evidence to be necessary, either take such evidence itself or direct it to be taken by the High Court.".

[12] The test to adduce fresh evidence under this section is to be gathered from the words 'if it [meaning the Court] thinks additional evidence to be necessary'. Admission of such evidence is thus a matter of judicial discretion. Judicial discretion is in turn exercised by reference to decided judicial precedent. The landmark case in this regard is the decision of the English Court of Appeal in *Parks* (supra) which was cited with approval and applied by this Court most recently in *Dato' Sri Mohd Najib bin Haji Abd Razak v Pendakwaraya* [05(L)-297-12/2021, 05(L)-299-12/2021 and 05(L)-301-12/2021 (16 March 2022)] ('Najib Razak').

[13] The four cumulative elements in *Parks*, as stated by Lord Parker CJ are these:

(i) Firstly, the evidence that is sought to be called must be evidence which was not available at the trial.

(ii) Secondly, and this goes without saying, it must be evidence relevant to the issues.

(iii) Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but it must be evidence which is capable of belief.

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(iv) Fourthly, the court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the applicant if that evidence had been given together with the other evidence at the trial.

[14] As decided by this Court in *Najib Razak*, the elements being cumulative means that if any one element is not fulfilled, then the application for fresh or additional evidence will fail. The test is necessarily stringent given the need to preserve finality in litigation.

[15] The four cumulative elements in *Parks* are actually a reformulation of the three elements stated by Lord Denning in *Ladd v Marshall* [1954] 3 All ER 745 ('Ladd'). Thus, the first element of *Parks*, should be read together with Lord Denning's first element, at page 748, which is that 'it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial'.

[16] In *Najib Razak*, this Court also endorsed the views of the Court of Appeal in *Murugayah v Public Prosecutor* [2004] 2 MLJ 545 ('Murugayah') that the affidavit in support of a motion to adduce fresh evidence must also state exactly what it is the witness sought to be called is prepared to say if he is called to give additional evidence. This is what was observed by Augustine Paul JCA (as he then was) in *Murugayah*:

> "[10] … However, what is essential is that the affidavit that has been filed in support of the application must state exactly what witness would be called, exactly what that witness would be prepared to say or prove, or of what inquiries had been made before the trial, or what subsequent inquiries had resulted in

the disclosure of the evidence (see *Wollongong Corporation v Cowan* (1955) 93 CLR 435).".

[17] The key words are 'must state exactly'.

The Proposed Additional Evidence

[18] The proposed additional evidence that the applicant seeks to introduce is set out in his submission. This includes, according the applicant, the following:

[19] Documentary evidence constituting the following:

(i) **DSN-11**: A copy of the Maybank Minutes of the Group Management Committee meeting dated 7.3.2012;

(ii) **DSN-12**: A copy of the Maybank Minutes of the Credit Review Committee meeting dated 7.3.2012;

(iii) **DSN-13**: A copy of the Minutes of the Special Meeting No. 2 of the Financial Year 2012 of the Board of Directors of Maybank;

(iv) **DSN-14**: A copy of the letter dated 14.9.2010 from MIB to 1MDB;

(v) **DSN-15**: A copy of a news article dated 14.3.2022 published in *Malaysia Today* titled "*Shocking Revelation: Najib's Trial Judge Nazlan's Conflict-of-interest exposed*";

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(vi) **DSN-16**: A copy of the 1MDB Board of Directors' Minutes of Meeting dated 6.9.2010;

(vii) **DSN-17**: A copy of the relevant parts of the Maybank Annual Report 2010;

(viii) **DSN-18**: A copy of the article dated 26.4.2022 published in *Malaysia Today* titled "*Maybank Is Also Responsible For the SRC Disaster*";

(ix) **DSN-19**: A copy of Late Paper for GMCC on 26.3.2012 containing, among other documents, Special Meeting No. 2 of the Financial Year 2012 of the Board of Maybank held on 12 March 2012, Resolution for item No. SB 2/2012;

(x) **DSN-20**: A copy of Maybank email thread dated 5.2.2015;

(xi) **DSN-21**: A copy of email dated 10.2.2015;

(xii) **DSN-22**: A copy of Maybank letter from Group General Counsel to the directors of Maybank dated 10.2.2015 together with Maybank Memorandum dated 10.2.2015;

(xiii) **DSN-23**: A copy of Minutes of 4/2010 Meeting of the Board of Directors of 1MDB dated 5.4.2010;

(xiv) **DSN-24**: A copy of *AmIslamic* Folder for account number 211-202-200973-6 for SRC International Sdn. Bhd.

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[20] The *viva voce* evidence of the following witnesses, namely:

(i) Datuk Shahrol Azral Ibrahim Halmi, ex-Chief Executive Officer of 1MDB;

(ii) Rosli bin Hussein (PW57), an investigating officer of the MACC in relation to the SRC case investigation;

(iii) Mohamad Zamri Zainul Abidin, Head of AMLA in MACC;

(iv) Asrul Ridzuan bin Ahmad Rustami, Officer in AMLA Division, MACC;

(v) Noor Syazana binti Kamin, Assistant Investigating Officer in MACC;

(vi) Zain Bador, Director & Head of Strategic Advisory of MIB, and director in Bina Fikir Sdn. Bhd;

(vii) Fazilah binti Abu Bakar, the Secretary to the Credit Committee, Maybank Group; and

(viii) Michael Oh-Lau, the Managing Director, Head of Debt Markets, MIB.

[21] Learned counsel for the applicant stresses that all the above evidence could not have been obtained with reasonable diligence at trial and this therefore satisfies the first element of *Parks*. He stated that it is not atypical for cases like this that attract tremendous public interest that

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the accused would receive tip-offs from anonymous sources. To this extent, he cited the example of an anonymous telephone call in *Ex Parte Pinochet Ugarte (No. 2)* [2000] 1 AC 119, at page 128. And so, Tuan Haji Hisyam submits that the applicant only recently received the proposed additional evidence around May 2022 and July 2022.

