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**SIVARASA RASIAH & ORS**  
**v.**  
**CHE HAMZAH CHE ISMAIL & ORS**

High Court Malaya, Kuala Lumpur  
John Louis O'Hara J  
[Suit No: 21NCVC-53-2010]  
24 September 2013

**Case(s) referred to:**

*A v. Bottrill* [2003] 1 AC 449 (refd)  
*Bell v. Midland Railway Company* [1861] English Reports 142, 10 C B (NS) 287 (refd)  
*Broome v. Cassell & Co Ltd* [1972] AC 1027 (refd)  
*Cassell & Co Ltd v. Broome and Another* [1972] AC 1027 (refd)  
*Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLRH 332; [1993] 3 MLJ 352; [1994] 1 CLJ 19; [1994] 1 AMR 201 (refd)  
*Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2008] 2 MLRA 735; [2009] 1 MLJ 1; [2009] 1 CLJ 663 (refd)  
*Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v. Awang Soh Mamat & Ors* [2009] 2 MLRA 1; [2009] 4 MLJ 610; [2009] 5 CLJ 1 (refd)  
*Rooks v. Barnard and others* [1964] AC 1129 (refd)  
*Roshairree Abdul Wahab v. Mejar Mustafa Omar* [1996] 1 MLRH 548; [1996] 3 MLJ 337; [1997] 2 AMR 2044 (refd)  
*Thompson v. Commissioner of Police of the Metropolis, Hsu v. Commissioner of Police for the Metropolis* [1997] 2 All ER 762 (refd)

**Legislation referred to:**

Criminal Procedure Code, s 28A(2)  
Federal Constitution, art 145(3)  
Government Proceedings Act 1956, ss 4, 5, 6  
Penal Code, ss 143, 145  
Police Act 1967, s 27(4), (5)(a)

**Counsel:**

*For the plaintiffs: Edmund Bon (together with Leela J Jesuthasan and Chan Yen Hui); M/s Faiz & Co*  
*For the defendants: Nadia Hanim Mohd Tajuddin (Lailawati Ali with her); SFCs*

[Ordered accordingly.]

**Case Progression:**

High Court: [2011] 5 MLRH 740



## JUDGMENT

**John Louis O'Hara J:**

### Introduction

[1] This matter came before the Court as the hearing of the claim by the plaintiffs as set out in para 27 of their Statement of Claim as follows:-

- "a) Deklarasi bahawa hak-hak Perlembagaan Plaintiff-Plaintif telah dicabuli dan penangkapan serta penahanan Plaintiff-Plaintif adalah tidak sah dan salah disisi undang-undang;
- b) Gantirugi am termasuk gantirugi teruk dan gantirugi teladan;
- c) Gantirugi khas sebanyak RM5,454 (Rand 11,937);
- d) Faedah atas gantirugi khas kepada kadar 4% setahun dari tarikh 9 November 2007 sehingga tarikh penghakiman;
- e) Faedah atas gantirugi am pada kadar 8% setahun dari tarikh penghakiman sehingga tarikh penyelesaian penuh;
- f) Kos; dan
- g) Relif-relif lain atau selanjutnya yang difikirkan adil dan suaimanfaat oleh Mahkamah yang Mulia ini.

[2] After a hearing in which a total of 19 witnesses were called, the Court found in favour of the Plaintiffs but only awarded them nominal general damages of RM10,000.00 each and special damages of RM5,454.00 as pleaded in para 27 c) above.

[3] Both the Plaintiffs and the Defendants now appeal against the Court's decision. In handing down its decision on 10 July 2013 the Court did state that proper grounds would follow if required. These then are the proper grounds.

### The Agreed Facts

[4] The Agreed Facts are as follows:-

- "a) The Plaintiffs were, at the material time, participants of an assembly and procession held on 9 December 2007;
- b) The 1st Defendant was, at the material time, the Deputy Chief of Police, the acting OCPD of Dang Wangi Police Station in Kuala Lumpur and the Ground Commander in charge of police operations in respect of the said assembly and procession;



c) The 2nd Defendant is the Inspector-General of Police, holding the highest post in the Malaysian Police Force. The 2nd defendant is responsible for, supervises and exercises control over all police officers, including the 1st Defendant, in the execution of their duties;

d) The 3rd Defendant is a Ministry established and operating for and on behalf of the Government of Malaysia. The 3rd Defendant is responsible for, supervises and exercises control over all police officers, including the 1st and 2nd Defendants, in the execution of their duties;

e) The 4th Defendant is the Government of Malaysia. The Government is the employer and/or the principal for the 1st, 2nd and 3rd Defendants;

