

**M A L A Y S I A**

**DALAM MAHKAMAH SESYEN DI KUALA LUMPUR**

**KES TANGKAP NO: 62- 537 HINGGA 543 - 2007**

**PENDAKWA RAYA**

**LAWAN**

**(1) ERIC PAULSEN**

**(2) NOORAZA BINTI OTHMAN**

**(3) JOHNY BIN ANDU @ ABU BAKAR ADNAN**

**(4) SIVARASA A/L K.RASIAH**

**(5) LATHEEFA BEEBI KOYA**

**(6) N.SURENDRAN A/L NAGARAJAN**

**(7) AMER HAMZAH BIN ARSHAD**

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**GROUND OF JUDGMENT**

**INTRODUCTION**

(1) Sunday, 9 December 2007 was World Human Rights Day. On this day, a small group had gathered in front of a restaurant along Jalan Tuanku Abdul Rahman, Kuala Lumpur. The seven accused persons, of whom three are advocates and solicitors, were part of this group. They were arrested and have been charged for participating in an unlawful assembly.

**THE CHARGES**

(2) The charges framed against each of the seven accused persons reads as follows:

**PERTUDUHAN PERTAMA**

*“Bahawa kamu bersama-sama pada 9 Disember 2007 di antara jam lebih kurang 8.10 pagi dan 8.50 pagi di hadapan bangunan KAMDAR di Jalan Tuanku Abdul Rahman, Daerah Dang Wangi, dalam Bandaraya Kuala Lumpur, di Wilayah Persekutuan Kuala Lumpur, sebagai ahli perhimpunan yang menyalahi undang-undang, yang mana tujuan perhimpunan itu ialah melakukan mudarat awam (public nuisance) dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 143 Kanun Keseksaan.”*

**PERTUDUHAN PILIHAN**

*“Bahawa kamu pada 9 Disember 2007 di antara jam lebih kurang 8.10 pagi dan 8.50 pagi di hadapan bangunan KAMDAR di Jalan Tuanku Abdul Rahman, Daerah Dang Wangi, dalam Bandaraya Kuala Lumpur, di Wilayah Persekutuan Kuala Lumpur, telah didapati mengambil bahagian dalam satu perhimpunan yang menyalahi undang-undang, dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 27(5) (a) Akta Polis*

1967 (Akta 334) yang boleh dihukum di bawah seksyen 27(8) Akta yagn sama.”

**PERTUDUHAN KEDUA**

“Bahawa kamu pada 9 Disember 2007 di atrnara jam lebih kurang 8.10 pagi dan 8.50 pagi di hadapan bangunan KAMDAR di jalan Tuanku Abdul Rahman, Daerah Dang Wangi, dalam Bandaraya Kuala Lumpur, di Wilayah Persekutuan Kuala Lumpur, telah terus menyertai perhimpunan yang menyalahi undang-undang dengan mengetahui perhimpunan tersebut telah diarahkan untuk bersurai mengikut kaedah undang-undang dan dengan itu kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 145 Kanun Keseksaan.”

**PERTUDUHAN PILIHAN**

“Bahawa kamu apda 9 Disember 2007 di antara jam lebih kruang 8.10 pagi dan 8.50 pagi di hadapan bangunan KAMDAR di Jalan Tuanu Abdul Rahman, Daerah Dang Wangi, dalam Bandaraya Kuala Lumpur, di Wilayah Persekutuan Kuala Lumpur, sebagai anggota satu perhimpunan yang menyalahi undang-undang telah didapati mengingkari perintah untuk bersurai yang diberikan oleh P/Supt. Che Hamzah bin Hj. Che Ismail dan oleh yang demikian kamu telah melakukan satu kesalahan dibawah seksyen 27(4)

*Akta Polis 1967, dan boleh dihukum dibawah seksyen 27(8) Akta yang sama.”*

(3) To these charges, each of the seven accused persons pleaded not guilty and were jointly tried.

#### **CASE FOR THE PROSECUTION**

(4) The prosecution examined a total of 19 witnesses to establish its case. Except for Datuk Ambiga a/p Sreenevasan (PW16), the then President of the Malaysian Bar Council, the rest were police witnesses.