[22] Learned counsel for the applicant went on to submit that the proposed additional evidence, when considered in totality is relevant because it establishes Justice Nazlan's conflict of interest vis-à-vis the SRC trial and affects his findings on *mens rea* on the part of the applicant. The evidence is also credible and reliable because it is, in effect, from independent sources and is thus, capable of belief. And, once admitted, it would establish conflict of interest and/or bias, and thereby vitiate the entire trial in the High Court. Based on this, the applicant submits that the four cumulative elements in *Parks* are met and the Motion ought to be allowed.

[23] The respondent submits that some of the evidence sought to be introduced, especially DSN-16 was available at trial. And, because DSN-14 is connected to DSN-16, DSN-14 would have also been available, in effect, if the applicant or his counsel had used reasonable diligence.

[24] Learned counsel for the applicant maintains that even if the evidence was available as contended by the respondent, the material evidence was served on the applicant only in relation to the separately ongoing 1MDB trial and not in the SRC trial which is the subject of the pending appeals before us.

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[25] The respondent in any event submits that the proposed additional evidence is all irrelevant to the charges as framed and this fails to meet the second element of *Parks*. They also object to the admission of such additional evidence because they claim hearsay, privilege and breach of secrecy under the Official Secrets Act 1972.

[26] Having recapped the law and stated the gist of parties' rivalling contentions, we shall now proceed to state our findings in respect of the Motion.

Application of the Law to the Facts

<u>Reasonable Diligence</u>

[27] Preliminarily, we agree with learned Deputy Public Prosecutor for the respondent, Dato' V Sithambaram that the question of the availability of the evidence is quite apart from the question of the prosecution's duty to deliver certain documents under section 51A of the Criminal Procedure Code ('CPC').

[28] Both *Parks* and *Ladd* as well as the slew of cases decided thereafter emphasise the point of 'availability' of the evidence and whether it was discoverable by reasonable diligence by the party seeking leave to adduce the additional evidence. In this regard, the issue is quite apart from the respondent's compliance or non-compliance with section 51A of the CPC. Rather, it is a question of whether the evidence was available to the applicant.

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[29] According to the respondent, they had served DSN-16 on the applicant in the 1MDB trial on 4.11.2019 which is a month before the defence commenced its case in the SRC trial on 3.12.2019. It bears mentioning here that counsel for the applicant in the 1MDB trial and the SRC trial was the same, i.e., Tan Sri Muhammad Shafee bin Abdullah. DSN-16 was thus available to the applicant for use in his defence in the SRC case and the supposed involvement of MIB which is mentioned in DSN-16 could have been raised before Justice Nazlan, for both parties conceded during argument that they knew, even before the commencement of trial, of Justice Nazlan's position as GC and GSC of the Maybank Group of Companies before his elevation to the Bench.

[30] In our view, the same can be said of DSN-14. Since the test is one of availability, and DSN-16 was available to the applicant even if he was not served in relation to the present SRC case, he could have obtained DSN-14 or raised suspicions regarding the possible existence of DSN-14 to the respondent by reference to DSN-16. Specifically, upon examining DSN-16 which states the proposed role of MIB and its subsidiary, BinaFikir Sdn Bhd., it would have been open to the applicant to then ask for any evidence related to DSN-16 to be produced to him, which would mean that DSN-14 could have been obtained by reasonable diligence. It is not as if Justice Nazlan's previous employment with the Maybank Group of Companies was a secret to any party such that his subsequent involvement with them came as a surprise.

[31] Thus, in relation to DSN-14 and DSN-16, it is our finding that the first element of *Parks* has not been satisfied. As the test is cumulative, we need not consider whether these pieces of evidence have met the other three elements of *Parks* – apart from our further findings below. This

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is consistent with the decision of the Supreme Court in *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70 where an application to adduce additional evidence was dismissed solely on the ground that it could have been obtained by use of reasonable diligence. Suffian LP, at page 71 said thus:

> "I do not think that the appellant has satisfied the first condition. He knew that Mr. Callow was at the material times chief architect at the Ministry of Education, that he had direct knowledge as to what drawings he (the appellant) was required (a) to trace, (b) to modify where necessary, and (c) to prepare new designs from Government drawings and the reasons which made the drawings necessary, and that Mr. Callow's evidence would therefore be important to the appellant's case. The appellant was not an ignorant and unrepresented rustic but the head of an important engineering firm represented by an eminent firm of solicitors. He contrived to trace Mr. Callow's address after judgment and I am of the opinion that it cannot be said that it could not have been obtained before the trial had he used reasonable diligence.".

<u>Relevancy</u>

[32] This leads us to the rest of the additional evidence that the applicant seeks to adduce. Our findings here, though not strictly necessary, are also relevant in relation to the earlier exhibits DSN-14, and DSN-16. We are here referring to the second element of *Parks*, that is to say, relevancy.

[33] The question of relevancy is inextricably linked to the seven charges preferred against the applicant. The first charge alleges abuse of power. The next three charges allege criminal breach of trust while the last three charges relate to money-laundering. The crucial question insofar as relevancy is concerned is whether Justice Nazlan's employment with the

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Maybank Group of Companies and his role therein is in any way relevant to the seven charges to the point that there may be a real danger of bias.

[34] In relation to the first charge, that is the abuse of power charge, the allegation is that the applicant had abused his position as the Prime Minister of Malaysia and Minister of Finance to secure Government guarantees for a loan by Kumpulan Wang Persaraan (Diperbadankan) ('KWAP') amounting to RM4 billion to be issued in favour of SRC International Sdn Bhd with the applicant's further view (as alleged) to channelling therefrom RM42 million to his own personal advantage.

[35] The applicant's learned counsel highlighted to us how Justice Nazlan made findings to the effect that the applicant had overarching control over SRC International Bhd and had thus intended to establish SRC International Bhd to benefit himself. In this regard, the applicant sought to adduce DSN-16 and DSN-14 as well as call the MACC officers who, in the course of their investigations, recorded statements from Justice Nazlan and related parties (such as Fazilah binti Abu Bakar and Michael Oh-Lau) on Justice Nazlan's purported involvement in the establishment of SRC and later transactions relating to the RM140 million Maybank loan to PPD or the RM4.17 billion Maybank loan to 1MDB.

