

**IN THE COURT OF APPEAL OF MALAYSIA**

**Coram:** Iskandar Hashim, JCA; Hasnah Hashim, JCA; Rhodzariah Bujang, JCA

**Mohd Khaidir Bin Ahmad v Mohd Iqbal Bin Zainal Abidin**

**Citation:** [2018] MYCA 257 **Suit Number:** Civil Appeal No. C-02(NCVC)(W)-1010-05/2017

**Date of Judgment:** 19 July 2018

*Defamation – Libel – Appeal against liability and quantum of damages Defamation – Defence of justification or fair comment – Defence of qualified privilege – Issue of locus standi – Whether there was a positive identification of the respondent*

*Defamation – Innuendo – Whether the fact that innuendo was not pleaded by the respondent would in any way affect the merit of the claim*

*Damages – Quantum of damages – Whether the amount justified when considered against the gravity of the accusation, the extent of the publication and the office held by the appellant*

**JUDGMENT**

[1] The appellant was a caged fish breeder in Temerloh and Chairman of an organisation called Pertubuhan Pelindung Khazanah Alam Malaysia, Cawangan Pahang [PEKA]. The appellant has filed this appeal against the decision of the High Court of Temerloh who found him liable for defaming the respondent, who was at that material time an Assistant District Officer of Temerloh and he was ordered to pay damages in the sum of RM50,000.00 to the respondent. His appeal was both against the finding of liability and the quantum of damages.

**Background Facts**

[2] The facts upon which the cause of action rest are almost largely undisputed. It started with a police report lodged by one Hamzah bin Mohamed Hussien, that a sign board has been erected on his land at Kampung Tebing Tinggi, Mukim Lebok which reads:

*Projek Ternakan Ikan Sangkar, Nama: Khaidir bin Ahmad, TOL/LPS PTT/234/2015/11:*

The said land was state land and Hamzah was granted a Temporary Occupation Licence [TOL]

and Permit 4B over it. The police report was extended to the office of the Land Administrator of Temerloh and an inspection on site confirmed the existence of the signboard and there was also a pathway cleared on the land leading to the riverbank. Following this inspection a notice dated 15/05/2015 signed by the respondent was served on the appellant. The signboard was also taken down. The appellant retaliated by uploading the said notice on his Facebook account with comments which the respondent claimed were defamatory of him. The relevant postings are reproduced in paragraph 12 of the respondent's statement of claim whilst the actual postings can be found at page 298 of the Core Bundle of Documents [CBD]. The said paragraph 12 reads:

*"Defendan telah menerbitkan dan menyatakan kenyataan melalui mukabukunya tersebut pada 21/05/2015 iaitu "YA ALLAH, TERGAMAK MEREKA MAHU MENZALIMI AKU!!!" dan beberapa kenyataan lain seperti:*

*[a] "Demi menjaga kepentingan projek pam pasir yang akan diusahakan oleh bangsa asing, Penolong Pentadbir Tanah Daerah Temerloh, Mohd Iqbal bin Zainal Abidin yang berasal dari Perak sanggup mencipta sejarah mengeluarkan notis untuk memusnahkan dan membinasakan sangkar ternakan yang diusahakan oleh anak tempatan bangsanya sendiri";*

*[b] "Yang menimbulkan kemusykilan, notis kepada saya kerana kesalahan menceroboh tanah kerajaan tetapi laporan kepada Pihak Berkuasa Negeri [PBN] mengatakan sangkar saya terletak di atas tapak TOL pam pasir, sedangkan pelan yang disertakan jelas terletak berjauhan";*

*[c] "Kenapa daripada ratusan penternak ikan sangkar di sepanjang Sungai Pahang yang wujud sejak berpuluh-puluh tahun lalu...HANYA saya seorang yang menjadi sasaran?"*

*[d] "Apa motif dan agenda Pegawai Melayu ini terhadap bangsanya sendiri?"*

*[e] "Siapa di belakang dia?"*

*[f] "Saya kerugian lebih RM200,000.00 kerana sangkar saya di tapak lama musnah akibat kemarau dan banjir. Kenapa di tapak lama yang tidak sesuai itu Pegawai Melayu ini tidak ambil tindakan terhadap saya?"*

*[g] "Kenapa di tapak berhampiran TOL pam pasir yang belum beroperasi kerana bantahan penduduk ini, dia mahu menunjukkan kuasanya?"; dan*

*[h] "Tidak adakah akal dan hati perut dia memikirkan nasib dan masa depan anak bangsanya sendiri?"*