On the morning of 9 December 2007, the Plaintiffs along with others ("the Group") participated in the said assembly and procession that commenced in front of Pasaraya SOGO/Restoran Siddique at Jalan Tuanku Abdul Rahman, Kuala Lumpur;

g) The 2nd and 3rd Plaintiffs then approached the 1st Defendant for discussion;

h) The 1st Defendant instructed the arrests of the participants;

i) Upon being informed that they were being arrested, the Plaintiffs submitted to the arrests and were subsequently detained;

j) The Plaintiffs were brought to IPK Kuala Lumpur;

k) On 10 December 2007, the Plaintiffs were charged under ss 143 and 145 of the Penal Code and alternatively, under s 27(5)(a) and 27(4) of the Police Act 1967 ("Criminal Prosecution");

l) The Criminal Prosecution was lead by the Attorney-General, Abdul Gani Patail who objected to bail. The Kuala Lumpur Session Court however allowed bail in the sum of RM2,000 without sureties.

(m) At trial of the Criminal Prosecution, the 1st Defendant was among 19 witnesses relied on by the Prosecution to prove a *prima facie* case against the Plaintiffs;

(n) On 16 April 2009, the Session Court held that the prosecution had failed to establish a *prima facie* case, and accordingly discharged and acquitted the Plaintiffs. No appeal against the decision was filed."

### The Agreed Issues

[5] The Agreed Issues were:-



- "a) whether the arrest of each of the Plaintiffs was lawful?
- b) whether the denial of each of the Plaintiffs' right of access to counsel was lawful?
- c) whether the detention of the Plaintiffs was lawful?
- d) whether the prosecution of the Plaintiffs in the Kuala Lumpur Sessions Court Arrest No. 62-537 to 543-2007 was initiated in bad faith and/or a collateral purpose (ie maliciously)?
- e) whether the Plaintiffs have correctly named all the relevant tortfeasors in this suit to ground liability?"

### Consideration And Decision

[6] The witnesses who gave evidence during the trial were as follows:-

- Collin George Nicholas (SP1)
- Latheefa Beebi Koya (SP2)
- Chan Chee Keong (SP3)
- N Surendran K Nagarajan (SP4)
- Eric Paulsen (SP5)
- Amer Hamzah Arshad (SP6)
- Sivarasa Rasiah (SP7)
- Johny Andu @ Abu Bakar Adnan (SP8)
- Too Chee Hung (SP9)
- and
- Detektif Sarjan Md Sharif Nasir (SD1)
- Sup. Che Hamzah Hj Che Ismail (SD2)
- ASP Azlihan Ishak (SD3)
- Shahrudin Zaibidi (SD4)
- ASP Chong Chook Foo (SD5)
- Supt. Norisah Abdul Hamid (SD6)



Acting ASP Zakwanhafiz Ahmad Ansari (SD7)

Supt. Rosly Hassan (SD8)

DSP Rotzam Rashid (SD9)

ASP Nasri Mansor (SD10)

[7] In addition to hearing the testimony of the witnesses for the Plaintiffs as well as for the Defendants this Court had the opportunity of viewing the video evidence as well as seeing the photographs taken of the incident to provide a moving pictorial real time enactment of what transpired. This has assisted the Court immensely because it has given the Court a first hand account of what actually took place.

[8] It is also pertinent to remember that the Plaintiffs were charged but acquitted and discharged for offences under ss 143 and 145 of the Penal Code alternatively under s 27(5)(a) and 27(4) of the Police Act 1967. However the standard of proof there was beyond a reasonable doubt.

[9] The pivotal witness is SD2 Supt. Che Hamzah bin Hj. Che Ismail, who is the 1st Defendant. The Court finds from the video evidence that he had given conflicting, confusing and contradictory instructions over the loud hailer. What had come across loud and clear were the words "10 minit". But during the dialogue between SD2 and SP2 it has become apparent to the Court that SD2 had not been decisive in the instructions that SD2 had issued. Nevertheless what was revealed from the transcript of the video were the following instructions:

"Audible words heard

1. Ok. Tuan-tuan. Tuan-tuan yang berarak. Saya (inaudible) Che Hamzah Che Ismail, (inaudible) Dang Wangi. Ingin memaklumkan bahawa Tuan telah melakukan kesalahan, berarak tanpa permit polis. Saya bagi amaran supaya bersurai dalam tempoh 10 minit. Tempoh 10 minit sahaja. Kalau tidak bersuai, saya akan mengambil tindakan yang tegas terhadap perarakan ini.
2. Tak boleh.
3. No, now you walk without permit.
4. Ok. Arahan saya. 10 minit sahaja. Tak boleh. Disperse disperse.
5. Kalau boleh bersurai, surai. 10 minit sahaja.
6. Boleh bersurai, surai. 10 minit sahaja. Tak boleh berarak lagi. Tak boleh berarak.



