IN THE FEDERAL COURT OF MALAYSIA

CRIMINAL APPLICATION NO: 05(RJ)-11-09/2022(W)

BETWEEN

DATO' SRI MOHD NAJIB BIN HJ ABDUL RAZAK

... APPLICANT

AND

PUBLIC PROSECUTOR ... RESPONDENT

CORAM

ABDUL RAHMAN SEBLI, CJSS

VERNON ONG LAM KIAT, FCJ

RHODZARIAH BUJANG, FCJ

NORDIN HASSAN, FCJ

ABU BAKAR JAIS, JCA

MINORITY JUDGMENT

[1] The applicant was convicted and sentenced to a concurrent imprisonment term of 12 years and a fine of RM210 million in default another 5 years imprisonment by the Kuala Lumpur High Court on 28.7.2020 for 7 separate offences under the Malaysian Anti Corruption Commission Act 2009, the Penal Code and the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001.

[2] His convictions and sentence were affirmed by the Court of Appeal on 8.12.2021 and perfected by the Federal Court on 23.8.2022. Presently the applicant is serving his imprisonment term at the Sungai Buloh prison since 23.8.2022.

[3] By four Notices of Motion the applicant seeks a review of four decisions of this court delivered on 16.8.2022 and 23.8.2022 respectively. The four Notices of Motion are in the following terms:

Notice of Motion No. 1

"1. That the decision of the Federal Court on the 16th of August 2022 in the Criminal Appeal No. 05(L) - (289 & 290 & 291) - 12/2021(W) (in the Motions to adduce additional/further evidence and for the disqualification of Justice YA Dato' Mohd Nazlan bin Mohd Ghazali in the High Court Trial (WA - 45 (2 & 3) - 07/2018 and WA – 45 – 5 - 08/2018 and for the nullification of that trial or for it to be declared null and void) wherein the Honourable Federal Court had unanimously dismissed the Applications/Motions altogether in Enclosures 210, 31, 32 (as amended), be set aside. That in the event this prayer is granted by this Honourable Court, this Honourable Court orders a discharge and acquittal of the Applicant or an order for a retrial of the charges in the High Court before a different judge:"

Notice of Motion No. 2

"2. That the decision of the Federal Court on the 16th of August 2022 in the Criminal Appeal No. 05(L) - (289 & 290 & 291) - 12/2021(W) in the Application for adjournment where the Honourable Federal Court unanimously refused to grant any adjournment on the main appeals, be set aside. A further order is sought for an acquittal and discharge of the Applicant or in the alternative a rehearing of the appeal before this Honourable Court with a newly constituted quorum of not less than 7 Federal Court Judges or as this Honourable Court deems fit and just;"

Notice of Motion No. 3

"3. That the decision of the Federal Court on the 23rd of August 2022 in the Criminal Appeal No. 05(L) - (289 & 290 & 291) - 12/2021(W) (for the recusal of the Chief Justice) where the Honourable Federal Court unanimously dismissed the application of the Applicant/Appellant to recuse the Honourable

Chief Justice from further hearing the said Appeals, be set aside. In the event this prayer is allowed for the Honourable Federal Court to further order a rehearing of this Appeal before a newly constituted quorum of not less than 7 members or as this Honourable Court deems fit and just."

Notice of Motion No. 4

"4. That the decision of the Federal Court on 23rd of August 2022 in the Criminal Appeal No. 05(L) - (289 & 290 & 291) - 12/2021(W) (in the main appeals) where the Honourable Federal Court unanimously dismissed the appeals of the Applicant and confirmed the conviction and sentence handed down by the High Court and the Court of Appeal, be set aside. That in the event this prayer is allowed, this Honourable Court orders the acquittal and discharge of the Applicant or in the alternative a rehearing of the main appeal before another newly constituted quorum of not less than 7 Federal Court Judges or as this Honourable Court deems fit and just."

[4] The first three motions arose from three applications made by the applicant before the main appeals (Appeals No. No. 05(L) - (289 & 290 & 291) - 12/2021(W)) were heard by the earlier panel of this court. They were therefore interlocutory in nature vis-à-vis the main appeals. For purposes of this judgment I shall focus on Motion No. 2 which in my opinion is determinative of the question whether a review under Rule 137 of the Rules of the Federal Court 1995 ("the Rules") is warranted. Rule 137 of the Rules provides as follows:

"For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court."

[5] I shall express no opinion on the other three motions. The word “Court” means the Federal Court and any judge of that court (Rule 2). The provision is a codification of the inherent jurisdiction of the Federal Court. The term “inherent jurisdiction” is summed up in *Halsbury’s Laws of England* (4th Ed. Vol. 37) as follows at paragraph 12:

“In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, **in particular to ensure the observance of the due process of the law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them**.”
(emphasis added)

[6] The legislative intent behind Rule 137 is clear, that the court’s inherent power of review is to be exercised whenever necessary to prevent injustice or to prevent an abuse of the court process. However the power must be exercised with circumspection and in rare and exceptional cases. Whether the decision under consideration has caused injustice to any party depends on the facts and circumstances of each case.

[7] There is no dearth of authority on the Rule. Suffice it if I refer to three decisions of this court. First, *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 6 CLJ 1 where Abdul Hamid Mohamad CJ held as follows:

"[4] In an application for a review by this court of its own decision, the court must be satisfied that it is a case that falls within the limited grounds and very exceptional circumstance in which a review may be made. Only if it does, that the court reviews its own earlier judgment. Under no circumstances should the court position itself as if it were hearing an appeal and decide the case as such. In other words, it is not for the court to consider whether this court had or had not made a correct decision on the facts. That is a matter of opinion. Even on the issue of law, it is not for this court to determine whether this court had earlier, in the same case, interpreted or applied the law correctly or not. That too is a matter of opinion. An occasion that I can think of where this court may review its own judgment in the same case on question of law is where the court had applied a statutory provision that has been repealed. I do not think that review power should be exercised even where the earlier panel had followed certain judgments and not the others or had overlooked the others. Not even where the earlier panel had disagreed with the court's earlier judgments. If a party is dissatisfied with a judgment of this court's own earlier judgments, the matter may be taken up in another appeal in a similar case. That is what is usually called "revisiting". Certainly, it should not be taken up in the same case by way of review. That had been the practice of this court all these years and it should remain so. Otherwise there will be no end to litigation. A review may lead to another review and a further review."

[8] Zaki Tun Azmi PCA (later CJ) in his supporting judgment in the same case said:

"There is no doubt that this court has that authority to allow this application. Whether it does so, depends on the circumstances of each case. This court has on many previous occasions decide that it has the right to order a review of its own decision to prevent injustice or an abuse of the process of the court. It has that very wide discretion. However, that wide discretion will not be used liberally but only sparingly, in exceptional cases on a case to case basis where a significant injustice had probably occurred and there was no alternative effective remedy. The court must exercise strong control over such

application. It must be satisfied that it is within exceptional category. Rule 137 cannot be construed as conferring unlimited power to review its earlier decision for whatever purpose. The court must not be too eager to invoke the rule."

[9] As for the circumstances in which an application under Rule 137 of the Rules may be allowed, Zaki Tun Azmi PCA (later CJ) listed the following non-exhaustive circumstances as some of them, which is far less restrictive than what Abdul Hamid Mohamad CJ had in mind, who only mentioned a case where the court had applied a statutory provision that has been repealed:

"(a) That there was a lack of quorum eg, the court was not duly constituted as two of the three presiding judges had retired (*Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 CLJ 61).

(b) The applicant had been denied the right to have his appeal heard on the merits by the appellate court (*Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 CLJ 645).

(c) Where the decision had been obtained by fraud or suppression of material evidence (*MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 3 CLJ 577).

(d) Where the court making the decision was not properly constituted, was illegal or was lacking jurisdiction, but the lack of jurisdiction is not confined to the standing of the quorum that rendered the impugned decision (*Allied Capital Sdn Bhd v Mohd Latiff bin Shah Mohd and another application* [2004] 4 CLJ 350).

(e) Clear infringement of the law (*Adorna Properties Sdn Bhd v Kobchai Sosothikul* [2005] 1 CLJ 565).

(f) It does not apply where the findings of this court is questioned, whether in law or on the facts (since these are matters of opinion which this court may disagree with its earlier panel) (*Chan Yook Cher @ Chan Yock Kher v Chan Teong Peng* [2005] 4 CLJ 29).

(g) Where an applicant under r. 137 has not been heard by this court and yet through no fault of his, an order was inadvertently made as if he had been heard (*Raja Prithwi Chand v Sukhraj Rai* [AIR] 1941).

(h) Where bias had been established (*Taylor & Anor v Lawrence & Anor* [2002] 2 All ER 353).

(i) Where it is demonstrated that the integrity of its earlier decision had been critically undermined e.g. where the process had been corrupted and a wrong result might have been arrived at (*Re Uddin* [2005] 3 All ER 550).

(j) Where the Federal Court allows an appeal which should have been consequently dismissed because it accepted the concurrent findings of the High Court and Court of Appeal (*Joceline Tan Poh Choo & Ors v V. Muthusamy* [2007] 6 CLJ 1; [2007] 6 MLJ 485)."
(emphasis added)

[10] Secondly the case *Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors and other applications* [2013] 4 MLJ 351 where Arifin Zakaria CJ also spoke of the grounds on which an application for review under Rule 137 of the Rules may be allowed:

"[18] From the authorities, it would appear that an application may be allowed on the grounds of:

(a) bias (*Taylor v Lawrence*);

(b) coram failure (*Gurbachan Singh s/o Bagawan Singh & Anor v Vellasamy s/o Pennusamy & Ors and other applications* [2012] 2 MLJ 149;

(c) fraud or suppression of material evidence (*MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673; [2002] 3 CLJ 577; *Re Uddin*; or

(d) **procedural unfairness** (*Cassel & Co Ltd v Broome and another* (No.2) [1972] 2 All ER 849; [1972] AC 1136.

[19] From the above, we can briefly summarise that this court as a court of law is clothed with inherent jurisdiction to remedy any injustice arising from procedural unfairness due to coram failure, **breach of the rules of natural justice** or that the decision was tainted by actual bias or a real danger of bias on the part of one or more members of the panel."
(emphasis added)

[11] I would add another category that calls for review under Rule 137, and that is if the decision has caused a miscarriage of justice resulting from a denial of a fair trial, for example where the decision altogether defeats the rights of the parties.

[12] The third case is *Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor* [2022] 1 MLJ 1. The following paragraph [36] of the judgment is relevant:

"[36] However, in the rarest of rare cases, where the final judgment complained of has caused grave injustice which is apparent from the face of the record, and which can lead to public misgivings about the administration of justice, the court hearing the application for review is obliged to rectify the error. **In such a case, the public interest of ensuring justice is done must**

take precedence over the interest of certainty and finality. The reason for this is that a failure to remedy such injustice will undermine the overriding public interest that there should be confidence in the administration of justice (see *R v Gough* [1993] 2 All ER 724 at p. 728).
(emphasis added)

[13] Thus, while the principle of finality in the criminal law must be kept at the forefront of the court's mind when dealing with an application for review under Rule 137 of the Rules, it must not be allowed to overshadow the criminal process, which is to be measured, not in monetary terms, but in terms of life and liberty. As Chao Hick Tin JA aptly said in the Singapore Court of Appeal case of *Kho Jabing v Public Prosecutor* [2016] SGCA 21:

"42. However, the cost of error in the criminal process is measured not in monetary terms, but in terms of the liberty and, sometimes, even the life of an individual. For this reason, where criminal cases are concerned, the principle of finality cannot be applied in as unyielding a manner as in the civil context, and it seems that the court should, in exceptional cases, be able to review its previous decisions where it is necessary to correct a miscarriage of justice. The question would then be this: when do these conditions obtain? In the present criminal motion, we confront this very issue.

[14] Having referred to a long line of authorities both local and abroad, including the decisions of this court in *Asean Security Paper Mills* and *Dato' See Teow Chuan* (supra at [7] and [10]), the learned judge of the Singapore apex court went on to say at paragraphs 43, 62 and 63:

"43. Gathering up the threads of the foregoing analysis, several propositions can be distilled:

(a) First, a final appellate court has the inherent power, by virtue of its character as a court of justice, to correct its own mistakes in order to prevent miscarriages of justice or, to use a cognate expression favoured in England, “real injustice”.

(b) Second, this power of review is to be exercised sparingly, and only in circumstances which can be described as “exceptional” and which therefore override the imperative of finality.

(c) Third, a review by a final appellate court is distinct from and should not be confused with an appeal. In conducting a review, the court is primarily concerned not with the correctness of the decision under review, but with whether there has been a miscarriage of justice. These concepts are not the same. **The paradigm case of a miscarriage of justice is where there has been a breach of natural justice**.

(d) Fourth, the substratum of an application for review should be new material that was not previously canvassed in the proceedings leading to the decision under challenge. The material in question must demonstrate a “powerful probability” that there has been a miscarriage of justice which warrants invoking the court’s review jurisdiction.

