

Case Commentary:
**Vasanta a/l Amarasekera v PP: Extending the Debate on
Whether Statements Made by Witnesses to Police are
Considered Absolutely Privileged**

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ABSTRACT

The High Court in *Vasanta all Amarasekera v PP* has decided that an accused person can be supplied with statements made by witnesses to the police during the investigation process, who are not called by the prosecution and subsequently offered to the defence. The importance of this case is that the High Court has the benefit of analysing two recent conflicting decisions of the Court of Appeal on this issue. First, the Court of Appeal's decision in *Siti Aisyah v PP* in 2019 which ruled that the statements are not absolutely privileged. In so doing, the Court did not follow the earlier decision of the Federal Court in *Husdi v PP* in 1980, which declared the statements as absolutely privileged. The second is the Court of Appeal's decision in 2022 in the case of *Dato' Sri Mohd Najib bin Hj Abd Razak v PP* where it stated that it is bound by the decision of the Federal Court in *Husdi's* case. This case commentary critically analyses the rationale behind the High Court's decision in following *Siti Aisyah's* case, thus, making it as a new addition to the list of recent Malaysian courts which have decided that such statements are not absolutely privileged.

Keywords: Witness statements, Privilege, Malaysia

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1. Introduction

*Vasanta a/l Amarasekera v PP*¹ is the most recent case that deals with the issue of whether an accused person can be supplied with statements made by witnesses to the police during an investigation process, who are not called by the prosecution and subsequently offered to the defence.² The crux of the matter revolves on whether the statements are absolutely privileged under the law. The view that such statements are absolutely privileged was first propounded by the High Court in *Husdi v PP*,³ and was later affirmed by the Federal Court.⁴

However, in 2019, the Court of Appeal in *Siti Aisyah v PP*⁵ declared that police statements are not absolutely privileged and the ratio in *Husdi's* case is confined to the issue of supplying witness statements before a trial commences. Since the Court of Appeal's decision was not appealed to the Federal Court which is the apex court of the country, its decision cannot be regarded as the settled law in this matter especially when a different quorum of Court of Appeal in 2022 in the case of *Dato' Sri Mohd Najib bin Hj Abd Razak v PP* opted to follow *Husdi's* ratio based on the doctrine of stare decisis.⁶ Thus, it is important to thoroughly examine *Vasanta's* case because it was decided after *Dato' Sri Mohd Najib's* case and therefore, the trial judge when deciding the case had the privilege of analysing the two conflicting views of the Court of Appeal in this matter.

2. Facts of the Case

The appellant in this case was charged under s 467 of the Penal Code for forging a Will belonging to one Adamberage Ananda Rex De Alwis (the Deceased). He was called to enter defence by the Magistrate and the Prosecution offered all together seven witnesses to the Defence. Following this, the Defence sought permission with the Prosecution to interview one witness by the name of Maurice. In addition to that, the Appellant's lawyers via a letter dated on 3 March 2022, requested the Prosecution to provide a copy of Maurice's statement recorded under s 112 of the Criminal Procedure Code (CPC). The request by the Appellant's lawyers to obtain a copy of Maurice's statement was rejected by the Prosecution but the request to interview Maurice was allowed. Subsequently, the interview session with Maurice took place on 13 March 2020 with the presence of the Appellant's lawyers and the Investigation Officer for the case.

¹ *Vasanta a/l Amarasekera v PP* [2022] 9 MLJ 940 (High Court).

² See also *Chris Christian & Ors v PP* [2019] MLJU 1916 (High Court) [2]. This case also deals with the same issue.

³ *Husdi v PP* [1979] 2 MLJ 304 (High Court), 307.

⁴ *Husdi v PP* [1980] 2 MLJ 80 (Federal Court), 82.

⁵ *Siti Aisyah v PP* [2019] 4 MLJ 49 (Court of Appeal) [56].

⁶ *Dato' Sri Mohd Najib bin Hj Abd Razak v PP* [2022] 1 MLJ 137 (Court of Appeal) [378].