[36] With respect, we fail to see how any of the proposed additional evidence relate to the first charge on abuse of power. The respondent denies that MIB was involved in the establishment of SRC International Bhd in the manner suggested by the applicant but even if MIB was involved, the question is how is MIB and by extension Justice Nazlan's involvement in any way material to the question of abuse of power on the part of the applicant as Prime Minister and/or Minister of Finance?

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[37] The applicant contends that the findings of 'overarching control' by Justice Nazlan in relation to the applicant could in some way have been coloured by his involvement in Maybank and his personal knowledge relating to the transactions. The respondent's response is that Justice Nazlan's findings were made on the basis of evidence disclosed at trial. There is, according to the respondent, no basis to suggest that Justice Nazlan's professional association with Maybank did in any way affect his finding on abuse of power.

[38] We state again here that we have not examined the correctness of the findings of Justice Nazlan in relation to the abuse of power. These are questions for the main appeals. But, at this stage, and for the purposes of the Motion, we are not in any way convinced that the proposed evidence establishes anything to the effect that Justice Nazlan's findings were in any way mired by any discreet or undisclosed personal interest on his part on the establishment of SRC International Sdn Bhd and its subsequent operation such as to render him a conflicted or biased judge. Nor do we find anything in the Motion that Justice Nazlan had any particular knowledge or was inspired by any extraneous considerations gained from his previous employment with Maybank to sustain any of his factual or legal findings in respect of the seven charges against the applicant.

[39] The next point in the argument of learned counsel for the applicant is that Justice Nazlan knew about the source of the monies when they were allegedly misappropriated by the applicant from SRC International Sdn Bhd. As conceded by Tuan Haji Hisyam in the course of his submission on the Motion, it is trite law that in cases involving criminal breach of trust, the source of the misappropriated monies is not relevant.

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What is important to establish as an ingredient of the charge of criminal breach of trust is that the accused had dominion over the funds and that they were misappropriated. From our observations, we are not convinced that Justice Nazlan made his findings based on anything other than the evidence on record. We further find that that there is no nexus between Justice Nazlan's previous employment with Maybank and the charges against the applicant so as to suggest conflict of interest, giving rise to bias. Whether or not Justice Nazlan's findings are correct, on the evidence on record, is the subject for consideration in the main appeals.

[40] Viewed in this light, the entirety of the additional evidence sought to be introduced (as set out above), is in our view, irrelevant to the charges preferred against the applicant and fails to disclose any conflict of interest on the part of Justice Nazlan.

[41] Thus, it is our view, that all the additional evidence sought to be adduced, both oral and documentary, fails to meet the second requirement of *Parks* in that it is not relevant to the charges levied against the applicant.

Allegations of Bias

[42] At this juncture, it is our view that though the applicant has cited the correct authorities in relation to the test on bias, the proposed additional evidence fails to disclose any nexus between Justice Nazlan and the charges preferred against the applicant. We need not therefore consider those cases cited.

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[43] In any event, and further to our views above, we agree with the respondent that the applicant has further failed to meet the *Murugayah* requirement which was affirmed by this Court recently in *Najib Razak*. In other words, we find that the applicant's affidavit in support of the Motion as amended), fails to state exactly what it is the proposed additional evidence, both documentary and oral, will prove or say in relation to the charges brought against him. It is in that sense, as put by the respondent, a call by the applicant on the Court to investigate on possible bias rather than to act on any reliable or relevant evidence that can establish any real danger of bias.

[44] A point was also made by learned counsel for the applicant that the dismissal of the Motion would occasion a miscarriage of justice on the part of the applicant. With respect, we are unable to agree. For reasons stated above, some of the proposed additional evidence was available at trial or at the very least, could have been discovered or obtained by use of reasonable diligence. In any event, the proposed additional evidence is wholly irrelevant to the charges preferred against the applicant. There is, to our minds, no miscarriage of justice because the concurrent judgments of the Courts below are still liable to attack in the main appeals that are pending.

Hearsay, Privilege and Related Issues

[45] The respondent further objected to the admission of the proposed additional evidence on the basis that the applicant's averments constitute hearsay and that the proposed *viva voce* evidence of certain witnesses to wit, the MACC officers are covered by privilege and/or are classified under the Official Secrets Act 1972.

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[46] Given our findings on the applicant's non-compliance with section 93 of the CJA 1964, *Parks* and related cases, we do not consider it necessary to deal with this aspect of the respondent's objections.

CONCLUSION

[47] For all the reasons above stated, we find that the applicant has failed to cross the high threshold of section 93 of the CJA 1964 and decided judicial authorities. In the circumstances, the Motion is hereby dismissed. For the avoidance of doubt, all motions in Enclosures 210, 31, 32 (as amended) are hereby dismissed.

Dated: 16th August, 2022.

(TENGKU MAIMUN BINTI TUAN MAT)
Chief Justice,
Federal Court of Malaysia.

(ABANG ISKANDAR BIN ABANG HASHIM)
Chief Judge of Sabah and Sarawak,
Federal Court of Malaysia.

(NALLINI PATHMANATHAN)
Judge,
Federal Court of Malaysia.

(MARY LIM THIAM SUAN)
Judge,
Federal Court of Malaysia.

(MOHAMAD ZABIDIN BIN MOHD DIAH)
Judge,
Federal Court of Malaysia.

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Nallini Pathmanathan, FCJ
Mary Lim Thiam Suan, FCJ
Mohamad Zabidin bin Mohd Diah, FCJ

BROAD GROUNDS
(*Application for Adjournment*)

INTRODUCTION

[1] Having dismissed the motions to adduce additional evidence, we directed parties to proceed with the appeals. Learned counsel for the appellant, Tuan Haji Hisyam Teh, however moves to adjourn the hearing of the appeals to a later date in three to four months. The basis of his application for adjournment is that he and his team only recently took over and that the appeals – spanning tens of thousands of documents – disclose strong serious points to be canvassed and that his team be given adequate opportunity to do a good job.

