DISCLOSURE OF DOCUMENTS

Gurbachan Singh v. *Public Prosecutor* [1]

It is interesting to note that until 1966, no case had arisen in Malaysia or Singapore dealing with the problem of disclosure of documents in a criminal action. *Gurbachan Singh* v. *P.P.* is the first case in which the problem has been squarely raised but it is disappointing to note that the decision was decided *per incuriam* — without any reference to the Evidence Ordinance.

The relevant facts of the case are as follows: the appellant had been convicted on a charge under the Prevention of Corruption Act, 1961.[2] On the hearing of the appeal the appellant sought to introduce further evidence for the admission of a police inquiry paper. The Minister of Home Affairs issued a certificate [3] objecting to the production of the file claiming that the objection was merely on grounds of principle.

The issue of the cases was clearly stated by Yong J. as follows: [4]

> The question which this court has now to decide is this: In cases where the Minister claims privilege over a class of documents, can the court in view of the Minister's certificate claiming privilege, inspect the file in order to ascertain whether in point of substance, its production in court would be injurious to the public interest. The better opinion of the legal authorities shows that it could in cases where the Minister's claim for privilege was over a class of documents.

8. See *Attorney-General* v. *Homer* (1884) 14 Q.B.D. 246, *per* Brett M.R. at p. 257.

* Final Year Law Student, University of Singapore.

1. [1966] 2 M.L.J. 125.
2. Act No. 42 of 1961.
3. It should be noted that the Minister did not file any affidavit in support of his claim for privilege.
4. [1966] 2 M.L.J. 125 at p. 127.

He then quoted Lord Denning M.R. in *Re Grosvenor Hotel London,*[5] where the learned judge held that the Court could if it thought fit call for the documents and inspect them itself and see whether there were reasonable grounds for withholding them.

Yong J. then concluded by saying: [6]

> . . . after careful consideration of the contents of the file, this court has come to the conclusion that they do not substantially relate to affairs Of state nor do they give any reasonable ground for believing that the production of the file would be injurious to the public interests. This court therefore orders its production.

The main criticism of the judgment is that the learned judge decided the case without reference to the Evidence Ordinance[7] which is the governing statute. He had instead applied English common law principles which are quite different from the provisions of the Evidence Ordinance. The relevant provisions of the Ordinance are sections 123, 124 and 162(2).

Section 123 provides:

> No one shall be permitted to produce any unpublished official records relating to affairs of State, or to give any evidence derived therefrom, except with the permission of the officer at the head of the Department concerned, who shall give or withhold such permission as he thinks fit, subject, however, to the control of the Minister in the case of the Department of the Federal Government and of the Chief Minister in the case of a State.

And section 124 provides:

> No public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interests would suffer by the disclosure.

The main distinction between section 123 and section 124 is illustrated in section 162(2) where it is provided:

> The Court, if it sees fit, may inspect the document unless it refers to affairs of State, or take other evidence to enable it to determine on its admissability.

In other words, the Court can inspect documents falling under section 124 but not under 123.[8] It is therefore necessary for the Court to determine whether the document refers to affairs of state or falls under section 124. Only then can the Court decide whether the claim for privilege is to be upheld or not.

Since the Evidence Ordinance is silent as to how this point is to be determined, it is submitted that the procedure suggested by the Indian Supreme Court should be followed.

The Indian cases [9] have suggested that the Court should first hold a preliminary inquiry. In such an inquiry the Court should look into other evidence. Thus for such a purpose the Minister's affidavit which lays out the grounds of his objection

5. [1964] 3 W.L.R. 992.

6. [1966] 2 M.L.J. 126 at p. 127.

7. No. 11 of 1950 (Federation of Malaya).

8. This is the interpretation given by the Supreme Court of India. See footnote 9. However the Supreme Court of Ceylon in *Danial Appuhamy* v. *Illangaratane,* 66 N.L.R. 97, has he'd that section 162(2) and section 123 are independent sections dealing with different aspects. In other words section 123 is not qualified by section 162(2). This, it is submitted, is not the correct interpretation of the two sections and the interpretation given by the Supreme Court of India is to be preferred.

9. *State of Punjab* v. *S. S. Singh* A.I.R. 1961 S.C. 493; *Amar Chand Butail* v. *Union of India* A.I.R. 1964 S.C. 1658.

for the production of the document is very essential. If the Court is not satisfied with the Minister's affidavit, the Court may call for further affidavits to be filed. From these affidavits the Court should have to determine whether the privilege claimed refers to affairs of state [10] or not.

Difficulties arise when the Minister refuses to state sufficiently the grounds of his objection. In such a case leave should be granted to the other party for the Minister to be called. It should then be open to the other party to cross examine [11] the Minister so as to help the Court to determine the issue.

Thus in the present case what the learned judge should have done was to have asked the Minister to file his affidavit and then to have decided whether the documents fell under sections 123 or 124, only then could he have decided whether the Court could look into the document itself.

The learned judge had instead looked straight into the document and held that it should be disclosed. Though the judge might have been correct in so doing according to the then prevailing opinion of the English judges,[12] he could not have done so under the Evidence Ordinance without first determining the preliminary issue as to whether the Court could look into the document. It would have been interesting to know what the position would have been if the documents in question had related to affairs of state — the learned judge would have done what was prohibited by the Evidence Ordinance.

VISU SINNADURAI*

10. One of the best definitions of "affairs of state" seems to be that given in the Indian case of *Governor-General-in-Council* v. *Peer Mohd.* A.I.R. 1950 Punjab 228, where it was said that the term "affairs of state" consists of three categories, *viz.* (i) matters pertaining to internal security; (ii) national defence; (iii) matters relating to diplomatic relations with foreign countries.

11. *State of Punjab* v. S. S. *Singh supra;* Gross J. in *Re Grosvenor Hotel London,* [1963] 3 W.L.R. 955.

12. *Re Grosvenor Hotel London* [1964] 8 W.L.R. 992; *Merricks* v. *Nott-Bower* [1965] 1 Q.B. 57; *Wedneabury Corporation* v. *Ministry of Housing and Local Government* [1965] 1 W.L.R. 261. It should he noted that this trilogy of cases has since been disapproved in the recent case of *Conway v. Rimmer* [1967] 1 W.L.R, 1031.

* Final Year Law Student, University of Singapore.