

Che Omar bin Che Soh Appellant a

And

Public Prosecutor Respondent b

Wan Jalil bin Wan Abdul Rahman
and
Muhamad bin Embong Appellants c

And

Public Prosecutor Respondent d

Salleh Abas LP
Wan Suleiman SCJ, George Seah SCJ e
16 December 1987; 29 February 1988. Hashim Yeop Sani SCJ, Syed Agil SCJ

Constitutional law—Validity of mandatory death sentence—Whether law in contravention of Islamic principles—Whether valid under Federal Constitution—Dangerous Drugs Act 1952—Firearms (Increased Penalties) Act 1971—Federal Constitution, Articles 3; 162. f

Islamic law—Extent of application in Malaysia—Whether general law in contravention of Islamic principles valid—Secular laws—Validity and extent of application. g

Legal history—Position of Islam prior to Independence—Role of Sultans—Intention of framers of the Constitution as to the extent of application of Islamic law—Malaysia. h

Constitutional law—Position of Rulers—Powers of—Sovereignty of—Muslim law in the States. h

Words and Phrases—‘Islamic religion’—‘Islam’.

The question considered by the Supreme Court in these two appeals was whether the mandatory death sentence for drug trafficking offences under

a the Dangerous Drugs Act 1952 and for offences under the Firearms (Increased Penalties) Act 1971 was unconstitutional as being in contravention of the principles of Islamic law. It was argued that as Islam was the religion of the Federation as stated in Article 3 of the Federal Constitution, any law in Malaysia which contravened the principles of Islamic law was unconstitutional.

b **Held**, dismissing the argument, (1) considering the history of Islam and the legal history of the Federation, it is clear that the framers of the Constitution did not intend that every law in Malaysia should be in accordance with Islamic principles. The provisions of the Constitution cannot be interpreted to mean that any law contrary to Islamic principles will be held to be void. On the contrary, provisions like Article 162 expressly preserve the continuity of secular laws. c

d *Per Salleh Abas LP:* [D]uring the British colonial period, through their legal system of indirect rule and establishment of secular institutions, Islamic law was rendered isolated in a narrow confinement of the law of marriage, divorce and inheritance only... In our view it is within this dichotomy that the framers of the Constitution understood the meaning of the word ‘Islam’ in the context of Article 3. If it had been otherwise, there would have been another provision in the Constitution which would have the effect that any law contrary to the injunction of Islam will be void.

e (2) Article 3 cannot be interpreted to support the argument that the death sentence is unconstitutional and therefore void. Neither could it be said that since Islam is the religion of the Federation or that since Syariah law is applicable in Malaysia, all laws must be in accordance with Islamic or Syariah law.

f *Per Salleh Abas LP:* [T]he standard of justice naturally varies from individual to individual, but the only yardstick that the court will have to accept, apart from our personal feelings, is the law that was legislated by Parliament.

g *Per Salleh Abas LP:* The law in this country is still what it is today, secular law, where morality not accepted by the law does not enjoy the status of the law. Perhaps that argument should be addressed at other forums or at seminars and, perhaps, to politicians and Parliament. Until the law and the system is changed we have no choice but to proceed as we are doing today.

No cases were referred to in the judgment.

Legislation referred to in the judgment:

- Civil Law Act 1956 (Act 67, Revised 1972)
- Dangerous Drugs Act 1952 (Act 234, Revised 1980).
- Firearms (Increased Penalties) Act 1971 (Act 37, Reprint 1980).
- Federal Constitution (Reprint No 1 of 1988), Articles 3(1); 4(1); 164.

Other sources referred to in the judgment:

Abdul A'la Maududi, *The Islamic Law of Constitution*, 7th edition (1980). a

Hooker MB, *Islamic Law in South-east Asia*, (1984).

The Proclamation of Independence.

The Treaty of Pangkor.

Holy Quran.

Appeal:

Supreme Court Criminal Appeals No 28 of 1986 and 29 of 1986 arising from Criminal Trials No 7 and 8 of 1984. The accused, Che Omar bin Che Soh, was charged under the Dangerous Drugs Act 1952 whilst the other two accused in the second appeal were charged under the Firearms (Increased Penalties) Act 1971. The offences for which all three accused were charged carried the mandatory death sentence under the respective Acts. An application to the Supreme Court was made by the accused (appellants) to amend their petition of appeal. c

The following judgment of the Supreme Court delivered by Salleh Abas LP deals with the main argument raised by counsel in both the appeals that the death sentence imposed by the Dangerous Drugs Act 1952 and the Firearms Increased Penalties Act 1971 was unconstitutional and thereby void as being against the principles of Islam. d

S Sivasubramaniam for Che Omar bin Che Soh.

T Mura Raju for Wan Jalil bin Wan Abdul Rahman

Ramdas Tikamdas for Muhamad bin Embong.

Mohd Noor Haji Ahmad, Deputy Public Prosecutor and *Zaini Haji Abdul Rahman*, f

Deputy Public Prosecutor for the respondents.

Their Lordships took time for consideration. g

29 February 1988. The following written judgment of the Supreme Court was delivered by Salleh Abas LP. h

Salleh Abas LP: The additional ground of appeal in Criminal Appeal No 28 and 29 of 1986 seeks to show that a mandatory death sentence for drug trafficking offence under the Dangerous Drugs Act 1952 and for the offence under the Firearms (Increased Penalties) Act 1971 is

against the injunctions of Islam and therefore void. It is argued that since Islam is the religion of the Federation (Article 3(1)), and since the Constitution is the supreme law of the Federation (Article 4(1)), the imposition of death penalty for these offences, not being a *huddud* or *qisas* according to Islamic Law is contrary to Islamic injunction and is therefore unconstitutional.

