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PP v. SUDESH RATNARAJAH & ORS

COURT OF APPEAL, PUTRAJAYA
SURAYA OTHMAN JCA
ABU BAKAR JAIS JCA
AHMAD NASFY YASIN JCA
B [CRIMINAL APPEAL NO: W-05-234-05-2019]
26 MARCH 2021

CRIMINAL PROCEDURE: *Forfeiture – Principles governing – Notice to third parties under s. 61(1) of Anti-Money Laundering, Anti-Terrorism Financing and*
C *Proceeds of Unlawful Activities Act 2001 ('AMLATFPUA') – Application for representative action and return of forfeited monies – Whether all requirements under s. 61(4)(a) to (e) of AMLATFPUA have to be fulfilled – Whether court to scrutinise and determine nature and extent of interest of each individual person – Whether representative action ought to be allowed*

D ***JURISDICTION:*** *Courts – Court of Appeal – Criminal appeal related to criminal application at High Court – Whether Court of Appeal given wide discretion to make any order – Whether case could be remitted to High Court to be concluded – Guiding principles in remission of case – Whether based on nature of misdirection and/or omission by court below – Courts of Judicature Act 1964, s. 69*

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The Public Prosecutor ('PP') commenced an action, following which the High Court directed for notice to be issued to third parties to be gazetted under s. 61(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('AMLATFPUA'). The
F respondent, as a third party in the High Court, filed an application, praying, *inter alia*, that the respondent be allowed to represent 78 persons, annexed as Annexure A to the application. The respondent also prayed for a sum of RM1,112,700 from the sum of RM2,200,000 seized, be returned to the respondent and the persons stated in Annexure A. At the High Court, three applications were heard together, including the respondent's application. As
G regards the application by the respondent, representing 78 other persons, the High Court allowed the application on the ground that the respondent and the persons he represented had fulfilled the requirements in s. 61(4)(a) and (b) of the AMLATFPUA. In addition, the trial judge held that the requirements of paras. (c), (d) and (e) of s. 61(4) of the AMLATFPUA do
H not apply to the respondent and the persons he represented, in the circumstances of the particular case. The PP raised a preliminary objection that, in so far as the application by the respondent purported to be fashioned as a representative action, it was flawed and the application must fail on that score alone. However, the objection was dismissed. The PP appealed and
I against the decision allowing the respondent's application, the PP reiterated that the procedural objection on the maintainability of the application by the respondent, in so far as it purported to be fashioned as a representative action, was flawed and on that score alone, the application must fail.

Held (remitting matter to High Court with additional order)
Per Ahmad Nasfy Yasin JCA delivering the judgment of the court:

(1) The nature of the forfeiture proceeding under s. 56 of the AMLATFPUA, is a civil forfeiture and not criminal and there was no rhyme nor reason to disallow a representative action in a proceeding under s. 56 of the AMLATFPUA. A representative procedure is especially suitable in s. 56 as it will achieve the objective of saving judicial time and that will also be in accord with the concept of access to justice as enunciated in arts. 5 and 8 of the Federal Constitution. However, this could not be construed to mean that the High Court hearing the application under s. 61 of the AMLATFPUA made in a representative action is relieved of the obligation to scrutinise and determine the nature and extent of the interest of each individual person claiming to have a common interest and cause. In the present case, there was common interest over the money claimed, although each of the person claimed a different amount thereof; there was a common grievance and the relief sought would be beneficial to all of them. Thus, the conditions set out in the catena of cases dealing with representative actions had been met. (paras 9, 12 &17)

