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)

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

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)-291-12/2021

Between

Dato' Sri Mohd Najib bin Hj Abd Razak … Appellant

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).

[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.

(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:

"**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.

(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*";

(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.

[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

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.

[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

Reasonable Diligence

[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.

[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

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.".

Relevancy

[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

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?

[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.

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.

[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.

[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.