The first point to consider here is the meaning which could be given to the expression 'Islam' or 'Islamic religion' in Article 3 of the Constitution. If the religion of Islam in the context means only such acts as relate to rituals and ceremonies, the argument has no basis whatsoever. On the other hand, if the religion of Islam or Islam itself is an all-embracing concept, as is normally understood, which consists of not only the ritualistic aspect but also a comprehensive system of life, including its jurisprudence and moral standard, then the submission has a great implication in that every law has to be tested according to this yardstick. c

There can be no doubt that Islam is not just a mere collection of dogmas and rituals but it is a complete way of life covering all fields of human activities, may they be private or public, legal, political, economic, social, cultural, moral or judicial. This way of ordering the life with all the precepts and moral standards is based on Divine Guidance through His prophets and the last of such Guidance is Quran and the last messenger is Mohammad *saw* whose conduct and utterances are revered: see *S Abdul A'la Maududi, The Islamic Law and Constitution*, 7th edition, March 1980. e

The question here is this: Was this the meaning intended by the framers of the Constitution? For this purpose it is necessary to trace the history of Islam in this country after the British intervention in the affairs of the Malay States at the close of the last century. f

Before the British came to Malaya, which was then known as Tanah Melayu, the Sultans in each of their respective States were the Heads not only of the religion of Islam but also as the political leaders in their States, which were Islamic in the true sense of the word, because, not only were they themselves Muslims, their subjects were also Muslims and the law applicable in the States was Muslim law. Under such law the Sultan was regarded as God's vicegerent (representative) on earth. He was entrusted with the power to run the country in accordance with the law ordained by Islam, ie Islamic law and to see that law was enforced. When the British came, however, through a series of treaties with the Sultans beginning with the *Treaty of Pangkor* and through the so-called British advice, the reli-

gion of Islam became separated into two separate aspects, viz: the public aspect and the private aspect. The development of the public aspect of Islam had left the religion as a mere adjunct to the Ruler's power and sovereignty. The Ruler ceased to be regarded as God's viceroy on earth but regarded as a sovereign within his territory. The concept of sovereignty ascribed to humans is alien to Islamic religion, because in Islam sovereignty belongs to God alone. By ascribing sovereignty to the Ruler, ie to a human, the divine source of legal validity is severed and thus the British turned the system into a secular institution. Thus all laws including administration of Islamic Laws had to receive this validity through a secular fiat. Although theoretically because of the sovereignty the Ruler was absolute in the sense that he could do what he liked, and govern according to what he thought fit, the Anglo/Malay Treaties restricted this power. The effect of the restriction made it possible for the colonial regime under the guise of 'advice' to rule the country as it saw fit and rendered the position of the Ruler to one of continuous process of diminution. For example, the establishment of the Federated Malay States in 1895, with the subsequent establishment of the Council of States and other constitutional developments, further resulted in the weakening of the Ruler's plenary power to such an extent that Islam in its public aspect had become nothing more than a mere appendix to the Ruler's sovereignty. Because of this, only laws relating to family and inheritance were left to be administered and even this was not considered by the court to have territorial application binding all persons irrespective of religion and race living in the State. The law was only applicable to Muslims as their personal law. Thus, it can be seen that during the British Colonial period, through their system of indirect rule and establishment of secular institutions, Islamic law was rendered isolated in a narrow confinement of the law of marriage, divorce, and inheritance only: see MB Hooker, *Islamic Law in South-East Asia*, 1984.

In our view it is within this dichotomy that the framers of the Constitution understood the meaning of the word 'Islam' in the context of Article 3. If it had been otherwise, there would have been another provision in the Constitution which would have the effect that any law contrary to the injunction of Islam will be void. Far from making such provision, Article 162, on the other hand, purposely preserves the continuity of secular law prior to the Constitution, unless such law is contrary to the latter.

It would thus appear that not much reliance can be placed on the wording of Article 3 to sustain the submission that punishment of death for the offence of drug trafficking, or any other offence, will be

void as being unconstitutional.

We, therefore, do not consider it important to discuss cases cited by counsel on the question of the death penalty being contrary to Islamic perception.

It is the contention of Mr Ramdas Tikamdas that, because Islam is the religion of the Federation, the law passed by Parliament must be imbued with Islamic and religious principles and Mr Mura Raju, in addition, submitted that, because Syariah law is the existing law at the time of Merdeka, any law of general application in this country must conform to Syariah law. Needless to say that this submission, in our view, will be contrary to the Constitutional and legal history of the Federation and also to the Civil Law Act which provides for the reception of English common law in this country.

A great deal of argument was spent to say that the law must be just, and *The Proclamation of Independence* was cited as an authority. There is of course no need for us to go further than to say that the standard of justice naturally varies from individual to individual; but the only yardstick that the court will have to accept, apart from our personal feelings, is the law that was legislated by Parliament.

We thank counsel for the efforts in making researches into the subject, which enabled them to put the submissions before us. We are particularly impressed in view of the fact they are not Muslims. However, we have to set aside our personal feelings because the law in this country is still what it is today, secular law, where morality not accepted by the law is not enjoying the status of law. Perhaps that argument should be addressed at other forums or at seminars and, perhaps, to politicians and Parliament. Until the law and the system is changed we have no choice but to proceed as we are doing today.

Solicitors: *Siva, Ram & Associates* for Che Omar bin Soh and Muhamad bin Embong; *Mura Raju & Co* for Wan Jalil bin Wan Abdul Rahman; *Attorney General's Chambers* for the respondents in both the appeals.