

**IN THE COURT OF APPEAL OF MALAYSIA AT PUTRAJAYA  
(APPELLATE JURISDICTION)  
CRIMINAL APPEAL NO: A-09-279-11/2023 & A-09-280-11/2023**

**BETWEEN**

**HENDRA BIN MULANA**

**- APPELLANT**

**AND**

**PUBLIC PROSECUTOR**

**-RESPONDENT**

**[In the Matter of the High Court of Malaya at Taiping,  
Perak Darul Ridzuan,  
Criminal Appeal No: AB-42JSKS-2-02/2023, AB -JSKS -03-02/2023,  
AB-42JSKH-1-02/2023 & AB42JSKH-2-02/2023**

**Between**

**Hendra Bin Mulana**

**- Appellant**

**And**

**Public Prosecutor**

**- Respondent]**



**[In the Matter of the Sessions Court at Taiping, Perak Darul Ridzuan  
Criminal Trial No: AB-62JSK-20-11/2019 & AB-62JSK-21-11/2019**

**Between**

**Public Prosecutor**

**And**

**Hendra Bin Mulana]**

**CORAM:**

**HADHARIAH BINTI SYED ISMAIL, JCA**

**AZMI BIN ARIFFIN, JCA**

**S.M. KOMATHY A/P SUPPIAH, JCA**

**JUDGMENT**

**Introduction**

[1] The Appellant was tried in the Sessions Court at Taiping with four (4) offences of requesting for child pornography under sections 8(b) of the Sexual Offences Against Children Act 2017.

[2] Particulars of the amended charges reads as follows:

*Sessions Court Case No: AB-62JSK-20-11/2-2019:*

*HC Appeal: AB- 42JSKS-2-02/ 2023*



S/N 6arASepOZkWXYWVV714G3A

\*\*Note : Serial number will be used to verify the originality of this document via eFILING portal

COA Appeal: A-09-279-11 /2023

### **First Amended Charge**

*Bahawa kamu pada 14/10/2019 di antara jam 0001hrs sehingga 2150hrs melalui media whatsapp (No. telefon: 60177954312) di alamat JT101 Jalan Kuala Kangsar 34850 Changkat Jering dalam Daerah Larut Matang Negeri Perak telah meminta pornografi kanak-kanak daripada XXXXX, KPT: 070410-08-0180 yang merupakan seorang kanak kanak di bawah umur 18 tahun semasa kejadian. Oleh demikian kamu telah melakukan suatu kesalahan di bawah Seksyen 8(b) Akta Kesalahan Kesalahan Seksual terhadap Kanak-Kanak 2017 dan boleh dihukum dibawah seksyen dan Akta yang sama.*

*Hukuman Hukuman Penjara selama tempoh tidak lebih lima belas tahun dan hendaklah juga dihukum sebat tidak kurang tiga sebatan.*

### **Second Amended Charge**

*Bahawa kamu pada 15/10/2019 di antara jam 2325hrs sehingga 2359hrs melalui media whatsapp (No. telefon: 60177954312) di alamat JT101 Jalan Kuala Kangsar 34850 Changkat Jering dalam Daerah Larut Matang Negeri Perak telah meminta pornografi kanak-kanak daripada XXXXX, KPT: 070410-08-0180 yang merupakan seorang kanak kanak di bawah umur 18 tahun semasa kejadian. Oleh demikian kamu telah melakukan suatu kesalahan di bawah Seksyen 8(b) Akta Kesalahan Kesalahan Seksual terhadap Kanak-*



S/N 6arASepOZkWXYWVV714G3A

\*\*Note : Serial number will be used to verify the originality of this document via eFILING portal

*Kanak 2017 dan boleh dihukum dibawah seksyen dan Akta yang sama.*

*Hukuman Penjara selama tempoh tidak lebih lima belas tahun dan hendaklah juga dihukum sebat tidak kurang tiga sebatan.*

### ***Third Amended Charge***

*Bahawa kamu pada 16/10/2019 di antara jam 0001hrs sehingga 2150hrs melalui media whatsapp (No. telefon: 60177954312) di alamat JT101 Jalan Kuala Kangsar 34850 Changkat Jering dalam Daerah Larut Matang Negeri Perak telah meminta pornografi kanak-kanak daripada XXXXX, KPT: 070410-08-0180 yang merupakan seorang kanak kanak di bawah umur 18 tahun semasa kejadian. Oleh demikian kamu telah melakukan suatu kesalahan di bawah Seksyen 8(b) Akta Kesalahan Kesalahan Seksual terhadap Kanak-Kanak 2017 dan boleh dihukum dibawah seksyen dan Akta yang sama.*

*Hukuman penjara selama tempoh tidak lebih lima belas tahun dan hendaklah juga dihukum sebat tidak kurang tiga sebatan.*

*Sessions Court Case No: AB-62JSK-21-11/2019*

*HC Appeal: AB -JSKS -03-02/2023*

*COA Appeal: A-09-280-11/ 2023*



### ***Fourth Amended Charge***

*Bahawa kamu pada 17/10/2019 di antara jam 0001hrs sehingga 0250 hrs melalui media whatsapp (no telefon: 60177954312) di alamat JT101 Jalan Kuala Kangsar 34850 Changkat Jering dalam Daerah Larut Matang Negeri Perak telah meminta pornografi kanak-kanak daripada XXXXX, KPT: 070410-08-0108 yang merupakan seorang kanak-kanak di bawah umur 18 tahun semasa kejadian. Oleh demikian kamu telah melakukan suatu kesalahan di bawah seksyen 8(b) Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017 dan boleh dihukum dibawah seksyen dan Akta yang sama.*

*Hukuman penjara tidak lebih lima belas tahun dan hendaklah juga dikenakan hukuman sebatan tidak kurang 3 sebatan.*

- [3] These cases were tried together.
- [4] The Appellant pleaded not guilty to all the amended charges.
- [5] In support of its case, the prosecution called thirteen (13) witnesses to testify against the Appellant.
- [6] At the end of the prosecution case, the learned trial judge ordered the Appellant to enter his defence.
- [7] The Appellant elected to give evidence under oath and he was the sole witness for the defence.



[8] At the end of the defence case, on 16 February 2023, the learned trial judge found the Appellant guilty and convicted him of the offences. The learned trial judge imposed the following sentences:

***First Amended Charge:***

*The Appellant was sentenced to 13 years imprisonment from the date of conviction (16 February 2023) and 3 strokes of whipping.*

***Second Amended Charge:***

*The Appellant was sentenced to 13 years imprisonment from the date of conviction (16 February 2023) and 3 strokes of whipping.*

***Third Amended Charge:***

*The Appellant was sentenced to 13 years imprisonment from the date of conviction (16 February 2023) and 3 strokes of whipping.*

***Fourth Amended Charge:***

*The Appellant was sentenced to 13 years imprisonment from the date of conviction (16 February 2023) and 3 strokes of whipping.*

[9] The learned Sessions Court Judge ordered that the imprisonment sentences for all the charges in cases AB-62JSK-20-11/2019 & AB-62JSK-21-11/2019 were to run concurrently.



[10] The Appellant was also sentenced to undergo counselling while in prison and 3 years police supervision under section 27 of the Sexual Offences Against Children Act 2017 after completing the imprisonment sentence.

[11] Aggrieved, on 20 February 2023 the Appellant filed Notice of Appeal against his conviction and sentence to the High Court.

[12] Dissatisfied, the Public Prosecutor/Respondent had cross-appealed in Appeal Nos. AB-42JSKH-1-02/2023 and AB-42JSKH-2-02/2023 against the imprisonment sentences.

[13] On 2 November 2023, the learned Judicial Commissioner having heard these appeals together, dismissed the Appellant's appeal against conviction.

[14] As for the sentence, the learned Judicial Commissioner reduced all the sentences of imprisonment to 10 years imprisonment. However, she maintained the sentence of whipping and the other additional orders imposed.

[15] The Respondent's cross appeal on the inadequacy of sentence was dismissed.

