Verdict on the Malaysian Bar

Nick Cowdery QC reports on the judgment of the Supreme Court of Malaysia in Manjeet Singh Dhillon's case.

On Sunday, 21 October 1990 a general election was held in Malaysia. It was called at short notice but had long been expected. The Prime Minister, Dr Mahathir, was returned with his two-thirds majority intact.

As soon as the result was clear the Supreme Court of Malaysia (the Federation's highest court) listed for judgment the matter of *Attorney-General, Malaysia v Manjeet Singh Dhillon*, in which judgment had been reserved on 7 June (see *Bar News*, Spring 1990, pp 9-11). The date for judgment was twice put back, until on Monday 5 November it was delivered.

By majority (2:1, the presiding judge dissenting) the Court found that the Vice President of the Malaysian Bar (then Secretary) was in contempt of court by his statements in an affidavit affirmed on 25 April, 1989. The affidavit was made expressly on behalf of the Bar and filed in support of an application by the Bar that the Lord President (the Federation's highest judicial officer) be himself dealt with for contempt for his actions on 2 July 1988. On that day he had sought to prevent the holding of a special sitting of the Supreme Court at which an urgent application, to which he (as Chairman of a Tribunal then sitting) was the respondent, was to be heard.

The offending parts of the affidavit are set out in the Spring report.

Each of the judges delivered a separate judgment. The senior judge in the majority, Dato' Mohamed Yusoff bin Mohamed SCJ stated that he had read the final judgment of the dissentient Tan Sri Dato' Harun M Hashim SCJ "last Saturday morning" - i.e. on 3 November. Datuk Gunn Chit Tuan SCJ stated he had read both of the other two judgments. Harun SCJ's judgment was the longest and most closely reasoned (although still somewhat confused).

After hearing submissions on penalty (in which the Attorney-General pressed for a custodial sentence) the Court adjourned briefly. Only the judges in the majority returned. They imposed a fine of $M5,000 (about $A2,400) in default three months' imprisonment.

The Attorney-General then asked for costs and suggested forcefully and repeatedly that Harun SCJ return to court to deliberate on that matter. Yusoff SCJ announced that all three had earlier discussed the question of costs and that he would take responsibility for the matter. The Court ordered that each party pay its own costs.

The fine was paid by the Bar Association.

The Judgments

Elsewhere (see the December issue of *Australian Law News*) I have described the judgments as a muddle (which the Shorter Oxford English Dictionary defines as, inter alia, "intellectual bewilderment"; "a confused assemblage"). They are full of false trails, notions raised and abandoned, internal inconsistencies. Particularly is that so in the case of the majority, being indicative of haste.

The only common ground in all three judgments appears to be:

1. A finding that the relevant common law which applies to such a case is exemplified by the decision in *R v Gray* [1900] 2 QB 36 which identifies two classes of contempt of court:

   (a) "any act done or writing published calculated to bring a Court or a Judge of the Court into contempt, or to lower his authority"; and

   (b) "any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts".

The former is "scandalising" a judge or court and is "subject to one and an important qualification. Judges and Courts are alike open to criticism and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court".

> ***" The judgments ... are full of false trails, notions raised and abandoned, internal inconsistencies"***

2. An expressed need to make allowances for "local circumstances" in Malaysia - but without identifying what "social conditions" (in the words of Gunn SCJ) were relevant or how they bore on the issue.

Yusoff SCJ held that both classes of contempt had been established; the Lord President could not have been in contempt because the sitting on 2 July, 1988 was unlawful (a conclusion also reached by Harun SCJ, dissenting); justification or honest intention could not be a defence, but a guilty intention must be found - [I have some difficulty with that, too] - and was present [despite the uncontroverted evidence of the Respondent to the contrary - he was not cross-examined].

Gunn SCJ held that the contempt was of the first class in *R v Gray*; a defence of justification was available but not made out because the criticisms went beyond "what any litigant could honestly and reasonably ... consider to form the basis of a serious and genuine argument in the proceedings" (citing *R v Collins* [1954] VLR 46); a guilty intention was established by reason of the Respondent's intention to affirm the affidavit which in fact contained statements "causing unwarranted and defamatory aspersions on his character, which could be considered to be scurrilously abusive of the Judge". He cited (then apparently discounted) the words of Atkin L.J. in *Ambard v Attorney-General for Trinidad and Tobago* [1936] AC 322 at 335:

> "The path of criticism is a public way: the wrong-headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in

malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."

