The Conundrums of the Sedition Act 1948

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Introduction

The Court of Appeal has recently held that section 3(3) of the Sedition Act 1948 ("Act") contravenes Article 10 of the Federal Constitution and therefore is invalid and of no effect in law.

This could be found in the unreported Grounds of Judgment dated 25 November 2016 in Mat Shuhaimi Bin Shafiei v Kerajaan Malaysia .[1] The Coram was made up of Lim Yee Lan JCA, Varghese George JCA, Harmindar Singh Dhaliwal JCA.

Background Facts of the Case

The facts are not so much in dispute and could be summarised as follows. The Appellant was initially charged on 7 February 2011 at the Sessions Court at Shah Alam under section 4(1)(c) of the Act for publishing an article online captioned "Pandangan saya berasaskan Undang-Undang Tubuh Kerajaan Negeri Selangor, 1959". At the time of the publication, the Appellant was the Ahli Dewan Undangan Negeri ("ADUN") for the State Seat of Sri Muda.

The Appellant had claimed trial to that charge. However before commencement of the trial, the Appellant had by a Notice of Motion dated 1 August 2011 filed in Shah Alam High Court (Criminal Application No: 44-72-2011) sought for certain orders, inter alia, for the charge against him to be struck off on the grounds that section 4 of the Act was inconsistent with Article 10 of the Federal Constitution.

The High Court had dismissed that motion on 19 January 2012. The Appellant's appeal to the Court of Appeal against that decision was in turn also dismissed on 26 December 2013.[2]

The Appellant had thereafter sought to appeal to the Federal Court but the leave application was subsequently withdrawn in light of the Federal Court's decision in Siow Chung Peng v PP[3], which held that it had no jurisdiction to entertain any further appeal that arose in relation to a criminal case filed in the Sessions Court.

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The Appellant thereafter filed this Civil Suit No: 24-36-09/2014 for a declaration that section 3 of the Act read together with section 4 of the same Act, was in violation of or inconsistent to a citizen's right to freedom of speech and expression as enshrined in Article 10(1)(a) of the Federal Constitution.

The Appellant's Argument

The crux of the Appellant's argument was that the exclusion of intention having to be proved when a person was charged with the commission of an offence under the Act was an unreasonable and disproportionate inroad into one's fundamental rights, although Article 10(2)(a) allowed for the existence of such laws as were necessary or expedient to preserve the security of the nation or public order generally.

For ease of reference, section 3(3) is reproduced as follows:
"For the purpose of proving the commission of any offence against this Act the intention of the person charged at the time he did or attempted to do or made any preparation to do or conspired with any person to do any act or uttered any seditious words or printed, published, sold, offered for sale, distributed, reproduced or imported any publication or did any other thing shall be deemed to be irrelevant if in fact the act had, or would, if done, have had, or the words, publication or thing had a seditious tendency."

The Appellant contended that in criminal law, mens rea or proof of 'intention' behind the impugned act had always been an essential element that had to be established on evidence to constitute culpability and a punishable crime. In that light, the rendering of such 'intention' to be irrelevant by section 3(3) had to be held as a restriction which breached the 'principles of proportionality', even to meet the permissible objectives of such laws validated under Article 10(2)(a).

Further, the Appellant submitted that the total removal of the element of intention by section 3(3) was a disproportionate measure to meet the purposes for which 'restrictions' were permitted under Clause 2 of Article 10. Objectively assessed, it was argued that section 3(3) was an overkill, akin to using 'a hammer to confront the menace of a mosquito'. As such, the so-called "excessive" restriction ought to be struck down as being unconstitutional.

The Court of Appeal found merits in these ingenious contentions, particularly with regard that section 3(3) of the Act, as presently worded, was a total displacement or removal of any consideration or necessary finding on the issue of intention of the accused underlying such impugned act. Indeed, mens rea is an essential ingredient to be proved in any criminal proceedings in order for the prosecution to nail down the conviction of an accused. It is indisputable that Article 8 enjoins that all persons ought to be treated equally by the law and that they were further entitled to the equal protection of the law, both substantive and procedural law.

The Court of Appeal further observed that the obvious "raison d'être" of section 3(3) was to create another regime in respect of prosecution of offences under the Act, by rendering that the accused person's intention is irrelevant. This exclusion was irrefutably a deviation from the general rule in so far as criminal prosecutions were concerned and peculiarly applicable only for an offence under the Act.[4]

Reference to Other Statutes
Another significant aspect considered by the Court of Appeal in deciding on the constitutionality issue of the provision was that section 3(3) was also not in the terms of a 'rebuttable presumption' as provided for in other statutes where the burden of proving the intention was shifted to the accused person.