(2) The High Court had made a finding in paragraphs under s. 61(4)(a) and (b) of the AMLATFPUA. However, the High Court had not made any finding on whether the respondent had fulfilled the paragraphs under s. 61(4)(c), (d) and (e). In short, the examination and exercise that should have been undertaken by the judge was incomplete. Given that the judge had misdirected himself on the law, the matter was ordered to be remitted to the High Court for the judge to make a determination, based on the evidence, whether the respondent and the persons in Appendix A had fulfilled all the requirements in the paragraphs under s. 61(4) of the AMLATFPUA. This was so since all the requirements in s. 61(4)(a) to (e) has to be fulfilled before the property could be returned to the respondent and the persons in Appendix A. It was only appropriate in the circumstances of this case that the judge complete the exercise and made its findings on paras. 61(4)(c), (d) and (e). (paras 24 & 25)

(3) The court had exercised the power rooted on the provisions of the Courts of Judicature Act 1964 ('CJA') and s. 69 has been interpreted by the Court of Appeal as giving ample power to the court to make appropriate orders. The appeal was registered as a criminal appeal as it was related to a criminal application moved at the High Court. Section 69(4) invests the power on the Court of Appeal to: (i) make any order which ought to have been given or made; (ii) make any order as the case requires. Further, both ss. 60 and 69 of the CJA contained similar

phraseology or formula, *ie*, (i) in s. 60 – 'make such other order in the matter as to it may seem just'; and (ii) in s. 69 – 'make any order as the case requires'. Thus, the Court of Appeal in hearing either a civil or criminal appeal, possesses wide discretion, as circumstances dictates, to remit the matter to the High Court to conclude the hearing of the case, which includes writing a supplemental ground in an appropriate case. (paras 26, 27 & 31-35)

(4) The guiding principles upon which an order would be made to remit the matter to the lower court would be the nature of the misdirection and/or omission made by the court below. This case was remitted to the High Court with a direction for the judge to determine whether s. 61(4)(c), (d) and (e) of the AMLATFPUA has been fulfilled by the respondent. If the judge was satisfied that all the five requirements were fulfilled, the High Court shall return the sum of RM1,112,700 to the respondent. However, if paras. (c), (d) and (e) are not fulfilled, then the sum claimed by the respondent shall be forfeited to the Government. (paras 36 & 37)

Case(s) referred to:

Bedford (Duke) v. Ellis [1901] AC 1 ***(refd)***

BSNC Leasing Sdn Bhd v. Sabah Shipyard Sdn Bhd & Ors & Another Appeal [2000] 2 CLJ 197 CA ***(refd)***

EL Chong Motor Trading Sdn Bhd lwn. PP [2017] 3 CLJ 592 HC ***(refd)***

Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v. Awang Soh Mamat & Ors [2009] 5 CLJ 1 CA ***(refd)***

Lim Choon Seng v. Lim Poh Kwee [2020] 9 CLJ 1 FC ***(dist)***

Malayan Banking Bhd v. Chairman Sarawak Housing Developers' Association [2014] 6 CLJ 409 FC ***(refd)***

PP v. Amar Asyraf Zolkepli; Public Islamic Bank Bhd (Third Party); Messrs Wan Shahrizal, Hari & Co (Intervener) [2021] 1 CLJ 843 CA ***(refd)***

PP v. Awalluddin Sham Bokhari [2018] 1 CLJ 305 FC ***(refd)***

PP v. Hanif Basree Abdul Rahman [2007] 2 CLJ 33 CA ***(refd)***

PP v. Kuala Dimensi Sdn Bhd & Ors [2019] 3 CLJ 650 CA ***(refd)***

PP v. Lau Kwai Thong (MTSA Kes No: 44-20-2008) (Unreported) ***(refd)***

PP lwn. Raja Noor Asma Raja Harun [2013] 5 CLJ 656 HC ***(refd)***

PP v. Rungit Singh Jaswant Singh (Mahkamah Rayuan Rayuan Jenayah No: P-05-60-98) (Unreported) ***(refd)***

Superintendent Of Lands & Surveys, Bintulu & Anor v. Agi Bungkong & Ors [2012] 6 CLJ 823 CA ***(refd)***