Harun SCJ conducted a thorough examination of the events of 1988 and concluded that the Lord President had not been in contempt because the special sitting was unlawful; he held that the Resondent's criticisms were defamatory; the Bar may well have been in contempt for stirring up publicity about events but it was not on trial; but the Respondent was not in contempt because the Lord President had not been acting in his judicial capacity. [Why the "mere abuse" he found had occurred did not fall into the first class of contempt in *R v Gray* is anybody's guess; but perhaps it needs to be remembered that this was the judge who in 1987 declared the Prime Minister's political party, UNMO, an illegal organisation and who subsequently was supported by the Bar in the face of vigorous political attack. It is perhaps ironic that he received the honour Tan Sri on the King's birthday which fell during this trial.)

Comment:

The "muddle" is to be found in:

1. The difficulty in characterising the alleged contempt as falling into one or other or both of the classes identified in *R v Gray*;

2. The uncertainty over the mental element or intention required for either or both classes;

3. The basis for finding a relevant guilty intention;

4. The conflict over whether or not justification could be a defence;

5. The doubt about whether the offended judge must have been acting in a judicial capacity - and what that means.

Overshadowing the propositions advanced in all judgments is an even more sinister feature: the "local circumstances" held (without more) to require "a stricter view of matters pertaining to the dignity of the court "(in the words of Yusoff SCJ). The qualification comes from section 3 of the *Civil Law Act*, 1956 which applied to Malaysia the common law of England as it was on 7 April, 1956 "subject to such qualifications as local circumstances render necessary". The phrase seems to have been regarded by the Court as giving it licence to make up its own mind, without evidence or argument, about:

1. what local circumstances are relevant;
2. how they are to be interpreted; and
3. what influence they will have on the application of the common law.

In fact, they (whatever they were) were regarded as requiring an even greater restriction on free speech - guaranteed under the Constitution - than contempt law already imposed.

Questions:

What action, if any, will the Attorney-General now take against the Malaysian Bar, or against Manjeet Singh Dhillon, its Vice-President?

What do the judgments (and the manner of their preparation and delivery) say about the independence of the judiciary in Malaysia?

What do the judgments say about the future of the rule of law in Malaysia? Just what are the "local circumstances" in Malaysia?

How secure is the future and the independence of the Malaysian Bar?

We should watch for the answers. ❑

Resiling with (Some) Dignity

"The language of the Selective Service Act can be interpreted consistently with this history of our international contentions. I think the decision of the Court today does so. Failure of the Attorney General's opinion to consider the matter in this light is difficult to explain in view of the fact that he personally had urged this history upon this Court in arguing Perkins v. Elg, 307 US 25 83 L ed 1320 59 S Ct 884. Its details may be found in the briefs and their cited sources. It would be charitable to assume that neither the nominal addressee nor the nominal author of the opinion read it. That, I do not doubt, explains Mr. Stimson's acceptance of an answer so inadequate to his questions. But no such confession and avoidance can excuse the then Attorney General.

Precedent, however, is not lacking for ways by which a judge may recede from a prior opinion that has proven untenable and perhaps misled others. See Chief Justice Taney, License Cases (US) 5 How 504, 12 . L ed 256, recanting views he had pressed upon the court as Attorney General of Maryland in Brown v. Maryland (US) 12 Wheat 419, 6 L ed 678. Baron Bramwell extricated himself from a somewhat similar embarrassment by saying, "The matter does not appear to me now as it appears to have appeared to me then." Andrews v. Styrap (Eng) 26 LT NS 704, 706. And Mr. Justice Story, accounting for his contradiction of his own former opinion, quite properly put the matter: "My own error, however, can furnish no ground for its being adopted by this Court ... " United States v. Gooding (US) 12 Wheat 460, 478, 6 L ed 693, 699. Perhaps Dr Johnson really went to the heart of the matter in his dictionary - "Ignorance, sir, ignorance." But an escape less self-depreciating was taken by Lord Westbury, who, it is said, rebuffed a barrister's reliance upon an earlier opinion of his Lordship: "I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion." If there are any other ways of gracefully and good naturedly surrendering former views to a better considered position, I invoke them all." ❑

(Justice Jackson concurring in McGrath v. Kristensen (1950) 340 US 176-178)