[16] Aggrieved, on 9 November 2023, the Appellant filed two (2) Notices of Appeal to the Court of Appeal against the High Court against his conviction and sentence in respect of Appeal Nos. AB-42JSKS-2-02/2023 and AB-42JSKS-3-02/2023.



## The Prosecution's Case

[17] The facts leading the arrest of the Appellant are well set out in the judgment of the learned Judicial Commissioner which is reproduced herein:

The case of the prosecution was well laid out by the learned Judicial Commissioner in her grounds of judgment which is reproduced herein:

*[7] The evidence adduced by the prosecution in respect of the charges were given directly through SP10. She testified that she was an only child and her parents owned a small business selling fruits. They were seldom at home early and she was left much on her own after she finished school; her mother would come home around midnight. She did not have a close relationship with her parents due to their work commitment. SP10 then spent much time on the internet and chatting in social media platforms such as "BIGO" and WhatsApp and she would often stay up late. SP10 had 2 mobile telephones, brand names Redmi and Neffos, bearing registration numbers 014-922XXX and 014-322XXXX. One was given to her by her father and the other phone was a gift from her grandmother.*

*[8] SP10 first came to know the Appellant in 2019 through the live streaming platform known as BIGO when she was in Year 6 (at the age of 12 years old). SP10 had a few accounts with BIGO which was an adults-only social media platform. She had obtained the assistance of her friend, S, (which the Court shall not state her*





*friend's full name here in order to protect the identities of the children) to register the accounts on her behalf. She told the court that she usually used 014-922XXXX to communicate, have lewd conversations and send sexual-related pictures and videos to the Appellant upon his request. SP10 stated that she saved his number as "Secret love" (using the icon love after the word "Secret"). Both telephones were password-protected but her mother, SP1, knew the password as SP10 had told her about it.*

*[9] SP10 had never met the Appellant in person but they had communicated via live streaming first and later on WhatsApp video calls more than 10 times. She told him that she was 14 years old at that time and she knew his full name, his age and where he worked. They had a special relationship where she would address him as "dear" and he would address her as "love" in their conversations. After gaining her trust that they had a special relationship, the Appellant became more forward and daring by sending sexually explicit pictures (photos) and videos including those of his genital. He encouraged and persuaded SP10 to reciprocate and send him photos and videos of her breast and private part. He pretended to sulk if she refused to do so. SP10 was reluctant at first as she thought it was wrong but after many coaxing, she relented because she felt that the Appellant cared for and loved her.*

*[10] One day on 19.10.2019, while her daughter was away at school, SP1 chanced upon SP10's telephone in the lounge of their house and unlocked it using the password. She was shocked to see her daughter's lewd video and conversations in WhatsApp with an unknown man. SP1 took only a glance at the last 2 videos in the*



*chat with "Secret love". One showed her daughter lying in her bedroom and playing with her private part. It was sent to "Secret love". The other video showed the man masturbating and that video was sent to her daughter's phone. SP1 was heartbroken with what she had seen as she did not expect her daughter to behave in such a manner. SP1 later went to SP3's house to look for her daughter as the latter had not come home from school. That was when she found out from the school's headmaster that the school's PTA President had brought SP10 to the police station to lodge a police report against her. SP1 and SP10 had a misunderstanding the day before where SP1 allegedly threatened her daughter with a knife as the latter did not want to listen to her advice. According to her, SP10 used to be a good daughter until she started playing online game(s). She became aggressive, skipped school, defied her parents, and they often had misunderstandings because of the online games.*

*[11] The next day the police came and both SP1 and her husband were arrested as the police commenced investigations against them for alleged child abuse. She did not manage to see her daughter but she gave SP11 both telephones belonging to SP10 while they were in remand. SP11 advised her to lodge a police report after they were released from custody on 25.10.2019 and the telephones were seized by the police. SP1 lodged a police report on the same day. Meanwhile, SP10 was sent to stay with her grandmother and for that 3 months, both SP1 and her husband did not see their daughter while investigations were on-going. They were never charged for any offence in respect of their daughter.*



*[12] Police investigations with a telecommunications provider led to the arrest of the Appellant by SP8 at his workplace in Seri Petaling, Kuala Lumpur on 20.11.2019. A Samsung telephone belonging to the Appellant was seized at that time and he was brought to IPD Taiping for further investigations. SP8 lodged a police report regarding the arrest and seizure of the telephone. On 23.11.2019, SP11 received the Appellant's second telephone (which was a Vivo brand) from his sister SP12 at the IPD Taiping. The telephone was password-protected. Later SP11 obtained the password from the Appellant.*

*[13] SP9 was the Forensic Digital Analyst who analyzed data in and tested the 4 telephones seized after he received the request and passwords (for the telephones) from the police through SP7. He took about 3 weeks to conduct the analysis from the time he received the items on 31.3.2020 until they were returned to the police through SP7 on 23.4.2020. He had extracted the photos, videos and WhatsApp conversation between SP10 (from telephones marked as C1 and C2) and the Appellant (from telephones marked as C3 and C4).*

*SP9 used their forensic workstation and the softwares Cellebrite 4PC to extract data (whether encrypted or otherwise) and Cellebrite Physical Analyzer to analyse the extracted data. From the Appellant's Vivo telephone folder, he extracted 5 sexually explicit videos marked as P27(A-E) and 83 photos marked as P28(1-83) relating to the conversation with SP10. In his analysis on SP10's Neffos telephone he found a WhatsApp conversation between Secret Love and SP10 totaling 2447 communications which started*



*on 10.9.2019 and ended on 22.10.2019. The sexually explicit conversations were still available in the Neffos and Vivo telephones as can be seen in the exhibits (RRJ3). The Appellant was charged on 27.11.2019.*

## **The Defence of The Accused**

[18] The gist of the Appellant's defence may be summarised as follows:

- [i] The Appellant did not think that his actions were wrong because they were lovers and he wanted to marry SP10. He did not know SP10's true age because in her BIGO profile it was stated as 19 years old.
  
- [ii] The Appellant alleged that SP10 had also told him she was still in school and that she was in Form Six (Upper).

## **Findings of The Trial Judge End of Defence Case**

[19] Before we turn to the issues in this appeal, it will be helpful to reproduce the learned trial judge findings at the end of the whole case which we find convincing.

*69. Mahkamah ini berpendapat, dengan bersandarkan kepada keterangan SP10 itu sendiri dan keterangan kesemua saksi pendakwaan di dalam kes ini beserta ekshibit-ekshibit yang dikemukakan, sudah terang lagi bersuluh, bahawa Tertuduh merupakan individu dan pelaku yang meminta pornografi daripada*



*SP10 yang jelas merupakan seorang kanak-kanak di dalam kes ini dan perlakuan Tertuduh itu telah dilakukan secara terang-terangan.*

*70. Mahkamah juga mendapati kesemua keterangan bersumpah saksi-saksi pendakwaan di dalam kes ini termasuk keterangan bersumpah SP10, adalah menyokong antara satu sama lain dan mempunyai rangkaian penceritaan yang kukuh dan yang saling berkait antara satu sama lain. Terdapat pembuktian yang jelas dan nyata bahawa Tertuduh merupakan satu-satunya individu yang meminta pornografi daripada SP10 di dalam kes ini. Peguambela Tertuduh juga tidak pernah mempersoalkan dan tidak pernah mencabar keterangan saksi-saksi pendakwaan bahawa telah berlaku perbuatan meminta pornografi oleh Tertuduh terhadap SP10 di dalam kes ini. Sebaliknya, apa yang pembelaan perlihatkan di mahkamah ini ialah penafian kosong semata-mata iaitu, Tertuduh menyatakan bahawa perbuatan meminta pornografi tersebut dilakukan kerana Tertuduh menyangka bahawa SP10 merupakan seorang yang telah dewasa dan disebabkan hal itu, Tertuduh merasakan adalah tidak salah baginya melakukan perbuatan meminta pornografi daripada SP10 di dalam kes ini*