Teh Tek Soon lwn. PP [2015] 1 LNS 1504 CA ***(refd)***

Tengku Abdullah Ibni Sultan Abu Bakar & Ors v. Mohd Latiff Shah Mohd & Ors & Other Appeals [1997] 2 CLJ 607 CA ***(refd)***

Vellasamy Pennusamy & Ors v. Gurbachan Singh Bagawan Singh & Ors [2012] 2 CLJ 712 CA ***(refd)***

Legislation referred to:

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, ss. 56, 61(1), (4)(a), (b), (c), (d), (e)
Courts of Judicature Act 1964, ss. 60, 69(4)
Federal Constitution, arts. 5, 8
Rules of the Court of Appeal 1994, O. 76

For the appellant - Faizah Salleh; DPP
For the respondent - Ravi Nekoo & Parvinder Kaur; M/s Hakem Arabi & Assocs

Reported by S Barathi

JUDGMENT

Ahmad Nasfy Yasin JCA:

Introduction

[1] This is yet another case arising from the menace of money laundering. In essence it is a conflict of claim between the State and third parties. Having heard parties and having read the written submissions in this appeal before us, we were not minded to allow the appeal. Instead, we have, for reasons that will be set out below, found that the matter is a fit and proper case for us to exercise our powers to remit the matter to the High Court with additional order. The Public Prosecutor have now appealed against our order. The following are our grounds for our decision.

[2] The case begun with an application by the Public Prosecutor commencing an action, registered as WA-44-189-12-2017 following which the High Court directed for notice to be issued to third parties to be gazetted under s. 61(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (hereafter referred to as "AMLATFPUA" or the "Act"). The respondent here, then as a third party in the High Court, filed an application, registered as Criminal Application, WA-44-126-08-2018 praying, *inter alia*, first, that the respondent be allowed to represent 78 persons, annexed as Annexure A to the application. Secondly, the respondent prayed for a sum of RM1,112,700 from the sum of RM2,200,000 seized, be returned to the respondent and the persons stated in Annexure A. In short, they have applied for a relief against the forfeiture of the money on the basis that they have been taken for a good ride by the person who had persuaded them to part with the money in the first place. Their grievance is common: they are all victims of a financial scam under the guise of that trendy word "forex" which lends a debonair and cosmopolitan air to the scam. Only that they learnt of it too late in the day. Promises of lofty profits came to naught.

The Proceeding At The High Court

[3] At the High Court three applications were heard together as follows:

(i) the application by the respondent, representing 78 other persons - WA-44-126-08-2018;

A (ii) the seventh respondent in the Public Prosecutor's application in WA-44-189-12-2017 seeking to resist the forfeiture of a motor vehicle Honda City 1.5L, I-VTEC bearing registration number NCT 5512 registered under the name of the seventh respondent;

B (iii) the application by Maybank Islamic Bhd's ("Maybank") application registered as WA-44-148-09-2018 staking a claim on a motor vehicle Toyota Vellfire DBA-AGH30W(A) bearing registration number WS 8822 A registered under the name of Zaripah binti Zainudin (the fifth respondent in the Public Prosecutor's application).

C **[4]** The learned judge arrived at the following decision in respect of the applications:

(i) that the Public Prosecutor's application (in WA-44-189-12-2017) against the seventh respondent was dismissed on the ground that the Public Prosecutor had failed to prove its case against the seventh D respondent, on the balance of probabilities;

(ii) allowing the application by Maybank WA-44-148-09-2018 as Maybank had fulfilled the requirements in s. 61(4)(a) to (e) of the Act.

(iii) allowing the application by the respondent, representing 78 other persons – WA-44-126-08-2018 on ground that the respondent and the E persons he represented have fulfilled the requirements in s. 61(4)(a) and (b) of the Act. In addition, the learned judge held that the requirements of paras. (c), (d) and (e) of s. 61(4) of the Act do not apply to the respondent and the persons he represented, in the circumstances of the particular case – see para. 54 of the grounds of judgment.