(e) Finally, this power of review is available in both civil and criminal cases, although the rules governing its exercise might differ depending on the context.

…….

62. At the end of the day, the inquiry into whether the material tendered in support of an application for review “is compelling” is directed towards the quality of the material presented as assessed against the precise issues in dispute. **A useful summative question is whether, taken as a whole, the material is capable of showing “almost conclusively” that there has been a miscarriage of justice and is therefore “compelling” enough to warrant the exercise of the Court of Appeal’s inherent power of review**.

This is a question of fact which calls for an exercise of judgment of the kind that judges are called on to perform on an almost daily basis.

63. **At it's core, it connotes that there must be a manifest error and/or an egregious violation of a principle of law or procedure which strikes at the very heart of the decision under challenge and robs it of it's character as a reasoned judicial decision**."
(emphasis added)

[15] Thus, although the reopening of an appeal is considered exceptional and only in rare cases, the power to reopen is plainly available. The principle has not prevented re-opening by apex and intermediate courts of criminal appeals: *Elliot v R* (2007) 234 CLR 38; *DPP v Majewski* [1977] AC 443; *R v Maughan* [2004] NICA 21; *R v Trotta* [2007] 3 SCR 453; *R v Smith* [2003] 3 NZLR 617; *R v De May* [2005] NZCA.

[16] Justice is not only about the guilt or innocence of the accused person. It is also about according him a fair trial. The accused person should feel that he has had a fair trial *(Kiew Foo Mui & Ors v Public Prosecutor* [1996] 1 CLJ 14*)*. If he cannot be tried fairly for the offence that he is charged with, he should not be tried for it at all *(R v Horseferry Riad Magistrates' Court, ex p Bennet* [1994] 1 AC 4*)*. The principle applies equally to appeals as appeals are by way of rehearing.

[17] In *Dietrich v R* [1993] 3 LRC 272, Mason CJ and McHugh J of the High Court of Australia, which is the apex court in the country, said of the right to a fair trial at page 280:

"The right of an accused to receive a fair trial according to law is a fundamental element of our criminal justice system: see *Jago v District Court (NSW)* (1989) 168 CLR 23, per Mason CJ at 29; Deane J at 56; Toohey J at 72; Gudron J at 75."

[18] In his *Commentary on the Constitution of India*, Vol. 5. 9th ed., (India LexisNexis, 2015) Durga Das Basu said:

"A fair trial is aimed at ascertaining the truth for all concerned. It was held that failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. **Fair hearing requires an opportunity to preserve the process. It may be vitiated and violated by an over-hasty, stage-managed, tailored and partisan trial. Denial of right of accused to adduce evidence in support of his defence amounts to denial of fair trial**."
(emphasis added)

[19] In *Alma Nudo Atenza v Public Prosecutor* [2019] 4 MLJ 1, this is what this court had to say on the right to a fair trial at paragraph [109]:

"[109] Accordingly, art 5(1) which guarantees that a person shall not be deprived of his life or personal liberty (read in the widest sense) save in accordance with law envisages a state of action that is **fair both in point of procedure and substance.** In the context of a criminal case, the article enshrines an accused's constitutional right to receive a fair trial by an impartial tribunal and to have a just decision on the facts (see *Lee Kwan Woh* at para 18)."
(emphasis added)

[20] In *Hong Yik Plastics (M) Sdn Bhd v Ho Shen Lee (M) Sdn Bhd & Anor* [2020] 1 MLJ 743 Vernon Ong Lam Kiat JCA (now FCJ) explained the right more comprehensively:

"[10] A fair trial is generally defined as a trial by an impartial and disinterested tribunal in accordance with law. The right to a fair trial is generally construed in the light of the rule of law. The right to a fair trial is also a fundamental right pursuant to art 8 of the Federal Constitution which provides for equality before the law and equal protection under the law; otherwise described as the principle of equality among citizens. In this connection, the common law has long recognized two minimum fair trial guarantees known as the principle of natural justice: (a) the principle of judicial impartiality (*nemo judex in causa sua*); and (b) the right to be heard (*audi alteram partem*) (Jackson, P, Natural Justice (2nd Ed, Sweet & Maxwell, London 1973). The right to a fair trial has also evolved to encompass a right to access to the courts, public hearings and a hearing within a reasonable time."

[11] In both civil and criminal cases rights exist and are being adjudged. In each the same inherent and constitutional rights exist. In each the duty of the trial judge is the same. In each the parties are entitled to justice under the law. Concomitant with this is the trial judge's duty to determine and apply the law applicable to the facts found. To the lowest and humblest, to the weak, the poor, and the strong, the same law applies. To be equally administered by a judge. **However, justice does not exist in substantive law alone. Justice in the application of substantive law is dependent on the pre-existent fairness of the procedure; in other words, procedural due process in the trial of the cause**. Procedural due process is not only for the parties, but, also, for the court itself. Only thereby can it appeal to, and justify the trust and confidence of the public."
(emphasis added)

[21] In *N. Jrishna Murthy, Accused v Abdul Sabban and Another* 1964 KAR 102 (Karnataka High Court) Hedge J said:

"**One of the contents of natural justice, which we so much value, is the guarantee of a fair trial to an accused person. A fair trial is as important as a just decision. Neither the one nor the other can be sacrificed. Sacrifice of the one, in the generality of cases, is bound to lead to the sacrifice of the other. The two are closely interlinked**. The way to justice, on occasions, may be long and laborious. But we have to go all that way. Because that is the only surest way. Short cuts to Justice, though quite tempting, are full of dangerous possibilities. Recent history of several dictatorial countries bear testimony to that fact. Judges know by experience that the first impression may not always be the right impression and truth may be hidden behind imposing facades. In Courts of law nothing can or should be taken for granted. Everything must be tested – tested by the laws of the land which are the quintessence of experience of life; if it is oral evidence it must be tested by cross-examination and if it is a question of probabilities, it must be tested by comparing the various versions put forward by concerned parties, **which means that those parties should have had reasonable opportunity to put forward their versions**. **In short a fair trial which is not the same thing as a trial strictly in accordance with the rules of procedure is a must. A denial of fair trial is a denial of justice**."
(emphasis added)

[22] Denying the accused of a fair trial is a grave form of injustice. *The Concise Oxford English Dictionary* (11th Ed.) defines the word "injustice" as "an unjust act or occurrence". It is an act that inflicts undeserved hurt to another. Rule 137 of the Rules is there to remedy the perpetuation of such unjust acts. In the words of Lord Diplock in *Bremer Vulcan Schiffbau and Maschinenfabrik v Sourh India Shipping Corp* [1981] 1 All ER 289 "the doing by the court of

acts which it needs must have power to do in order to maintain its character as a court of justice."

[23] Ultimately, a review under Rule 137 of the Rules is to protect the integrity of the judicial process as opposed to an appeal which is primarily concerned with the merits of the case, subject to the infringements listed out by Zaki Tun Azmi PCA (later CJ) in *Asean Security Paper Mills Sdn Bhd* (supra at [9]) and by Arifin Zakaria CJ in *Dato' See Teow Chuan* (supra at [10]), which under those circumstances the decisions will be subject to review.

[24] Therefore, it is not entirely correct say that a review under Rule 137 is only confined to those factors mentioned by Abdul Hamid Mohamad CJ in his judgment in *Asean Security Paper Mills Sdn Bhd* (supra at [7]) because a clear infringement of the law for example is a ground for review as decided by Zaki Tun Azmi PCA in the same case, citing *Adorna Properties Sdn Bhd v Kobchai Sosothikul* [2005] 1 CLJ 565. So is failure by the appellate court to hear the merits of the case. Abdul Hamid Mohamad CJ's judgment restricting the applicability of Rule 137 to cases where the court had applied repealed laws must be understood in that light. Of pertinence to note is that he did not express any disagreement with Zaki Tun Azmi PCA on the matter.

[25] Judicial process is the series of steps taken in the course of the administration of justice, which must be fair at every stage. The question that calls for determination in an application under Rule 137 is not whether the decision of the court of final appeal is right or wrong on the merits (subject to what I have said in paragraphs

[23] and [24] above), but whether an injustice had been done to the applicant or whether an abuse of the court process had been committed. If the answer to either question is in the affirmative, then it is the duty of the court to review the decision to prevent the injustice done even if the decision is unassailable on the merits because a fair trial is as important as a just decision (*N. Jrishna Murthy,* supra at [21]).

[26] With the foregoing principles in mind, I shall now proceed to deal with Motion No. 2 – the application to set aside the decision of the earlier panel to refuse an adjournment of the main appeals. The decision has since been reported in *Dato' Sri Mohd Najib bin Hj Abdul Razak v PP and Other Appeals (No 2)* [2022] 8 CLJ 378.

[27] The issue is whether the refusal by the earlier panel to grant an adjournment of the main appeals was unjust in all the circumstances of the case. The question has no direct relation to the issue of whether the decision by the earlier panel to refuse the adjournment was right or wrong on the merits. Anyway the guiding principle is that the court is not to treat an application for review as if it is an appeal (*Asean Security Paper Mills Sdn Bhd,* supra at [7]). Any reference to the merits of the decision in this judgment is purely incidental to the question whether the decision of the earlier panel had caused injustice to the applicant which is the central issue in the present application.

[28] The reasons given by the earlier panel for refusing to adjourn the hearing of the main appeals were as follows:

"[17] Firstly, from our narration of the procedural history on the fixing of these appeals, all parties to this matter, including the appellant, were well aware that the appeals had been fixed for hearing on 15 to 26 August 2022 since April 2022 and the request for an adjournment on the same ground had been refused.

[18] In this regard, we find r. 6(a) of the Legal Profession (Practice and Etiquette) Rules 1978 ('1978 Rules') most relevant. It stipulates thus:

> Rule 6. An advocate and solicitor not to accept brief if unable to appear
>
> (a) An advocate and solicitor shall not accept any brief unless he is reasonably certain of being able to appear and represent the client on the required day.

[19] Thus, where counsel has accepted a brief, he should be deemed as 'reasonably certain of being able to appear and represent the client on the required day'. The 1978 Rules also appear to recognize the general disposition of the courts in this country to disfavor adjournments unless cogent reasons are provided. The general rule is that counsel shall make every effort to be ready for trial (and we think by extension appeals) on the day fixed. See r. 24(a) and (b) of the 1978 Rules.

[20] The 1978 Rules are not, in a sense, binding on the courts. But they are nevertheless binding on members of the Bar who are obliged to comply with them. And they are indicative of the fact that any disciplined lawyer such as the counsel for the appellant would not have accepted a brief with dates already fixed for hearing unless he was prepared.

[21] In fact, the appellant having been well aware of the dates fixed for hearing elected to discharge his former solicitors and appoint Messrs Zaid Ibrahim and Tuan Hj Hisyam Teh as his solicitors and counsel respectively. This is his right to do so but he cannot, after having made that decision, turn around and say that his new lawyers are not ready to proceed with the

hearing of the appeals. The new lawyers too, having accepted the brief, are not entitled to say they need more time to prepare knowing fully well that the dates had been fixed well in advance.

[22] Given the circumstances we have outlined, the request for the adjournment and the grounds in support thereof are neither cogent nor reasonable.

[23] In this regard, we recall the following words of Harun J from *PP v Mohtar Abdul Latiff* [1980] 1 LNS 62; [1980] 2 MLJ 51, at pp. 51 to 52:

> In any criminal trial, there are three parties, the court, the prosecution and the defence. If dates of hearing are to be fixed at the convenience of all three parties, then trial dates will be fixed at some considerable time hence. There is of course no guarantee, as happened in this case, that the trial will go on as scheduled on the date fixed, if everyone's convenience is taken into account. The general rule, therefore, has always been that trial dates are fixed at the convenience of the court, on a first-come-first-served basis. This is fair to all concerned. Public funds are not wasted on idle courts when there is so much work to do."

[24] The stark reality is that considerable public funds would be wasted if granting an adjournment in a case of this kind was an easier option. Article 8 of the Federal Constitution and the rule of law demand that the appellant be treated just like any other accused. As such, we state again that while the appellant is entitled to his right to change his counsel, he is not entitled to make this choice at the expense of the court, the prosecution or the entire justice system.

[25] While on this subject, another very significant component of the right to a fair trial is that justice cannot be unduly delayed. In this regard, we remind ourselves of Arahan Amalan Ketua Hakim Negara No. 2/2003 which states that cases of this nature must be prioritized.

[26] Further, the time taken on this case, especially the number of days fixed for the hearing means many other criminal cases and accused persons have had to wait their turn for their appeals to be heard. Justice delayed in this case is also justice denied to the other accused persons."