*71. SP10 melalui platform media sosial yang dikenali sebagai Bigo pada sekitartahun 2019 dan memanggil SP10 dengan nama panggilan Yana. Tertuduh dalam keterangannya juga memberitahu mahkamah bahawa SP10 merupakan kekasihnya dan sepanjang perkenalan mereka, Tertuduh tidak pernah berjumpa secara bersemuka dengan SP10. Mereka cuma berkomunikasi melalui platform Bigo dan aplikasi whatsapp sahaja dan Tertuduh tidak mengenali ibu bapa SP10.*



72. Di dalam keterangannya juga, Tertuduh memaklumkan bahawa dia tidak mengetahui umur sebenar SP10 selain daripada hanya mengetahui yang SP10 masih bersekolah di tingkatan 6 Atas. Disebabkan oleh hal itu, maka Tertuduh menyangka SP10 berumur 19 tahun sepanjang perhubungan mereka tersebut. Tertuduh juga memaklumkan mahkamah ini bahawa tujuan Tertuduh menjalinkan hubungan dengan SP10 ialah kerana Tertuduh ingin berkahwin dengan SP10 tetapi tidak pernah memberitahu ahli keluarganya tentang hasratnya tersebut.

73. Apabila disoal oleh peguambela Tertuduh semasa pemeriksaan utama, berkenaan hal adakah Tertuduh pernah meminta SP10 menghantar gambar- gambar serta video-video beraksi lucah dan berinteraksi lucah dengan SP10 sepanjang tempoh perkenalan mereka, Tertuduh telah menjawab di hadapan mahkamah ini dengan membuat pengakuan bahawa Tertuduh merupakan pelaku tersebut kerana Tertuduh merasakan mereka berdua sedang menjalinkan hubungan cinta. Tertuduh juga di dalam keterangannya menceritakan kepada mahkamah ini bahawa Tertuduh menggelar dirinya sebagai husband dan SP10 menggelar dirinya sebagai wife.

Disebabkan oleh hal gelaran status sebagai suami dan isteri itu, maka Tertuduh merasakan bahawa kesemua perlakuannya meminta SP10 menghantar gambar-gambar dan video-video berbaur seksual dan lucah tersebut adalah tidak salah kerana mereka adalah pasangan yang sedang bercinta dan adalah menjadi satu kebiasaan bagi pasangan yang sedang bercinta seperti mereka melakukan perkara tersebut.



74. Selanjutnya, Tertuduh di dalam keterangannya, semasa pemeriksaan utama, memberitahu mahkamah ini Tertuduh pernah berinteraksi secara live video dengan SP10 dan dapat melihat reaksi SP10 yang menyukai tindakannya menghantar gambar-gambar dan video-video lucu tersebut. Di sini ingin mahkamah ini memberi penekanan bahawa Tertuduh di dalam keterangannya sendiri telah membuat pengakuan segala perbuatan meminta pornografi daripada SP10 dan juga Tertuduh telah membuat pengakuan bahawa Tertuduh pernah melihat reaksi 'suka' SP10 di dalam kes ini. Ini bermaksud Tertuduh telah berpeluang melihat bentuk ciri-ciri fizikal, rupa paras dan perwatakan serta perlakuan kanak-kanak SP10 yang merupakan seorang kanak-kanak semasa sesi live video yang berlangsung antara Tertuduh dan SP10 pada masa kejadian, dipetik keterangan Tertuduh semasa pemeriksaan utama:

PB: Hendra dalam perbualan kamu atau pun perhubungan kamu dalam whatsapp, adakah kamu pernah menghantar dan menerima gambar atau video-video yang beraksi lucu?

SD1: Pernah.

PB: Boleh beritahu Mahkamah mengapa kamu meminta dan menghantar gambar-gambar seperti ini?

SD1: Macam yang saya beritahu kami kan bercinta dan kami berhasrat untuk berkahwin. Saya pun gelarkan diri saya dan dia juga gelarkan diri dia sebagai husband and wife.



*Jadi saya yakin yang saya dah macam suami isteri kepada dia. Perkara ini pun saya rasa dah biasa dilakukan oleh orang-orang yang tengah bercinta. Lagi pun Yana dah biasa bersembang perkara-perkara yang dewasa bila dekat Bigo. Pernah satu masa dekat Bigo Yana masuk dalam live seseorang dan bersembang tentang topik-topik dewasa. Jadi saya rasa Yana ini dah terbuka tentang perkara-perkara macam ini.*

*PB: Boleh bagitahu Mahkamah bagaimanakah Yana respon selepas dia menghantar gambar dan video beraksi lucu kepada kamu?*

*SD1: Dia suka sebab lepas dia hantar dia akan bagitahu detail. Contoh dia bagitahu kain dia dah basah, dia rasa Jega, dia ada hantar emoji-emoji suka.*

*PB: Bagaimana pula respon atau pun reaksi Yana apabila terima gambar-gambar lucu dan video-video beraksi lucu daripada kamu?*

*SD1: Sama juga dia suka sebab selepas saya hantar itu dia akan bagi komen dekat gambar dan video. Dia komen tentang badan saya, dia ada komen tentang perut saya. Kalau dia tak suka dia mungkin tak akan komen benda-benda yang saya hantar itu.*

*75. Semasa pemeriksaan balas oleh puan Timbalan Pendakwaraya, Tertuduh memberitahu mahkamah ini*





*bahawa Tertuduh tidak pernah menyiasat tentang umur sebenar SP10 sepanjang perkenalannya dengan SP10 kerana Tertuduh percaya bulat-bulat bahawa SP10 adalah seorang dewasa berdasarkan butiran yang terdapat dalam akaun di platform Bigo tersebut. Di peringkat ini, mahkamah berpendapat alasan yang diberikan oleh Tertuduh ini adalah tidak munasabah dan tidak boleh diterima oleh mahkamah ini, memandangkan Tertuduh bukanlah seorang yang tidak berpendidikan sehingga tidak dapat membezakan ciri-ciri antara seorang perempuan yang berumur kanak-kanak dan seorang perempuan berumur dewasa semasa berinteraksi dengan SP10 dan adakah Tertuduh tidak terfikir langsung untuk menyiasat umur sebenar SP10 apabila Tertuduh dapat melihat sesuatu yang mencurigakan tentang umur sebenar SP10 di dalam kes ini. Tambahan pula Tertuduh di dalam kes ini mempunyai latar belakang pendidikan Diploma di dalam Jurusan Pendidikan Awal Kanak-Kanak dari Kolej Islam Antarabangsa dan mahkamah berpendapat, bagi seseorang yang mempunyai latar belakang pendidikan Awai Kanak-Kanak daripada Kolej Islam Antarabangsa keterangan Tertuduh bahawa Tertuduh menyangka dan mempercayai bulat-bulat bahawa SP10 di dalam kes ini merupakan seorang dewasa adalah tidak munasabah.*

76. *Tertuduh juga di dalam keterangannya, telah bersetuju atas soalan dan cadangan yang dikemukakan kepadanya oleh puan Timbalan Pendakwaraya bahawa sesiapa*



*sahaja boleh menipu pendaftaran profile di platform Bigo dan sesiapa sahaja boleh mendaftar di akaun Bigo. Dipetik keterangan Tertuduh semasa pemeriksaan balas dan pemeriksaan semula:*

*Pemeriksaan balas*

*TPR: Sebelum ini saya ada tunjuk di skrin ada profile dia. Rujuk saksi pada P28 gambar ke-80. Dekat profile Bigo Yana tulis tarikh lahir dia 1920 kamu tak rasa curiga nak siasat hal ini?*

*SD1: Dekat gambar inf profile ini cuma boleh dilihat oleh owner akaun sahaja. Untuk orang luar cuma boleh tengok umur dia sahaja. Bahagian ini adalah bahagian untuk di edit oleh owner.*

