IS SECTION 98 CPC MEANT FOR PREVENTING GATHERINGS, ASSEMBLIES AND CONFERENCES?

By

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(This article is meant, particularly, for senior police officers, lawyers, legal and judicial officers, the Attorney General and judges. I welcome arguments to the contrary.)

I am writing this article based on the following three cases involving section 98 of the Criminal Procedure Code (CPC). The cases are:

1. Datuk Seri Anwar Bin Ibrahim v Pendakwa Raya Case Analysis [2010] 2 MLJ 425 High Court (Kuala Lumpur), Zainal Azman J.C.;

2. Badrul Hisham v Public Prosecutor and Another Appeal [2014] 1 LNS 1939 (C.A), Linton Albert (JCA), David Wong Dak Wah (JCA) and Zakaria Sam (JCA).

3. Polis DiRaja Malaysia v Persekutuan Persatuan-Persatuan Lembaga Pengurus Sekolah Cina Malaysia (Dong Zong), Permohonan Jenayah BH-89-219-12/2019 Dalam Mahkamah Majistret di Kajang, Selangor D.E.)[1]

It appears that, in the last decade, the police have been resorting to the section to obtain the order of the Magistrate's Court to stop a gathering in the Parliament yard (Anwar's case), to prohibit any assembly at Dataran Merdeka (Badrul' case) and to prevent the holding of a conference (Dong Zhong's case).

That the police had resorted to such applications in the last decade is quite understandable. That is as a result of the coming into force of the Peaceful Assemblies Act 2012 and the repeal of section 27 of the Police Act 1967. Under section 27 of the Police Act 1967, the organiser of an assembly, meeting or procession at a public place was required to obtain a licence from the Officer in Charge of the Police District (OCPD) in which such assembly, meeting or procession was going to be held. The OCPD would only issue the licence if he was *"satisfied that the assembly, meeting or precession (was) not likely to be prejudicial to the interest of the security of Malaysia or any part thereof or to excite a disturbance of the peace…"* Otherwise, he was entitled to refuse it. So, there was no necessity for a court order.

[1] I am grateful to Syazlin Mansur and Muhamad Izwan Ishak, both advocates and solicitors, for supplying me with the judgments and order of the court, without which I would not be able to write this article. However, the opinions expressed herein are mine alone.

Now, under the Peaceful Assemblies Act 2012, the organizer is only required to notify the OCPD where the assembly is to be held, ten days before the assembly is scheduled to be held - section 9(1).

So, faced the new law but the same old problems, it seems that the police had to dig deep into the CPC to find a provision that could assist them and, the nearest that they could find was section 98.

It appears that in all the three cases, it was the respective OCPD himself or his officer who appeared before the Magistrate to ask for the order. It is not known whether the Deputy Public Prosecutor (DPP) was approached for advice, to prepare the papers for the application and the supporting affidavit, and to appear in court. If they were approached, it is not known what was the response from the DPPs and their superior officers in the Attorney General's Chambers (AGC). As it is, we do not know the stand of the Public Prosecutor (PP), who is also the Attorney General (AG) on the application. Note that I am only referring to the correctness in law of using that section for that purpose and nothing else.

During my days as a Magistrate, in 1970's, prosecution of all criminal cases, other than corruption cases, were done by police officers. Nowadays, I am told that every Magistrate Court has a resident DPP, who handles prosecution, including application for bail. If they even handle applications for bail, why did they not appear before the Magistrate to apply for the order under discussion? The application, required to be made in a particular form supported by an affidavit, certainly requires more legal expertise to prepare than an oral application for bail.

Is it because they were not consulted, for whatever reasons the police had or the PP had directed the police to do it, themselves? Whatever it is, I hope the AG, as PP will clarify the matter and decide future procedure.

Before going any further, I want to make it clear that, in this article, I am not concerned whether the order should be made or not against Dong Zong, or anybody, on the merits. I am merely looking at the law which lawyers, judges, the PP (AG) and his DPPs should be interested in.