The Court of Appeal first referred to section 37 of the Dangerous Drugs Act 1952 which provides for various presumptions as may be necessary to be invoked but was worded in the following terms — "...shall be presumed, until the contrary is proved...".

Further, reference was also made to section 50 of the Malaysian Anti-Corruption Commission Act 2009 ("MACC Act") which allowed for a presumption to be invoked in respect of certain matters. Be that as it may, the accused was not denied the opportunity to rebut that presumption based on credible evidence under the MACC Act.

At this juncture, it is beneficial to refer to the case of Public Prosecutor v Thavanthan[5], whereby it was held that once it was proved that the money had been given to or received by the accused, the presumption under section 14 of the Prevention of Corruption Act 1961 (which is in pari materia to section 50(1) of the MACC Act) arose, and it was for the accused to give an innocent explanation which the court considered more likely than not that it was true, ie on a balance of probabilities.

In addition, the Court of Appeal also held that the attempt by section 3(3) to displace proof of intent in determination of commission of an offence under the Act would also appear to be in conflict with section 505 of the Penal Code, which provides for criminal liability for any person who makes, publishes or circulates any statements conducing to public mischief.

The Court of Appeal further noted that there would appear to be two sets of law that could be resorted to in a similarly circumstanced situation, namely under the Penal Code where 'intent' had to be proved, and the other alternative avenue under section 4 (read together with section 3(1)) of the Act. The ultimate outcome would be that the accused charged under the Act would be clearly disadvantaged and in effect discriminated. This in effect would leave open the door for selective prosecution, an anathema or affront to the constitutional right to be dealt with equally and to be also protected equally before the law.[6]

In the upshot, the Court of Appeal was of the considered view that section 3(3) was a disproportionate restriction or measure to meet the permissible objectives spelt out in Article 10(2)(a) of the Federal Constitution. Accordingly, section 3(3) was in violation of the constitutional rights of a citizen to be treated equally and also to be protected equally before the law.
This judgment is indeed a fascinating one, if one puts it side-by-side with the Court of Appeal's judgment in Mat Shuhaimi bin Shafiei v Public Prosecutor[7] decided by Abdul Malik Ishak JCA, Azahar Mohamed JCA and Zawawi Salleh JCA.

In that case, His Lordship Abdul Malik Ishak JCA in clear terms held as follows:
"In our judgment, the Sedition Act is constitutional and it does not violate arts 10(1)(a) and 10(2)(a) of the Federal Constitution. It does not offend the reasonableness test. It is reasonable to maintain the Sedition Act because 'The Government has a right to preserve public peace and order, and therefore, has a good right to prohibit the propagation of opinions which have a seditious tendency'".[8]

The last line is of course, quoted from the late Raja Azlan Shah J (as His Majesty then was) in the oft-cited case of PP v Ooi Kee Saik & Ors[9].

Further, with regard to the proportionality test, the Court of Appeal held and again I quote the words of His Lordship Abdul Malik Ishak JCA as follows:

"The Sedition Act is proportionate to the necessity to safeguard the security of the Federation and to maintain law and order as well as to avoid incitement. In particular, the impugned provision does not overreach Article 10(2)(a) of the Federal Constitution (on lawful restrictions on freedom of speech) and it is substantively fair and proportionate and thus it does not violate the equality provision in Article 8(1) of the Federal Constitution."

"We gratefully adopt the principles enunciated in the above mentioned passages and we hold that the impugned provision is constitutional and it passed the proportionality test with flying colours."[10]

The conundrums pertaining to the Act will irrefutably remain in the foreseeable future. Perhaps, it is worthwhile to remember, "Strategic litigation is seldom achieved with one case. It often builds on piles of unsuccessful cases." For now, this is one of those successful cases.

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[1]*Mat Shuhaimi Bin Shafiei v Kerajaan Malaysia (Rayuan Sivil No. W-01(A)-115-04/2015)*

[2]*Mat Shuhaimi bin Shafiei v Public Prosecutor [2014] 2 MLJ 145*

[3]*Siow Chung Peng v PP [2014] 4 MLJ 504*

[4]*At paragraph 32 of the judgment.*

[5]*Public Prosecutor v Thavanthan [1997] 2 MLJ 401*

[6]*At paragraph 42 of the judgment.*

[7]*Mat Shuhaimi bin Shafiei v Public Prosecutor [2014] 2 MLJ 145*

[8]*supra*

[9]*PP v Ooi Kee Saik & Ors [1971] 2 MLJ 108*

[10]*At paragraphs 103 and 104 of the judgment.*