[29] The reasons can be reduced to the following five factors:

(a) Rule 6(a) of the Legal Profession (Practice and Etiquette) Rules 1978 which was binding on the applicant's counsel prohibited him from accepting the brief with dates already fixed for hearing unless he was prepared;

(b) Considerable public funds would be wasted if an adjournment was granted;

(c) Justice would be unduly delayed if an adjournment was granted;

(d) The Chief Justice Practice Direction No. 2 of 2003 requires cases of this nature to be given priority;

(e) An adjournment would delay cases of other accused persons.

[30] In its grounds of judgment for the main appeals as reported in *Dato' Sri Mohd Najib Hj Abdul Razak v PP & Other Appeals (No 4)* [2022] 8 CLJ 393 the earlier panel pointed out in paragraph [21] that while the applicant and his counsel were physically present at the hearing, they "deliberately refuse to participate in the appeal

hearing". What the court meant by this remark as the record will show is that the applicant's counsel, who had just taken over conduct of the case from the previous counsel barely 3 weeks earlier, refused to make any submission after his application for an adjournment of 3 – 4 months of the main appeals was refused by the court.

[31] Counsel representing the applicant at the time was Tuan Hj Hisyam Teh Poh Teik ("Hj Hisyam"), a senior and prominent member of the Bar with more than 40 years experience behind him and who appears regularly in criminal matters in the Federal Court.

[32] The chain of events that led to counsel's refusal to submit on the main appeals and eventually to discharge himself from representing the applicant is well documented. The notes of proceedings shows as follows, starting with the proceedings on 15.8.2022, which was the first day of the hearing of the main appeals:

<u>Day 1 - 15.8.2022 (Monday)</u>

- The court allowed all the 3 motions in Enclosures 229, 228 and 218 to amend the original motions to adduce additional evidence.

- The court proceeded to hear the amended motions in 210, 31 and 32.

- Hj Hisyam then proceeded to address the court on the motion to adduce additional evidence and for a declaration that the

High Court trial was null and void due to a conflict of interest on the part of the trial judge Justice Mohd Nazlan bin Mohd Ghazali.

- Dato' Sithambaram submitted in reply. Hj Hisyam asked that his reply be heard the next day, i.e. 16.8.2022. The request was granted by the court.

Day 2 - 16.8.2022 (Tuesday)

- Dato' Sithambaram continued with his submissions, followed by Hj Hisyam's reply.

- The court then delivered its decision to dismiss enclosures 210, 31, 32 as amended and ordered the main appeals to be proceeded with.

- Hj Hisyam asked for an adjournment of the main appeals. The prosecution left the matter in the hands of the court. The application for adjournment was refused. The hearing of the main appeals was adjourned to 18.8.2022.

Day 3 - 18.8.2022 (Thursday)

- Hj Hisyam pleaded for the court to reconsider his application for an adjournment of the main appeals. In the event the adjournment was refused, he said he would discharge himself as counsel for the applicant as he was totally unprepared.

- The Solicitor General Datuk Terrirudin bin Mohd Salleh who had just joined the prosecution team led by Dato' Sithambaram informed the court that he would leave it to the court.

- Hj Hisyam asked the court to seriously consider his second plea that adequate time be given for him to prepare for the main appeals since there was no or no serious objection by the prosecution. He reiterated that he was not prepared to argue the main appeals. He admitted that he had not studied the appeal record as there were so many issues and he was only asking for 3 months and he would come back, point for point.

- The court responded by saying that it had made a decision on the adjournment and there was no reason to review the earlier decision. Hj Hisyam's response was that he was not prepared and left it entirely to the court.

- The court delivered its decision on Hj Hisyam's decision to discharge himself as counsel for the applicant, which was to disallow the discharge.

- On being queried by the court if he had anything to say on the 94 grounds of appeal Hj Hisyam told the court that he had nothing to submit. The court enquired whether he would be relying on the submissions filed in the Court of Appeal in relation to the findings of the High Court. Hj Hisyam replied in the affirmative.

- The court then told the parties that since the case was of public interest, the court would invite the learned Deputy Public Prosecutor to submit first, with a view to giving the applicant more time to prepare for the main appeals.

- When proceedings resumed in the afternoon, Hj Hisyam told the court that he would like to verify his statement earlier in the morning when he said he would be adopting the submissions filed in the Court of Appeal. He explained that the correct position would be that the court could act on the record, and if given the opportunity he would like to make fresh submissions on behalf of the applicant and perhaps look at the petition of appeal and the amended petition. The court took note of the position.

- The court asked Hj Hisyam to clarify what he meant earlier when he said that the court could act on the written submissions in the Court of Appeal and later saying that he would file a fresh submission and relook at the petition of appeal. Hj Hisyam replied that if given time, if given an adjournment, he would do so. He said without the adjournment, he could not participate in the hearing of the main appeals.

- The court stressed that the court would not adjourn the matter and proceeded to invite the learned Deputy Public Prosecutor to submit first. Hj Hisyam was told that he would have taken notes and decide which area that he could respond when the learned Deputy Public Prosecutor had finished with his submissions. Hj Hisyam again told the court that he was in no

position to participate or take part in the proceedings. Dato' Sithambaram continued with his submissions.

Day 4 - 19.8.2022 (Friday)

- Dato' Sithambaram continued with his submissions and after he finished, the court adjourned hearing to the afternoon.

- When the court resumed in the afternoon, Hj Hisyam asked the court if the hearing could continue on Thursday (the case was fixed on Tuesday) in the event the hearing could not be completed that afternoon. Dato' Sithambaram informed the court that he had finished with his submissions.

- Hj Hisyam told the court that he had no submissions to make, not even oral submissions. He sought permission from the court if he could be excused on Tuesday as he would be saying the same thing.

- The court gave Hj Hisyam 3 days (Saturday, Sunday and Monday) to prepare for the main appeals. The hearing was then adjourned to 23.8.2022.

Day 5 - 23.8.2022 (Tuesday)

- Hj Hisyam informed the court that he had filed an application for recusal of the learned Chief Justice (Enclosure 300). The court enquired whether Hj Hisyam would have anything to submit on the main appeals. He answered "no" except on the issue of his representation as counsel for the applicant. He asked to submit on the main appeals after the disposal of the

recusal application. He then began to submit on the issue of representation and adjournment, followed by submissions in reply by the learned Deputy Public Prosecutor.

- Hj Hisyam informed the court that TS Shafee, who turned up in court, would take over on the issue of recusal. The court asked TS Shafee to submit on the merits of the application. TS Shafee asked for an adjournment to the following morning (24.8.2022) as he had just arrived from Parliament. The adjournment was refused and Hj Hisyam was then invited to submit on the recusal application.

- Hj Hisyam told the court that he had nothing to submit on the recusal application. He then requested for another lawyer Dato' Firoz Hussein to speak. Dato' Firoz addressed the court by saying that he needed to take instructions on the issue and therefore asked for an adjournment.

- The court refused to hear submissions from anybody else. The court then delivered its decision on the recusal application, which was to dismiss the application. The learned Chief Judge of Sabah and Sarawak on behalf of himself and on behalf of the other members of the panel in a separate judgment concurred with the learned Chief Justice.

- Hj Hisyam made a request for the court to allow the applicant to make a statement and to say something to the panel.

- The request was granted and the applicant proceeded to read his statement from the dock, after which the court delivered its decision on the main appeals, dismissing them and affirming the decision of the High Court as affirmed by the Court of Appeal.

[33] In his impassioned plea for an adjournment of the main appeals to be granted for 3 – 4 months earlier, this is what Hj Hisyam had to say ("HT" stands for Hj Hisyam, "CJ" for the Right Honourable the Chief Justice and "DS" for Dato' Sithambaram, the learned Deputy Public Prosecutor):

"HT: My ladies, My Lords, as far as the main appeal is concerned, we're asking for an adjournment on the ground that I'm not prepared. I took this brief, or I agreed to take this brief on the 21/07/2022. **And from the time I took the brief until today, I worked very hard on the arguments with respect of the motion**. I request for time because we'd like to come back again to argue the same appeal, with the same amount of passion and sincerity. **I ask for time, it's not the Appellant's fault, it's mine**. When I took the brief, I am aware that this case is set down for hearing on the 15th. I'm also aware of the rules of the evidence. But I was hopeful and consciously confident that the reasons I advance are valid, are strong, to urge this Court to exercise discretion in our favour. **Give me sufficient time to prepare for the main appeal. My Ladies, My Lords, in this case, I've been informed there are about 179 volumes of the appeal record. Altogether about seven (sic) witnesses has been called. Judgments of both the High Court and the Court of Appeal consist of about more than 1000 pages. This is no ordinary appeal**. I need plenty of time in which to really…I say, My Ladies, My Lords, I've been in practice about four and half decades. I normally do not come to this Court, or any other Court, to ask for an adjournment unless it's absolutely necessary. And this is one such things. There are strong points of law we argue, serious arguments have to be canvassed by the Appellant and

the Respondent. **And I'd also like to add that the application I make now, is made in good faith. It's a bona fide application for an adjournment. Why I say bona fide? When we took the brief on 21/07/2022, we had the first case management on 29/07/2022. Indications given to us by the learned DPP that this case will not be adjourned. We did not come to Court empty handed. We took the message from the Federal Court, we underwent a lot of work in the preparation of the arguments. My Ladies, My Lords can see the number of authorities we cited, the number of submissions we made, and these are strong arguments, bona fide arguments. So, it's not a question of to purposely delay the hearing of this main appeal**. I'm also, when I took this case, I was also motivated by the case of Anwar Ibrahim, where I cited earlier on, where there's a clash of interest between finality and fairness and justice. I applied this case in my mind, and in this case there's a clash of interest between expeditious trial and appeal, on one hand, and fairness and justice on the other. I look back at the history of this case. The conviction in the Court of Appeal was sometime in December 2021. And the appeal came up eight months later. And I thought to myself, if I were to come before My Ladies and My Lords and ask for at least another three or four months, **and the Court allows me that three or four months, it means that this appeal is heard one year after the decision, final decision of the Court of Appeal, which is not too long under the circumstances**. I've seen with my own eyes, My Ladies, My Lords, where in other appeals, a lawyer stands up and says, "I've just been retained", and this Court allows the adjournment. Or the accused comes to the Court, raises his hand and says, "I want to change a lawyer", adjournment was granted under the circumstances. **We ask for the same treatment, equal protection, equal opportunity, there must be ample opportunity given for the accused person because these are serious charges and this is the final lap, regard to this appeal**. So, on these grounds, My Ladies, My Lords, I plead with all sincerity in me, I plead that justice be seen to be done, I plead that adequate opportunity be given to me and my team to do a good job, to come back again and argue the points that are relevant. **There are about more than 90 grounds in the petition, we'd like to look at the petition again, perhaps remodel that, so that we focus on a few main points, so**

that judicial time can be saved. And this is the first time in my carrier that I plead so hard to give us another chance for time which I'm most grateful.

CJ: Yes, prosecution?

DS: Yang Amat Arif-Yang Amat Arif, Yang Arif-Yang Arif. The Court in this appeal is fully conversant with the facts and circumstances of this case. My learned friend has, from the time in the two case managements and letters from the Court, has been duly informed that this case would proceed on the appointed days. And all the facts are before, it's now a question of – I have nothing new to add, all facts are before the Court and the two CMs, I – **the prosecution leaves this matter in the hands of the Court**. That's all we can say, because the facts are before, and the Court has already rejected twice, so, what does the Court do now is something, a discussion in the hands of this honourable Court. That's all I'll say. Thank you."
(emphasis added)

[34] The words in bold make out the reasons given by counsel for asking for an adjournment of the main appeals. So, despite putting his best argument forward in trying to persuade the court to grant an adjournment of the main appeals, it came to nothing as it was rejected by the court.

[35] Before us, Tan Sri Muhammed Shafee Abdullah ("TS Shafee") who has now taken over as counsel for the applicant from Hj Hisyam emphasised the point that when Hj Hisyam applied for the 3 - 4 months adjournment of the main appeals, he openly admitted that the fault was his and not the applicant for accepting the brief at such late stage, but was motivated by his belief that his request for an adjournment was reasonable considering that it had

not even been a year since the decision of the Court of Appeal was delivered, and that based on his four and half decades in practice, it was not unusual for courts to grant adjournments on the basis that counsel had just been appointed and/or discharged notwithstanding that the matter had been fixed for hearing.

[36] Counsel also emphasized the point that when Hj Hisyam applied for the adjournment, there was no objection by the prosecution. In fact, and this is not disputed, the Solicitor-General Datuk Terrirudin Mohd Salleh who appeared personally on the morning of 18.8.2022 to join the prosecution team led by Dato' Sithambaram did not object to the request for adjournment by leaving it to the court. The stand taken by the Solicitor-General must be taken as the stand taken by the Attorney-General himself, who is also the Public Prosecutor.