Unfortunately, until now, unless it is shown to the contrary, in spite of the judgment of the High Court in Anwar's case and the judgment of the Court of Appeal in Badrul's case, no judge had addressed the issue that I have raised in this article i.e. whether section 98 of the CPC provides for the procedure for the purpose in question.

I should make another clarification here. The fact the issue was not considered and decided upon, does not affect the validity of the Court of Appeal's judgment in Badrul's case. Had it been decided that the section was not meant for such an application, the order would have been void without even considering the merits of the case. If the court's answer were to the contrary, still the order was wrongly made on merits.

Let us take a quick look at the three cases. First, Anwar's case. All I have on this case is the case analysis. From the case analysis, it appears that the only issue before the court was whether the Magistrate should hear the application to set aside the order on merits as the order had expired when the application came up for hearing. The Judicial Commissioner said he should.

I believe that the counsel for the appellant did not raise the issue of the propriety of resorting to the section for the purpose. Hence, the Judicial Commissioner too did not deal with it.

The second case is Badrul's case. Here, all I have is the judgment of the Court of Appeal delivered by Linton Albert, JCA.

We can skip the facts and go straight to the judgment on the law. Linton Albert JCA reproduced section 98 and the order and went on to criticize the police, because:

"There is absolutely no reason for the application to have been made ex parte and not to accord at least the first respondent in the application the right to be served and be heard. It is clear from the affidavit of the Chief Police Officer supporting the application that he knows of the plan for the sit-in assembly as far back as 28.04.2012 more than three weeks before. That by and of itself puts into question the bona fides of the Chief Police Officer who is the applicant for the Order. No reason has been offered to explain why the application is only made just two days before the planned sit in assembly."

Next, he criticised the Magistrate because:

"Clearly, the approach taken by the learned Magistrate is to unquestioningly accept everything before him thus precluding any critical devaluation of the matters that have to be considered under the provision of section 98 of the CPC. The total lack of circumspection can only mean that the learned Magistrate is only paying lip service to having been satisfied of the various matters set out in the Order."

The learned Judge continued:

"Apart from that is the fact that the respondents in the application have been deprived of their fundamental right to be heard. Thus the basis for making the application is ill-founded."

Next, he criticized the High Court Judge for falling *"into grave error in overlooking the material non-compliance of the provisions of section 98 of the CPC on the part of the learned Magistrate."*

He then cited three paragraphs from Indian cases as the *"principles to be applied in determining the validity of an order made under section 98 of the CPC."*

The quotations from the Indian cases without any analysis of the cases, served no more than to make the judgment look “complete” and “learned”. Before the computer days, a judge was considered “learned” if he cited numerous authorities and quotations in his judgment. Now, with computer and research officer, it is often nothing more than a “cut and paste” job done by the research officer.

While I do not say that the Magistrate was not at fault, others higher up, lawyers, DPPs (even AG), the High Court Judge and the Court of Appeal Judges, are even more so. They have more years of experience behind them, they have more time to think, in the case of the Judges of the Court of Appeal, they have the learned counsel and DPP to argue the case before them, they have their research officers to assist them, they have the other members of the panel to discuss with, indeed even the draft judgments written by them are circulated among the members of the panel for comments. So, more is expected from them.

First, let us look at the predicament faced by the Magistrate. I am adopting some of the facts in Dong Zong’s case and imputing my imagination based on my own experience as a Magistrate, in this argument.

Magistrates are the most junior officers in the Legal and Judicial Service. One can imagine, in Dong Zong’s case, soon after the Magistrate returned to his office after lunch and Friday prayer, in walked the OCPD. After giving the Magistrate a big salute, the OCPD produced the application and the affidavit in support and told the Magistrate that he needed the order urgently as the conference was scheduled to be held the next day, Saturday. The order will have to be served on Dong Zong.

The Magistrate looked at his watch. It was already 3.00 pm and a Friday. Office would close in two hours’ time.

That could be the first time the Magistrate had seen such an application and, I am not surprised if he had not read that section before, because an application under that section is extremely rare. He tried to read the application and the affidavit as fast as he could, trying to grasp what it was about. Even if he were to grab his CPC and read that section, I doubt he could understand it fully, given the way it was drafted and the limited time he had and the pressure he was under. I took a few days trying to understand what that section really means and, only after I have completed writing this article that I thought I could make out what the drafters were trying to say, but still with grave doubt.