F **[5]** It is to be noted that the application by the respondent was met with a procedural objection by the Public Prosecutor; that the procedure involving the change of solicitors were irregular and that has a determinative impact and for that reason alone the application is infirmed and must stand dismissed. That technical argument, was rightly in our view, rejected.

G **[6]** A preliminary objection was also raised that in so far as the application by the respondent purports to be fashioned as a representative action, it is flawed and, on that score alone, the application must fail. That objection did not impress the learned judge and was dismissed.

H **The Proceedings In The Court Of Appeal**

[7] Against the decisions of the High Court, the Public Prosecutor appealed. It came before us. We heard arguments.

[8] In respect of the decision in WA-44-126-08-2018 whereby the I respondent's application was allowed, the Public Prosecutor now reiterates the procedural objection on the maintainability of the application by the respondent in so far as it purports to be fashioned as a representative action; it is flawed and on that score alone, the application must fail. In support of

this objection, it was canvassed that a representative action is confined in civil cases and since the entire proceeding in the High Court is in the nature of "*quasi*-criminal", a representative procedure is inapplicable. This is further fortified by the fact that Rules of the Court 2012 which contained provisions on representative action has no application in the proceeding before the High Court. In short, in the absence of a permissible provision, no such procedure could be employed or resorted to. It was also sought to be impressed upon us that a representative action is akin to a "test case" and that the case of *Lim Choon Seng v. Lim Poh Kwee* [2020] 9 CLJ 1 will apply to the facts of the present appeal to deny the respondent of a representative action. It was also submitted that a representative procedure is proscribed impliedly by s. 61 as any applicant making a claim must appear physically before the court and that each and every applicant must state the nature of his claim and the court must satisfy itself that each applicant is entitled to his claim and that this objective cannot be achieved in a representative action. Alternatively, it was argued that the respondent herein had not fulfilled all the legal requirements of a representative action and cited the decision of this court in *Vellasamy Pennusamy & Ors v. Gurbachan Singh Bagawan Singh & Ors* [2012] 2 CLJ 712.

[9] With respect, we are unable to agree with the submissions of the Public Prosecutor. On the nature of the forfeiture proceeding under s. 56 of the Act, in our judgment, it is a civil forfeiture and not a criminal one. This is clear from the standard of proof required at the proceeding. On this issue the Federal Court in *PP v. Awalluddin Sham Bokhari* [2018] 1 CLJ 305; [2018] 2 MLJ 401 had stated thus:

> [31] In an application for an order of forfeiture of property under s. 56(1) where there is no prosecution, the standard of proof to determine whether the property has been obtained as a result of or in connection with an offence under s. 4(1) is the standard of proof required in civil proceedings: See s. 56(4) of the Act. Any question of fact to be decided by the court in proceedings under the Act shall be decided on the balance of probabilities: See s. 70(1) of the Act.

[10] This court in *PP v. Kuala Dimensi Sdn Bhd & Ors* [2019] 3 CLJ 650; [2018] 6 MLJ 37 had occasion to state as follows:

> [135] Further, the forfeiture proceeding under s. 56 is a civil forfeiture proceeding as stated in ss. 56(4) and 70(1) of the AMLATFA where the standard of proof is on a balance of probabilities. We do not see any prejudice arising as a result of the usage of affidavit evidence because all parties are given the opportunity to rebut any allegations made and also to disclose whatever evidence necessary in support of their necessary contentions.
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> [136] In perusing the AMLATFA, it does not disclose in what manner affidavit evidence is to be governed and used in a s. 56 application. The CPC is also silent on this except the fact that affidavit evidence may be used as per s. 424 of the CPC.

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> [137] This being the case, reference would have to be made to O. 41 of the Rules of Court 2012 [PU(A) 205/2012] (ROC 2012). Although this law governs civil proceedings, it is applicable in a forfeiture application such as this. This is especially so as forfeiture proceeding under s. 56 is a civil forfeiture proceeding.