[37] As is clear by now, the reason why Hj Hisyam discharged himself from representing the applicant was because he was totally unprepared to argue the main appeals, which involved some 30,000 documents to go through. He was only prepared to argue the motion to adduce additional evidence and for a declaration that the trial before the High Court was null and void due to a conflict of interest on the part of the trial judge Justice Mohd Nazlan bin Mohd Ghazali. The motion was fixed for hearing on the same day as the hearing of the main appeals. Be that as it may, he managed to present his submissions on the motion, which according to the applicant shows that he was not totally unprepared to handle the entire case after accepting the brief one week earlier on 21.7.2022.

His total lack of preparation was only in respect of the main appeals.

[38] Hj Hisyam was surprised that his decision to discharge himself from representing the applicant was also not allowed by the court. The reason given by the court was that the discharge if allowed would leave the applicant with no legal representation. It was held that in criminal proceedings, leave must first be obtained before counsel can discharge himself from representing the accused person. He was then told to remain in court as counsel on record for the applicant. In other words, he was forced to act as counsel for the applicant.

[39] In his affidavit in support, the applicant averred that it was rather absurd and ironic for the court to disallow his counsel to discharge himself (and therefore leaving him with no legal representation) when having counsel who was not prepared was no different from having no legal representation at all. I shall revert to this issue later in this judgment.

[40] The contention was that Hj Hisyam did the right thing by asking for time to prepare for the main appeals as he would be doing injustice to the applicant if he had proceeded to submit without adequate preparation, given the seriousness and complexity of the case. However the court did not accept such reason as a valid ground for the grant of an adjournment. The court's reasons are found in paragraph [21] of the grounds of judgment which is reproduced again below for ease of reference:

"[21] In fact, the appellant having been aware of the dates fixed for hearing elected to discharge his former solicitors and appoint Messrs Zaid Ibrahim and Tuan Hj Hisyam Teh as his solicitors and counsel respectively. This is his right to do so but he cannot, after having made that decision, turn around and say that his lawyers are not ready to proceed with the hearing of the appeals. The new lawyers too, after having accepted the brief, are not entitled to say they need more time to prepare knowing fully well that the dates had been fixed well in advance."

[41] It was submitted that if at all any blame is to be attributed to anyone, it should be to his lawyers and not the applicant. In my humble opinion that is a fair statement to make. There is no justification to make the applicant pay such a heavy price, as the price that he is paying now, for his lawyers' mistake.

[42] To avoid any misperception, I must make it absolutely clear that I am not expressing any opinion, let alone any judgment on the propriety of Hj Hisyam's decision to discharge himself after accepting the brief on such short notice and being unable to argue the main appeals for want of preparation. That must be left for the relevant authority to determine. The court could have cited him for contempt or referred him to the Disciplinary Board of the Bar Council but apparently the court did not consider that option to be viable. We were told that the Bar Council has commenced action against Messrs ZIST and Zaid Ibrahim as well as Hj Hisyam. But that has nothing to do with the applicant whose only interest is to see that his lawyer acts in his best interest, nothing more nothing less.

[43] What is pertinent to note in the whole scheme of things is that there was no allegation, proven or otherwise, that the seeking of an adjournment of 3 - 4 months was a ploy or strategy by the applicant to delay the hearing of the main appeals. Importantly, there was no allegation that the change of solicitors and counsel by the applicant was for that improper purpose. In fairness to the panel, it did not say so in its judgment. In fact the court gave entirely different reasons for disallowing the adjournment, which essentially was that enough time (4 months) had been given to the applicant and his lawyers to prepare for the main appeals.

[44] It was only at the hearing of the present application that the allegation was pursued with vigour by the learned Deputy Public Prosecutor. The contention was that the application for adjournment was "a strategy that backfired" for the applicant when his motion to adduce additional evidence and for the nullification of the High Court trial was dismissed on 16.8.2022.

[45] With all due respect to the learned Deputy Public Prosecutor, I do not think it is open for the prosecution to take that position now, having taken a contrary position at the time the applications for adjournment were made on 16.8.2022 and on 18.8.2022. They cannot be allowed to approbate and reprobate (*Express Newapapers Plc v News (UK) Ltd* [1990] 1 WLR 1320). The application for an adjournment of 3 – 4 months by the applicant must therefore be taken to have been made in good faith and not a ploy or strategy by him to delay the hearing of the main appeals as alleged by the prosecution.

[46] That will be the starting point in determining whether the application for review should be allowed in terms of Motion No. 2, i.e. that the application for adjournment by the applicant was made in good faith and not to delay the hearing of the main appeals.

[47] It was the contention of the learned Deputy Public Prosecutor that the decision by the earlier panel to refuse an adjournment is non-reviewable as it goes to the merits and therefore falling outside the scope of Rule 137. I am unable to accede to the argument. The merits of the earlier panel's decision is not the issue. The issue is whether the decision by the earlier panel to refuse an adjournment of the main appeals had resulted in injustice to the applicant. This falls squarely within the purview of Rule 137 of the Rules, one of which is *"to prevent injustice"*.

[48] The learned Deputy Public Prosecutor cited the Federal Court case of *Halaman Perdana Sdn Bhd & Ors v Tasik Bayangan Sdn Bhd* [2014] 3 CLJ 681; [2014] 4 MLJ 1 for the proposition that the Federal Court cannot review its own decision to refuse to grant an adjournment as it is an exercise of discretion by the court. It is clear that the basis for the decision in that case was an exercise of discretion by the court. The following passages in the judgment, amongst others, were reproduced by the learned Deputy Public Prosecutor:

"[20] We now turn to prayer B of the motion. Basically it is for the rehearing of the leave application. But in doing so the applicants sought to impugn the two decisions of the learned judges of this court who heard the leave application.

The first decision was the refusal to grant an adjournment and the second decision was the dismissal of the leave application itself.

[21] As regards the prayer to set aside the first decision we are of the view that it was obviously not within the ambit of r 137. The grant or refusal of an adjournment was entirely an exercise of discretion by the learned judges who heard the leave application."

[49] It is a principle of great antiquity that the decision whether to allow or to disallow an adjournment is at the discretion of the court. *Halaman Perdana* merely restates this trite principle of law and applying it to the facts of the case. But what is also trite law is that the discretion must be exercised judiciously and not capriciously or arbitrarily. I do not think it is necessary for me to cite any authority for this proposition of law.

[50] In any case it has never been the law that an adjournment must be granted as a matter of course or as a rule of thumb where the opposing party does not object to the request for adjournment or engages an incompetent or unprepared lawyer at the eleventh hour. First of all, an adjournment is not a right and secondly, as I have just mentioned, whether or not to grant an adjournment is at the discretion of the court, to be exercised judiciously and not capriciously or arbitrarily. A judicious decision is a decision that is well-considered; discreet; wisely circumspect: see *Black's Law Dictionary* (Deluxe Ninth Ed.) A discretion that is not exercised judiciously is not a valid exercise of discretion and is liable to be set aside.

[51] The case of *Halaman Perdana* relied on by the learned Deputy Public Prosecutor must be confined to its own peculiar facts and circumstances. It is fact centric and has no semblance to the facts obtaining in the present case. The distinguishing feature is that a postponement was asked for in that case because there was a pending leave application in the Court of Appeal. The context in which the adjournment issue became relevant in that case can be gauged from the following paragraphs of the judgment:

"[17] Notwithstanding the foregoing, it remains the law that 'where the Court of Appeal is the apex court of any particular case in view of s. 87 of the Courts of Judicature Act 1964 ('CJA') then it is also clothed with such inherent power. (See: *Harcharan Singh Piara Singh v PP* [2011] 6 CLJ 625).

[18] As such, the COA review application was an incompetent application *ab initio*. The COA was not the apex court in this case. There was therefore no basis in law for the applicants to complain that this court erred in not allowing the adjournment of the leave application pending the disposal of the COA review application.

[19] Hence, prayer A of the motion is a non-starter and an abuse of the process of the court. It is therefore refused."

[52] The facts of the case are therefore poles apart from the facts of the present case, where the issue is whether the earlier panel's refusal to grant an adjournment of 3 – 4 months for the hearing of the main appeals despite the *bona fide* of the application had the effect of defeating the applicant's rights altogether, thereby occasioning a miscarriage of justice and a breach of Article 5(1) of the Federal Constitution, which reads:

"Article 5. Liberty of the person

(1) No person shall be deprived of his life or personal liberty save in accordance with law."

[53] It is important to appreciate that it is not the exercise of discretion *per se* by the earlier panel that is in issue. It is accepted that the panel had the discretion whether to grant or not to grant an adjournment. The issue is whether the exercise of the discretion had deprived the applicant of his right to a fair hearing of the main appeals.

[54] It is the applicant's contention that his right to a fair hearing was altogether defeated when the court proceeded to hear the main appeals and to deliver its decision on the same day in spite of the fact that he was, for all practical purposes, not legally represented after his counsel discharged himself. His counsel's mere presence in court does not change anything as he refused to take part in the proceedings. Furthermore, the applicant was not asked if he wished to say anything before the court proceeded to call the learned Deputy Public Prosecutor to submit.

[55] The procedure at the hearing of a criminal appeal is prescribed by section 313 of the Criminal Procedure Code ("the CPC"), which provides as follows:

"**Procedure at hearing**

313. (1) When the appeal comes on for hearing **the appellant, if present, shall be first heard in support of the appeal**, the respondent, if present, shall be heard against it, and the appellant shall be entitled to reply.

(2) If the appellant does not appear to support his appeal the Court may consider his appeal and may make such order thereon as it thinks fit:

> Provided that the Court may refuse to consider the appeal or to make any such order in the case of an appellant who is out of the jurisdiction or who does not appear personally before the Court in pursuance of a condition upon which he was admitted to bail, except on such terms as it thinks to impose."
> (emphasis added)

[56] Thus, the order of proceedings is that the appellant must ("shall") be heard first, followed by the respondent. The appellant may then be heard in reply, after which the court may make such order in the matter as to it may seem just.

[57] This statutory procedural requirement was not followed by the court. Instead of hearing the applicant first, who was present, the court invited the learned Deputy Public Prosecutor to submit first, who then took two full days to submit. The reason why the panel took this unusual course of action was because the applicant's counsel refused to submit despite being invited to do so, and not because the applicant did not appear to support his appeal. Counsel's refusal to submit was equated by the court as non-appearance by the applicant or his advocate to support his appeal.

[58] With the greatest of respect to the panel, this is surreal because the applicant and his advocate were in fact physically present in court. Given the fact that the applicant's counsel (assuming he was still counsel for the applicant after his

discharge) refused to submit, what the court should have done in the circumstances was to invite the applicant to speak first before inviting the learned Deputy Public Prosecutor to submit. But his was not done, in breach of section 313(1) of the CPC.

[59] Learned counsel for the applicant described the procedure adopted by the previous panel as akin to the procedure to be followed in an *ex parte* application where only one side is heard in the absence of the other party. It was submitted that in effect the earlier panel had converted what should have been an inter-parte argument in a criminal appeal into an ex-parte criminal proceeding.

[60] What becomes clear from this episode is that the prosecution was heard for two full days whereas the applicant was not heard at all. Any which way one looks at it, the end result was that the court only heard one side. In other words, the applicant's right to be heard was comprised, in breach of the *audi alteram partem* rule.

[61] A number of authorities were cited by the applicant in support but I shall only refer to five of them. In the old English case of *Maxwell v Keun and Others* [1926] 1 KB 645 Lord Atkin held that the courts had a duty to review where an order is made to defeat the rights of the parties altogether. This is what His Lordship said at page 653:

"I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does so; **but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the**

parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the Court has power to review such order, and it is, to my mind, its kduty to do so."
(emphasis added)

[62] The *ratio decidendi* of the case is clear. If it appears that the result of the decision complained of was to defeat the rights of the parties altogether, it is the duty of the court to review the decision. The principle applies in the present application for review as the issue before the court is whether the result of the decision by the court to refuse an adjournment and to proceed with the hearing of the main appeals was to defeat altogether the right of the applicant to a fair hearing.