[2] To put it bluntly, the defence seeks an adjournment of these appeals for the simple reason that they are not prepared.

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[3] The respondent's position is that the fixing of the dates of the appeals in August 2022 has been known since as far back as the case management on 8.4.2022 – which is some four months ago. Parties were then advised that the Court would proceed on the dates fixed. The Court's minutes of the case management on 8.4.2022 confirm this. Parties were therefore well aware that the Court will proceed on those dates.

[4] The Federal Court Registry, issued a Notice of Hearing dated 29.4.2022 informing all parties that the hearing of the appeals is scheduled on 15.8.2022 to 26.8.2022. Therefore, any change in counsel was done with full knowledge of the dates that have been fixed for hearing.

[5] Then, on 26.7.2022, the Court received a letter from the appellant's former solicitors, Messrs. Shafee & Co. stating that the appellant had discharged them as his solicitors on record. This is in Enclosure 237. The former solicitors clearly indicated that the choice to discharge the former solicitors was the appellant's. Messrs. Shafee & Co stated as follows:

> "2. Sila ambil perhatian bahawa pada 25 Julai 2022, jam lebih kurang 5.00 petang, **pihak kami telah menerima sesalinan surat dari Dato' Sri Mohd Najib Bin Hj Abd Razak ("Perayu")** yang mana Perayu telah memberhentikan (discharged) dengan serta merta Tetuan Shafee & Co. daripada bertindak sebagai kaunsel dan peguamcara yang mewakili beliau di dalam Rayuan-Rayuan Jenayah ini dan Prosiding-Prosiding berkenaan. Menerusi surat yang sama, Perayu telah memaklumkan bahawa beliau telah melantik Tetuan Zaid Ibrahim Suffian TH Liew & Partners ("ZIST") sebagai peguamcara.".
>
> [Emphasis added]

[6] It is obvious that the appellant took it upon himself to discharge his solicitors to the present ones, Messrs. Zaid Ibrahim Suflan TH Liew &

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Partners ('Messrs. Zaid Ibrahim') who in turn appointed Tuan Haji Hisyam Teh as lead counsel.

[7] Messrs. Zaid Ibrahim thereafter wrote to Court vide a letter dated 26.7.2022 notifying and confirming the change of solicitors. Their letter is to be found in Enclosure 239. In this letter, Messrs. Zaid Ibrahim requested for an urgent case management and sought permission to participate in a case management that was already fixed on 29.7.2022. They also stated their intention to put on record their motion to adjourn for the reason that "a wholly new team has taken over the conduct of the above matter".

[8] The Court's reply is to be found in Enclosure 245 which contains a letter dated 28.7.2022 stating two things. Firstly, the Deputy Registrar of the Federal Court, Puan Wan Fatimah Zaharah binti Wan Yussof, confirmed the case management on 29.7.2022 and secondly, indicated the Court's directions that the hearing of the appeals would proceed as scheduled on 15.8.2022 to 26.8.2022. In short, the Court refused the adjournment.

[9] It is to be noted that despite having been discharged by the appellant on 25.7.2022, the appellant's former counsel Tan Sri Shafee Abdullah had nonetheless attended the case management on 29.7.2022. This is reflected in the Court's minutes for case management on 29.7.2022.

[10] The case management minutes on 29.7.2022 also disclose that Tan Sri Shafee had advised the Court that the digital copies of the records of appeal had been uploaded and shared with the new counsel, Messrs. Zaid

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Ibrahim on 22.7.2022. This is despite discharge only having been effected subsequently on 25.7.2022.

[11] Finally, the minutes also state that the Court reminded parties, no less than four times, that the appeals will proceed as scheduled notwithstanding the change in solicitors.

[12] It is against this backdrop that an adjournment is sought once again.

DECISION

The Law on Adjournments

[13] It is beyond settled that though the Courts have absolute discretion to grant or refuse adjournments, such discretion must be exercised judiciously. What is judicious hinges on a proper and wholesome consideration of the facts and circumstances of the case before making a decision.

[14] In the context of this case, we accept unreservedly the notion that the right to a fair trial is part and parcel of the right to life and personal liberty guaranteed by Article 5(1) of the Federal Constitution. See: *Yahya Hussein Mohsen Abdulrab v Public Prosecutor* [2021] 5 MLJ 811. The right of the accused to meaningful legal representation by counsel of his choosing is another important component of the right to a fair trial. This much is also apparent from Article 5(3) of the Federal Constitution but we hasten to add that this right is not absolute.

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[15] This leads us to the primary reason given by counsel for the appellant in favour of an adjournment which we stated earlier. In short, an adjournment ought to be granted because the new defence team needs adequate time to prepare. In the other words, they are not ready.

[16] We start by saying that we agree that in appropriate cases, where counsel is not ready to proceed for legitimate reasons, the Court should be minded to adjourn a cause or matter. We do not think this is the case here.

[17] Firstly, from our narration of the procedural history on the fixing of these appeals, all parties to this matter, including the appellant, were well aware that the appeals had been fixed for hearing on 15-26.8.2022 since April 2022 and the request for an adjournment on the same ground had been refused.

[18] In this regard, we find Rule 6(a) of the Legal Profession (Practice and Etiquette) Rules 1978 ('1978 Rules') most relevant. It stipulates thus:

> "**Rule 6. An advocate and solicitor not to accept brief if unable to appear.**
>
> (a) An advocate and solicitor shall not accept any brief unless he is reasonably certain of being able to appear and represent the client on the required day.".

[19] Thus, where counsel has accepted a brief, he should be deemed as 'reasonably certain of being able to appear and represent the client on the required day'. The 1978 Rules also appear to recognise the general disposition of the Courts in this country to disfavour adjournments unless

cogent reasons are provided. The general rule is that counsel shall make every effort to be ready for trial (and we think by extension appeals) on the day fixed. See: Rule 24(a) and (b) of the 1978 Rules.

[20] The 1978 Rules are not, in a sense, binding on the Courts. But they are nevertheless binding on members of the Bar who are obliged to comply with them. And, they are indicative of the fact that any disciplined lawyer such as the counsel for the appellant would not have accepted a brief with dates already fixed for hearing unless he was prepared.