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> [138] Accordingly, we are of the view that any affidavit intending to be used in a s. 56 application must comply in terms of form and substance with O. 41 of the ROC 2012.

(See also *PP lwn. Raja Noor Asma Raja Harun* [2013] 5 CLJ 656; [2013] 9 MLJ 181).

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[11] Therefore the submission which seems to suggest that the entire Rules of Court 2012 has no application in a proceeding under s. 56 of the Act is clearly misconceived. We must hasten to add that accordingly too, there is no rhyme nor reason to disallow a representative action in a proceeding under s. 56 of the Act. It bears mention that a representative action was an

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invention of the Court of Chancery. On the requirement of physical presence, the following words of Lord Macnaghten spoken in *Bedford (Duke) v. Ellis* [1901] AC 1 would provide the complete answer to the argument of the Public Prosecutor:

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> The old rule in the Court of Chancery was very simple and perfectly well understood. Under the old practice the Court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could "come at justice", to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience: for

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> the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.

[12] We would like to add that a representative procedure is especially suitable in s. 56 as it will achieve the objective of saving the judicial time

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and that will also be in accord with the concept of access to justice as enunciated in arts. 5 and 8 of the Federal Constitution.

[13] We have carefully directed our attention to the case of *Lim Choon Seng* (*supra*) relied on by the Public Prosecutor. With respect, the reliance on that case is grossly misconceived. There, a total of 37 suits were filed in the High

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Court and that pursuant to an agreement between the parties, a test case was tried resulting in a judgment which binds all other 36 suits. On this issue, the Federal Court stated:

> [22] What has become clear is that this was not a class action (there was only one plaintiff) ...

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[14] The High Court decided in favour of the plaintiff. A total of 37 judgments were prepared. However only one defendant filed a notice of appeal to the Court of Appeal. That notice merely stated that the defendant

appeals against the decision of the High Court that binds the other 36 suits as well. The Court of Appeal in reversing the High Court held that the other 36 defendants are entitled to take benefit from the reversal of the decision. In the Federal Court the primary issue was whether a single notice of appeal in a test case can operate as a common notice to cover appeal by the other parties. Put it differently, the question is whether a single notice of appeal by a defendant in a suit may put other defendants at the same level although the latter had not filed any notice of appeal. This is how the Federal Court puts it:

> [41] That said, the question remains whether a single notice of appeal filed by the party in the test case can operate as a common notice of appeal to cover appeals by the other parties. In the context of the present appeal, the question is whether the other 36 defendants in the other 36 suits could hitch a ride on the respondent's notice of appeal to pursue their appeals without lodging notices of appeal of their own.

[15] That question was answered in the negative and accordingly the decision of the Court of Appeal was reversed.

[16] We accordingly see no relevance or any connection between that case and the case before us.

[17] We wish to reiterate that what we have stated above cannot be construed to mean that the High Court hearing the application under s. 61 of the Act made in a representative action is relieved of the obligation to scrutinise and determine the nature and extent of the interest of each individual person claiming to have a common interest and cause. In the present case it is germane to state that there is common interest over the money claimed, although each of the person claims a different amount thereof; there is a common grievance and the relief sought will be beneficial to all of them. Thus the conditions set out in the *catena* of cases dealing with representative actions, in our judgment, had been met – *Tengku Abdullah Ibni Sultan Abu Bakar And Ors v. Mohd Latiff Shah Mohd & Ors & Other Appeals* [1997] 2 CLJ 607; [1996] 2 MLJ 265; *Malayan Banking Bhd v. Chairman Sarawak Housing Developers' Association* [2014] 6 CLJ 409; [2014] 5 MLJ 169; and *Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v. Awang Soh Mamat & Ors* [2009] 5 CLJ 1; [2009] 4 MLJ 610.