[63] For the purposes of determining this issue, no distinction should be drawn between a trial and an appeal in an application for review under Rule 137 as the hearing of the main appeals by the earlier panel, which is the subject matter of the present application, was by way of rehearing, which was a continuation of the trial. This is not to treat the application as if it is an appeal but to determine if the impugned decision has resulted in injustice to any party. In the Court of Appeal case of *Ishak bin Haji Shaari v Public Prosecutor* [2006] 3 MLJ 405 Gopal Sri Ram JCA (as he then was) said:

"[10] In the third place, counsel's argument overlooks that in the word 'trial' in the context of r 76, having regard to its purpose **includes an appeal**. As a matter of pure principle, it has been held in a number of decisions concerning criminal cases that **an appeal is part of the trial of an offence or a mere continuation of it. In *Queen-Empress v Jabanulla* (1896) 23 ILR 23 Cal.**

975 at p 977, O' Kinealy J said that an appeal 'is not a second trial, but only a continuation of the first trial.' This view was followed in the case of *Re Bali Reddy* (1913) ILR 37 Mad 119 where the accused had been charged for murder and rioting but had been convicted by the sessions court for offences under ss 304 and 147 of the Indian Penal Code. In dealing with the contention that the appeal was a fresh proceeding, the court comprising of Benson and Sundara Avar JJ said, **'the present appeal is not a second trial but a continuation of the trial in the sessions court.'** ***Lasly in Bansi Lal v Emperor*** **(1907) 12 CWN 438, the court held that 'an appeal is part of the trial of an offence.**

[11] There is one further case of interest that supports the point we make. In *Ranjit Singh v State* AIR 1952 HP 81, it was argued that those provisions in the Criminal Procedure Code which empower the High Court to reverse an acquittal or act in revision to the prejudice of an accused offended the *autreois acquit* and *autrefois convict* principle embodied in the Indian Constitution. The court in rejecting this contention said that:

> an accused cannot be said to have been convicted or acquitted as a result of a judgment passed in the course of 'prosecution and punishment' if that judgment is still open to appeal to a court of higher jurisdiction. **It has therefore been held under the corresponding provisions of s 403 of the Code that an appeal is not a second trial but only a continuation of the trial in the sessions court**."
> (emphasis added)

[64] In *Maxwell* the plaintiff was an officer in the Army who was then serving in India. He made applications to the Lord Chief Justice, which were refused, to allow both actions to be adjourned in order to enable him to obtain leave from the Army to return to England for the hearing. Trial proceeded and that led to the appeal, which was ultimately granted. At page 657 Lord Atkin said:

"**The result of this seems to me to be that in the exercise of a proper judicial discretion no judge ought to make such an order as would defeat the rights of a party altogether, unless he is satisfied that he has been guilty of such conduct that justice can only properly be done to the other party by coming to that conclusion**. I am very far from being satisfied that that is so in this case; on the other hand, I am quite satisfied that very substantial injustice would be done to the plaintiff by refusing the application that this case should be postponed and that that is the result of the present order."
(emphasis added)

[65] The relevance of the authority to the present application is that the grant of an adjournment of 3 – 4 months of the hearing of the main appeals would not cause any injustice to the prosecution as they did not object to the request for adjournment. In other words the prosecution accepted that a break of 3 – 4 months for the hearing of the main appeals would not cause them any prejudice. There is therefore no question of the applicant being, in the words of Lord Atkin "guilty of such conduct that justice could only properly be done to the other party by coming to that conclusion." Surely it cannot be suggested that the prosecution by not objecting to the adjournment was in cahoots with the applicant to delay the hearing of the main appeals.

[66] On the other hand, very substantial injustice would be caused to the applicant by the refusal to grant an adjournment as he would be left without legal representation at the hearing of the main appeals. He could not be said have legal representation when counsel of his choice was unwilling to represent him any

further. A forced representation is no representation at all, especially where, as in this case, counsel refused to take part in the hearing of the main appeals. That is common sense. Obviously the applicant was in no position to argue the appeals himself, despite being a former Prime Minister. I do not think that is a point for argument. The fact is he was clearly disadvantaged. As the High Court of Australia said in *Dietrich* (supra at [17]) at page 282:

"**An unrepresented accused is disadvantaged, not merely because almost always he or she has insufficient legal knowledge and skills, but also because an accused in such a position is unable dispassionately to assess and present his or her case in the same manner as counsel for the Crown (*McInnis* (supra) per Murphy J at 590)**."

[67] At page 289 the court explained the position in Australia:

"**The decision whether to grant an adjournment or stay is to be made in the exercise of the trial judge's discretion, by asking whether the trial is likely to be unfair if the accused is forced or unrepresented. For our part, the desirability of an accused charged with a serious offence being represented is so great that we consider that the trial should proceed without representation for the accused in exceptional cases only. In all other cases of serious crimes, the remedy of an adjournment should be granted in order that representation can be obtained**.
(emphasis added)

[68] I see no reason why we should not adopt the Australian position as part of our law. In the context of the present case, the question for the earlier panel to ask was whether going ahead with the hearing of the main appeals was likely to be unfair to the applicant when he was not legally represented. There is no

question that he was charged with serious offences. At page 292 the court in *Dietrich* came to this conclusion:

"In view of the differences in the reasoning of the members of the court constituting the majority in the present case, it is desirable that, at the risk of some repetition, we identify what the majority considers to be the approach which should be adopted by a trial judge who is faced with an application for an adjournment or a stay by an indigent accused charged with a serious offence who, **through no fault of his or her part**, is unable to obtain legal representation. **In that situation, in the absence of exceptional circumstances**, **the trial in such a case should be adjourned, postponement or stayed until legal representation is available. If, in those circumstances, an application that the trial be delayed is refused and, by reason of the lack of representation of the accused, the resulting trial is not a fair one, a conviction of the accused must be quashed by an appellate court for the reason that there has been a miscarriage of justice in that the accused has been convicted without a fair trial**."

[69] That was a case where the accused was unable to obtain legal representation unlike the case before us where the applicant had obtained legal representation but his counsel discharged himself. I do not think however that the difference in the factual matrix of the case is of any significance as in both cases there was no legal representation at the trial (in the case of the accused) and at the hearing of the appeals (in the case of the applicant).

[70] What the case demonstrates is the importance of an accused person to be legally represented to guarantee the fairness of his trial or appeal process. It is only in exceptional cases that the trial or appeal should proceed without legal representation. In the present case, nothing exceptional has been shown to justify the

hearing of the main appeals without legal representation for the applicant.

[71] The principle in *Maxwell* (supra at [61]) was further developed by the English Court of Appeal in *Dick v Piller* [1943] AC 627. In that case the trial judge refused to grant an adjournment on the basis that the defendant's medical certificate to support his reason for being absent at the trial was not substantiated by an affidavit to support his application for adjournment. Croom-Johnson J held at page 634 that in considering an application for adjournment the court must consider whether a miscarriage of justice would have been occasioned if the adjournment was granted:

"On the question whether there has been a wrong exercise of discretion, a number of authorities were cited to us. In view of the passages from the judge's notes, to which I have already referred, I feel sure that the judge must have taken into consideration statements which, on fuller examination, turn out to be accurate. He had apparently made up his mind on September 16, long before any question of illness arose, to proceed with the trial in the absence of the defendant at the adjourned hearing, even if the defendant were absent. **I cannot believe that the judge applied his mind of the possibility of an injustice resulting from the case being decided without the defendant's evidence. Had he done so he must, I think, have come to one conclusion only. He would then have had to consider whether a miscarriage of justice might arise to the plaintiff if an adjournment were granted. I can find no trace of these points being considered or even discussed, whether an award of costs would not meet the case**."

[72] Similarly in the present case the court in refusing to allow the application for adjournment did not appear to have applied its mind

to the question whether a miscarriage of justice would have been occasioned to the prosecution if the adjournment was granted and whether conversely it would have such effect on the applicant if it was not granted. There is nothing in the grounds of judgment to indicate that the point had been considered or even discussed.

[73] In *Hup San Timber Trading Co Sdn Bhd v Tan Ah Lan* [1979] 1 MLJ 238, the Federal Court held that where a judge is in doubt as to the real reason behind the inability of the appellant to attend court, an adjournment should have been allowed to enable both parties to be given an opportunity to be heard. In that case, the trial judge suspected that the failure by the accused to attend court was to avoid the hearing. Wan Suleiman FJ said:

"The learned judge "strongly suspected" that the medical certificate and the absence of Mr. Lai on the day of the trial was not just coincidence. He had formed his suspicion because of what counsel for the respondent had stated, it would appear, from the Bar. It seems that in another case in Johore Bahru Mr. Lai had failed to attend court on the date of hearing, advancing as an excuse the fact that he had been barred i.e. by the immigration authorities from entering this country, in consequence of which evidence *de bene esse* was taken from him in Singapore and adduced in evidence.

We are unable to understand exactly why the learned judge subsequently proceeded under Order 36 rule 31, because at page 24 of the Grounds it looks very much as if he had two possibilities for Mr. Lai's absence in mind viz. (i) he was really indisposed as stated in the medical certificate or (ii) he had difficulties with the immigration authorities and therefore was unable to enter this country.

We would with respect say that either of these reasons would be sufficient grounds for an adjournment of the hearing.

……..

No doubt failure by appellant to obtain a medical certificate containing the appropriate information in a form so prescribed as to remove suspicion that he was trying to delay proceedings has inclined the learned trial judge to allow this rather drastic measure. But it seems to us that in this instance the judge was in some doubt as to the real reason behind his inability to attend court. **On occasions of doubt such as the present one the guiding principle should be that both parties should be given an opportunity to be heard**. Any delay occasioned by what appears to be an inadequate reason for absence can be compensated by an award of appropriate costs."

[74] In the present case, the question of the court doubting or "suspecting" the real reason for the application for adjournment did not arise. There is no such suggestion in the grounds of judgment. The main reason for refusing the application was because the court could not accept unpreparedness of counsel as a ground for granting an adjournment, apart from the need to give priority to cases of this nature as required by the Chief Justice Practice Direction No. 2 of 2003 and to avoid unnecessary expenses.

[75] In *Mohanlal Gordhandas Sheth v Ban Guan & Co* [1956] 22 MLJ 13, an appeal against an interlocutory order in refusing an adjournment was allowed. In so deciding, the court held that *"an injustice may occur if the appellant is deprived of his right to defend a suit"* where his counsel did not have the material before him upon being instructed to apply for an adjournment but was refused and the matter had proceeded to trial despite the learned judge having every reason to believe on the material before him

that the appellant had known of the date of hearing several weeks previously.

[76] In *Lee Ah Tee v Ong Tiow Pheng & Ors* [1983] 1 MLJ 10, although the Federal Court disallowed the application for adjournment it held as follows:

"The discretion of the Judge to allow or refuse an application for adjournment was a subject dealt with in depth by the Court of Appeal in *Dick v Piller* [1943] 1 All ER 627. We agree to and adopt the following principles as regards the discretion in allowing or refusing an adjournment:-

(1) Whether or not a party should be granted an adjournment is wholly at the discretion of the Judge. He would exercise the discretion solely upon his view of the facts;

(2) *Prima facie* this discretion is unfettered;

(3) **The question to ask in any particular case is whether on the facts there are adequate or sufficient reasons to refuse the adjournment**;

(4) Although an appellate court has power to interfere with the Judge's decision in regard to the granting of an adjournment, it would refrain from doing so **unless it appears that such discretion has been exercised in a way which tended to show that all necessary matters were not taken into consideration or the decision was otherwise arbitrarily made**;

(5) An appellate court ought to be very slow to interfere with the exercise of the discretion. **But if it appears that the result of the order made below would be to defeat the rights of the parties**

altogether or that there would be an injustice to one or the other of the parties then the appellate court has power and indeed a duty to review the exercise of the discretion."

[77] Paragraph (5) above is an adoption of the principle laid down by Lord Atkin in *Maxwell* (supra at [60]). The principle has therefore become the law of this country, which is, if it appears that the result of the order made below would be to defeat the rights of the parties altogether or that there would be an injustice to one or other of the parties then the appellate court has power and indeed a duty to review the exercise of the discretion. The principle applies and there is no legal basis nor precedent that I am aware of which says that it only applies to appellate courts hearing appeals from the lower courts and not to a court hearing an application for review under Rule 137. It must be kept in mind that Rule 137 is there "to prevent injustice or to prevent an abuse of the process of the Court." Effect must be given to the legislative intent of the provision.

[78] These cases it will be noted are all civil cases, where the consequences are far less serious than in criminal cases where the stakes are high, such as the present case where the applicant had 12 years of imprisonment hanging over his head in addition to a colossal fine of RM210 million, in default another 5 years imprisonment.

[79] What the cases highlight is the need for the court to strike a balance between the interests of the parties in deciding whether to allow or to refuse an application for adjournment. Whatever may

be the considerations, it must not defeat the rights of the parties altogether or to result in injustice to any party, technicalities aside. It is true that the cases are not cases on review under Rule 137 of the Rules but the underlying principle is that the decision must not result in injustice to any party, which is what Rule 137 is meant to remedy.

[80] In the present case, I am constrained to agree with the applicant that his right to a fair hearing was altogether defeated when the court decided to go ahead with the hearing of the main appeals in spite of the fact that he was not legally represented after his counsel Hj Hisyam discharged himself. The fact that counsel remained in court (as directed by the court) does not change the equation as the applicant was still without legal representation in the real sense of the word as counsel refused to take further part in the proceedings. In that situation, an adjournment would have been in order to enable the applicant to engage another counsel or alternatively to give his counsel Hj Hisyam sufficient time to prepare for the main appeals, bearing in mind the application for adjournment was not to scuttle the hearing of the main appeals. It was done in good faith by a lawyer who had just been retained 3 weeks earlier to represent the applicant.