(5) In support of its case, the prosecution also relied on photographs and video recordings taken at the locus.

(6) The evidence disclosed that on the morning in question, a large police presence of about 200 officers were deployed to Jalan Tuanku Abdul Rahman in anticipation of a Human Rights Walk that had been planned by a group of lawyers to celebrate World Human Rights Day. Superintendent Hamzah (PW5), the then Acting OCPD of Dang Wangi Police Station, was the Ground Commander in charge of the operations at the locus. As the Ground Commander, he was charged with the

responsibility of ensuring that public order and public security were not threatened or disrupted by the group.

(7) At around 7 a.m., people slowly started to trickle in and assemble at the public footpath in front of the Siddique Restaurant, opposite the Sogo Building. There were lawyers and members of the public in this group. Even some young children were present. The group reached about 100 in number not long thereafter. Some of the people in the group wore surgical masks whilst a few were carrying cardboard placards.

(8) At about 8 a.m., Latheefa (Accused No. 5), N. Surendran (Accused No. 6) and one Selvam, approached Supt. Hamzah for permission for the group to walk to the Bar Council Building using the public footpath along Jalan Tuanku Abdul Rahman. In response to this express request, Supt. Hamzah granted the group the permission to walk to the Bar Council Building, a short distance away.

(9) Upon being granted the requisite permission, the group commenced their walk to the Bar Council Building. A banner was unfurled and the persons carrying the banner led the group in the direction of the Bar Council Building. The message on the banner in

English stated "LAWYERS FOR FREEDOM OF ASSEMBLY BERSAMA RAKYAT!".

(10) Along the way, before the group reached the Bar Council Building, in front of the Kamdar building, Supt. Hamzah countermanded his earlier permission and ordered the group to disperse in 10 minutes. The group continued to walk when the order was given and when they reached the CIMB Bank, the accused persons were arrested despite Latheefa's protestations that they were willing to disperse although the 10 minutes given by Supt. Hamzah to disperse had not expired.

(11) Upon arrest, the accused persons went peacefully with the police to IPK, Kuala Lumpur. Throughout the entire incident, i.e from the beginning of the walk until the time they were arrested, the police did not have any cause to exert any force or even to expend any physical effort to control the group or to take the accused persons into custody.

#### **INGREDIENTS TO BE PROVEN**

(12) Both the prosecution and the defence are in agreement as to the ingredients that have to be proven to establish the charges.

(13) For the principal charges, the ingredients to be proven are:

**Section 143 Penal Code**

- i. That the assembly in question consisted of five or more person;
- ii. That the object of the persons assembled (either at the time it became an assembly, or during the time that it continued to be assembled) was to commit a public nuisance;
- iii. That such object was common to the persons assembled;
- iv. That the accused joined, or continued, in such assembly;
- v. That he did so intentionally; and
- vi. That he did so being aware of the above facts.

**Section 145 Penal Code**

- i. the above ingredients (i) to (vi);
- ii: That such unlawful assembly had been commanded to disperse;
- iii: That such command to disperse was in the manner prescribed by law;
- iv. That the accused joined or continued in such unlawful assembly after it had been commanded to disperse;
- v. that the accused did so, knowing that it had been commanded to disperse.

(14) As for the alternative charges, the ingredients are:

**Section 27(5) (a) Police Act**

- i. There is an assembly or gathering or the coming together of three persons or more in public place;
- ii. Such assembly or gathering is a convened or organized event as distinguished from a spontaneous gathering of persons for a lawful object;
- iii. No licence has been issued under section 27(2) by the OCPD for such assembly; and
- iv. Each of the persons charged knew that he is taking part in an assembly, meeting etc. that is being convened or organized without a licence.

**Section 27(4) Police Act**

- i. the above ingredients (i) to (iv);
- ii. That such unlawful assembly had been commanded to disperse;
- iii. That such command to disperse was in the manner prescribed by law;
- iv. That the accused joined or continued in such unlawful assembly after it had been commanded to disperse;
- v. That the accused did so, knowing that it had been commanded to disperse.