[3] That was not all. On 23/05/2015 the appellant made another posting of his comments which is at page 321 of CBD and pleaded as paragraph 14 of the statement of claim and this was followed by photographs of the respondent, his son and car on 25/05/2015 [at page 329 of CB]. The said paragraph 14 is reproduced below:

"Satu lagi kenyataan-kenyataan yang berunsur fitnah dan tidak benar ke atas Plaintiff diterbit dan dikeluarkan oleh Defendan pada 23/05/2015 iaitu "MENGAPA MEREKA ZALIM DAN TIDAK JUJUR???" dan kenyataan-kenyataan lain seperti:

[a] "Jawapannya dia bertindak di atas aduan HANYA seorang pemilik TOL pam pasir yang terletak berjauhan dengan sangkar ikan saya";

[b] "1. Mengapa Pegawai Melayu bernama Mohd Iqbal ini tidak mengambil apa-apa tindakan terhadap berates-beratus penternak dan penduduk bangsa Melayu Mukim Lebak, menurunkan tandatangan mebantah projek pam pasir yang diusahakan oleh TAUKE CINA itu?;"

[c] "2. Mengapakah dia hanya memikirkan kepentingan TAUKE CINA dan langsung tidak mahu berkompromi terhadap anak bangsanya sendiri untuk mencari rezeki keluarga?";

[d] "3. Mengapakah dia tidak memberi pilihan atau peluang kepada saya untuk meneruskan usaha mencari rezeki menerusi kegiatan menternak ikan dalam sangkar ini?";

[e] "4. Mengapakah dia berdolak-dalik dan tidak jujur dalam tindakannya?...Kenapa dia perlu MENIPU dan tidak menyatakan KEDUDUKAN sebenar?""

[4] These postings attracted responses, negative ones at that, on his Facebook page and these comments are pleaded in paragraphs 13 and 15 of the statement of claim which need not be reproduced in this judgment. Suffice to say that the appellant's allegation of abuse of power and corruption appeared to resonate with the netizens who posted their comments, generally agreeing with the same. The respondent therefore filed this action for libel for he said that the published words, which referred to him, in their natural and ordinary meanings carry the connotation as pleaded in paragraph 19 of the statement of claim. This paragraph 19 has been translated in paragraph 2.7 of the written submission of the appellant's counsel before us as follows:

2.7 It is the Plaintiff pleaded case [paragraph 19 of the Statement of Claim] that the words in the impugned statements in their natural and usual meaning carries the connotation that:

(i) the Plaintiff is a Malay officer who is corrupt and involved on bribe;

(ii) Plaintiff only takes cares of the interest of the other races and does not take care of the interest of his own, that is the Malay race;

(iii) the Plaintiff had misused his power and had the ill intention to destroy the breeding cages of the Defendant;

(iv) the Plaintiff intends to destroy the breeding cages of the Defendant because he had been paid or is used by certain parties;

(v) the Plaintiff is heartless, evil and cruel and unjust to the Defendant's own race; and

(vi) *the Plaintiff is a liar.*

The appellant had also written to the Menteri Besar of Pahang to complain about the issuance of the notice and for which the respondent was ordered to make a report to the office of the Menteri Besar.

### **The Defence**

[5] The appellant denied that the words were defamatory of the respondent, that they were fair comments and disclaimed responsibility for the negative comments by the netizens. On the signboard that he put up, he said it was not in the area covered by Permit 4B and there were infact others who reared fishes in the area without a TOL licence and for which no actions were taken against them.

[6] After a full trial, the learned Judicial Commissioner allowed the respondent's claim and awarded the damages as alluded to at the outset of this judgment. A summary of His Lordship's reasons for arriving at this decision are as follows:

(i) A reasonable person reading the published words literally would say that they are defamatory. The words were "kasar dan kesat" and had disparaged his reputation. These words clearly identified the respondent as "Mohd Iqbal bin Zainal Abidin, Penolong Pentadbir Tanah Daerah Temerloh". The words highlighted by His Lordship at paragraph 54 of the grounds of judgement which we see fit to reproduce are:

*[54] Jelas terdapat perkataan yang memburuk-burukkan dan menghina Plaintiff di dalam pengataan-pengataan tersebut seperti "Tidak ada akal dan hati perut dia memikirkan nasib dan masa depan anak bangsanya sendiri", "Sanggup ambil tindakan terhadap bangsa sendiri bila rasuah menguasai diri...", "Mengapa Pegawai Melayu bernama Mohd Iqbal ini tidak mengambil tindakan terhadap berates-ratus penternak dan penduduk bangsa melayu Mukim Lebak, menurun tandatangan membantah proje pam pasir yang diusahakan oleh TAUKE CINA", "Mengapa dia hanya memikirkan kepentingan TAUKE CINA", "Mengapakah dia berdolak dalik dan tidak jujur dalam tindakannya" dan "Kenapa dia perlu MENIPU dan tidak menyatakan kedudukan sebenar".*

We pause have to note that the fact that these were words posted by the appellant in his Facebook page were not in dispute and neither could it be denied that they were made in reference to the respondent given the clear mention of his name in the said postings.

