

- likely to take for the appeal to be heard;
- (3) whether there are difficult points of law involved;
- (4) whether the accused is a first offender or has previous conviction;
- (5) whether the accused would become involved again in another offence whilst at liberty; and
- (6) whether the security imposed will ensure the attendance of the appellant before the appellate court.

See: *Set Kon Kim v. Public Prosecutor*⁽¹⁾ (F.T.C. Appn. 3/1983) (unreported).

In *Mallal's Criminal Procedure*, 4th Edition, page 461, it is stated as follows:

"Bail should not be refused on the ground that the accused have been sentenced to a long term of imprisonment or that the granting of bail has a tendency to increase the number of appeals and of protracting the appellate proceedings. The discretion vested in the Court to grant bail should be judiciously exercised in accordance with the principles laid down by the Statutes on the facts of each particular case."

It is hoped the above principle would serve as guidance to Magistrates and Presidents in the subordinate courts when exercising their discretions in a matter like this particular case which, I feel, ought not to have come before this court but such application could have been granted by the court of first instance.

In the above circumstances, I grant this application for a stay of execution. The applicant is released on bail in the sum of \$3,000/- with two sureties.

Application allowed.

Solicitors: *Gurbakhash & Tan.*

A **ABDUL RAHIM BIN HAJI BAHAUDIN v.
CHIEF KADI, KEDAH**

[O.C.J. (Mustapha Hussain J.) May 20, 1983]
[Alor Star – Originating Motion No. 7 of 1983]

B *Administrative Law – Prohibition – Accused a non-Muslim charged in Syariah Court – Accused not subject to jurisdiction of Syariah Court – Kedah Administration of Muslim Law Enactment, 1962, s. 4(3).*

C *Islamic Law – Jurisdiction of Syariah Court – No jurisdiction over non-Muslims – Kedah Administration of Muslim Law Enactment, 1962, s.4(3)*

C In this case the applicant had been charged in the Syariah Court in Kedah on charges of distributing religious pamphlets and documents relating to the Ahmadhi sect. The applicant claimed to have embraced the Ahmadhi sect. He applied for a writ of Prohibition to prohibit the Syariah Court from hearing the cases.

D **Held**, the applicant being a follower of the Ahmadhi sect is a non-Muslim and therefore not subject to the jurisdiction of the Syariah Court. A writ of prohibition was therefore issued prohibiting the Chief Kadi from hearing the cases.

E **APPLICATION.**

R. C. Murugeson for the applicant.
Abu Bakar Awang (Legal Adviser, Kedah) for the respondent.

Cur. Adv. Vult.

F **Mustapha Hussain J.** (translation): This is an Application for a Writ of Prohibition against the Respondent under 0.53 R.H.C. 1980.

G The Applicant by his affidavit affirmed on March 27, 1983 in supporting his Motion and also by his accompanying Statement, stated that he had publicly declared and embraced the Ahmadhi sect on February 1, 1970. (Ahmadhi sect is also known as the Qadiani sect).

H The Applicant was arrested by the officials of the Religious Department on charges of distributing religious pamphlets and documents relating to the Ahmadhi sect. The Applicant was charged at Kubang Pasu Syariah Court, Jitra for offences under s.163(1) and s.163(2) of the Administration of Muslim Law Enactment and his cases were transferred to the Alor Setar Kadi's Court and the hearing was fixed on April 16, 19, and 30, 1983.

I He is on bail now.

On March 21, 1983 the Applicant filed an *ex-parte* Notice of Motion applying for a Writ of

Prohibition. The Motion was heard on April 9, 1983 when the court granted leave and a stay of the hearing of the cases against him at the Kadi's court, Alor Setar.