(15) The defence does not dispute that the evidence proves there was an assembly and the accused persons were members of this assembly. The defence however takes issue on two points, namely, first, that this was an unlawful assembly and secondly, that the order to disperse was disobeyed.

**1) WHETHER ASSEMBLY UNLAWFUL**

(16) It is pertinent to note that according to the charges as framed, the locus at which the offences are alleged to have been committed is the front of the Kamdar building. The question the court has to determine therefore is whether the assembly was unlawful at this locus.

(17) The prosecution contends that it was unlawful on two grounds. First, it is said that there was a failure to comply with section 27(2) of the Police Act and, in the alternative, the group had violated the permission given by Supt. Hamzah. The second is based on the common object of the assembly on the day of the incident.

**A. Section 27(2) Police Act**

(18) The prosecution relies on section 27(2) and (5) of the Police Act to argue that the assembly was unlawful because no licence in writing had

been issued by the OCPD of Dang Wangi Police Station as provided by the section. These provisions read as follows:

**27(2)** *Any person intending to convene or collect any assembly or meeting or to form a procession in any public place afore said, shall before conveying, collecting or forming such assembly, meeting or procession make to the Officer-in-charge of the Police District in which such assembly, meeting or procession is to be held an application for a licence in that behalf, and if such police officer is satisfied that the assembly, meeting or procession is not likely to be prejudicial to the interest of the security of Malaysia or any part thereof or to excite a disturbance of the peace, he shall issue a licence in such form as may be prescribed specifying the name of the licensee and defining the conditions upon which such assembly meeting or procession is permitted.”*

**27(5)** *Any assembly, meeting or procession –*

- (a) which takes place without a licence issued under subsection (2) or*
- (b) in which three or more persons taking part neglect or refuse to obey any order given under the provisions of subsection (1) or subsection (3),*

*shall be deemed to be an unlawful assembly, and all persons attending, found at or taking part in such assembly, meeting or procession and, in the case of an assembly, meeting or procession for which no licence has been issued, all persons taking part or concerned in convening, collecting or directing such assembly, meeting or procession, shall be guilty of an offence.*

(19) With regard to this submission, it is true that no permit had been applied by the group for an assembly to be convened or to hold a procession. However, Supt. Hamzah clarified in his evidence that notwithstanding the non-application for a permit, he as the Ground Commander of the operation, had given unconditional permission for the group to walk to the Bar Council building. In his evidence in examination-in-chief he explained as follows.

**“Mereka datang jumpa saya untuk dapat izin untuk berjalan dari Restoran ke Bar Council atas kaki lima. Saya benarkan mereka jalan ...”**

And in cross-examination, he explained further that:

"Saya setuju masa itu tiada keraguan siapa kumpulan ini. Masa itu fahaman saya jalan maksud ialah untuk beri peluang gerak ke tempat yang hendak dituju. Ini hak mereka dan tidak ganggu lalu lintas dan keteteraman awam. Sebagai Ground Commander saya beri kebenaran ikut Akta Polis . . . .

Kuasa diberi ikut section 27(1). Masa itu saya tiada apa-apa surat. Sebagai Ground Commander saya beri kebenaran pada kumpulan. Ground Commander tugas untuk jaga public order dan keselamatan dan lalu lintas . . .

I gave them consent I agree I was the police officer representing the state at the time and had the sole authority to decide . . .

As Ground Commander at the time, I knew the state of security at Jalan Tuanku Abdul Rahman. I was aware of this at the time of giving my consent. I agree the group acted on my consent and walked . . .

Puan Latheefa boleh jalan tanpa beri apa-apa syarat."

(20) In dealing with the permission granted by Supt. Hamzah, the deputy public prosecutor dissociates herself from the view expressed by Supt. Hamzah that he had the power under section 27 of the Police Act

to give permission to the group to walk. She contends that his permission cannot amount to a licence within the meaning of section 27(2) of the Police Act as only a licence in writing is valid under this section.