*MAH: Soalan dia kamu tak rasa curiga untuk siasat?*

*SD1: Ini saya tak curiga sebab saya tak tahu bahagian ini, sebab bahagian ini tak ditunjukkan dekat Bigo.*

*Selanjutnya.*

*TPR: Hendra kamu ada akaun Bigo?*

*SD1: Ya, betul.*



*TPR: Jadi nak daffar akaun Bigo ini macam mana? Boleh bagitahu Mahkamah?*

*SD1: Mesti ada email and then usia mesti 18 tahun ke atas. Kemudian mesti ada nombor telefon dan mesti ada umur.*

*TPR: Jadi kalau nak daftar Bigo ini ada tak kena upload kad pengenalan atau sijil lahir?*

*SD1: Itu tak ada.*

*TPR: Kalau macam itu maksudnya sesiapa pun boleh daffar Bigo?*

*SD1: Betul, tapi dekat aplikasi Bigo itu untuk kita download pun dia dah bagitahu yang aplikasi itu untuk usia 18 tahun ke atas.*

*Selanjutnya.*

*TPR: Setuju tak maklumat yang dekat Bigo, dekat profile mungkin boleh jadi betul atau mungkin boleh dipalsukan oleh orang yang daftar itu?*

*SD1: Setuju. Tapi Bigo ini dia ada satu komuniti yang mana dia akan pantau setiap pengguna-pengguna Bigo. Contohnya kalau macam pengguna itu buat Jive, dia tengok pengguna itu adalah bawah umur dia akan block terus akaun Bigo itu.*



*Selanjutnya.*

*Semasa pemeriksaan semula.*

*PB: Semasa kamu mengenali Yana di aplikasi Bigo, adakah kamu tahu status umur Yana?*

*SD1: Saya lihat status umur Yana 19 tahun sebab dia ada letak umur dia dekat Bigo itu.*

*PB: Adakah kamu sendiri pernah bertanya kepada Yana tentang umur dia?*

*SD1: Tak pernah tapi yang saya yakin Yana betul-betul umur 19 tahun dan Yana pernah cakap dia berada di Tingkatan 6 Atas.*

*Selanjutnya.*

*PB: Boleh bagitahu Mahkamah macam mana cara Yana beritahu tentang umur dia itu dalam Bigo ke whatsapp?*

*SD1: Semasa sembang di telefon.*

*PB: Boleh beritahu apakah sebenarnya hasrat atau tujuan kamu menjalin hubungan dengan Yana?*

*SD1: Kami kan bercinta jadi saya berhasrat jalinkan hubungan lebih serius dan nak kahwin dengan Yana.*



77. *Tertuduh di dalam keterangannya lagi, menafikan telah dapat melihat SP10 secara bersemuka di dalam sesi live video antara mereka dan Tertuduh tidak dapat mengenalpasti sama ada SP10 itu seorang kanak-kanak atau dewasa kerana telefon bimbit SP10 mempunyai aplikasi yang boleh edit dan filter, iatu sejenis aplikasi yang boleh mengubah wajah seseorang untuk menunjukkan diri seseorang itu kelihatan lebih dewasa dan apabila dicadangkan oleh Puan Timbalan Pendakwaraya, bahawa, jika itu pernyataan Tertuduh kepada mahkamah ini adalah lebih wajar sekiranya Tertuduh berjumpa dengan SP10 sendiri di luar sana bagi memastikan identiti sebenar SP10 dan Tertuduh di dalam jawapannya bersetuju dengan cadangan Tmbalan Pendakwaraya tersebut, tetapi di mahkamah ini, Tertuduh tidak menunjukkan Tertuduh ada menjalankan usaha dan ikhtiar untuk berjumpa dengan SP10 sendiri bagi memastikan sama ada SP10 ialah seorang dewasa atau kanak-kanak sebelum Tertuduh meneruskan hubungan terlarang dan meminta pornografi daripada SP10 di dalam kes ini. Di peringkat ini, Mahkamah berpendapat, Tertuduh pada setiap masa dan waktu kejadian sememangnya telah mengetahui bahawa SP10 ialah seorang kanak-kanak pada waktu kejadian dan Tertuduh telah melakukan perbuatan meminta pornografi itu dengan niat untuk menjadikan SP10 seorang yang masih kanak-kanak pada ketika itu sebagai mangsanya dan lebih teruk lagi, Tertuduh di dalam kes ini telah memberitahu mahkamah ini di dalam keterangannya bahawa adalah wajar baginya*



*meminta gambar lucah daripada SP10 iaitu kanak-kanak di dalam kes ini dengan menggunakan alasan mereka ialah pasangan kekasih dan ingin berkahwin.*

78. *Mahkamah berpendapat, alasan yang diberikan oleh Tertuduh sebagai pasangan kekasih dan ingin berkahwin dengan SP10 tersebut hanyalah salah satu umpan dan helah yang digunakan oleh Tertuduh merayu untuk meransang SP10 memuaskan nafsu serakahnya sepanjang perhubungan mereka tersebut, dipetik keterangan Tertuduh semasa pemeriksaan balas:*

*TPR: Kamu pernah live dengan dia, daripada video yang kita tengok itu tengok daripada muka dia, perwatakan dia bukan saja Hendra tapi semua orang boleh tahu yang dia bawah umur. Setuju atau tidak?*

*SD1: Tak setuju.*

*TPR: Sebab apa tak setuju?*

*SD1: Sebab saya tak bersemuka dengan Yana, saya cuma dia dekat telefon. Dekat telefon dia ada filter yang kita boleh edit dan adjust nampak seperti orang dewasa. Perwatakan Yana pun seperti orang dewasa sebab dia tahu sembang tentang perkara-perkara dewasa. Yana pun saya tengok dekat telefon dia tinggi.*



TPR: *Dekat sini maksud kamu, kamu salah anggap tentang umur dia sebab tak bersemuka dengan Yana?*

SD1: *Ya, betul.*

TPR: *Jadi sepatutnya kamu kena jumpa dengan Yana untuk sahkan umur dia, betul*

SD1: *Betul.*

*Selanjutnya.*

TPR: *Hendra wajarkah tindakan kamu minta gambar lucah daripada seseorang dengan alasan hanya kamu pasangan kekasih dan nak kahwin dengan dia. Wajar ke tidak perbuatan ini?*

SD1: *Wajar.*

79. *Mahkamah berpandangan, dengan melihat kepada keseluruhan keterangan Tertuduh ini, jelas di sini Tertuduh merupakan pelaku yang melakukan semua perbuatan meminta pornografi daripada SP10 di dalam kes ini.*

## **Findings of The High Court**

[20] After a close examination of the evidence, the learned Judicial Commissioner concluded *inter alia* as follows:



*[15] The Appellant never disputed the authenticity of the videos and the makers therein and admitted that he did not think his actions were wrong because they were lovers and he wanted to marry SP10. The defence of the Appellant was that he did not know her true age because in her BIGO profile it was stated as 19 years. He alleged she had also told him she was still in school and that she was in Form Six (Upper). SP10 in her evidence told the Court that she admitted that she did not give her true age as she wanted to keep it a secret (assuming from the public view). However, she was adamant that she told the Appellant that she was 14 years old (although she was actually 12 years old at that time) and had never said she was in Form 6. Moreover, the BIGO account was actually her friend's account. S let her use the account and later S registered a few other accounts for her. SP10 claimed ignorance of what S had registered in the other accounts. The Court will elaborate further on the defence raised by the Appellant under s.20 of the 2017 Act and my reasons for dismissing the appeals against conviction later in this Grounds of Judgment.*

*[21] SP10's evidence started at page 264-356 (RRJ2B) over a period of 4 days. The learned SCJ in considering the issue of SP10's credibility had also looked at the court recording system of the trial before the previous SCJ and found that she was able to give evidence in a well, smooth, articulate (clear), consistent and unhesitant manner. She was also unwavering in her evidence when under intense cross-examination by the Appellant's counsel (paragraphs 18-25 of the SCJ's grounds of judgment). The SCJ found that the first ingredient of the charges had been proved wherein SP1 and SP4 had proved the age of their daughter by*