7. Dalam masa 10 minit sahaja. Kalan tidak saya ambil tindakan yang tegas. Ok. (inaudible) jika tuan-tuan mengingkar ... maka kita ...

8. Ok. Tangkapan boleh dijalankan kalau mengingkar untuk bersurai. Tangkapan boleh dibuat jika ingkar untuk bersurai."

[10] The above instruction given by SD2 had led the Plaintiffs to believe that they had 10 minutes to walk before dispersing.

[11] The Court therefore holds that the subsequent arrest of the Plaintiffs was unlawful because to arrest a person after he had been given to believe that he had 10 minutes to walk and disperse was clearly wrong. Furthermore all the arresting officers stated in evidence that they would not have arrested the Plaintiffs if SD2 had not ordered then to do so. They were merely acting upon SD2's instruction and carrying out SD2's order. They did not have an independent mind in regard to the arrest and were an extension of SD2.

[12] Now moving on s 28A(2) of the CPC is clear in that it states that a police officer before commencing any form of questioning or recording of any statement shall inform the person that he may communicate and consult with a legal practitioner of his choice. It is the finding of the Court that the Defendants were denied their right to communicate and consult with a legal practitioner as the reasons given by SD8 were neither cogent, convincing nor compelling.

[13] Furthermore having found the arrest of the Plaintiff unlawful it is the Court's finding that their subsequent detention became illegal. The Court therefore rules in favour of the Plaintiffs in regard to issue b) and c) of the Agreed Issues.

[14] In regard to the Prosecution of the Plaintiffs in the Kuala Lumpur Sessions Court 62-537 to 543/2007, it is the prerogative and the power of the Attorney - General under the Federal Constitution art 145(3), exercisable at his discretion to institute, conduct or discontinue any proceedings for an offence. The Court does not find that it was initiated in bad faith and for a collateral purpose. The Court does not accept the Plaintiffs' contention that the fact that the Attorney - General himself appeared for the prosecution and his actions in strenuously opposing bail by saying that the Plaintiffs were threats to national security strengthens the Plaintiffs' case that the prosecution was malicious. It believes the Attorney - General was just doing his job on the evidence provided to him by the Police, and therefore rules against the Plaintiffs in regard to issue d).

[15] As for the last issue, the Court finds that the Plaintiffs had named all the relevant tortfeasors. Having regard to the facts of the case there was no need to name each and every arresting officer individually because they were only acting as the "arms" of SD2 who had been named as the 1st Defendant. (*Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2008] 2 MLRA 735; [2009] 1 MLJ 1; [2009] 1 CLJ 663 referred to). The officer of the Government who was



responsible for the tortuous act (ie SD2) had been made a party to the suit and as such *Lay Kee Tee (supra)* and ss 4, 5 and 6 of the Government Proceedings Act 1956 had been complied with.

[16] In regard to the Plaintiffs' Statement of Claim the Court would in view of above reasoning, grant an order in terms of para 27(a).

[17] The Plaintiffs claim ganti rugi am termasuk ganti rugi teruk dan ganti rugi teladan vide para 27(b) of their Statement of Claim.

[18] It is also the Court's finding that the Plaintiffs contributed to the situation both in front of Kamdar and in front of the CIMB Building. In particular, it was only when questioned that SD9 answered that SP2, SP4 and SP7 are being arrested. If SD9 had not been asked if SP2, SP4 and SP7 were being arrested then it is anyone's guess if the Plaintiffs would have been arrested. Therefore it was this situation that resulted in the confusion that eventually led to their arrest. In regard to general damages, the Court therefore award each Plaintiff nominal general damages of RM10,000.00.

[19] There is abundant case law in regard to the underlying principles pertaining to aggravated damages and exemplary damages.

[20] In *Thompson v. Commissioner of Police of the Metropolis*, *Hsu v. Commissioner of Police for the Metropolis* [1997] 2 All ER 762 @ 774, Lord Woolf MR stated as follows:-

"Aggravated damages can only be awarded where they are claimed by the plaintiff and where there are aggravated features about the defendant's conduct which justify the award of aggravated damages."