[81] It cannot be doubted that a criminal trial is most fairly conducted when both the prosecution and defence are represented by competent counsel: see *Dietrich* (supra at [16]). In *Dietrich* the accused was unable to obtain legal representation and for that reason alone he was ordered to be acquitted on appeal on

the ground that there had been a miscarriage of justice in that he had been convicted without a fair trial.

[82] If inability to obtain legal representation can be a ground for quashing a conviction, as in *Dietrich*, *a fortiori* it should also be a ground for quashing a conviction where the accused was unrepresented by counsel, as in the present case where the applicant was without legal representation when the main appeals were heard and decided by the court of final appeal, thus causing a miscarriage of justice.

[83] In *State (Healy) v Donoghue* [1976] IR 325 O'Higgins CJ of the Supreme Court of Northern Ireland expressed a similar sentiment when he said at page 350:

"The general view of what is a fair and proper in relation to criminal trials has always been the subject of change and development. Rules of evidence and rules of procedure gradually evolved as notions of fairness developed. **The right to speak and to give evidence, and the right to be represented by a lawyer of one's choice were recognized gradually**. Today many people would be horrified to learn how far it was necessary to travel in order to create a balance between the accuser and the accused."
(emphasis added)

[84] The right to counsel would be illusory if it precludes the right of counsel to be heard. Justice Sutherland of the United States Supreme Court said in *Powell v Alabama* (1932) 287 US at page 68 that the right to be heard would, in many cases, be of little avail if it did not comprehend the right to be heard by counsel.

[85] In *Strickland v Washington* (1984) 466 US 668 the same court held that the right to counsel is to be strictly defined as being the right to be represented by an effective counsel. A violation of the right to effective representation would occur where the defendant's choice is wrongfully denied. See the United States Supreme Court case of *United States v Gonzalez-Lopez* (2006) 548 US 140.

[86] In the present case, in failing to consider the risk of prejudice to the applicant by denying his counsel an adjournment in order to give him sufficient time to prepare for the main appeals, the earlier panel with the greatest of respect had denied the applicant of his right to be represented by an effective counsel. It cannot then be said that he had the services of an effective counsel when his counsel was shackled from representing him effectively for want of preparation, which forced him to discharge himself, which was also denied.

[87] The learned Deputy Public Prosecutor argued that the earlier panel made the right decision to refuse an adjournment applied for by Hj Hisyam as he had 4 months to prepare for the main appeals. That is not entirely correct. In fact it is factually wrong. The period of 4 months was good for Shafee & Co but not for Hj Hisyam who took over conduct of the case from Shafee & Co only on 21.7.2022. This gave him only about 3 weeks to prepare for the main appeals which were already fixed for hearing on 15.8.2022 to 26.8.2022, which were also the dates allocated by the court for the hearing of the motions, including the motion to adduce additional evidence and for a declaration that the High Court trial was a

nullity due to a conflict of interest on the part of the trial judge Justice Mohd Nazlan bin Mohd Ghazali. As I mentioned earlier, despite the time constraints, Hj Hisyam managed to present his submissions for the motion on the first day of hearing on 15.8.2022. This effectively rebuts any allegation that the change of counsel was to delay the hearing of the main appeals. If that had been the intention, it would have been more prudent for Hj Hisyam to also apply for an adjournment of the motions as well. But he did not.

[88] In any event, the question to ask is not whether the court made the right decision in refusing to allow an adjournment. The right question to ask is whether the decision had caused injustice to the applicant. There is a difference between making a right decision and a decision that causes injustice to any party. The difference is like doing the right thing and doing it right.

[89] But more importantly, it would be grossly unfair to make the applicant suffer the consequences of his lawyer's fault in accepting the brief knowing that he was only prepared to argue the motion to adduce additional evidence and to declare the High Court trial a nullity but not the main appeals. The undisputed fact is that the applicant was given a firm assurance, in absolute terms in fact, by his new lawyers including Messrs Zaid Ibrahim Suffian TH Liew & Partners (Messrs ZIST) that an adjournment of the case would be granted by the court for a new team to prepare. It is also an undisputed fact that this was the first time the applicant changed his solicitors and counsel since his trial began in the High Court on 3.4.2019. His record does not show that he was in the habit of

changing counsel, let alone changing counsel to delay the proceedings. The applicant cannot be faulted for listening to his lawyers' advice.

[90] The point was also missed that before changing his solicitors and counsel from Messrs Shafee & Co to Messrs ZIST with Hj Hisyam as lead counsel, the applicant's desire was to engage a Queen Counsel (QC) to work together with TS Shafee in the final lap of his final appeal after losing his battles in the High Courti and in the Court of Appeal. This was not a mere puff by the applicant as he had indeed applied to obtain an ad hoc licence for the QC to appear as his counsel in the main appeals. But unfortunately for him, the application was dismissed by the Kuala Lumpur High Court on the ground that the lawyer from England could not speak Bahasa Malaysia.

[91] It was only after his application for an ad hoc admission of the QC was dismissed that the applicant engaged Messrs ZIST with Hj Hisyam as lead counsel to replace Messrs Shafee & Co. According to the applicant, the QC had been paid in full and he would have gone on with him on the hearing dates of 15.8.2022 to 26.8.2022 had it not been for the High Court's refusal to grant the QC leave to appear as counsel. This was not disputed by the prosecution. Therefore, the appointment of the new set of solicitors and counsel was necessitated by the refusal of the High Court to grant an ad hoc admission to the QC and not to delay the hearing of the main appeals.

[92] In the chronology of events that I have set out earlier in this judgment, the applicant was allowed by the court to make a statement at the tail end of the proceedings on 23.8.2022, minutes before he was escorted to prison to serve his sentence. There was no objection raised by the prosecution for the inclusion of this statement in the record of proceedings. Nor was there any objection when it was read out in open court by learned counsel for the applicant at the hearing of this application. It therefore forms part of the record for the purposes of this review application.

[93] Although it was too late in the day, the applicant pleaded yet again, this time personally since his counsel had discharged himself, for him to be given time to prepare for the main appeals. This time he bargained for a shorter adjournment period of 2 months instead of the 3 – 4 months requested for by his counsel Hj Hisyam before he discharged himself. The request was rejected and the court proceeded to deliver its decision dismissing his appeals.

[94] The statement that the applicant gave from the dock is a manifestation of his disappointment at the way his appeals were handled by the court. He did not feel that he has had a fair hearing (*Kiew Foo Mui & Ors* supra at [16]). The following passages in the statement, so far as they are relevant to the issue of adjournment, bear this out, a little bit lengthy but necessary to provide context to his plea for an adjournment of 2 months for the main appeals:

"I wish to address this Honourable Court on my position in this appeal. I am the appellant, yet the same feels illusory.

Over the past week, I have watched from the dock as my chances of success at this appeal slowly erode away. Not because of lack of merit but because I am not represented. While I note this Honourable Court's decision on barring the discharge of my lawyers the fact of the matter is I am unrepresented.

I believe that there has never been a single occasion in Malaysian legal history where a counsel in a criminal trial or appeal has been prevented from discharging himself from representing his client in similar circumstances or any reasonable circumstances. Even the cases cited by Dato Sitham on Friday do not demonstrate this! In fact, the cases he presented to the court show in these cases there were continuing trend of multiple adjournments in the proceedings applied for by the accused/appellant before such drastic actions were taken by the court. **In our case, this is the first time I have changed solicitors/counsel for a good reason which I shall elaborate in a while. This is also the first time an adjournment of a mere 4 months is requested for, unlike other cases where adjournments of about 70 times were allowed by our courts**. At the end of this I wish to say something about what I have discovered from my casual understanding of the law in relation to the engagement of new counsel and circumstances posed that make it necessary for a request of an adjournment.

I take responsibility of decisions pertaining to my representation. But I genuinely thought they were sound decisions at the time based on my solicitors and external counsel advice. Now it seems to be adversely interpreted against me by this Honourable Court if an appellant similarly placed in my position cannot rely on his lawyer's advice and being punished instead, fair trial and the rule of law seems to me illusory.

Yet, and at no point have I been afforded the opportunity to explain myself nor have I been asked about the circumstances that led us here. **It is said that the accused is the most important person in the criminal court, yet I somehow feel mistreated and I feel fair trial has not been accorded to me**.

Yang Arif, I plead that no offence is taken for what I have said, but it is simply how I feel. As an accused and appellant at the final stage of a case, it is the worst feeling to have, to realize that the might of the judiciary machinery is pinned against me in the most unfair manner.

…….....

With your permission Yang Arif.

My previous lawyers at Shafee & Co., did well over the past four years representing me in the High Court and the Court of Appeal, leaving no stones unturned, which is why they remain my lawyers in the other trials I am facing.

But notwithstanding their valiant effort, I lost in both my trial and the appeal to the Court of Appeal, not because my defence lacks merit. My previous lawyers and I seriously entertained the notion that even my defence would have not been called at the trial on all charges and therefore the reasons for the voluminous submissions by my counsel even at that stage.

It is with this backdrop I felt a fresh perspective of the case, and to bring in new ideas was warranted and necessary for my final appeal before this court as all and every valiant effort seems not to work. This after all involves my life, nothing less.

My initial plan was the engagement of Jonathan Laidlaw QC to come onboard with Shafee & Co. and to work with Tan Sri Shafee and Harvey. The QC came with the highest of recommendations and I was confident that he would be a positive contribution to the team. After all, Chambers and Partners, described him as a top most silk in the UK and in most part of the commonwealth, in the field of criminal law particularly relating to fraud, corruption, abuse of powers and other corporate and white collared crime, for the last 4 years consecutively.

It is important to bear in mind here, the QC was prepared for the purposes of the hearing of this appeal starting on the last 15th August

2022. Fees for his services were paid. This should deliver the message to this court that I was serious with the appeal to go on the 15th.

……

Unfortunately, the High Court rejected the QC's bid to come onboard as my lawyer on the 21st July 2022. I was discouraged as this literally stopped the QC's preparation as the weeks of the appeal that he had reserved for the appeal would become wasted and he had to resort to adjusting his busy calendar.

With the High Court's rejection and this appeal fixed around the corner I could not run the risk of the QC's rejection being maintained at the appeal in the Federal Court leaving me with no additional counsel which by then I took the view was imperative to independently argue the issue regarding Justice Nazlan.

Datuk Zaid Ibrahim who had approached me some time back represented that he was able to bring in legal expertise from India through his Singaporean partner, a certain Mr Niru Pillai.

I had no knowledge of Datuk Zaid Ibrahim or his Singaporean partner of their expertise or otherwise in areas of criminal law, but I was then introduced by them to two senior counsel from India, who initially impressed me with their ides. Ultimately they suggested they will do the back end work while Datuk Zaid's firm would facilitate the court process.

Datuk Zaid and team came with a condition that their engagement must include his firm being placed as solicitors on record and a new local counsel to come onboard. I never knew that neither Zaid Ibrahim nor Niru Pillai has ever practiced criminal law or had sufficient knowledge on those subjects.

I was advised by Datuk Zaid and Mr Niru Pillai that this was the only way they would be afforded time to prepare for the appeal as by practice and precedent the court will (and this was represented to me in absolute

terms) grant time for a new team to prepare. Acting on their legal advice, I agreed to this course of action.

I was not made known of the various legal propositions cited by this Honourable Court in the judgment recently pronounced the other day pertaining to the undue difficulties of change of counsel and the adjournment that would become necessary to enable the new counsel and solicitors to familiarize with the case.

I was also convinced that this was an appropriate decision after being told that other high-profile appeals in the past were granted multiple adjournments in the spirit of due process to achieve real justice.

… The SRC case has taken 4 years, two years of which were affected by the pandemic and no less than seven other proceedings, criminal and civil against me. **As I have said, I have also *never* sought for an adjournment in this appeal apart from the ones following my change of solicitors and counsel**.

I say in no uncertain terms – My intention was not to simply delay the court process but rather because of QC Jonathan Laidlaw's application not looking good based on the unreasonable and strong objections raised by the prosecution and the Bar Council, and ultimately the application being rejected less than a month before the scheduled dates at the gearing (sic) of the appeal. The objections taken by the prosecution and the Bar were so ridiculous that they argued that the QC must have Bahasa Malaysia qualification, a point settled by the Federal Court itself in Geoffrey Robertson QC, case. This point is important to show how these two bodies were all out to deprive me of a competent counsel before even I reach the Federal Court on the 15th of August. **Any new team bringing in fresh ideas will need time, to read the voluminous Record of Appeal, written submissions, applications etc**.

I am not ashamed to say, I was desperate, as would any litigant placed in my situation and predicament. I thought what I decided would increase my chances of improving the quality of submissions at the appeal.