Earlier, His Lordship had rightly addressed his mind to the test in determining whether the words were defamatory by reference to this court's decision in **Choo Fook Choo v The China Press** [1999] 1 CLJ 461 which said these:

*"It cannot, I think, be doubted that the first task of a court, in action for defamation, is to determine whether the words complained of are capable of bearing a defamatory meaning. And it is beyond argument that this is in essence a question of law that turns upon the construction of the words published. Having decided whether the words complained of are capable of being a*

*defamatory meaning, the next step in the enquiry is for a court to ascertain whether the words complained of are in fact defamatory. This is a question of fact dependent upon the circumstances of a particular case”.*

*The court also held that:*

*“...the test which is to be applied lies in the question: do the words published in their natural meaning and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motive or lack of integrity on his part?. If the question invites an affirmative response, the words complained of are defamatory.”*

According to His Lordship further, the published words in their natural and ordinary sense carry the meanings that:

- (i) Plaintiff adalah seorang pegawai melayu yang korup dan terlibat dengan rasuah;*
- (ii) Plaintiff hanya menjaga kepentingan bangsa asing, tidak menjaga kepentingan bangsa sendiri iaitu bangsa melayu;*
- (iii) Plaintiff menyalahgunakan kuasa dan niat jahat untuk memusnah dan membinasakan sangkar ternakan Defendan;*
- (iv) Plaintiff hendak memusnahkan sangkar ternakan Defendan kerana dibayar atau digunakan oleh pihak tertentu;*
- (v) Plaintiff tidak berhati perut, jahat dan kejam serta menganiaya bangsa sendiri iaitu Defendan; dan*
- (vi) Plaintiff seorang yang tidak jujur dan seorang penipu.*

We are certainly in agreement with the above findings by the learned High Court Judge when we examined the published words as reproduced above. The belated denial made during the trial by the appellant that being a former editor he was only aggrieved or sad by the prevalence of corruption in Malaysia and did not accuse the respondent of corruption flies in the face of the postings made by him.

(ii) The learned Judicial Commissioner also rejected the defence of justification or fair comment for the appellant failed to prove that the respondent had received bribes from a “Tauke Cina” who remained unidentified at the trial and all the other disparaging allegations in the postings as stated earlier. His Lordship referred to the evidence of [PW3] Sukardi bin Hj Mat Hassan, the Assistant Land Officer who testified that the appellant did apply for a TOL on the very same area as that which was issued with a TOL to Hamzah a few days before making the impugned postings. The District Office’s issuance of the notice to him was therefore validly done. Again we have to agree with His Lordship for the truth of the postings made by him was not even proven. Although, as raised by the appellant’s counsel in written submission, that Hamzah [PW2] had given evidence

that at that material time i.e. between January-August 2015 he was not operating his business on the land and that his licence was only issued on 03/08/2015, the facts that the court was concerned with are not these but the postings made by the appellant-whether the accusation made therein were justifiable or fairly made. It must not be forgotten that the Land Office and the District Office carried out their own official investigations into the matter and found the appellant had wrongly erected his signboard. Thus, we are unable to agree that based on the evidence of Hamzah as highlighted by the appellant's counsel, his defence of justification or fair comment had been proven.

(iii) On the defence of qualified privilege, the learned Judicial Commissioner held that it was inapplicable to the appellant because he had made the postings without there being a duty to do so for them, as well as the complaint to the Menteri Besar, were done for his own interest, not that of the public. In respect of the latter, the appellant also failed to prove at the trial that there were other caged-fish breeders who suffered problems like him and therefore he was not representing fellow businessmen in the same trade. Thus his complaint was not covered by the defence of qualified privilege and considering that it was not made in good faith but with an intention to defame the respondent.