The Construction Of Section 61(4) Of AMLATFPUAA – Conjunctive Or Disjunctive?

[18] The learned judge in arriving at his decision, as stated above, held that the respondent had satisfied the requirements in s. 61(4)(a) and (b) of the Act and that paras. (c) to (e) of the same sub-section do not apply to the applicant "in the circumstances of the particular case" – see para. 53 of the grounds of judgment.

[19] It is rather unfortunate that quite apart from stating that His Lordship agreed with learned counsel for the applicant, the learned judge had erred in not explaining what those reasons were.

[20] More importantly the net effect of that decision is that the learned judge appears to have decided that paras. (a) to (e) to sub-s. 4 of s. 61 of the Act should be read disjunctively.

[21] That decision in our view is plainly wrong. The learned judge had failed to acquaint himself with the correct decisions of this court which is binding on him.

[22] Section 61 of the Act reads as follows:

> (1) The provisions in this Part shall apply without prejudice to the rights of *bona fide* third parties.
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> (2) The court making the order of forfeiture under subsection 28L(1) or section 55 or the judge to whom an application is made under subsection 28L(2) or 56(1) shall cause to be published a notice in the *Gazette* calling upon any third party who claims to have any interest in the property to attend before the court on the date specified in the notice to show cause as to why the property shall not be forfeited.
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> (3) A third party's lack of good faith may be inferred, by the court or an enforcement agency, from the objective circumstances of the case.
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> (4) The court or enforcement agency shall return the property to the claimant when it is satisfied that:
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> (a) the claimant has a legitimate legal interest in the property;
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> (b) no participation, collusion or involvement with respect to the offence under subsection 4(1) or Part IVA, or a terrorism financing offence which is the object of the proceedings can be imputed to the claimant;
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> (c) the claimant lacked knowledge and was not intentionally ignorant of the illegal use of the property, or if he had knowledge, did not freely consent to its illegal use;
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> (d) the claimant did not acquire any right in the property from a person proceeded against under circumstances that give rise to a reasonable inference that any right was transferred for the purpose of avoiding the eventual subsequent forfeiture of the property; and
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> (e) the claimant did all that could reasonably be expected to prevent the illegal use of the property.

[23] The issue on whether paragraphs in s. 61(4) of the Act have to be read conjunctively or disjunctively had been decided in a number of cases. In an unreported decision in *PP v. Lau Kwai Thong* (MTSA Kes No: 44-20-2008) referred to by Kamardin Hashim J in *PP lwn. Raja Noor Asma Raja Harun* [2013] 5 CLJ 656, Abang Iskandar JC (as His Lordship then was), held that the paragraphs must be read conjunctively. That position stood unchanged

and this court in *Teh Tek Soon lwn. PP* [2015] 1 LNS 1504; [2015] MLJU 2212 affirmed the same. More recently, this court again reiterated the same in *PP v. Amar Asyraf Zolkepli; Public Islamic Bank Bhd (Third Party); Messrs Wan Shahrizal, Hari & Co (Intervener)* [2021] 1 CLJ 843. (See also *EL Chong Motor Trading Sdn Bhd lwn. PP* [2017] 3 CLJ 592; [2017] 11 MLJ 793).

Remitting The Matter To The High Court

[24] Given that the learned judge has misdirected himself on the law, we then made an order for the matter to be remitted to the High Court for the learned judge to make a determination, based on the evidence, whether the respondent and the persons in Appendix A had fulfilled all the requirements in the paragraphs under s. 61(4) of the Act. This is so since all the requirements in s. 61(4)(a) to (e) have to be fulfilled before the property can be returned to the respondent and the persons in Appendix A.