*producing her birth certificate. The SCJ had also applied the provisions of s. 17 and s.18 of the 2017 Act. I see no reason to disturb the findings of the SCJ on the issue of SP10's credibility and therefore, there was no merit on the second issue raised by the Appellant in the appeals.*

*[36] A perusal of the SCJ's Grounds of Judgment would show that the learned SCJ had considered the defence case. Moreover, in the present case, the Appellant was not convicted upon the uncorroborated evidence of a child witness as there was ample corroboration of SP10's testimony in court.*

*[37] The SCJ had discussed the defence case thoroughly and compared it with the evidence given by the prosecution witnesses at the prima facie stage. She had considered the Appellant's testimony and tested it against the victim's evidence. The SCJ found that his defence did not raise any reasonable doubt on the prosecution case as she did not accept his explanation that he had no knowledge of SP10's age. The trier of fact had the benefit of assessing the witness's credibility before her (SCJ) whereas this Court is disadvantaged as it only has the records of the appeals before it. Nevertheless, in assessing the whole of the evidence in the records of appeal and applying the law, it was crystal clear that the Appellant did not have a valid defence at all.*

*[56] My observation on this last part of the trial was that these allegations against SP10 were never put to her or her parents when they were giving evidence. In my view, if these were true facts, the Appellant certainly knew a lot of things about her background. His*



*“ignorance” about her true age was just feigned. He took advantage of the child to have “telephone-sex” with her because he knew her parents were not home. Despite knowing that she was still in school, he urged her on in the wee hours of the night to give him an exclusive sexual show, to satisfy his lust. I agreed with the SCJ that his defence did not manage to raise any reasonable doubt on the prosecution case; this evidential burden is even lower than to rebut the prosecution evidence on a balance of probabilities that he did not know her true age.*

*[57] If I am wrong on the evidential burden to be satisfied by the Appellant, I am of the view that applying the principle in Mat v PP (supra), I did not accept or believe the Appellant's explanation and it had not raised any reasonable doubt on the prosecution case. Taking into account his academic background in Early Childhood Education, to my mind that was the “final nail in the coffin” for the Appellant in regard to his purported defence under s.20 of the 2017 Act.*

## **The Relevant Provisions of Law**

- (A) Section 2 of the Sexual Offences Against Children Act 2017 provides that:

### **Application**

*2. (1) This Act shall apply to a child who is under the age of eighteen years and where this Act relates to any other written law, to a child of such age as specified in such written law.*



*(2) Any reference to a child in respect of any offence under this Act, or any offence specified in the Schedule where the victim is a child shall include a person whom an accused believes is a person of or under the age as specified in the respective provisions of such offences.*

(B) Section 4 of the Sexual Offences Against Children Act 2017 provides that:

### **Child pornography**

(I) *In this Act-*

*(a) "child pornography" means any representation in whole or in part, whether visual, audio or written or the combination of visual, audio or written, by any means including but not limited to electronic, mechanical, digital, optical or magnetic means, or manually crafted, or the combination of any means-*

*(i) of a child engaged in sexually explicit conduct;*

*(ii) of a person appearing to be a child engaged in sexually explicit conduct;*

*(iii) of realistic or graphic images of a child engaged in sexually explicit conduct; or*

*(iv) of realistic or graphic images of a person appearing to be a child engaged in sexually explicit conduct; and*



(b) *"sexually explicit conduct" includes actual or simulated of the following:*

(i) *sexual intercourse, or lewd acts including physical contact involving genital to genital, oral to genital, anal to genital, or oral to anal, between persons of the same or opposite sex;*

(ii) *bestiality;*

(iii) *masturbation;*

(iv) *sadistic or masochistic abuse in a sexual context;*

(v) *exhibition for sexual purpose of the genital, buttock, breast, pubic area or anus; and*

(vi) *use of any object or instrument for lewd acts."*

(C) Section 8(b) of the Sexual Offences Against Children Act 2017 provides that:

**Exchanging, publishing, etc., child pornography.**

*Any person who-*

(a) *exchanges, publishes, prints, reproduces, sells, lets for hire, distributes, exhibits, advertises, transmits, promotes,*



*imports, exports, conveys, offers or makes available, in any manner, any child pornography;*

*(b) obtains, collects or seeks any child pornography; or*

*(c) participates in or receives profits from any business that he knows or has reason to believe is related to any child pornography, commits an offence and shall, on conviction, be punished with imprisonment for a term not exceeding fifteen years and shall also be punished with whipping of not less than three strokes.*

(D) Section 20 of the Sexual Offences Against Children Act 2017 provides that:

### **Presumption of age of a child**

*It is not a defence to a charge for any offence under this Act, or any offence specified in the Schedule where the victim is a child, that an accused believed that the age of the child is or more than that as specified in the respective provisions of such offences at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the child.*

(E) Section 26 of the Sexual Offences Against Children Act 2017 provides that:

### **Rehabilitative counselling**



- (1) *The court may, in addition to any punishment imposed for any offence under this Act, or any offence specified in the Schedule where the victim is a child, order period of rehabilitative counselling on the person convicted of such offence within the period of his detention.*
  - (2) *The rehabilitative counselling ordered under subsection (1) shall be under the Minister charged with the responsibility for prison.*
- (F) Section 27 of the Sexual Offences Against Children Act 2017 provides that:

### **Police supervision**

- (1) *Notwithstanding subsection 295(1) of the Criminal Procedure Code, whether or not he has previously been convicted of any offence, when a person is convicted of any offence under this Act, or of any offence specified in the Schedule where the victim is a child, the court shall direct that he be subject to the supervision of the police for a period of not less than one year and not more than three years commencing immediately after the expiration of the sentence passed on him.*
- (2) *When any person subject to the supervision of the police under subsection (1) is, while still subject to such supervision, sentenced to a term of imprisonment within*



*Malaysia, any term spent in prison shall be excluded from the period of supervision."*

## **The Appeal**

[21] In the Petition of Appeal, learned counsel for the Appellant raised the following eight (8) grounds of appeal:

*Pesuruhjaya Kehakiman Mahkamah Tinggi Taiping yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila gagal mempertimbangkan dan/atau secara salah arah (misdirection) telah membuat dapatan dan memutuskan seperti berikut:*

- (i) Mengesahkan dapatan Mahkamah Sesyen apabila wujud keraguan Perayu terhadap umur Pengadu SP10 Perayu harus berjumpa secara fizikal dengan Pengadu SP10;*
- (ii) Mengesahkan dapatan Mahkamah Sesyen bahawa Perayu sedar dan tahu yang SP10 dalam kes ini merupakan seorang kanak-kanak pada waktu kejadian berdasarkan fakta dan keterangan jelas bahawa Pendakwa sendiri telah gagal untuk membuktikan pengetahuan Perayu sedemikian dengan ketiadaan apa-apa keterangan positif makluman umur Pengadu sepanjang yang berkaitan dengan keterangan Pengadu SP10 dan Pegawai Penyiasat SP11.*
- (iii) Mengesahkan dapatan Mahkamah Sesyen bahawa dalam membincangkan pemakaian seksyen 20 Akta Kesalahan-Kesalahan Seksual terhadap Kanak-kanak 2017 secara khilaf*



*telah meletakkan beban kepada Perayu untuk 'menyiasat' umur Pengadu bertentangan dengan peruntukkan dan perkataan-perkataan jelas seksyen 20;*