The appellant's counsel, in written submission before us confined the defence of qualified privilege to the letter of complaint to the Menteri Besar, saying that his client has a legal, social and moral duty to do so. With respect we are unable to agree with him because as rightly pointed out by the learned Judicial Commissioner, it was made without evidential support that the appellant had such a duty, in the context of this case, to do so. The existence of such a duty and the reciprocal one of the recipient (Menteri Besar) to receive it is a mandatory requirement to be proved by the appellant. This was the principle in **Adam v Ward** (1917) AC 309 and applied by the Federal Court in **Abdul Rahman Talib v Seenivasagam & Anor** (1965) 31 MLJ 154.

(iv) As for the issue of locus standi, the learned Judicial Commissioner held based on **Government of the State of Sarawak and Anor v Chong Chieng Jen** [2016] MLJU 113 and **Lim Guan Eng v Utusan Melayu [M] Bhd** [2012] 3 MLRH 124 and **Datuk Seri Utama Dr. Rais Yatim v Amizudin Ahmat** [2012] 1 MLRH 519 that a public officer can file an action for defamation in his personal capacity. Before us learned counsel for the appellant submitted that the learned Judicial Commissioner erred in not distinguishing the facts in the cases cited above. With respect, there was nothing to distinguish because what the learned Judicial Commissioner did was to apply the legal principle stated in the said cases which held that a public official whose individual reputation is wrongly impaired can sue for defamation in his personal capacity even though that individual and a democratically elected Government must be open to uninhibited public criticism relating to such public administration and affairs.

[7] In this case, although the statement of claim pleaded the post held by the respondent in the said government department, it is clear from the pleading that he was suing in his personal capacity. Furthermore, his official position was not inserted in bracket below his name in the intitulum of the writ and statement of claim. Such absence has been taken favourably by the courts in both **Lim Guan**

**Eng's and Datuk Seri Rais Yatim's** case [supra] to signify that the claim was mounted in such a personal capacity. Since the respondent was clothed with such a capacity, the fact that the Public Prosecutor can charge the appellant with criminal defamation was not worth a consideration at all in determining his locus to sue. The respondent had to plead his official position as it is one of the material facts which moved the appellant to make the postings that ranted against him, leading to the accusation of him being corrupt. The postings, we must also add, cannot be read in isolation but as a whole. Therefore, although the photographs of the respondent which the appellant copied and pasted from the respondent's own Facebook page were not in themselves defamatory but they must be seen in the context of the other postings which were and because he was not just named but also on account of the photographs, the reader of his posts could not have mistaken that the respondent was the person referred to by the appellant in his postings. In other words there was positive identification of his victim, the respondent.

[8] Still on this issue, we agree with the appellant's submission that innuendo was not pleaded by the respondent, but again, given the uploading of the photographs and the explicit derogatory words used in the postings, reliance on innuendo would be superfluous and the fact that it was not pleaded does not in any way affect the merit of the claim.

### **Damages**

[9] On the quantum of damages ordered, it was not addressed to us in submission-whether oral or written and we have indicated our view at the outset of this judgment that the amount was fully justified when considered against the gravity of the accusation, the extent of the publication given that it was made online and the office held by the appellant. These are factors held by the Federal Court in **Datuk Harris Mohd Salleh v Datuk Yong Teck Lee & Anor** (2018) 1 CLJ 145 case (supra) to be relevant in an assessment for damages in a defamation of case. The same is therefore affirmed.

### **Conclusion**

For all these reasons, the appeal is dismissed with cost.

Dated: 19 July 2018

**RHODZARIAH BINTI BUJANG**

Judge

Court of Appeal Malaysia

Putrajaya

### **COUNSEL**

For the Appellant: Mr. T. Gunaseelan, Mr. Ikmal Hisam Idris and Mr Keshvinjit Singh, Messrs. Gunaseelan & Associates

For the Respondent: Mr. Adnan bin Seman @ Abdullah, Messrs. Adnan Sharida & Associates

**JUDGMENTS REFERRED TO:**

*Abdul Rahman Talib v Seenivasagam & Anor* (1965) 31 MLJ 154

*Adam v Ward* (1917) AC 309

*Choo Fook Choo v The China Press* [1999] 1 CLJ 461

*Datuk Harris Mohd Salleh v Datuk Yong Teck Lee & Anor* (2018) 1 CLJ 145

*Datuk Seri Utama Dr. Rais Yatim v Amizudin Ahmat* [2012] 1 MLRH 519

*Government of the State of Sarawak and Anor v Chong Chieng Jen* [2016] MLJU 113

*Lim Guan Eng v Utusan Melayu [M] Bhd* [2012] 3 MLRH 124

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