Yang Arif, my decision has now left me with no counsel. While Tn Haji Hisyam came in with the most nobel (sic) of intentions, he cannot represent me effectively as he never had adequate time to prepare or read, and I consider him and the team of solicitors discharged as of August 18th, 2022 as it was made clear by Tn Haji on behalf of the team that they were not prepared to argue the appeals, in their state of total unpreparedness. **Seriously, Yang Arif, may I ask this Court, am I to be blamed and punished for relying on my own solicitors and counsel advice**.

Since, your decision last week, I have called up various counsel to find alternative representation, but considering the decision and grounds of this Honourable Court last Tuesday (16th August 2022), nobody is able or willing to take up my appeal, unless adequate time is given to that, as was being requested by Tn. Hj. Hisyam.

Even my previous counsel and solicitors are not able or willing to re-take the brief unless they are given adequate time of at least 2 months to re-mobilise their work considering the volume of preparation and other commitments to the courts. They can do this preparation in 2 months as they were involved at the High Court and the Court of Appeal. Tn Haji Hisyam on the other hand, together with his solicitors, being totally new to the case would require at least 4 months to get themselves ready and comfortable to argue the appeals.

This I must repeat leaves me with no counsel and I don't know what to do. If given time of at least 2 months, I am confident I can assemble a team to adequately represent me – perhaps with a combination of my previous counsel and Hj. Hisyam in a consolidated team. In that proposed combination perhaps Tn. Hj. Hisyam can be brought up to speed by Shafee & Co. to be able to understand the case within 2 months.

Yang Amat Arif, on Monday Tn Haji Hisyam said a hearing is like a contest. But right now it seems like I'm put out of the contest, a contest that affects my liberty. I feel this is not cricket at all as there is total unfairness executed on me.

In the normal course of events my counsel at this stage will be submitting copiously in my defence. But that is not the case today. I can't fault Tuan Haji for this and for him to just submit on a few points as suggested, would as I understand be a breach of another rule of practice where a defence counsel must present ALL legal defences available to him, surely not one or two points out of the 90 over grounds. My previous counsel Tan Sri Shafee and Harvey Singh had impressed upon me when preparing this appeal previously that there are at least 40 distinct grounds within the 90 grounds of the Petition of Appeal where my appeal on any single matter out of the 40 can be successful amounting to my acquittal in the appeal. **How can any responsible counsel resort to taking up only 2 or 3 points out of the 90 grounds and do justice to me. This Honourable Court seems overly concern about the time allotted for this appeal and that any adjournment would pose inconvenience to this Court and perhaps the Prosecution. But, Yang Arif surely, in the light of what I have said and what would be said later on, must justice be sacrificed at the altar of convenience?**

Therefore, I plead that time be given Yang Amat Arif. At this stage I am asking for two months for my counsel to be prepared and to conduct this appeal. I am already disadvantaged but at the least let me have my day in court with proper representation with the fullest of the argument of my defence without limitation.

The upshot of what I am asking is a mere 2 months postponement adjournment of the hearing of the appeal as opposed to my life and liberty being shortened by 12 years of imprisonment, not to mention the astronomical sum of the fine.

……..

With the help of some counsel I have discovered that there are many reported cases in the commonwealth from United Kingdom to Australia, Malaysia, India and Jamaica, South Africa, and from a non-commonwealth country in the United States, and my survey indicates that in my situation this Court should have given time to my counsel for adequate preparation in this very important appeal, which is noted by all the Court including the trial court as being the case that poses unusual issues and certainly great difficulties both in law and facts. In the old case, Chong Fah Hin versus Public Prosecutor, a 1949 decision by Justice Russell in Malaya, it was already decided that every accused person have a right to be defended by an advocate and should be given sufficient time to instruct his counsel.

……

I am disappointed with Your Ladyships and Your Lordships rulings that I am not entitled to an adjournment in order to provide effective defence through an effective counsel. Two of Your Ladyships decided in Yahya Hussein Mohsen AbdulRab versus Public Prosecutor that a flagrantly incompetent counsel does not amount to the right to a counsel of an accused person to be adequately satisfied. **Yang Arif, has directed my unprepared counsel to nevertheless submit, even on one or two points out of the 90 points, does not this tantamount to instructing an ineffective counsel to submit on matters affecting my liberty. And through no fault of my own! Is this the justice that the Highest Court of this land wants to deliver? Or am I just a pawn, as Geoffery Robertson QC said, "in a justice game"?"**.
(emphasis added)

[95] In his written submissions, the learned Deputy Public Prosecutor contended that "If any injustice is suffered by the Applicant, it is ultimately the Applicant's own doing". At the oral hearing before us he put it another way by saying that the applicant was "the author of his own misfortune". The verbatim text of his written argument on the point is reproduced below:

"90. I submit that the Prosecution and Defence are expected to treat the trial dates as commitments to be honoured. The Court has the right to refuse an adjournment on the ground that it had no time to prepare the case.

91. The Applicant was complicit with his new Counsel in seeking an adjournment despite the hearing dates being fixed 4 months before the hearing of the Appeals.

92. It is obvious that the Applicant appointed his new solicitors/Counsel to seek an adjournment of the Appeals.

93. Thus, it is obvious that the solicitors/Counsel deliberately accepted the brief with the sole view of postponing a case that was fixed for 4 months earlier. This conduct of the solicitors/Counsel in accepting the brief with the sole intention to postpone the substantive appeals is contemptuous and an interference with the course of justice.

94. It is of utmost importance that defence Counsel who cannot fulfill the obligation to conduct the case without seeking an adjournment should not accept the brief.

95. The right to counsel does not encompass only the right to counsel of choice but counsel who is available to conduct the appeal hearing on the scheduled date.

96. The Respondent reiterates the Review Principles found in paragraphs 30.1 to 30.4 at pages 37-38 of this submission."

[96] There is no mistaking the allegation that the applicant had worked hands in glove with his lawyers to delay the hearing of the main appeals. I have dealt with the allegation earlier in this judgment and I shall not repeat it save to say that it is baseless.

[97] Looking objectively at the overall surrounding circumstances of the case, in particular the fact that the applicant was left to fend for himself after his counsel discharged himself, it is difficult not to agree with the applicant that he was not given a fair hearing by being denied a reasonable opportunity to prepare and to present his case before the court decided on the fate of his appeals, and his personal liberty. This is elementary rule of natural justice, a breach of which would warrant a review under Rule 137 of the Rules (*Dato' See Teow Chuan & Ors*, supra at [10]).

[98] There is merit in the applicant's contention that even if the court was not minded to give a full 3 – 4 months adjournment that Hj Hisyam asked for, it could at the very least grant a shorter period, but not the mere 3 days that it granted to counsel for him to file his written submissions for the main appeals which involved volumes of documents containing some 30,000 pages of material for each appeal to go through. The combined judgments of the High Court and the Court of Appeal alone consisted of some 1000 pages.

[99] Given the precarious situation that he was in after the court refused to grant an adjournment of the main appeals followed by his lawyer's decision to discharge himself, it is understandable why the applicant was alarmed by the court's decision to go ahead with the hearing of the main appeals on 23.8.2022 and to decide thereon when he had no legal representation. He could not understand the speed at which the court wanted to complete the hearing of the main appeals and to deliver its verdict without giving his newly appointed counsel sufficient time to prepare.

[100] The issue is not so much a denial of the applicant's right to counsel of his choice, for he was never denied that right. The issue is whether it was fair in the circumstances to deny his counsel, who had just been appointed barely 3 weeks earlier, an adjournment of 3 – 4 months, or 2 months or a shorter period to prepare for the main appeals.

[101] In *R v Thames Magistrates' Court, ex parte Polemis* [1972] 2 All ER 1219 at page 1225 Lord Widgery CJ in explaining the rationale for his decision to quash the accused's conviction when an adjournment was refused by the court said:

"I come back now to the four lay justices who refused the adjournment. As I have already said, I have not the slightest doubt that what was in their minds was that if they adjourned the case, it was equivalent to forgetting all about it and saying goodbye to the applicant and to any fine which might be imposed. I think they weighed the considerations for and against conducting the enquiry that afternoon and came to the view that the considerations in favour of conducting it prevailed. **I think they were wrong in that approach. I think they should have asked themselves first, whether the enquiry could be conducted having due regard to the rules of natural justice that afternoon and if the answer was No, then that would be the end of the matter; they would then have to make up their minds that they were not going to conduct that enquiry that enquiry that afternoon at all**. Of course it would then be for their consideration as to what steps could properly be taken to make sure that the captain, the fine and all trace of the affair did not slip away with the tide. But they would have no difficulty within the powers open to them in taking appropriate steps to that end. One bears in mind to start with that they had the power to remand the captain in custody, which would most effectively ensure that he was still available for disposal on the adjourned hearing date. One does not imagine that in practice such an extreme course would be necessary, but the possibility of that being available

as a last resort would no doubt stimulate the shipowners in cases of this kind to make some useful alternative suggestion, either by the provision of sureties for bail, or the deposit of a sum of money for any potential fine or otherwise. Indeed on that hurried day, 11 July 1973, the solicitors for the applicant did make an attempt to provide some kind of security of that sort. **The practical answer, as I see it, is that if the court cannot conduct a trial in accordance with the rules of natural justice before the ship sails, then the justices must adjourn the matter because the rules of natural justice are paramount**, but they have adequate powers to see that some sensible provision is made whereby there would be some security for the appropriate penalty in the event of a subsequent conviction.

So far as this court today is concerned, all that I need to say is that in my opinion certiorari should go to quash the conviction."
(emphasis added)

[102] By parity of reasoning, since it was not possible for the earlier panel to conduct the main appeals in accordance with the rules of natural justice due to the fact that the applicant's counsel had discharged himself, thus leaving the applicant stranded without legal representation to argue the appeals, it should have adjourned the hearing of the main appeals "because the rules of natural justice are paramount". As a matter of fact this was precisely the reason why the court directed Hj Hisyam to remain in court as counsel for the applicant after he had discharged himself - to ensure that the applicant was legally represented, on record.

[103] The decision of the High Court in *Awaluddin bin Suratman & Ors v Pendakwa Raya* [1992] 1 MLJ 416 is on point. Mohtar Abdullah J (later FCJ) in setting aside the conviction and ordering for a retrial said on review:

"Though the court should be strict in dealing with applications for postponements, the court owes a duty, too, to an accused person **to ensure that he has the benefit of counsel who would be properly able to act on his behalf**."
(emphasis added)

[104] The learned Deputy Public Prosecutor urged upon us not to countenance the last minute application for adjournment by the applicant as it will open the floodgates for similar applications in the future. The applicant's response was to refer to the Federal Court decision in *Yahya Hussein Mohsen Abdulrab v Public Prosecutor* [2021] 5 MLJ 811 where at paragraph [60] – [62] the court dealt with the floodgates issue as follows:

"[60] This brings us to the floodgates point. Learned DPP argued that if we were to accept the argument that convictions can be nullified because of defence counsel's flagrant incompetence, accused persons could purposely appoint incompetent lawyers to have their convictions overturned on appeal by virtue of such incompetency. The Court of Appeal seemed to accept this argument because it reiterated the same policy concern in its grounds of judgment at para 53, as follows

> [53]…If this order is made instead, it would be far too easy for an accused to be acquitted and discharge (sic), ie just by engaging counsels (sic) who would by design not handle the case properly and with certain standard (sic) expected in defending an accused person.

[61] With respect to the Court of Appeal and learned DPP, we find ourselves constrained to reject this assertion. The first reason has to do with the importance of a right to a fair trial that we have alluded to above. The prosecution's case is not the primary feature as the overall process must be

fair. Otherwise, it cannot be said that the accused was deprived of his life or personal liberty in accordance with law.

[62] Further, the assertion that an accused person would by design engaged an incompetent counsel to secure an acquittal defies common sense and is itself utterly devoid of any logic. We cannot imagine a case in which any lawyer would be willing to sacrifice his own reputation and credibility at the Bar or before the Bench to deliberately be incompetent in defending his client. We also cannot imagine any accused person agreeing to a strategy of sacrificing his counsel by calling him incompetent with the aim of having another set of counsel working to acquit him on that point alone. The ramifications of even thinking about such a strategy is that the accused will have to languish in prison pending the hearing of his appeal, incur significant expenses in retaining new counsel to conduct the appeal or even run the risk of jeopardizing his own defence or evidence during the trial process. In any case, the threshold to prove a breach of fair trial requires not just incompetency but flagrant incompetency which is a high threshold and so the number of cases in which convictions can be overturned on this ground will be sparse."

[105] It was a case on incompetency of lawyers and not on adjournment but it provides a complete answer to the floodgates point raised by the prosecution. To recapitulate and to give a more complete picture as to how the applicant's main appeals ended the way it did, it will help, at the risk of some repetition, if the chronology of events starting from the case management days up to the day Hj Hisyam discharged himself on 18.8.2022 is set out. The record of appeal shows the following train of events, starting from 25.1.2022.

