



PRESS STATEMENT

(For Immediate Release)

**OUR REPLY TO THE PRESS RELEASE DATED 4 SEPTEMBER 2018
ISSUED BY THE ATTORNEY GENERAL’S CHAMBERS TITLED
“DECISION TO *NOLLE PROSEQUI* CHARGES AGAINST
LIM GUAN ENG AND PHANG LI KOON”**

1. We act for Muhsin bin Abdul Latheef, who is the complainant and the first prosecution witness in the criminal trials of YB Lim Guan Eng and Phang Li Koon (No: 45-1-06/2016 & No: 46-1-06/2016) in the High Court in Malaya at George Town.
2. On 29 August 2018, we wrote a letter to the Attorney General’s Chambers – as stated in para 8 of the said press release – to humbly request that the abovementioned criminal trials are continued in order to allow the Honourable Judge to make a decision based on the merits of the case.
3. In fact, in the same letter, we reminded the Attorney General’s Chambers about the oft-quoted opinion of Lord Chief Justice Hewart from the English case of *R v Sussex Justices, ex parte McCarthy* (1924), that is, ‘... justice should not only be done but should manifestly and undoubtedly be seen to be done ... [and] [n]othing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.’

4. Nevertheless, the Attorney General, acting through one of his deputies, Dato' Mohd Masri Daud, accepted the representations made by the said accused persons and withdrew the charges for the offences under section 165 of the Penal Code and section 23(1) of the Malaysian Anti-Corruption Commission Act 2009.
5. It is our considered view that the decision of the Attorney General's Chambers to withdraw the said charges against the said accused persons has created an impression that there is an actual or perceived bias in favour of them, especially in favour of YB Lim.
6. It is not disputed that Tommy Thomas, the current Attorney General, has acted for YB Lim in a different but related proceeding, that is to say, in an application to set aside the leave granted to the former Attorney General, Tan Sri Mohamed Apandi Ali, to initiate a contempt proceeding against YB Lim, for claiming that the said charges were a part of a conspiracy to send him to the prison.
7. Also, it is not disputed that YB Lim was appointed as the Minister of Finance by the King on the advice of the Prime Minister during the course of the said criminal trials, and Tommy was also equally appointed as the Attorney General by the King on the advice of the Prime Minister, soon after that.
8. The declaration made by the Solicitor-Generals, Datuk Engku Nor Faizah binti Engku Atek and Datin Paduka Zauyah Be binti T. Loth Khan, in the joint statement – as stated in para 1 of the said press release – is at best ineffectual as it does not guarantee non-interference by Tommy.
9. Article 145(1) of the Federal Constitution provides that the Attorney General shall have the power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence. Furthermore, section 376(1) of the Criminal Procedure Code provides that the Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code.

10. For all intents and purposes, Tommy was (and still is) the Attorney General and the Public Prosecutor at the time when the decision was made by the Attorney General's Chambers to discontinue the said criminal trials.
11. When a judge recuses himself from presiding over a case to avoid a potential conflict of interest, another judge – who is equal to him – shall replace him to hear the case. Nonetheless, in the case of the Attorney General, there is no one who is equal to him and who can effectively replace him. The Solicitor-Generals and all other Deputy Public Prosecutors are his mere subordinates!
12. Therefore, we have reasons to believe, or at least suspect, that the decision of the Attorney General's Chambers to enter *nolle prosequi* in this case was not made in good faith.
13. For the sake of furthering the argument here, let's put the above discussions aside for a moment and focus on the explanation offered by Dato' Mohamad Hanafiah bin Zakaria, who is the Head of the Appellate and Trial Division at the Attorney General's Chambers.
14. In paras 3 and 4 of the said press release, Dato' Hanafiah concluded that the evidence supporting the said charges has been substantially weakened, as a result of the cross-examination of the prosecution witnesses who have testified so far, and, as such, it is futile for his team to continue prosecuting the said accused persons, knowing that it would be impossible to establish a *prima facie* case against them.
15. This, in our opinion, is nothing but a lame excuse or may be an afterthought on the part of the Attorney General's Chambers.
 - a. Firstly, it is the duty of the Honourable Judge, and not the Attorney General, to subject the evidence led by the prosecution in its totality to a maximum evaluation to determine whether or not a *prima facie* case has been established.

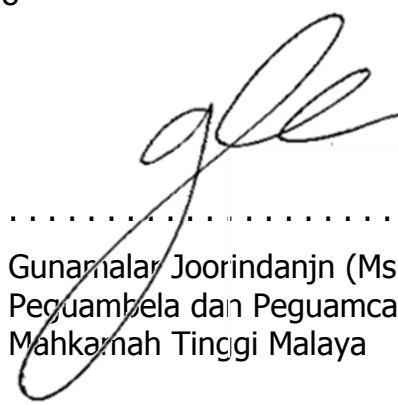
- b. Secondly, the prosecution has not closed its case and there are several other key witnesses that are yet to take the stand, let alone be cross-examined by the defence counsels.
 - c. Thirdly, the said criminal trials were conducted by Dato' Masri, and not by Dato' Hanafiah. How is it even remotely possible for a man, no matter how learned he is, to attach any meaningful weight to the testimony of witnesses, whose demeanour he has no advantage of seeing?
16. If, assuming that the prosecution case indeed has collapsed beyond repair midway during the prosecution stage, then there is absolutely no reason for Dato' Masri to demand for a discharge not amounting to an acquittal (DNAA). In that sense, the Honourable Judge was correct in making an order of acquittal.
17. On the other hand, if Dato' Masri needs a breather so that he could reorganise his strategies, then he should have asked for a further postponement, instead of exercising his power to withdraw the charge under section 254(1) of the Criminal Procedure Code. The reason is because once the Attorney General has exercised his right to withdraw the charge under the said section, then section 254(3) of the same Code gives the discretionary power to the High Court to order either a DNAA or an acquittal.
18. Had Dato' Masri asked for a postponement, the Honourable Judge either will grant the said postponement or order a DNAA. There is no option for the Honourable Judge in such case to order an acquittal. We are unable to fathom why such approach was not considered by the Attorney General's Chambers.
19. In conclusion, we refer to an extract of the judgment by Lord President Salleh Abas in the Supreme Court case of *Public Prosecutor v Zainuddin Sulaiman* (1986), which is worth quoting at length.

The law and Constitution in giving the Attorney-General an exclusive power respecting direction and control over criminal matters expect him to exercise it honestly and professionally. The law gives him complete trust in that the exercise of this power is his and his alone and that his decision is not open to any judicial review ... Members of the public expect that he exercises his power *bona fide* and professionally in that when he prefers a charge against an individual he does so because public interest demands that prosecution should be initiated and **when he refrains from charging an individual or discontinues a prosecution already initiated he also acts upon the dictate of public interest** [emphasis added].

20. We, therefore, reject the explanation made by the Attorney General's Chambers in the said press release. We demand that an **inquiry** is commissioned immediately to investigate the circumstances that have led to the acceptance of the letters of representation by the Attorney General's Chambers.

21. In the meantime, we call upon the Attorney General to file a **notice of appeal** within the time stipulated to give the Court of Appeal an opportunity to review whether or not the decision of the Honourable Judge to order an acquittal, instead of a DNAA, was justified, given the circumstances of the case.

Dated 4 September 2018



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Gunamalar Joorindanjn (Ms.)
Peguambela dan Peguamca
Mahkamah Tinggi Malaya