Under the circumstances, I am not surprised that the Magistrate obliged the OCPD by making the order, after all, it was an ex-parte order. In an ex-parte order, a judge makes an order after hearing one party, the applicant. The other party, the respondent could appear later to set it aside. I do not think that the Magistrate really dissected the section and came to a clear finding that the section was the proper provision for such an application. In that sense, the Court of Appeal is right in what it says about the poor Magistrate.

Have the others, along the line up, done any better? I believe that the learned counsel for the appellants too, did not consider the point. Otherwise, the learned Judge of the Court of Appeal would have dealt with it in his judgment. So, the learned counsel too accepted without question the view of the OCPD that that section provided a proper procedure for the purpose.

The DPP was in the High Court and the Court of Appeal only to respond to the arguments of the counsel for the appellant. If a point was not raised, there was nothing to respond.

As can be seen from Anwar's case, the judge only decided on the points argued by the counsel for the appellants.

The learned Judges of the Court of Appeal appeared to take the same approach, the normal approach. Hence, the judgment appears to deal with the issue raised by learned counsel for the appellant, without even mentioning him, let alone giving him any credit. And it came from a judge appointed from the Bar!

I doubt the two learned Judges of the Court of Appeal who were practicing lawyers in Sarawak and Sabah respectively, had ever come across that section before the file of Badrul's appeal was brought to them. Like any other appellate judge, their tendency would be to look at the petition of appeal to see the grounds of the appeal. The same may be said about the other member of the panel that decided the case.

As a result, no one took a close look at the section. The interpretation given by the police became more and more entrenched as the case moved higher and higher of the court hierarchy, finally becoming the law of the land, by default. Perhaps, this is an example of "police law".

The third case is Dong Zong's case. All I have is the order of the court. The order was obtained at 3.00 pm on Friday, served at 5.00 pm the same day and the conference was scheduled to be held on the following day, Saturday. There was clearly no opportunity for the respondent to make an application to set it aside. In the circumstances, what the Court of Appeal had said in Badrul's case equally applies here.

But, to be fair to all, assuming that that section provides the proper procedure for such an application, there might be a real situation which requires an order to be made urgently. In such a case, to require the application to be served on the respondent, to allow the respondent to file an affidavit in reply which may lead to the filing of the applicant's further affidavit and for the application to be heard inter-partes, giving rise to appeal and further appeal, would defeat the purpose of the section.

Now, let us take a close look at Section 98 of the CPC which provides:

"Power to issue order absolute at once in urgent cases of nuisance

98. (1) In cases where in the opinion of a Magistrate immediate prevention or speedy remedy is desirable that Magistrate may, by a written order stating the material facts of

the case and served in the manner provided in section 90, direct any person to abstain from a certain act or to take certain order with certain property in his possession or under his management if the Magistrate considers that the direction is likely to prevent or tends to prevent obstruction, annoyance or injury to any persons lawfully employed, or danger to human life, health or safety, or a riot or any affray.

(2) An order under this section may in cases of emergency or in cases where the circumstances do not admit of the serving in due time of notice upon the person against whom the order is made be made ex-parte.

(3) An order under this section may be directed to a particular person or to the public generally when frequenting or visiting a particular place.

(4) Any Magistrate may rescind or alter any order made under this section by himself or his predecessor in office.

(5) No order under this section shall remain in force for more than seven days from the making of it."

The difficulty arises because of the existence of the words *"with certain property in his possession or under his management"*. The question is whether that phrase is applicable to the first limb i.e. direct any person to abstain from a certain act, or, it only applies to the second limb i.e. to take certain order …In other words, whether the section is to be read:

A.
(a) First limb, *"….Magistrate….may direct any person to abstain from a certain act…with certain property in his possession or under his management…"*; or,

(b) Second limb, *"… Magistrate…may direct any person …to take certain order with certain property in his possession or under his management."*

OR

B
(a) First limb, *"….Magistrate….may direct any person to abstain from a certain act…"* ; or

(b) Second limb, *"… Magistrate…may direct any person to take certain order with certain property in his possession or under his management."*

If the first limb were to be read as in B(a), then it has nothing to do with the phrase *"with certain property."* In that case, the application was correctly made under that section, but, not otherwise.