25.1.2022

During the case management (CM), parties were informed that the hearing of the appeals would be fixed on dates as early as March 2022, i.e. within 2 months of the CM. Counsel for the applicant TS Shafee informed the Registrar that March 2022 was too short a time for them to prepare for the case, for the following reasons:

(a) the decision of the Court of Appeal was only delivered on 8.12.2021 (8 months after the completion of the hearing of the appeal). The Court of Appeal took 8 months to come up with its decision due to the complexity of the issues involved;

(b) parties had yet to receive from the Registry the full record of appeal. The record of appeal and the notes of proceedings would be voluminous and the judgment of the Court of Appeal was lengthy, running into more than 300 pages and the judgment of the High Court running into more than 700 pages;

(c) since the record of appeal had yet to be provided, the applicant was unable to prepare a complete petition of appeal as there was a need to go through the complete record of appeal. This had to be undertaken due to the shift in certain areas of the Court of Appeal judgment from the High Court judgment. There was also a possibility that there would be a request for extension of time to file a complete and comprehensive petition of appeal;

(d) the applicant needed additional time to go through the voluminous record of appeal. The extension of time was requested for and granted by the Court of Appeal;

(e) during the CM, TS Shafee informed the Registrar of the applicant's intention to engage a QC in the person of Mr Jonathan Laidlaw since the appeals involved complex issues and questions of law which are considered novel in Malaysia and in the Commonwealth. Hence, the applicant required time after receiving the record of appeal to supply the same to the QC in London. Moreover, many notes and documents were in the Malay language and needed to be translated into English for TS Shafee and the other counsel to brief the QC;

(f) fixing an early date for the hearing of the appeal would be greatly prejudicial to the applicant considering the fact that this was his final appeal. The applicant felt that his appeal was being rushed for no good reason;

(g) fresh and additional evidence in relation to the controversies of Tan Sri Zeti Aziz and Tan Sri Nor Mohd Yakcop and Nik Faisal Kamil were also before the Federal Court. If the Federal Court were to allow the additional fresh evidence, an extended procedure of reception of the evidence would ensue, which would change the landscape of the appeals. Fixing the hearing date of the substantive appeals without hearing the appeal for the fresh evidence

might deliver a wrong adverse message to the applicant and the general public.

8.4.2022

Following the CM on 8.4.2022, the applicant's counsel contacted the QC to inform him that the tentative date for the hearing of the appeals would be on 1.8.2022 to 12.8.2022. The QC took note of the proposed dates but informed that the free dates for his team to appear in Malaysia would be in the last two weeks of August 2022 beginning from 15.8.2022.

26.7.2022

Letter from the applicant's counsel to the Federal Court Registry on Notice of Discharge of Shafee & Co as counsel and solicitors for the applicant. The letter was issued by Messrs ZIST, who informed the Registry that at the next CM, their instruction was to withdraw the pending appeal against the decision of the High Court to dismiss the applicant's application for an ad-hoc admission of QC Jonathan Laidlaw. They were also instructed to address the court on their application for adjournment of the hearing of the Notice of Motion filed on 7.6.2022 as well as the main appeals fixed for hearing on 15.8.2022 to 26.8.2022, on the basis that **a wholly new team of solicitors had just taken over conduct of the case.**

28.7.2022

Affidavit of the applicant was filed to confirm that he had discharged Messrs Shafee & Co from acting further for him as solicitors and counsel and that Messrs ZIST would take over as his

solicitors with Hj Hisyam as lead counsel. The court took note of the appointment of Messrs ZIST as the new solicitors for the applicant.

29.7.2022

Parties were told that the hearing of the appeals fixed on 15.8.2022 to 19.8.2022 and from 22.8.2022 to 26.8.2022 **would not be postponed and that parties must be ready for the hearing**.

1.8.2022

At the CM, the Deputy Registrar informed parties that the applicant's Notice of Motion to adduce fresh evidence and the application to amend the Notice of Motion together with the appeals were all fixed for hearing on 15.8.2022 to 26.8.2022 (the dates fixed for the hearing of the appeals). The Registry was informed by Messrs ZIST that although lead counsel Hj Hisyam would be proceeding with the motion to adduce fresh evidence as well as the application to amend the motion, **they would be applying to the court for an adjournment of the hearing of the main appeals after the hearing of the motion**. The following reasons were given:

(1) They only took over as solicitors and counsel for the applicant on 26.7.2022 and that by any standard, this was a highly complicated appeal with multiple complex issues of fact and law, which required very substantial time and effort on their part.

(2) The complexity and the monumental task of preparing for the main appeals was manifest and is demonstrated by the extremely voluminous documents, which ran into at least 162 volumes. It was estimated that there were **about 30,000 pages of documents in respect of each appeal**. It was therefore humanly impossible to meaningfully review and digest the documents to be able to formulate their substantive arguments for the main appeals.

(3) This was a bona fide and genuine request by the new team of lawyers for an adjournment of the main appeals, to enable them to present a full, proper and comprehensive submissions to assist the court.

(4) Any lesser preparation would not only do injustice to the applicant in that it would have grave and far-reaching consequences and implications for him, but would also not be of any assistance to the court.

(5) As officers of the court, both lead counsel Hj Hisyam and Messrs ZIST owed a duty to assist the court to do justice on the case which had drawn considerable public interest This was quite apart from counsel's duty to the applicant to ensure that he received a full and fair hearing in this final stage of the legal proceedings involving the SRC matter.

2.8.2022

Letter from the Registry to Messrs ZIST informing the firm that the hearing of the main appeals would proceed right after the hearing

of the two notices of motion. Messrs ZIST was informed that if the notices of motion were allowed, the hearing would be adjourned pending the admission of the additional evidence, **but if the notices of motion were not allowed, the hearing of the main appeals would proceed on the same day and no adjournment would be allowed**.

16.8.2022

The motion to adduce additional evidence was heard and dismissed and parties were instructed to proceed with the substantive merits of the main appeals. Hj Hisyam told the court that he and his team, being the new lawyers for the applicant, were not prepared to argue the main appeals and moved the court to adjourn the appeals for 3 - 4 months. The application for adjournment was refused on the ground that unpreparedness of counsel to argue the case could not be accepted as a valid reason for granting an adjournment. Nevertheless the court allowed a two-day adjournment of the hearing to 18.8.2022 to allow Hj Hisyam and his team to "organize themselves" and to make use of the weekend to prepare "on any of the 94 grounds in the Petition of Appeal" and to submit on the same at the next hearing date on 23.8.2022 (Tuesday, the Monday 22.8.22 having been vacated by the court itself and taken off).

18.8.2022

Hj Hisyam made a fresh request for the appeals to be adjourned on the same ground that he and his team were not prepared to argue the appeals. **The request for adjournment was rejected by the court. With his application for adjournment refused, Hj**

Hisyam discharged himself from acting as counsel for the applicant. This was also refused for the reason that it would leave the applicant without legal representation. The court then invited Hj Hisyam to submit on the main appeals but counsel stood his ground that he was not making any submission for want of preparation. **Despite the stand taken by counsel, the court told him to remain in court as counsel on record for the applicant, after which the court proceeded to hear the appeals without the participation of the applicant.**

[106] The immediate effect of Hj Hisyam's decision to discharge himself from acting as counsel for the applicant was to leave the applicant without legal representation to face the prosecution at the hearing of the appeals. The consequence was that for a full two days he was practically forced to listen to the learned Deputy Public Prosecutor telling the court that there was ample evidence against him to justify his convictions and sentence.

[107] On the facts and the law applicable, there is only one conclusion that I can arrive at, and that is, the refusal by the court to grant an adjournment of the main appeals had defeated altogether the applicant's right to be represented by an effective counsel. This warrants a setting aside of the decision by way of review under Rule 137 of the Rules for the reason that it had caused injustice to the applicant for which he had no other effective remedy.

[108] I now come to the issue of the court's refusal to allow Hj Hisyam to discharge himself from representing the applicant. It will

be recalled that in not allowing Hj Hisyam to discharge himself, the court, in exercising its inherent jurisdiction, ruled that leave must first be obtained before counsel could do so. The question is whether the court had jurisdiction to stop him from discharging himself without leave of the court.

[109] The applicant's contention was that the court went against the Registrar's Circular No. 6 of 1960 ("the 1960 circular") in preventing Hj Hisyam from discharging himself. The 1960 circular is still in force and the notification of its enforceability can be accessed online at www.kehakiman.gov.my. It was addressed to "All Presidents, Sessions Courts. All Circuit Magistrates" and carbon copied to "All Senior/Assistant Registrars, Supreme Court. All Secretaries to Judges" and reads as follows:

"Some recent cases in the Lower Courts of defence counsel applying to the Court during the course of the trial for permission to withdraw from the case have been brought to the notice of the Chief Justice. **His Lordship has directed me to inform you that the correct reply in such cases is that there is no question of any leave of the Court being necessary. It is purely a private matter between counsel and his client. The Court has no power to compel a counsel to continue with a case if he does not wish to do so**.

2. I am to add that where any correspondences has been wrongly or inadvisably sent to the Court in relation to any pending case, the Court should refrain from expressing any opinion on such correspondence until the hearing of the case is concluded."
(emphasis added)

[110] The learned Deputy Public Prosecutor submitted that the 1960 circular does not apply to the Federal Court as it was only meant to be complied with by the subordinate courts, namely the Magistrates Court and the Sessions Court as it was addressed to them and not to judges of the superior courts.

[111] The applicant on the other hand argued, on the authority of *Lumley v Wagner* [1843-60] All ER Rep 368; (1952) 1 De GM & G 604; 42 ER 687; 91 RR, which was adopted and applied by the Federal Court in *Pertama Cabaret Nite Club Sdn Bhd v Roman Tam* [1981] 1 MLJ 149, that the court had no jurisdiction to prevent Hj Hisyam from discharging himself. The headnote to *Lumley v Wagner* reads as follows:

"The court will grant an injunction to restrain the breach of the negative part of the contract even though **it cannot specifically enforce the performance of the positive part of the contract, eg, where the positive part is an undertaking to render personal services, and the effect of the injunction is to compel the specific performance of the contract as a whole."**
(emphasis added)

[112] By its adoption by the Federal Court in *Pertama Cabaret*, *Lumley v Wagner* has become part of our law. Under the Federal Constitution law includes the common law. On the strength of this authority, it was submitted that the order by the court to prevent Hj Hisyam from discharging himself was unlawful as it had the effect of compelling specific performance of his contract with the applicant. Thus, even without the 1960 circular, the common law does not allow the court to stop counsel from discharging himself from representing his client. It is a private matter between counsel

and his client. The reasoning behind the 1960 circular conforms with the decision in *Lumley v Wagner*.

[113] It would be a strange working of the law and an anomaly if the directive is to apply only to the subordinate courts but not to the superior courts when we all know that lawyers appear in both the subordinate and superior courts. That can lead to chaos in the administration of justice. With due respect that cannot be the intention behind the 1960 circular which has not been amended or modified.

[114] I am in agreement with the applicant on this point. The earlier panel was therefore wrong in preventing Hj Hisyam from discharging himself from acting as counsel for the applicant. Therefore in law the applicant had no legal representation when his appeal was heard and dismissed on 23.8.2022. As decided by the Federal Court in *Asean Security Paper Mills Sdn Bhd* (supra at [7]) a clear infringement of the law is a ground for review under Rule 137 of the Rules.

[115] For all the reasons aforesaid, I allow the application in Motion No. 2. As for the consequential order to be made, the proper order in my view would be an order of acquittal and discharge for all the offences that the applicant was charged with. It appears clear to me that there had been a miscarriage of justice in that the applicant had been deprived of a fair hearing. In *Sankar v The State* [1994] UKPC 1, the incompetence of the accused's counsel had deprived him of a fair trial. Lord Woolf in delivering the judgment of the Privy Council said:

"In an extreme situation where the defendant is deprived of a fair trial then even though it is his own advocate who is responsible for what has happened, an appellate court may have to quash the conviction and will do so if it appears there has been a miscarriage of justice."

[116] His Lordship was speaking in the context of the power of an appellate court in hearing an appeal from the decision of the trial court but I see no valid reason in law why it should not apply to an application for review under Rule 137 of the Rules as the whole purpose behind the Rule is to prevent injustice to any person who is left with no other effective remedy.

Signed

ABDUL RAHMAN SEBLI

Chief Judge of Sabah and Sarawak

Dated: 31 March 2023.

For the Appellant: Tan Sri Dr. Muhammad Shafee Abdullah, Tania Scivetti, Sarah Abishegam, Muhammad Farhan Shafee, Wan Mohammad Arfan Wan Othman, Alaistair Brandah Norman, Genevieve Vanniashingham, Umi Nafesah Mohd Noor of Tetuan Shafee & Co.

For the Respondent: Dato' V. Sithambaram, Donald Joseph Franklin, Sulaiman Kho Kheng Fuei, Mohd Ashrof Adrin Kamarul and Manjira Vasudeva, Deputy Public Prosecutors of the Attorney General's Chambers.