[25] It was submitted by the Public Prosecutor that the proper course that we should have taken was to allow the appeal. With respect we do not agree. The High Court has made a finding in paragraphs under s. 61(4)(a) and (b) which findings we agreed were correct. However, the High Court has not made any finding on whether the respondent had fulfilled the paragraphs under s. 61(4)(c), (d) and (e). In short, the examination and exercise that should have been undertaken by the learned judge was incomplete. It is only appropriate in the circumstances of this case that the learned judge complete the exercise and made its findings on paras. 61(4)(c), (d) and (e) since this court ought not to be the surrogate of that primary task.

[26] We would like to state that we have exercised our power rooted on the provisions of the Courts of Judicature Act 1964.

[27] We are conscious that the appeal herein was registered as a criminal appeal as it relates to a criminal application moved at the High Court.

[28] Section 60 of the Courts of Judicature Act 1964 reads thus:

> (1) At the hearing of an appeal the Court of Appeal shall hear the appellant or his advocate, if he appears, and, if it thinks fit, the respondent or his advocate, if he appears, and may hear the appellant or his advocate in reply, and the Court of Appeal may thereupon confirm, reverse or vary the decision of the High Court, or may order a retrial or may remit the matter with the opinion of the Court of Appeal thereon to the trial court, or may make such other order in the matter as to it may seem just, and may by that order exercise any power which the trial court might have exercised:
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> Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

A (2) At the hearing of an appeal the Court of Appeal may, if it thinks that a different sentence should have been passed, quash the sentence passed, confirmed or varied by the High Court and pass such other sentence warranted in law (whether more or less severe) in substitution therefor as it thinks ought to have been passed.

B (3) The Court of Appeal shall in no case make any order under this section as to payment of costs of any appeal to or by the appellant or respondent.

[29] Section 69(4) of the Courts of Judicature Act 1964, which pertains to the power of this court *vis-à-vis* a civil appeal, reads as follows:

C (4) The Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.

[30] Order 76 of the Rules of the Court of Appeal 1994 in turn reads as follows:

D **Rule 76. Ancillary powers of the Court**

The Court shall exercise, for all purposes incidental to or arising from any application or appeal, all the powers which, under the provisions of any written law in force in the place of trial at first instance, were vested in the trial Judge, whether before, during or after the trial, to the extent that E such powers may be applicable to the circumstances of an application or appeal to the Court.

[31] It is germane to note that, textually, s. 69(4) invests the power on the Court of Appeal to:

F (i) make any order which ought to have been given or made; and

(ii) make any order as the case requires.

[32] Section 69 has been interpreted by the Court of Appeal as giving ample power to the court to make appropriate orders (see *BSNC Leasing Sdn Bhd v. Sabah Shipyard Sdn Bhd & Ors And Another Appeal* [2000] 2 CLJ 197; [2000] G 2 MLJ 70).

[33] In relation to the power to make an order to direct the High Court Judge to write a supplemental ground, the existence of the discretion is not in doubt. This is confirmed by the Court of Appeal in the case of *PP v. Hanif* H *Basree Abdul Rahman* [2007] 2 CLJ 33; [2007] 2 MLJ 320 wherein the court referred to s. 60 of the Courts of Judicature Act 1964 as the basis for that discretion.

[34] It is equally important to state that both s. 60 and s. 69 of the Act contained similar phraseology or formula namely:

I (i) in s. 60 – "make such other order in the matter as to it may seem just"; and

(ii) in s. 69 – "make any order as the case requires".

[35] Thus, the Court of Appeal in hearing either a civil or criminal appeal, in our judgment, possesses wide discretion, as circumstances dictates, to remit the matter to the High Court to conclude the hearing of the case, including to write a supplemental ground in an appropriate case. The Court of Appeal, at least in one instance as alluded to in *PP v. Hanif Basree* (*supra*) had ordered the High Court to write a supplemental ground to enable the Court of Appeal to proceed with the hearing of the criminal appeal – *PP v. Rungit Singh Jaswant Singh* (Mahkamah Rayuan Rayuan Jenayah No: P-05-60-98). The Court of Appeal then stated as follows:

> The case of *Rungit Singh* would seem to show that this court has the power under s. 60(1) of the CJA to make such an order, namely, to order a trial judge to write a supplementary judgment. Be that as it may, we are of the view that such power, which is discretionary, should be sparingly exercised and that would depend on the circumstances of the case and the nature of the omissions in the written grounds of judgment as opposed to what was said in the oral decision pronounced in open court.