In any event, the phrase *"with certain property"* does not seem to follow smoothly the phrase *"to abstain from a certain act"* and to *"take certain order"*. It would be clearer if it is read with the addition of the words "regard to", hence, *"to abstain from a certain act…with* ***regard to*** *certain property…"* and *"to take certain order with* ***regard to*** *certain*

property…" Still I do not understand what the phrase *"to take certain order"* refers to: what kind of order and order from whom? If it is from the Magistrate, the Magistrate might as well say so in his direction. Why direct the person to take an order from somebody? Whether such a direction could be more suitable in India where the CPC came from and not here, I do not know.

Now, let us look further, at the scheme of the CPC. Chapter IX is about Public Nuisances. The title of the first section of the chapter reads *"Magistrate may make conditional order for removal of nuisance"*. Thus, under that section, the Magistrate may make a conditional order, inter alia*, "requiring the person causing the obstruction or nuisance, or carrying on the trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, tree, substance, tank, well or excavation within a time to be fixed in the order to—*

(aa) remove the obstruction or nuisance;

(bb) suppress or remove the trade or occupation;

(cc) remove the goods or merchandise;

(dd) prevent or stop the construction of the building;

(ee) remove, repair or support the building;

(ff) lop or fell the tree;

(gg) alter the disposal of the substance;

(hh) fence the tank, well or excavation,…"

All the other sections in that chapter are consequential provisions, like:

- *Order to be served or notified (Section 90);*
- *Person against whom order is made to obey or appear and show cause (Section 91);*
- *Consequence of his failing to do so (Section 92);*
- *Procedure on appearance to show cause (Section 93);*
- *Procedure on order being made absolute (94);*
- *Consequence of disobedience to order (95);*
- *Injunction pending final decision (96);*

- *Power to prohibit repetition or continuance of public nuisance (97).*

Then comes Chapter X which has only one section, section 98. The title of the chapter reads, *"Temporary orders in urgent cases of nuisance".* The title of section 98 reads *"Power to issue order absolute at once in urgent cases of nuisance".* At a glance, the titles seem to contradict each other. However, I think that the word "temporary" is used in the title of the chapter because the life span of the order is only seven days. However, the order is absolute in nature from the moment it is made.

I am inclined to think that Chapter X is an extension of Chapter IX and the subject matter in both chapters are the same i.e. removal of public nuisance that has something to do with property. The difference is that while Chapter IX provides for **conditional order**, Chapter X provides for **order absolute** at once. So, the phrase *"with certain property in his possession or under his management"* must be read as applicable to both limbs.

In other words, both Chapter IX and Chapter X are not meant for prevention a gathering, an assembly or a conference. They are for removal or prevention of an obstruction, annoyance or injury to any persons lawfully employed, or danger to human life, health or safety, in one word, nuisance. Even the words "riot" and "affray" which arguably are more relevant to the original Indian context, are riot and affray arising from the nuisance caused by or having to do with the subject matter enumerated in the two sections, in one word, property.

So, we should not look at the CPC to prevent a gathering, an assembly or a conference. That was and is not the place. It used to be the Police Act 1967. Now, not anymore. That is the reality that the Police has to accept. They should not worry about the consequences. The Government in power wants it that way. Let it be.

Coming back to section 98. It is unfair to blame the magistrate who had to make a decision under the circumstances that he had to. Learned counsel, DPPs, AG, and judges, must take a close look at the section and, first, decide whether that section provides the procedure for the purpose. If the answer is "no", there will not be any more application under that section for the purpose.

If the answer is "yes", then, the judges should lay down the approach that magistrates should take, state what they have to look for in the application and affidavit in support, what are the factors that they should consider in making their decisions. It is the function of the appellate judges to teach, educate and direct those below them, not merely to say that they are wrong without telling them the right things to do.

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