(21) It is clear from a plain and simple reading of section 27 of the Police Act, that the object of this provision is to give senior police officers the power to control and direct the conduct of assemblies, meetings and processions as guardians of public security and public order. (See *Cheah Beng Poh & Ors v. PP* (1984)2 MLJ 225). In this content, it is imperative to note that the police officer who gave the assembly permission to walk on the day of the incident, was not a junior officer but the Ground Commander cum Acting OCPD of Dang Wangi Police Station. Next, and crucially, Supt. Hamzah as the Ground Commander was aware that the group did not have a permit to walk to the Bar Council but nevertheless authorised it. In my judgment, the oral permission granted by Supt. Hamzah, was, consequently, sufficient to meet and satisfy the requirements of section 27(2) of the Police Act. The police cannot renege and be seen to approve and reject at the same time, quod approbo non reprobo. I regard the conclusion which I have arrived as not only desirable but necessary to ensure that the Malaysian Police Force continues to command the respect, faith, trust and confidence of the public.

**B. NATURE OF PERMISSION GIVEN**

(22) The prosecutions next submits in the alternative, that if the permission granted by Supt. Hamzah tantamounts to a licence under Police Act, the said permission was violated when the accused persons formed a procession. It is said that the only permission that was given by Supt. Hamzah was for the group to walk and not to form a procession by walking in a formation as a group in an orderly fashion bearing banners and placards.

(23) As noted earlier, Supt. Hamzah in his evidence expressly stated that he imposed no conditions when he granted the group permission to walk from the Siddique Restaurant to the Bar Council building. He did not proffer an explanation for this omission. It cannot be gainsaid that from the early hours of the morning, he would have monitored and observed the group and based on this observation, he would have made the decision to give them unconditional permission to walk to the Bar Council building. It is unlikely that it would have missed his attention that there were about 100 people in front of the restaurant, and that some of these people wore surgical masks whilst others were holding placards. Yet, he did not think it was necessary to prohibit them from carrying or displaying those banners and placards. Nor did he order them to break up and walk in small groups. Equally, he did not tell them not to walk on the road.

(24) In the light of the foregoing, it is difficult to accept the prosecution's submission that the permission granted by Supt. Hamzah was for the group to walk in small groups on the footpath without banners and placards.

**C. WHETHER THERE WAS A COMMON OBJECT TO COMMIT PUBLIC NUISANCE**

(25) Section 141 of the Penal Code provides as follows:

**141. Unlawful assembly.**

An assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is

- (a) To overawe by criminal force, or show of criminal force, the Legislative or Executive Government of Malaysia or any State, or any public servant in the exercise of the lawful power of such public servant;
- (b) to resist the execution of any law, or of any legal process;
- (c) to commit any mischief or criminal trespass, or other offence;
- (d) by means of criminal force, or show of criminal force, to any person, to take or obtain possession of any

property, or to deprive any person of the enjoyment of a right of way, or of use of water or other incorporeal right of which he is in possessions or enjoyment, or to enforce any right of supposed right; or

- (e) by means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

(26) As previously noted, the charge against the accused persons is that they were members of an unlawful assembly the common object of which was to commit the offence of public nuisance under section 268 of the Penal Code. Section 268 is in these terms:

**268. Public nuisance.**

- (1) A person is guilty of a public nuisance, which does any act, or is guilty of an illegal omission, which causes any common injury, danger, or annoyance to the public, or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger, or annoyance to persons who may have occasion to use any public right.



- (2) A common nuisance is not excused on the ground that it causes some convenience or advantage.

(27) The essence of the prosecution's submission is that the acts of the accused persons in walking along the footpath and on the road of Jalan Tuanku Abdul Rahman and Jalan Tun Perak were acts that would have necessarily caused obstruction, danger or annoyance to the persons who may have wanted to use these two roads.