[21] In fact, the appellant having been well aware of the dates fixed for hearing elected to discharge his former solicitors and appoint Messrs. Zaid Ibrahim and Tuan Haji Hisyam Teh as his solicitors and counsel respectively. This is his right to do so but he cannot, after having made that decision, turn around and say that his new lawyers are not ready to proceed with the hearing of the appeals. The new lawyers too, having accepted the brief, are not entitled to say they need more time to prepare knowing fully well that the dates had been fixed well in advance.

[22] Given the circumstances we have outlined, the request for the adjournment and the grounds in support thereof are neither cogent nor reasonable.

[23] In this regard, we recall the following words of Harun J from *Public Prosecutor v Mohtar bin Abdul Latiff* [1980] 2 MLJ 51, at pages 51-52:

> "In any criminal trial, there are three parties, the Court, the prosecution and the defence. If dates of hearing are to be fixed at the convenience of all three parties, then trial dates will be fixed at some considerable time hence. There

> is of course no guarantee, as happened in this case, that the trial will go on as scheduled on the date fixed, if everyone's convenience is taken into account. The general rule, therefore, has always been that trial dates are fixed at the convenience of the court, on a first-come-first-served basis. This is fair to all concerned. Public funds are not wasted on idle courts when there is so much work to do.".

[24] The stark reality is that considerable public funds would be wasted if granting an adjournment in a case of this kind was an easier option. Article 8 of the Federal Constitution and the Rule of Law demand that the appellant be treated just like any other accused. As such, we state again that while the appellant is entitled to his right to change his counsel, he is not entitled to make this choice at the expense of the Court, the prosecution or the entire justice system.

[25] While on this subject, another very significant component of the right to a fair trial is that justice cannot be unduly delayed. In this regard, we remind ourselves of Arahan Amalan Ketua Hakim Negara No 2/2003 which states that cases of this nature must be prioritised.

[26] Further, the time taken on this case, especially the number of days fixed for hearing means many other criminal cases and accused persons have had to wait their turn for their appeals to be heard. Justice delayed in this case is also justice denied to other accused persons. In this regard we echo the following words of Richard Talalla J in *Lai Cheng Chong v Public Prosecutor* [1993] 3 MLJ 147, at page 151:

> "At no time has it been truer to say that justice delayed is justice denied. It cannot be disputed that at this point of time, justice is so delayed in our courts as to amount to denial. There is a huge backlog of cases. Statistics indicate

that a main cause for this unfortunate situation is adjournment and postponement of trials on the date appointed for trial, largely occasioned by counsel applying for the same on a variety of grounds, most of them avoidable if counsel's affairs were managed fairly and reasonably, bearing in mind counsel's duty not only to the client but also to the court and the public at large.".

[27] For these reasons, the appellant's motion to adjourn and vacate these appeals for a period of at least three to four months is unanimously refused.

Dated: 16th August, 2022.

(TENGKU MAIMUN BINTI TUAN MAT)
Chief Justice,
Federal Court of Malaysia.

(ABANG ISKANDAR BIN ABANG HASHIM)
Chief Judge of Sabah and Sarawak,
Federal Court of Malaysia.

(NALLINI PATHMANATHAN)
Judge,
Federal Court of Malaysia.

(MARY LIM THIAM SUAN)
Judge,
Federal Court of Malaysia.

(MOHAMAD ZABIDIN BIN MOHD DIAH)
Judge,
Federal Court of Malaysia.

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IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)
CRIMINAL APPEAL NO. 05(L)-289-12/2021(W)

Between

Dato' Sri Mohd Najib bin Hj Abd Razak ... Appellant

And

Pendakwa Raya ... Respondent

(HEARD TOGETHER WITH)

IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)
CRIMINAL APPEAL NO. 05(L)-290-12/2021(W)

Between

Dato' Sri Mohd Najib bin Hj Abd Razak ... Appellant

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IN THE FEDERAL COURT OF MALAYSIA
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CRIMINAL APPEAL NO. 05(L)-291-12/2021(W)

Between

Dato' Sri Mohd Najib bin Hj Abd Razak ... Appellant

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And

Pendakwa Raya **… Respondent**

Coram:

Tengku Maimun binti Tuan Mat, CJ
Abang Iskandar bin Abang Hashim, CJSS
Nallini Pathmanathan, FCJ
Mary Lim Thiam Suan, FCJ
Mohamad Zabidin bin Mohd Diah, FCJ

GROUNDS OF JUDGMENT
(*The Appeals*)

INTRODUCTION

[1] The appellant in this case is the former Prime Minister of Malaysia, Dato' Sri Mohd Najib bin Haji Abdul Razak. He was charged with seven offences against his conduct in relation to a company called SRC International Sdn Bhd ('SRC'). The High Court found him guilty and convicted him on all seven charges. The sentence imposed on the appellant is an aggregate concurrent custodial sentence of twelve years and a fine of RM210 million (in default 5 years' imprisonment). The Court of Appeal affirmed the conviction on all seven charges and the sentence imposed. In these three appeals before us, the appellant challenges the conviction and sentence.

[2] We must state that the respondent has not challenged the measure of the sentence imposed against the appellant.

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[3] The seven charges against the appellant are, in summary, simply these. The first charge relates to abuse of power under section 23 of the Malaysian Anti-Corruption Commission Act 2009 ('MACC Act 2009'). The next three charges are on criminal breach of trust under section 409 of the Penal Code while the last three charges are under section 4(1)(b) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('AMLATFAPUAA 2001').

[4] At the outset, we state that counsel for the appellant, Tuan Haji Hisyam Teh, impressed upon us with considerable fervour that these appeals concern strong serious points of law and fact. In point of fact, we find that there is nothing complex in these appeals. Putting aside the personality of the appellant, this is a simple and straightforward case of abuse of power, criminal breach of trust and money laundering.