After the interview session, the Appellant's lawyers sent another letter to the Prosecution requesting to be supplied a copy of Maurice's statement. However, this was again rejected by the Prosecution. In rejecting the second request, the Prosecution relied on *Husdi's* case on the basis that that Maurice's statement was 'privileged'. Aggrieved with the above decision, the Appellant's lawyers filed an application to obtain Maurice's statement to the Magistrate Court. Unfortunately, the application was dismissed by the Court. Following this, the Appellant appealed against the decision of the Magistrate Court to the High Court.

During the appeal, the Appellant relied heavily on the decision of the Court of Appeal in *Siti Aisyah's* case. Amongst the arguments put forward by the Appellant were that the Magistrate had erred in distinguishing the present case with the fact that in *Siti Aisyah's* case, the Appellant has a right under the law to be supplied with the statement because the application was made after he was ordered to enter his defence, the Prosecution has a common law duty to disclose and provide 'unused materials' to the Appellant and Maurice's statement was not a privileged document.

The Prosecution (Respondent), on the other hand, argued that the statement was a privileged document by relying on *Husdi's* case as per decided by both the High Court and the Federal Court as well as in the case of *PP v Dato' Seri Anwar Ibrahim (No 3)*.⁷ Stemming from the ratio in *Husdi's* case, the Respondent also argued that the danger of tampering with the witness was the reason why the Appellant should be denied from obtaining a copy of Maurice's statement.

3. Decision of the Court

At the end of the hearing, the High Court Judge, Justice Collin Lawrence Sequerah allowed the appeal and therefore, the Appellant was allowed to obtain a copy of Maurice's statement. If we sieve through the judgment given by His Lordship, it can be seen that the appeal was allowed based on four grounds. First, His Lordship had thoroughly examined the decision in *Husdi's* case as per decided by both the High Court and the Federal Court. In His Lordship's analysis, although the High Court's decision in *Husdi's* case declared that statements recorded from witnesses during a police investigation as privileged, the Federal Court in the same case did not directly deal with the issue. This is because, during the hearing at the Federal Court, the original questions referred to the Court were not argued for. Instead, the scope of the questions before the Federal Court had been narrowed down to whether, in the case of a witness called by the prosecution is in the witness box being cross examined, the counsel is entitled to a copy of the police statement in order to impeach his or her credit.⁸ Answering to this question, the Federal Court held that, whether or not a copy of the statement can be given to the defence counsel, is subject to whether the application to

⁷ *PP v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 (High Court) 186.

⁸ *Husdi* (n 4) 81.

impeach is successful when there is indeed a material discrepancy between the statement given in court and the statement previously recorded by the police.⁹

Based on the above, Justice Collin Lawrence Sequerah was of the view that the Federal Court in *Husdi's* case did not deal with the 'wider question', whether an accused person is entitled to copies of police statements of prosecution witnesses before a trial commences. Furthermore, His Lordship was also of the view that the Federal Court in *Husdi's* case did not embark upon a consideration as to whether such statements are privileged or otherwise. Therefore, it was of the view of His Lordship that the High Court was not bound by the High Court's decision in *Husdi's* case.

Second, His Lordship agreed and followed the decision of the Court of Appeal in *Siti Aisyah's* case. In that case, the Court of Appeal distinguished between the fact in *Siti Aisyah's* case and the fact in *Husdi's* case. In *Husdi's* case, the application to obtain the witness statement was made before the trial commenced. In *Siti Aisyah's* case, the fact was similar to the present case where the application was made after the defence was called and the statements sought for were in respect of that given by witnesses offered to the defence. On the issue of privilege, His Lordship reproduced the reasons provided by the Court of Appeal in *Siti Aisyah's* case. For example, unlike certain circumstances which have been listed as privilege under the Evidence Act 1950, such as affairs of state (s 123), official communications (s 124), marital privilege (s 122) and professional privilege (ss 126–129), apparently, police witness statements are not included in the list by the legislature.