The Applicant's only ground is that by a Gazette Notification of the State of Kedah No. 286 dated June 4, 1981 the Fatwa issued by the Majlis Ugama Islam dated August 10, 1972 is binding on all Muslims resident in the State of Kedah. The Fatwa dated April 10, 1972 in short says that whosoever believes in the teachings of the Qadiani (Ahmadhi) sect is an apostate. Since the Applicant is a follower of the Ahmadhi sect and that the Majlis says that he is not a Muslim, therefore the Majlis Ugama Islam and its Syariah Courts have no jurisdiction to try him.

On the hearing of the Motion on April 16, 1983 both the parties agreed that the court write to the Muslim Religious Council of Kedah for their ruling whether the followers of the Ahmadhi sect is a Muslim or a non-Muslim.

The Muslim Religious Council replied and this was confirmed by the President of the Council and the Chairman of the Fatwa Committee who gave evidence in Court that a follower of the Ahmadhi sect is *not* a Muslim.

Now, the Law

This Application is made to the High Court under s.25(2) of the Courts of Judicature Act 1964 where the High Court in its exercise of the powers of issuing prerogative writs can, in suitable cases and in particular for the protection of fundamental liberties enshrined in Part II of the Federal Constitution, issue orders against any person or authority.

The Kedah State Administration of Muslim Law Enactment 9 of 1962, section 41(3)(a) and (b) conferred a jurisdiction to the Kadi's or the Syariah Court only to Muslims. This means that non-Muslims, (and the Applicant is a non-Muslim as declared by the Majlis itself,) are outside the jurisdiction of the Majlis and its Syariah Courts.

This being so, the Application is therefore allowed. In fact in his written submission the learned Legal Adviser using his own words says "*the Respondent (i.e. the Majlis Ugama Islam and the Chief Kadi) concede that the Applicant is not a Muslim and therefore is not subject to the jurisdiction of Mahkamah Syariah*".

A The Motion is allowed, a Writ of Prohibition is hereby issued prohibiting the Chief Kadi of Kedah, his agents and/or servants from hearing cases Jenayah 1/83, 2/83, 3/83 and 4/83 Syariah Court, Alor Setar.

B No order as to costs.

Motion allowed.

Solicitors: *R.C. Murugeson.*

C

CHENG SUN CHUEN v. LEE CHEE SENG

[O.C.J. (Yusoff Mohamed J.) July 9, 1983]
[Johore Bahru – Divorce Petition No. 37 of 1980]

D

Family Law – Marriage – Nullity – Jurisdiction – Both parties to the marriage must reside in Malaysia at time when proceedings were commenced – Law Reform (Marriage & Divorce) Act, 1976, s. 67 – Divorce Ordinance, 1952, s. 49(1)(b).

E

Jurisdiction – Nullity of marriage – Law Reform (Marriage & Divorce) Act, 1976, s. 67 – Divorce Ordinance, 1952, s. 49(1)(b)

F

The petitioner in this case sought for a nullity of marriage. Their marriage was contracted at the Civil Registry of Marriages at Johore Bahru on October 13, 1976. After the marriage, both the petitioner and the respondent were reported to live in Singapore though each at different addresses until the date of the petition. The ground of the petition was that the husband/Respondent had wilfully refused to consummate the marriage, i.e. voidable marriage.

G

Held: with the passing of the new Law Reform (Marriage and Divorce) Act 1976, with effect from March 1, 1982, the courts cannot under s. 67 of the said Act grant a decree of nullity of a marriage unless both the parties to the marriage reside in Malaysia at the time when the proceedings were commenced. The petition would therefore be dismissed.

H

Case referred to:

(1) *John Kershaw Tattersall Pickup v. Bertha Florence Pickup Otherwise Godfrey* [1946] M.L.J. 35

DIVORCE PETITION.

K. Anantham for the petitioner.

I

Cur. Adv. Vult.

Yusoff Mohamed J.: In this petition for declaration of nullity of marriage, the question that arises is one of jurisdiction of his court to grant the decree sought by the petitioner. The ground of the petition is that the husband (respondent)