[36] In our view, the guiding principles upon which an order would be made to remit the matter to the lower court would be nature of the misdirection and/or omission made by the court below. We also draw support from the case of *Superintendent Of Lands & Surveys, Bintulu & Anor v. Agi Bungkong & Ors* [2012] 6 CLJ 823; [2011] MLJU 794 where this court has ordered the High Court Judge to provide additional judicial grounds to assist the Court of Appeal in evaluating the evidence before the court. The following passage is instructive:

> [65] Sixthly, the learned trial judge referred to 'map M' twice in his main grounds of judgment, that is, as I have pointed out, the first time at the first paragraph of his grounds of judgment and the second time at the concluding part of the same. As this 'map M' is not found in the appeal records (and nor could we obtain a copy of this alleged map either from the parties or from the High Court file) and since there is a dispute between the appellants and the respondents as to whether or not this particular map was appended to the statement of claim as alleged in para 5(b) of the statement of claim, we proposed to all counsel before us that the learned trial judge ought to be given an opportunity to clarify as to whether 'map M' was in fact appended to the statement of claim. All counsel before us agreed to the proposal and hence the court's registrar was directed to write to the secretary of the learned trial judge to request a supplementary grounds of judgment from the learned judge that would shed more light on 'map M', particularly, on the question as to whether the said 'map M' was ever annexed to the statement of claim, since there is a dispute between the parties as to whether the said map was annexed to the statement of claim. The registrar's letter brought to the learned trial judge's attention that the said 'map M' could not be found in the appeal records. The registrar's letter also brought to the attention of the learned trial judge of the fact that although En Baru Bian had informed the appeal court that 'map M' was never tendered as an exhibit to the High Court

during the trial, yet there is still this reference to this 'map M' in the learned trial judge's grounds of judgment and in the sealed order of the court. The learned judge furnished his supplementary grounds of judgment as requested by us. However, with respect, in his supplementary grounds of judgment, the learned judge, unfortunately, does not appear to me to have provided clear answers to the matters sought by the registrar's letter. The supplementary grounds of judgment merely say:

> Pursuant to the direction of the Court of Appeal through a letter ref () dalam MRRS No Q-02-289 of 2003 dated 27 July 2010, I now give my 'Alasan Penghakiman lanjutan' as follows:
>
> > In respect of the plan marked 'M', it is the plan attached to the statement of claim as set out in para 5(b) of the statement of claim wherein it states that plan marked 'M' is attached.
> >
> > For ease of reference, the relevant paragraph of the statement of claim is reproduced as per Appendix A.
> >
> > The defendants also made reference to this map. A copy of the defence of the first, second and third defendants dated 26 September 2001 filed by their advocates is also attached as per Appendix B. A copy of the defence of the fourth & fifth defendants dated 14 September 2001 filed by the legal officer of the state attorney general chambers is hereby attached as Appendix C.

Conclusion

[37] In the upshot, the case is now remitted to the High Court with a direction for the learned judge to determine whether s. 61(4)(c), (d) and (e) has been fulfilled by the respondent. If paras. (c), (d) and (e) are fulfilled, that is the judge is satisfied that all the five requirements are fulfilled, the High Court shall return the sum of RM1,112,700 to the respondent. However, if paras. (c), (d) and (e) are not fulfilled, then the sum of RM1,112,700 claimed by the respondent shall be forfeited to the Government.

[38] The appeal is therefore disposed in those terms as set out above. We so order.