- (iv) Mahkamah Tinggi secara khilaf telah membuat dapatan bahawa seksyen 20 Akta Kesalahan-Kesalahan Seksual terhadap Kanak-kanak 2017 adalah satu peruntukkan bersifat anggapan statutori (statutory presumption) dan/atau anggapan undang-undang (presumption of law) dan/atau anggapan fakta (presumption of fact);*
- (v) Mengesahkan dapatan Mahkamah Sesyen bahawa Perayu dikatakan tidak menjalankan ikhtiar dan usaha untuk berjumpa SP10 apabila gagal mengambil kira dan mempertimbangkan fakta, keterangan dan pemerhatian Mahkamah Sesyen sendiri bahawa Aplikasi media sosial Bigo adalah satu platform penstriman langsung yang membolehkan pengguna menjemput rakan untuk besembang video dalam talipon dan bukannya satu forum fizikal untuk meletakkan beban sedemikian ke atas Perayu;*
- (vi) Mahkamah Tinggi secara khilaf telah membuat dapatan bahawa keterangan Pengadu SP10 telah dicabar secara menyeluruh semasa Pemeriksaan Balas oleh peguam Tertuduh di Mahkamah Sesyen dan kredibiliti SP10 tidak dimusnahkan;*
- (vii) Mahkamah Tinggi secara khilaf telah membuat dapatan bahawa permohonan pengemukaan bukti/keterangan baru*





*jika pun dibenarkan, tidak akan menimbulkan keraguan munasabah terhadap kebersalahan Perayu.*

(viii) *Mahkamah Tinggi secara khilaf menggantikan hukuman pemenjaraan 13 tahun kepada 10 tahun apabila gagal mempertimbangkan faktor peringanan jelas berpihak kepada Perayu bahawa Perayu adalah pesalah pertama, ketidakwujudan elemen kekerasan dan ketidakwujudan keterangan trauma ke atas Pengadu SP10.*

## **The Law on Appellate Intervention**

[22] An appellate court should be slow in disturbing the findings of facts arrived by the trial court who had the advantage of seeing and hearing the witnesses, unless there are substantial and compelling reasons for disagreeing with the finding.

[23] In ***Tan Kim Ho & Anor v. PP*** (2009) 3 MLJ the Federal Court held as follows:

*“It is an established principle of law that when dealing in finding of facts, the trial judge is more often than not, in a better position to decide. The appellate court must be reluctant to interfere with such findings, unless the facts obviously disclose the courts below had clearly and wrongly evaluated the facts.”*

[24] In ***Yahaya bin Mohamad v. Chin Tuan Nam*** [1975] 1 LNS 195; [1975] 1 MLRA 322, the Privy Council held:



*(1) As in this case the learned trial judge had based his finding on the evidence of the plaintiff and his witness, his finding should not have been disturbed;*

*(2) This was not one of those rare cases where an Appellate Court, lacking the advantage of seeing and hearing the witnesses, was justified in coming to a different conclusion from the trial judge on the question of credibility. There was no reason to think that the trial judge had not taken proper advantage of his having seen and heard the witnesses.*

[25] In **Ye Wei Gen v. Public Prosecutor** [1999] 4 SLR 101, Yong Pung How CJ (as he then was) said:

*“It is trite law that an appellate court will be slow to overturn the trial judge 's finding of fact unless it can be shown that his decision was plainly wrong or against the weight of the evidence before him. These cases thus stand for the principle that findings of fact by the trial judge are prima facie correct unless there are very good grounds for disturbing them.”*

[26] In **PP v. Mohd Radzi bin Abu Bakar** [2005] 2 MLRA 590, the Federal Court held as follows:

*“Now, it settled law that it is no part of the function of an appellate Court in a criminal case-or indeed any case-to make its own findings of fact. That is a function exclusively reserved by the law to the trial Court. The reason is obvious an appellate Court is necessarily*



*fettered because it lacks the audio-visual advantage enjoyed by the trial Court."*

## **Our Decisions**

[27] Although the petition of appeal contained several grounds, however learned counsel for the appellant confined his submissions only to two (2) main points:

- (i) The Appellant had taken all reasonable steps to ascertain the age of SP10; and
- (ii) The trial judge fell into error when she had misappreciated the defence under section 20 of the 2017 Act wherein she had imposed a higher burden on the Appellant to prove his case in contravention of section 173(m)(i), (ii) and (iii) of the Criminal Procedure Code.

### **First Ground: Challenge Based on Victim's Age**

[28] As regards the first point, it was strenuously argued that the learned trial judge had erred in law and on facts in holding that the Appellant had failed to take all reasonable steps to ascertain the age of SP10. The Appellant claimed that he did not know her true age because in her BIGO profile it was stated as 19 years. He also alleged that SP10 had also told him she was still in school and that she was in Form Six (Upper).

[29] Hence, the learned counsel for the Appellant said that it was wrong for learned trial judge not to accept his defence which was provided by



law as he had raised a reasonable doubt on the prosecution case in regard to the victim's age. On the other hand, the learned Deputy Public Prosecutor submitted that section 20 of the said Act is a presumption of law and once it is triggered the evidentiary burden will fall on the shoulders of the Appellant and he had to prove on a balance of probabilities that he had taken all reasonable steps to ascertain SP10's age.

[30] In our judgment, upon subjecting the entire evidence, to a close examination, we find no reason to disagree with the finding of the learned trial judge that the Appellant actually knew her real age. There is ample evidence to show that the Appellant had knowledge of the victim age after considering and having taken into account the following matters:

(a) Photos picture of SP10 (P28(1-83)) clearly shows that she was just a child although the Appellant denied that fact. It is obvious that the Appellant had deliberately shut his eyes to the obvious and refrained from making an attempt to meet her in person because he knew from day one that she is not above 18 years old.

(b) SP10 first came to know the Appellant in 2019 through communication *via* BIGO when she was in Year six (6). SP10 even told the Appellant that she was 14 years old at that time, although she was actually 12 years old at that time.

(c) The Appellant admitted having conversations with SP10 *via* SP10 handphone. From his academic background i.e Diploma in Early Childhood Education, it can be inferred that the Appellant would have noticed that the voices of children and adult are different. Apparently, a child has short vocal cords, they produce short air



waves and consequently a high-pitched voice. Whilst the voices of adult are heavier and deeper than children's voice.

(d) The Appellant and SP10 had communicated *via* BIGO and later on WhatsApp video calls more than 10 times. Upon his persistent request, she finally agreed to send him lewd videos and photos of her breast and private part to the Appellant. Thus, we find it difficult to accept the Appellant defence that he had no knowledge the true age of the victim. Let it be repeated that based on the testimony of the Appellant the learned trial judge came to the following finding:

*74. Selanjutnya, Tertuduh di dalam keterangannya, semasa pemeriksaan utama, memberitahu mahkamah ini Tertuduh pernah berinteraksi secara live video dengan SP10 dan dapat melihat reaksi SP10 yang menyukai tindakannya menghantar gambar-gambar dan video-video lucu tersebut. Di sini ingin mahkamah ini memberi penekanan bahawa Tertuduh di dalam keterangannya sendiri telah membuat pengakuan segala perbuatan meminta pornografi daripada SP10 dan juga Tertuduh telah membuat pengakuan bahawa Tertuduh pernah melihat reaksi 'suka' SP10 di dalam kes ini. Ini bermaksud Tertuduh telah berpeluang melihat bentuk ciri-ciri fizikal, rupa paras dan perwatakan serta perlakuan kanak-kanak SP10 yang merupakan seorang kanak-kanak semasa sesi live video yang berlangsung antara Tertuduh dan SP10 pada masa kejadian, dipetik keterangan Tertuduh semasa pemeriksaan utama:*



*PB: Hendra dalam perbualan kamu atau pun perhubungan kamu dalam whatsapp, adakah kamu pernah menghantar dan menerima gambar atau video-video yang beraksi lucu?*

*SD1: Pernah.*

*PB: Boleh beritahu Mahkamah mengapa kamu meminta dan menghantar gambar-gambar seperti ini?*

*SD1: Macam yang saya beritahu kamikan bercinta dan kami berhasrat untuk berkahwin. Saya pun gelarkan diri saya dan dia juga gelarkan diri dia sebagai husband and wife. Jadi saya yakin yang saya dah macam suami isteri kepada dia. Perkara ini pun saya rasa dah biasa dilakukan oleh orang-orang yang tengah bercinta. Lagi pun Yana dah biasa bersembang perkara-perkara yang dewasa bila dekat Bigo. Pernah satu masa dekat Bigo Yana masuk dalam live seseorang dan bersembang tentang topik-topik dewasa. Jadi saya rasa Yana ini dah terbuka tentang perkara-perkara macam ini.*