In addition, His Lordship agreed with the Court of Appeal's view that even in the common law, the duty of the Prosecution to call a witness who can show the prisoner to be innocent or to provide the witness's statement to the defence, has existed since 1964 via the Lord Denning MR's judgment in the case of *Dallison v Caffery*.¹⁰ Besides that, His Lordship also agreed with the Court of Appeal's analysis on the application of s 51 of the CPC with regard to this issue. Section 51 of CPC provides the discretionary power to the Court to order the production of a document which is 'necessary' and 'desirable'. Since the application to obtain Maurice's statement was made after the commencement of the trial, these two requirements must be fulfilled before s 51 of CPC can be invoked. There were several circumstances why Maurice's statement to the police would fulfil the two requirements under s 51 of CPC. First, Maurice was not only the Executor of the Deceased's Will, but he was also the defendant in the civil proceedings brought by the Deceased's widow. Second, Maurice was a man of advanced age as he was 71 years old. According to His Lordship, it was unlikely for him to be able to remember all the things he said to the police during the investigation process and therefore, justifying the disclosure of his statement to the Appellant.

As to the last ground, His Lordship had carefully analysed the current provision of s 113 of the CPC which was amended in 2007 to consider whether a statement made under

⁹ *ibid* 82.

¹⁰ *Dallison v Caffery* [1964] 2 All ER 610 (CA), 618.

s 112 of the CPC would be deemed as absolutely privileged. By referring to s 113 of the CPC, such a statement can be admitted as evidence if it falls under the circumstances mentioned in subsections (2), (3), (4) and (5) of the section. Thus, it is incorrect to declare that the statement as absolutely privileged. In his final analysis, His Lordship also agreed with the Appellant's lawyers, that despite the Court of Appeal in *Dato' Sri Mohd Najib bin Hj Abd Razak v PP* having claimed it was bound by the Federal Court in *Husdi's* case, based on the written judgment and citation of the case in the judgment, the Court of Appeal was actually referring to the High Court's decision in *Husdi's* case, and not the Federal Court. In the Court of Appeal's judgment, the Court quoted the case of *Husdi v PP* [1979] 2 MLJ 304 which was the High Court's decision, whereas, the citation for the Federal Court's decision is actually [1980] 2 MLJ 80.

Apart from the above grounds, there was one interesting remark made by His Lordship in granting the Appellant's application to obtain Maurice's statement. His Lordship explained that the Court's decision in this case would not operate as a general rule where an accused person would be automatically entitled to copies of statements made by witnesses who have been offered by the Prosecution. According to His Lordship, providing such a right to an accused person requires legislative intervention.

4. Commentary

Overall, the High Court's decision in this case was a sound judgment and His Lordship's careful analysis and consideration of all the relevant cases that were associated with the legal issue involved is commendable. The most significant contribution of His Lordship's judgment is his analysis on the scope of the decision between the High Court in *Husdi's* case and the Federal Court in *Husdi's* case. By reading the judgment of these two Courts, it can be argued that the ruling where a witness statement made to the police during a police investigation is absolutely privileged was not from the decision of the Federal Court in *Husdi's* case but was instead the decision of the High Court. What transpired in the Court of Appeal's decision in the case of *Dato' Sri Mohd Najib bin Hj Abd Razak v PP* indicates that the Malaysian courts seem to assume that the decision of the High Court in *Husdi's* case on this issue was subsequently affirmed by the Federal Court in *Husdi's* case and thus, making its decision binding to lower courts. Therefore, His Lordship's judgment in the present case has helped to clarify this matter.