[5] The trial itself took an aggregate number of at least 86 days (57 for the prosecution case and 29 days for the defence). It is understandable that the trial took that long because of the number of witnesses involved, the sheer number of documents and due to the fact that a great part of the trial took place during the Covid-19 Pandemic. However, these considerations do not in themselves render the case complex.

[6] The area of the law is very much settled. There is an abundance of cases on abuse of power under the MACC Act 2009 and money laundering under AMLATFAPUAA 2001. The Penal Code too, was first enacted in 1936 and section 409 and the entire body of law on criminal breach of trust has developed since then. There are to our minds, no novel legal issues on this area of the law. The issues in these appeals mostly concern findings of fact and the application of settled law to the

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facts. It bears mentioning, and this will be elaborated in greater detail later, that as the apex Court, our role is not to make new findings of fact but to consider whether the existing findings and the application of the law to the facts are correct.

[7] Before we proceed to state our decision, we must first address some preliminary issues.

PRELIMINARY ISSUES

Counsel for the Appellant's Refusal to Make Submissions

[8] These appeals were fixed for hearing on the 15th of August to the 19th of August 2022 and the 23rd of August to the 26th of August 2022. This constitutes a total of nine days.

[9] The first two days of the appeal, the 15-16.8.2022, were spent on the appellant's motions to adduce additional evidence. We considered the motions and on 16.8.2022, after careful deliberation, we unanimously dismissed them with written grounds stating our reasons for doing so. On the same day 16.8.2022, we instructed parties to proceed with the substantive merits of the appeals. Tuan Haji Hisyam Teh, counsel for the appellant then stated that he and his team, being the new lawyers for the appellant, were not prepared to argue the appeals and moved to adjourn the appeals for three to four months.

[10] We stood down to consider the application for adjournment and on 16.8.2022 itself, we refused the adjournment and provided our written grounds stating our reasons. In those written broad grounds, we set out

the procedural history leading up to the appeals and how parties were well aware that the appeals will proceed as scheduled and that the reason of not being ready to argue the appeals would not be accepted. While the appellant was entitled to change his counsel from Messrs. Shafee & Co. to Messrs. Zaid Ibrahim Suflan TH Liew & Partners, he did so mindful of the date of the appeals. He cannot then turn around and say, having changed them so late in the day and counsel having accepted the brief when they did, that new counsel and solicitors are not ready. In any event, we decided to commence the hearing on 18.8.2022 (Thursday) so as to allow counsel for the appellant time to organise themselves.

[11] On the morning of 18.8.2022, counsel for the appellant moved to adjourn the appeals on the same ground namely that he and his team were not prepared. We rejected this ground. With the adjournment refused, Tuan Haji Hisyam Teh then moved to discharge himself as counsel for the appellant. We keep in mind that the Court possesses inherent jurisdiction to ensure that it can fulfil its mandate to administer justice, to prevent any abuse of process, and to ensure the machinery of the courts function in an orderly and effective manner. As counsel are key actors in the administration of justice, the Court has supervisory jurisdiction and authority to exercise inherent and supervisory control over counsel when necessary to protect its process. Hence, the Court, in invoking its inherent jurisdiction, refused counsel's application to discharge himself as that would have left the appellant unrepresented. Tuan Haji Hisyam Teh thus remained on record as counsel for the appellant.

[12] After discharge was refused, we invited Tuan Haji Hisyam Teh to make his submissions on the merits of the appeals. He refused. We then

proposed that the respondent submit first with a view to providing Tuan Haji Hisyam Teh time to prepare his submission. We asked Tuan Haji Hisyam Teh whether he would rely on the submission filed by the appellant in the Court of Appeal. He confirmed that he would rely on them. The respondent commenced their submissions in the morning and we broke for lunch thereafter. After the lunch break, Tuan Haji Hisyam Teh informed the Court that 'the correct position is that the Court can rely on the appeal records' which would include the submissions filed in support of the appeal in the Court of Appeal. Most critically, counsel for the appellant requested for leave to file written submissions in the Federal Court and perhaps to amend the petition of appeal. We duly allowed counsel for the appellant full liberty to do so. Thereafter, the respondent completed their submission for the day and requested to continue the rest of their oral submission on the next day.

[13] On 19.8.2022 (Friday), before the respondent continued with their oral submission, Tuan Haji Hisyam Teh informed the Court that the appellant had of his own accord, discharged his solicitors Messrs. Zaid Ibrahim Suflan TH Liew & Partners. Tuan Haji Hisyam Teh and his supporting counsel were present in Court throughout the hearing. By the end of the day, the respondent completed their oral submission on the appeals.

[14] At this point, it bears repeating that first, on 18.8.2022, Tuan Haji Hisyam Teh stated that he would rely on the submissions filed in the Court of Appeal. He then stated that this Court could instead, as a matter of course rely on those submissions as they comprise part of the records of appeals. Counsel then asked for permission to file written submissions, and if need be, amend the petition of appeal. At the close of the hearing

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on 19.8.2022 however, counsel took a different position stating that he would not be making any submission despite the Court having given him the opportunity to do so.

[15] In fact, we asked counsel on 19.8.2022 (Friday) if he would submit on Tuesday, 23.8.2022 which was the next date fixed for hearing. Tuan Haji Hisyam Teh stated that he would not be submitting. We clarified whether this included even oral submission, and counsel confirmed that he would not be making any submission on any of the 94 grounds of appeal in the petition of appeal, even oral submission. We told counsel that he had at least three days to prepare (that is the weekend and the Monday of 22.8.2022). He, despite this, and despite having asked for leave to file a written submission, took the position that he will not submit. This morning (23.8.2022), counsel again confirmed that he will not be making any submission on the appeal. This again, is in spite of his previous request to file a written submission.

[16] In the circumstances, we cannot but conclude from the above facts that counsel, having been given every opportunity to make submissions on the merits of the appeals, refused to do so.