[21] The Master of the Rolls went on at page 775 to explain as follows:-

"Aggravated features can include humiliating circumstances at the time of arrest or any conduct of those responsible for the arrest or the prosecution which shows that they behaved in a high handed, insulting, malicious or oppressive manner either in relation to the arrest or imprisonment or in conducting the prosecution. Aggravating features can also include the way the litigation and trial are conducted."

[22] In *Roshairee Abdul Wahab v. Mejar Mustafa Omar* [1996] 1 MLRH 548; [1996] 3 MLJ 337; [1997] 2 AMR 2044, James Foong J (as he then was) followed *Broome v. Cassell & Co Ltd* [1972] AC 1027 and awarded aggravated damages. The head note (9) reads as follows:-

"Aggravated damages was to compensate the plaintiff for injuries affecting his feelings arising out of the tortuous acts of the defendants. In assessing this, all circumstances of the case must be taken into account, including the character of the plaintiff. The plaintiff was entitled to self respect and dignity. By the acts of the first and second



defendants he has suffered humiliation, loss of pride and self-esteem."

[23] The Learned Judge went on at page 348 to state:-

"While considering the request for exemplary damages, the Court must bear in mind that the objective for an award under this category is to punish the defendants, and to display the Court's indignant attitude towards the acts committed by the defendants. However through the enlightened judgment of Lord Devlin in *Rookes v. Barnard & Ors* [1964] AC 1129 (@ page 1226) such damages must be restricted to a situation where there are 'oppressive arbitrary or unconstitutional action by servants of the government'.....".

[24] In *Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v. Awang Soh Mamat & Ors* [2009] 2 MLRA 1; [2009] 4 MLJ 610; [2009] 5 CLJ 1, James Foong FCJ (Abdull Hamid Embong concurring) stated that the gravity of the wrong is also another item to be taken into consideration when awarding exemplary damages. This is spelt out in *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLRH 332; [1993] 3 MLJ 352 ; [1994] 1 CLJ 19 ; [1994] 1 AMR 201.

[25] In the same case Abdul Malik Ishak JCA (in a dissenting judgment) stated that the primary purpose of awarding damages is to compensate the aggrieved party for the harm done to him.

[26] This, this Court has done by awarding the Plaintiffs general damages, albeit nominal general damages.

[27] His Lordship Abdul Malik JCA then went on to add that the secondary purpose of awarding damages is to punish the wrongdoer and this is done by imposing what is known as exemplary damages or punitive damages or vindictive damages or retributory damages (*Bell v. Midland Railway Company* [1861] English Reports 142, 10 C B (NS) 287 at 308; *Cassell & Co Ltd v. Broome and Another* [1972] AC 1027; and *Rooks v. Barnard and others* [1964] AC 1129). Exemplary damages would normally be ordered when the conduct of the wrongdoer has been outrageous as to merit such a punishment. Thus, when the conduct of the wrongdoer discloses malice, cruelty, fraud, insolence, etc, then exemplary damages would be ordered.

[28] *Broome v. Cassel (supra)* laid down the principle that in a case in which exemplary damages are appropriate, a jury should be directed that if, but only if, the sum that they have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the Defendant has behaved to the Plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, that it can award some larger sum.

[29] In *A v. Bottrill* [2003] 1 AC 449, Lord Nicholls of Burkenhead in delivering the majority judgment of the Privy Council stated at page 456 that cases satisfying the test of outrageousness will usually involve intentional





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wrongdoing with, additionally, an element of flagrancy or cynicism or oppression or the like: something additional rendering the wrongdoing or the manner or circumstances in which it was committed particularly appalling.

[30] Having regard to the factual matrix this Court finds the conduct of the Defendants to be neither oppressive, outrageous nor appalling. If ever the conduct of SD2 was indecisive and showed a confused state of mind. The conduct of SD9 was that of a person pushed into a corner wherein he was forced to react in the way he did by answering that SP2, SP4 and SP7 were under arrest.

[31] Furthermore the impression embossed upon the mind of the Court after it had viewed the video footage was that the Plaintiffs not only invited their own arrest but seemed quite content to have been arrested. It is even arguable that by being arrested and detained their esteem would have been enhanced in the eyes of those participants of the assembly and procession held on 9 December 2007.

[32] Therefore in regard to aggravated and exemplary/punitive damages the Court finds no basis established for the granting of these damages.

[33] Re para 27(c) the Court allows special damages RM5454.

[34] Re para 27(d) and (e) the Court is guided by Or 42 r 12, and allows interest at 5% from date of judgment to the date of full realization.

[35] Re paragraph (f) ie costs, the Court awards the Plaintiffs costs of RM60,000.00 to be borne jointly and severally by the Defendants.

**Order**

[36] So ordered accordingly.

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