*Selanjutnya.*

*PB: Boleh bagitahu Mahkamah bagaimanakah Yana respon selepas dia menghantar gambar dan video beraksi lucu kepada kamu?*



*SD1: Dia suka sebab lepas dia hantar dia akan bagitahu detail. Contoh dia bagitahu kain dia dah basah, dia rasa lega, dia ada hantar emoji-emoji suka.*

*PB: Bagaimana pula respon atau pun reaksi Yana apabila terima gambar-gambar lucu dan video-video beraksi lucu daripada kamu?*

*SD1: Sama juga dia suka sebab selepas saya hantar itu dia akan bagi komen dekat gambar dan video. Dia komen tentang badan saya, dia ada komen tentang perut saya. Kalau dia tak suka dia mungkin tak akan komen benda-benda yang saya hantar itu.*

(e) The Appellant claimed he and SP10 were lovers and he wanted to marry her. However, we see no proactive action taken by the Appellant to meet SP10 or her family members to discuss and make any marriage plans. This was a clear deliberate lie. The Appellant never had any intention to marry SP10 because he knew from the start that she was just a child. He had instead taken advantage of an underaged girl.

To support our view in this regard, perhaps reference can also be made to the Notes of Proceedings Enclosure 9 Records of Appeal Vol 3 (3) where the Investigation Officer, SP11 in his evidence said:

*Examination-in-chief (pages 418–420):*



*TPR: Jadi daripada siasatan Inspektor hubungan mangsa dengan 'secret love' adakah serius, bagaimana hubungan mereka?*

*SP11: Hubungan mereka adalah teman lelaki dengan teman wanita. Hubungan mereka adalah hubungan yang diakui sesama sendiri teman lelaki dan teman wanita tetapi tidak pernah berjumpa secara bersemuka, hanya berbual melalui telefon, video call dan melalui media sosial.*

*TPR: Tadi Inspektor kata hubungan mereka seperti teman lelaki dan teman wanita, jadi sejauh mana hubungan mereka itu?*

*SP11: Hubungan mereka adalah 100% atas talian dimana mangsa mengenali 'secret love' adalah seorang lelaki yang bernama Hendra Bin Mulana dan bekerja di I-Hospital. Mangsa turut mengenali 'secret love' ini berasal dari Johor dan kini sedang bekerja di Selangor.*

*TPR: 'Secret love' pernah kenalkan diri dia dalam perbualan dengan mangsa?*

*SP11: Ya, 'secret love' pernah kenalkan dirinya pada mangsa dengan nama Hendra Bin Mulana kerana sebelum ini mangsa mengenali 'secret love' dengan nama 'Therry' dan apabila mereka berbual dengan lebih mendalam, 'secret love' memberitahu kepada mangsa bahawa namanya adalah Hendra Bin Mulana.*





*TPR: Tadi Inspektor cakap ada dalam perbualan mereka, boleh tunjukkan pada Mahkamah perbualan itu?*

*SP11: Ya. Pada 10/09/2019 jam 10.21 malam 'secret love' ada memberitahu kepada mangsa bahawa namanya adalah Hendra Bin Mulana.*

*TPR: Tadi juga Inspektor cakap umur mangsa 12 tahun, betul?*

*SP11: Ya.*

*TPR: Jadi dalam perbualan antara mangsa dengan 'secret love' ada pernah bincang tentang umur mangsa?*

*SP11: Tidak pernah bincang tentang umur tetapi melalui perbualan tersebut saya dapati mangsa pernah perkenalkan diri sebagai pelajar sekolah dan 'secret love' tahu bahawa mangsa adalah seorang yang bawah umur.*

*TPR: Jadi bagaimana Inspektor kata yang 'secret love' ini adalah orang bawah umur?*

*SP11: Pada perbualan 25/09/2019 jam 11.27 malam mangsa pernah tulis mesej yang berbunyi 'banyak dear punya tak salah, salahlah kahwin bawah umur'.*

*TPR: Perbualan ini dimana Inspektor dapat?*

*SP11: Melalui laporan MCMC.*



*TPR: Jadi untuk perbualan bertariikh 25/09/2019 ini yang mana satu Inspektor?*

*SP11: Perbualan ini adalah antara nombor telefon 014-9221631 dengan nombor telefon 'secret love'.*

*TPR: Tadi keterangan Inspektor cakap yang hubungan antara mangsa dengan OKT ini adalah 100% di atas talian, betul?*

*SP11: Betul.*

*Cross-Examination (pages 436-437)*

*PB: Jadi saya katakan atas sebab itu OKT boleh percaya bahawa mangsa telah berusia 18 tahun ke atas walaupun dia masih bersekolah, setuju?*

*SP11: Tidak setuju.*

*PB: Inspektor juga ada berkata pada 25/09/2019 jam 11.27 malam mangsa pernah tulis mesej 'banyak dear punya salah' 'salahlah kalau kahwin bawah umur'. Mesej ini tidak mengatakan tentang umur sebenar mangsa, setuju?*

*SP11: Setuju.*

*PB: Saya juga katakan mesej ini tidak menunjukkan apa-apa pun tentang umur mangsa samada bawah 18 tahun atau atas 18 tahun?*



*SP11: Tidak setuju.*

*PB: Saya katakan dari siasatan Inspektor, bahawa Inspektor telah membuat anggapan bahawa OKT tahu umur sebenar mangsa berdasarkan keterangan mangsa bahawa dia masih bersekolah, setuju?*

*SP11: Tidak setuju.*

*PB: Inspektor pernah beri keterangan yang mana mangsa jelas berusia 12 tahun seorang kanak-kanak dan perkara ini diketahui oleh OKT dimana mangsa adalah di bawah umur. Walaupun OKT tidak tahu secara terperinci tarikh lahir mangsa bila tetapi OKT tahu mangsa di bawah umur dan masih bersekolah. Mangsa juga pernah hantar gambar berbaju sekolah kepada OKT. Jadi dalam jawapan Inspektor ini Inspektor tidak jelaskan bagaimana OKT tahu mangsa berumur 12 tahun?*

*SP11: Dalam kenyataan itu saya beritahu yang OKT tahu mangsa adalah bawah umur dan 12 tahun.*

*PB: Inspektor juga ada katakan yang mangsa ada hantar gambar memakai baju sekolah kepada OKT?*

*SP11: Ya.*

*PB: Setuju dengan saya bahawa gambar itu tidak pernah ditayangkan di skrin Mahkamah, betul?*



*SP11: Tidak pernah ditayangkan tetapi ada dalam eksibit kerana terdapat dalam laporan MCMC.*

*PB: Gambar yang Inspektor katakan itu tidak menjelaskan mangsa berada di darjah berapa atau tingkatan berapa?*

*SP11: Setuju.*

*PB: Setuju dengan saya gambar yang dikatakan itu adalah gambar mangsa berpakaian sukan sekolah?*

*SP11: Tidak setuju.*

*PB: Jadi saya katakan Inspektor telah membuat anggapan bahawa OKT tahu mangsa bawah umur berdasarkan kata-kata mangsa yang memberitahu bahawa dia masih bersekolah dan berpakaian baju sekolah dan OKT bertanya tentang exam yang bakal diambil olehmangsa, setuju?*

*SP11: Tidak setuju.*

*PB: Juga saya katakan pada Inspektor OKT tidak boleh dipersalahkan dengan kesalahan meminta bahan lucah pornografi dari kanak-kanak jika OKT tidak tahu dan tidak sedar tentang umur mangsa?*