(28) Judicial notice can be taken of the fact that Jalan Tuanku Abdul Rahman and Jalan Tun Perak are notoriously crowded with pedestrian and vehicular traffic on most days save for the early hours of Sundays and public holidays. It is clear from the photographs and video recordings that this was not the scenario on this Sunday morning. There was minimal traffic and most of the shops along Jalan Tuanku Abdul Rahman were still closed at this time. The walk did not cause any obstruction to pedestrian or vehicular traffic as police were not required to put up road blocks or to divert traffic or deal with incidents of breach of peace as a result of the group walking along Jalan Tuanku Abdul Rahman. There was no evidence of anyone being in danger or annoyed by what was going on. Further, it is clear from the video recordings that the group did in fact keep close to the edge of the road when they started to walk on the road.

(29) Based on the foregoing background, I am unable to concur with the prosecution that the acts of the accused persons amounted to public nuisance.

**WHETHER THE POLICE ORDER TO DISPERSE WAS DISOBEYED**

(30) I now turn to deal with the question whether the prosecution has proven that the accused persons had disobeyed the order to disperse.

(31) It is evident from the video recording of the incident, that when the group was in the vicinity of Kamdar Building, they were neither confrontational in their conduct or dealings with the police nor predisposed to violence. This accords with and explains why Supt. Hamzah gave them 10 minutes to disperse.

(32) It would be appropriate at this juncture to reproduce what Supt. Hamzah said in evidence as regards the order to disperse:-

**“Tak pasti pukul berapa OKT-OKT ditangkap.**

**Tak setuju mereka ditangkap sebelum 10 minit tamat.**

**Jam lebih kurang 8.00 pagi, saya beri amaran bersurai. Tak lihat jam saya masa itu.**

Saya tak pasti pukul berapa arahan tangkapan diberikan.

Tak setuju adalah salah untuk buat tangkapan sebelum the 10 minutes is up.

Kalau kesalahan masih dilakukan dalam tempoh 10 minit itu, tangkapan boleh dibuat. Tempoh masa tidak penting.

(shown IDD9J).

Tidak tahu apa perbincangan di 'J1 dan J2.'

Saya tak tahu jika DSP telah benarkan mereka disperse.

Saya tak pasti jika Latheefa ada beritahu DSP ini they were not able to disperse because they were being blocked by police officers.

Lepas tangkapan dibuat, saya ada cakap dengan DSP. He was the arresting officer.

Dia ada beritahu ada discussion antara dia dengan Latheefa. Dia kata ada.

Argument tentang masa 10 minit untuk bersurai. Setuju DSP ada beritahu yang Latheefa ada complaint tak dapat bersurai kerana di halang oleh polis."

(33) The prosecution submits that the order to disperse was disobeyed when the accused persons failed to disperse and continued with the walk. This submission, in my judgment, tantamounts to saying that the order given by Supt. Hamzah was for the group to disperse forthwith. But, that was not the order given by Supt. Hamzah. He had given the group 10 minutes to disperse.

(34) In addition, by informing the group that they had 10 minutes to disperse, Supt. Hamzah had created a reasonable or legitimate expectation in the minds of the accused person that the assembly would become unlawful only if they failed to disperse within 10 minutes. I therefore am unable to agree with the prosecution that the fact the group continued to walk was an indication that they had chosen to ignore the order to disperse.

(35) In my view, the accused persons can only be said to have disobeyed the order to disperse, after the lapse of the 10 minutes grace period given by Supt. Hamzah. It is therefore incumbent on the prosecution to prove that the accused persons were arrested after the lapse of the 10 minutes deadline given by Supt. Hamzah.

(36) In this connection, Supt. Hamzah's was commendably frank and honest when he admitted that he does not know if the order to arrest was

given after expiry of the 10 minutes. In the absence of any other evidence to the contrary from any of the prosecution witness to show that the accused persons were arrested after the lapse of the 10 minutes grace period, in my judgment, it cannot be said that the accused persons had disobeyed the order to disperse.

### **CONCLUSIONS**

(37) For the reasons given here, I find that the prosecution has failed to establish a prima facie case on both the principal and alternative charges. All accused persons are, accordingly, acquitted and discharged of the principal and alternative charges.

**SALINAN DIAKUI SAH**

  
**(S.M KOMATHY SUPPIAH)**

**Hakim**

**Mahkamah Sesyen Jenayah 1  
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