Nevertheless, His Lordship's conclusion that the Federal Court in *Husdi's* case did not deal with the 'wider question', whether such statements are privileged or otherwise can still be disputed by reading and interpreting the last paragraph of the Federal Court's judgment in *Husdi's* case, which states as follows:¹¹

Our conclusion is not inconsistent with judgment of Syed Othman FJ in *Husdi v Public Prosecutor* [1979] 2 MLJ 304 out of which arises this reference, which dealt with the wider question whether or not the defence is entitled in

¹¹ *Husdi* (n 4) 82.

advance of the trial to copies of police statements of prosecution witnesses, and which he answered in the negative, which answer was not challenged before us.

Based on the above excerpt, one can also argue that the Federal Court in *Husdi's* case had impliedly agreed or affirmed the High Court's decision in *Husdi's* case that an accused person would not be entitled to copies of police statements of prosecution witnesses before a trial commences even though the issue was not argued before the Court. In other words, it can be argued that the Federal Court in *Husdi's* case also agreed that police statements are absolutely privileged.

If we look closely, the main problem actually stems from what is the real meaning of 'absolutely privileged' as propounded by the High Court in *Husdi's* case and which was later impliedly affirmed by the Federal Court? Does it mean that the statements are considered absolutely privileged throughout the entire trial process or only during the pre-trial stage? One thing is for sure, this issue was never discussed before the High Court in *Husdi's* case because the Court was dealing with a pre-trial application to obtain the statements. Furthermore, if we look into the Federal Court in *Husdi's* case, the statements cannot be absolutely privileged throughout the entire trial process because the Court explained that a court may order the statements to be supplied to the defence during the trial for an impeachment proceeding. This is why the decision by the Court of Appeal in *Siti Aisyah's* case was significantly relevant because it dealt with a novel issue that had never been discussed in *Husdi's* case—whether or not the defence is entitled to copies of statements made by witnesses who have been offered by the Prosecution. Drawing from the ratio in the Federal Court in *Husdi's* case, it is clear that such statements would not be considered as absolutely privileged throughout the trial process but only before the trial commenced. Therefore, the author feels inclined to say that the Court of Appeal in *Siti Aisyah's* case was correct in its finding and analysis, so too in this present case.

Regardless of the above, it is still under the impression that the High Court in the present case lacks the courage to declare an accused person to be entitled to the statements as of right if the circumstance as in this case occurs. It is argued that there is no need for a specific provision to be included in the CPC to recognise the right. Section 5 of the CPC, which allows the application of English law when there is a lacuna in our law is sufficient for the recognition of such a right. After all, both the High Court in the present case and the Court of Appeal in *Siti Aisyah's* case were of the view that importing the English law which allows for the supply of witness statements to the defence is not in conflict nor inconsistent with the CPC, particularly ss 51 and 113 of the CPC.¹² We must not overlook the fact that common law is also recognised as one of the sources of law in Malaysia as mentioned in art 160 of the Federal Constitution. Furthermore, the application of common law in criminal matters is not restricted by the cut-off dates mentioned in s 3 of Civil Law Act 1956 which are only applicable to civil cases. Therefore, s 5 of the CPC is the sole determination whether or not English law is applicable when there is a *lacuna* in matters pertaining to criminal

¹² See *Siti Aisyah* (n 5) [24]–[26].

procedure in Malaysia. As mentioned earlier, since both the High Court in the present case and the Court of Appeal in *Siti Aisyah's* case had invoked s 5 of the CPC in supporting their decision, this was indeed operated as the recognition of the right of the defence to be supplied with statements made by witnesses who have been offered by the Prosecution at the end of the Prosecution case.

5. Conclusion

The decision of the High Court in this case indicates that there is a need for one concrete solution as to whether an accused person can be supplied with statements made by witnesses to the police during an investigation process, who are not called by the prosecution and subsequently offered to the defence. In this case, His Lordship is of the opinion that such an automatic right for the defence to access such statements requires a legislative intervention. Another possible solution and perhaps the easiest one is for this issue to be directly dealt with by the Federal Court which is the Apex Court of the land. However, the nature of an appeal process is that an issue of this kind must be brought up by parties and cannot be deliberated by the Court in its own motion. Thus, only time will tell when this issue will finally be put to rest.

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