Duty of the Court in the Absence of Submissions from the Appellant

[17] The question, in light of counsel for the appellant's refusal to make any submission is, how the Court should proceed with the disposal of these appeals. In this vein, the respondent advanced the following authorities:

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(i) *Mohd Zulkifli bin Md Ridzuan v Public Prosecutor* [2014] 1 MLJ 257;

(ii) *Nordin Hamid & Co v Pathmarajah* [1990] 2 MLJ 308;

(iii) *Go Pak Hoong Tractor and Building Construction v Syarikat Pasir Perdana* [1982] 1 MLJ 77;

(iv) *Mohamed bin Abdullah v Public Prosecutor* [1980] 2 MLJ 201;

(v) *Public Prosecutor v Tanggaah* [1972] 1 MLJ 207;

(vi) *Tan Teow Swee v R* [1955] 1 MLJ 76; and

(vii) *Hayati bte Aizan v Public Prosecutor* [2000] 1 MLJ 359.

[18] The appellant's counsel distinguishes the above cases on the facts. He invited the Court to consider the case of *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301 underscoring his point the denial of his right to submit amounts to a denial of the appellant's right to a fair trial. He then submitted that this right to a fair trial included a right for counsel to adequately prepare his submission, thereby entitling him to an adjournment. However, *Lee Kwan Woh*, is not authority for the proposition that an appellant is entitled to an adjournment to prepare an effective and meaningful submission. Unlike *Lee Kwan Woh*, this is not a case where the appellant was denied a right to submit as suggested by counsel. On the contrary, learned counsel was invited repeatedly to

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submit but persistently refused to do so. We reiterate our grounds when refusing the prior application for an adjournment.

[19] None of the authorities cited deal with the specific situation where an application for discharge has been refused in the exercise of the inherent jurisdiction of the Court. In other words, not being discharged, Tuan Haji Hisyam Teh is under a continuing duty to protect the appellant's prosecution of the appeals by submitting on the merits of the same. The authorities cited to us do however deal with cases where the accused himself is (1) absent or (2) left without his counsel or (3) counsel continues to represent the accused but is absent on the day fixed for trial or hearing. It has been held in those cases that the Courts may still refuse to grant an adjournment and may proceed with and dispose of those cases even in the absence of the appellant or counsel. The proceedings in those cases were not vitiated on account of a breach of natural justice.

[20] The principle in those cases, in our view, extends to the present appeals where counsel is present in name and in person but persistently refuses to make any submission despite repeated calls from the Court to do so. This is also supported by section 313 of the Criminal Procedure Code which provides as follows:

> "**Procedure at hearing**
>
> **313.** (1) When the appeal comes on for hearing the appellant, if present, shall be first heard in support of the appeal, the respondent, if present, shall be heard against it, and the appellant shall be entitled to reply.
>
> (2) If the appellant does not appear to support his appeal the Court may consider his appeal and may make such order thereon as it thinks fit:

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> Provided that the Court may refuse to consider the appeal or to make any such order in the case of an appellant who is out of the jurisdiction or who does not appear personally before the Court in pursuance of a condition upon which he was admitted to bail, except on such terms as it thinks fit to impose.”.

[21] The above section applies in relation to criminal appeals to the High Court but we see no reason why it ought not to apply analogously to appeals to the Federal Court from the Court of Appeal. The instant appeals mirror a position similar to that envisaged in section 313(2) in that while the appellant and his counsel are physically present, they deliberately refuse to participate in the appeal hearing. This, in our view, is equivalent to the appellant ‘not appearing to support’ the appeals. In such circumstances, the Court is empowered to proceed with the appeals. See also: section 92 of the Courts of the Judicature Act 1964.

[22] Having said that, we shall now proceed to consider the appellant’s appeals by having regard to the appeal records including the petition of appeal setting out no less than 94 grounds of appeal, the submissions filed in the Court of Appeal and the written judgments of the High Court and the Court of Appeal. In so doing, we find it necessary to state the settled role of this Court as the final and apex court of appeal.

The Role of the Apex Appellate Court

[23] We do not consider it necessary to reproduce the charges or repeat any of the facts which have been adequately stated and analysed in the judgments of the High Court and the Court of Appeal. The High Court judgment is reported in *Public Prosecutor v Dato’ Sri Mohd Najib bin Hj Abd Razak* [2020] 11 MLJ 808 while the Court of Appeal judgment is

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reported in *Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor* [2022] 1 MLJ 137.

[24] The learned trial Judge undertook an extensive analysis of all the evidence – documentary and oral that surfaced before him over the 86 or so days of trial. The Court of Appeal meticulously examined these findings and found no appealable errors.

[25] The role of the apex Court, as is settled law, is not to make any new findings of fact on the evidence on record or to substitute those findings with its own. In this regard, where there are concurrent findings of fact by the courts below, the apex Court would not be inclined to disturb those findings unless it can be shown that they are perverse, for example, if it can be shown that those findings were made in the absence of any evidence supporting them. See: *Puganeswaran a/l Ganesan & Ors v Public Prosecutor and other appeals* [2020] 12 MLJ 165.

[26] In light of this, all appellants in criminal appeals must understand that the burden is on them in the apex appellate Court to show that the concurrent findings were perverse and that those perverse findings occasioned a miscarriage of justice. In those circumstances, appellate intervention by the apex Court is warranted to correct those findings, resulting in an outright acquittal or an order for retrial – depending on the circumstances.

[27] In the present case, the respondent took us through their submissions and illustrated how the findings of the trial judge were supported by the evidence. The respondent argued that a *prima facie* case was validly established at the close of the prosecution case and that

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the defence, when called, was adequately considered and found not to raise a reasonable doubt on the prosecution case.

The Appeals

[28] In these circumstances, we shall now proceed to state our findings in relation to the appeals. In the absence of any submissions from the appellant, we turn our attention to the 94 grounds of appeal in the petition of appeal. We have examined them carefully and in great detail. In our view they disclose in essence, the following main complaints.

[29] Firstly, that the Court of Appeal erred in fact and in law by finding that the High Court Judge had correctly found that the prosecution had made out a prima facie case on all seven charges.

[30] Secondly, that the Court of Appeal erred in fact and in law by finding that the High Court Judge had correctly appreciated the defence. It was argued that the defence managed to raise a reasonable doubt on all seven charges.

[31] The respondent, over the course of two full days, took us through the evidence and the High Court's findings in relation thereto. The respondent illustrated how the evidence was so overwhelming that at the close of the prosecution case, the learned trial judge was satisfied in law and in fact that all the ingredients of all the seven charges were satisfied to warrant calling for defence. We have considered these submissions and find that the learned High Court Judge undertook a very detailed and objective analysis of the evidence to support his findings at the close of the prosecution case. In the circumstances, we fail to see how and where

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any of the learned trial judge's findings leading to the ultimate finding that a *prima facie* case had been made out, are perverse. The learned trial Judge correctly held that all the ingredients of the seven charges were established at the close of the prosecution case. The appellant was thus rightly called upon to enter his defence on all the seven charges.

[32] The respondent then took us through the defence case and highlighted how the defence was completely inconsistent and incoherent, and unworthy of belief. During the trial the appellant did not dispute that RM42 million entered his personal bank accounts. The thrust of his defence was to challenge the *mens rea* element, that is, the appellant denied knowledge that the funds were from SRC.

[33] The respondent maintains that the defence was unworthy of belief because, on the one hand, the defence maintained that the RM42 million said to have been wrongfully gained by the appellant to the wrongful loss to SRC was not within the knowledge of the appellant. On the other hand, the appellant also maintained that he was framed in a conspiracy hatched by one Low Taek Jho ('Jho Low'), Azlin Alias, Nik Faisal Ariff Kamil, and the bankers. The appellant also maintained the defence that the monies that were credited into his personal AmIslamic bank accounts, i.e. Accounts 880 and 906 which are the subject of the last six charges, were received from Arab Donations from Saudi Arabia. The respondent contended in essence, that they had always maintained at trial that these defences are completely inconsistent and diametrically opposed to one another.

[34] The respondent also referred to documentary evidence which established that the appellant had expended the RM42 million.

[35] According to the respondent, the learned High Court Judge correctly evaluated all the evidence led in relation to the defence and did not believe the defence narrative.

[36] In our judgment, the findings of the High Court on the defence are correct. In concluding that the defence failed to raise a reasonable doubt on the prosecution case, we find that the learned High Court Judge had undertaken a thorough analysis of the evidence produced by the defence.

[37] Thus, we are unable to conclude that any of the findings of the High Court, as affirmed by the Court of Appeal were perverse or plainly wrong so as to warrant appellate intervention. We agree that the defence is so inherently inconsistent and incredible that it does not raise a reasonable doubt on the prosecution case.

[38] In the circumstances, and having pored through the evidence, the submissions and the rest of the records of appeal, we find the appellant's complaints as contained in the petition of appeal devoid of any merit. On the totality of the evidence, we find the conviction of the appellant on all seven charges safe. We also find that the sentence imposed is not manifestly excessive.

CONCLUSION

[39] These appeals are therefore unanimously dismissed and the conviction and sentence are affirmed.

Dated: 23rd August, 2022.

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(TENGKU MAIMUN BINTI TUAN MAT)
Chief Justice,
Federal Court of Malaysia.

(ABANG ISKANDAR BIN ABANG HASHIM)
Chief Judge of Sabah and Sarawak,
Federal Court of Malaysia.

(NALLINI PATHMANATHAN)
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Federal Court of Malaysia.

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Judge,
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(MOHAMAD ZABIDIN BIN MOHD DIAH)
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Between

Dato' Sri Mohd Najib bin Hj Abd Razak ... Appellant

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And

Pendakwa Raya **… Respondent**

Coram:

Tengku Maimun binti Tuan Mat, CJ
Abang Iskandar bin Abang Hashim, CJSS
Nallini Pathmanathan, FCJ
Mary Lim Thiam Suan, FCJ
Mohamad Zabidin bin Mohd Diah, FCJ

DECISION ON ENCLOSURE 300
(*Recusal*)

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

[2] The grounds in support of the application are firstly, a Facebook post dated 11.5.2018 by my husband, Zamani bin Ibrahim and secondly, a letter from the Bar Council of Malaysia stating that I, as Chief Justice, had no objection if lawyers would apply for adjournments to attend an event called *Walk of Justice* on 17.6.2022 relating to Justice Nazlan.

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

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

[5] The Federal Court, in *Public Prosecutor v Tengku Adnan bin Tengku Mansor* [2020] 5 MLJ 220, has recently affirmed that in order to recuse a judge the test is the 'real danger of bias test'.

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

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

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

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

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

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

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

[11] Thus, in proving the real danger of bias test, it must be shown that the views expressed by third party, in this case, the spouse, actually impacted on the views of the judge sought to be recused as opposed to simply presupposing that just because certain general views were

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expressed as a citizen they are automatically the views of the judge presiding. In other words, the fact of a 'spousal relationship' is not by itself a reason to ascribe the spouse's views to the judge.

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

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

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

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

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

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Dated: 23 August, 2022.

(TENGKU MAIMUN BINTI TUAN MAT)
Chief Justice,
Federal Court of Malaysia.

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SUPPORTING DECISION ON ENCLOSURE 300
(Recusal)

[1] Following on from what was just stated by the learned Chief Justice, on behalf of myself and the other members of the coram, we concur and wish to just reiterate the following. The event complained of in the first ground in Enclosure 300, in particular, happened four years ago. And there was no live case at the time of the Facebook post. The appellant had not even been charged. There can therefore be no nexus between that posting and the current appeals.

[2] We further agree with the respondent's submission, for the reasons advanced, that this application in Enclosure 3000 is lacking in *bona fides*, given the series of applications filed in instalments and the staggered timing. We therefore reiterate that there are no merits whatsoever in the application and we would also dismiss Enclosure 300.

Dated: 23 August, 2022.

(ABANG ISKANDAR BIN ABANG HASHIM)
Chief Judge of Sabah and Sarawak,
Federal Court of Malaysia.

(NALLINI PATHMANATHAN)
Judge,
Federal Court of Malaysia.

(MARY LIM THIAM SUAN)
Judge,
Federal Court of Malaysia.

(MOHAMAD ZABIDIN BIN MOHD DIAH)
Judge,
Federal Court of Malaysia.

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