*SP11: Tidak setuju.*

*Re-Examination (pages 444 – 446)*



*TPR: Peguam juga ada rujuk Inspektor pada tarikh 25/09/2019 jam 11.27 malam. Mangsa beritahu 'banyaklah dear punya tak salah, salahlah kahwin bawah umur'. Peguam kata mesej ini tidak menunjukkan apa-apa samaada dia bawah umur atau 18 tahun dan Inspektor tidak setuju, boleh jelaskan?*

*SP11: Saya tidak setuju kerana sememangnya OKT tahu mangsa adalah bawah umur. Walaupun teks ini tidak menyatakan umur tetapi sekiranya kita rujuk semula kepada beberapa teks sebelum ini. Apa yang membawa kepada teks ini adalah OKT ajak mangsa untuk kahwin. Dan mangsa menyatakan adalah salah untuk kahwin bawah umur. OKT menjawab 'tahun depan kan cukup umur'. Jadi memang dalam pengetahuan OKT bahawa mangsa adalah bawah umur kerana OKT mengatakan tahun depan akan cukup umur.*

*TPR: Peguam juga ada katakan pada Inspektor bahawa mangsa ada hantar gambar pakai baju sekolah tetapi gambar ini tidak pernah ditayangkan di Mahkamah atau dijadikan eksibit. Boleh jelaskan?*

*SP11: Sebab gambar tersebut ada dalam laporan MCMC dalam softcopy. Laporan MCMC ini merupakan eksibit yang dikemukakan.*

*TPR: Inspektor juga telah ditanya oleh peguam yang menyatakan Inspektor buat anggapan bahawa mangsa adalah bawah*



*umur berdasarkan kepada kata-kata mangsa yang dia bawah umur, dia masih bersekolah dan berpakaian baju sekolah serta OKT tanya tentang exam yang diambil oleh mangsa. Inspektor kata tidak setuju, boleh jelaskan?*

*SP11: Saya tidak setuju kerana saya bukan beranggapan. OKT bertanyakan mangsa tentang exam, perbualan yang berkenaan dengan kahwin bawah umur. Semua ini menunjukkan OKT tahu mangsa adalah bawah umur.*

*SP11: Saya bukan beranggapan kerana selain daripada perbualan kahwin bawah umur dan perbualan bertanyakan exam saya turut mengambil kira keterangan OKT yang diambil oleh saya bahawa OKT memang kenal mangsa adalah bawah umur.*

*TPR: Peguam juga katakan bahawa OKT tidak boleh dipersalahkan untuk minta bahan pornografi daripada kanak-kanak jika OKT tidak tahu tentang umur mangsa dan jika OKT percaya mangsa adalah seorang yang dewasa dan cukup umur. Inspektor tidak setuju, boleh jelaskan?*

*SP11: Saya tidak setuju kerana OKT tidak berusaha untuk menanyakan lebih lanjut mengenai tarikh lahir sebenar mangsa. OKT tidak menunjukkan usaha untuk mengetahui umur sebenar mangsa. Berdasarkan gambar dan video call OKT dengan mangsa, OKT sepatutnya boleh nampak wajah mangsa adalah seorang kanak-kanak. Saya percaya OKT adalah seorang yang boleh membezakan seorang*



*kanak-kanak dan orang dewasa kerana OKT mempunyai kelulusan Diploma Pendidikan Awal Kanak-Kanak. OKT sepatutnya lebih mengetahui kanak-kanak dari orang biasa lain. Selain itu OKT turut pernah kerja sebagai guru tadika. Dimana saya percaya OKT adalah seorang yang mengenali perwatakan dan wajah seorang kanak-kanak.*

[33] To sum up, it is crystal clear that Appellant knew SP10's true age. With respect, this ground of appeal has no merits.

### **Second Grounds: Challenge Based on Presumption.**

[34] Turning to the final issue, the learned counsel for the Appellant argued that the Appellant had taken all reasonable steps to ascertain the age of the victim, SP10. Her BIGO profile stated she was 19 years of age. He alleged she had also told him she was still in school and that she was in Form Six (Upper). It was further argued that section 20 of the Sexual Offences Against Children Act 2017 is not a presumption of law because the said section does not expressly provide the phrase '*shall be presumed, until the contrary is proved*'. Hence, it is not a deeming provision. Thus, there is no burden on the Appellant to prove his innocence, but merely for him to raise a reasonable doubt as to his guilt. That the finding made by the learned trial judge that section 20 of the said Act is a statutory presumption/presumption of law or presumption of fact was a serious misdirection.

[35] With greatest respect, we beg to differ. Section 20 is a statutory presumption. It was incumbent upon the prosecution to adduce positive evidence of the relevant facts before the presumption could be invoked.



Here, the prosecution had succeeded in establishing a *prima facie* against the Appellant. The presumption then became operative and the prosecution was permitted to use the presumption as a matter of law.

[36] Lest to forget, the title of section 20 of the Sexual Offences Against Children Act 2017 expressly uses the words "*presumption*". The wordings of the section also speak volumes. Viewed in this context, the intention of the legislature is clear and unequivocal that section 20 was intended to be treated or recognized as legal presumption.

[37] On how a statute is to be read, interpreted or applied, the Federal Court in ***Public Prosecutor v. Sihabduin Hj Salleh & Anor*** [1981] 1 CLJ Rep 82: [1981] 1 CLJ 39, held as follows:

*Thirdly, if the law-maker so amends the law, to paraphrase the words of Lord Diplock at p. 541 in Duport Steels Ltd. v. Sirs [1980] 1 All ER 529, the role of the judiciary is confined to ascertaining from the words that the law-maker has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the words is plain and unambiguous it is not for Judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral or to paraphrase the words of Lord Scarman at p. 551 in the same case, in the field of statute law the Judge must be obedient to the will of the law-maker as expressed in its enactments, the Judge has power of choice where differing constructions are possible, but he must choose the construction which in his judgment best meets the legislative purpose of the enactment. Even if the*





*result be unjust but inevitable, he must not deny the statute; unpalatable statute law may not be disregarded or rejected, simply because it is unpalatable; the Judge's duty is to interpret and apply it.*

[38] The said presumption is, however rebuttable. The legal burden then shifts to the Appellant to show that he believed that the age of the victim is above eighteen (18) years at the time the offence is alleged to have been committed after having proven that he had taken all reasonable steps to ascertain the true age of the victim.

[39] In this regard, we find ourselves in agreement with the learned sessions judge and Judicial Commissioner's finding that anyone could see from the phone WhatsApp images of SP10 (P28(1-83)) that she was just a child although the Appellant denied that fact. In evaluating the defence case, we also find that the learned sessions judge did not fall into error when she made a finding of fact that the Appellant did not make any effort to go and meet SP10 in person to ascertain her true age. To us, this is important because the Appellant's defence proceeded along the line that he had taken all reasonable steps to ascertain the age of the child. However, we find that the Appellant had failed to disprove, negate or rebut the presumption on the balance of probabilities. Rightly, he was found guilty.

[40] Before concluding on this issue, one final point must be made. The learned sessions judge did not fall into error when she ruled that although the Appellant said that he had been communicating *via* BIGO, telephone and WhatsApp with SP10, but still he could not ascertain her real age because BIGO was an adults-only platform and not intended for anyone



under 18 years of age, was just a bare denial and not in accord with the evidence and the probabilities of the case. More-so when the learned trial judge in her grounds of judgment said that the videos showed SP10's face despite the Appellant's denial that he could not see her face as she used a filter in the media. In the end, what we have before us is nothing more than a bare assertion, highly unbelievable story created by the Appellant to exonerate himself to which no degree of credence ought to be attached and as such must be rejected. It is well established principle that a defence of bare denial is no defence and cannot raised a reasonable doubt (see *Mr Losali v. PP* [2011] 4 MLJ 694)

## Conclusion

[41] The present appeal without question turns upon a pure question of facts. The learned trial judge and Judicial Commissioner had taken pains to consider in detail the evidence presented and arrived at well-reasoned finding which we find no reason to disturb. The learned trial judge findings were premised on the credibility of witness which is within the domain of a trial judge. There was no failure on the analysis of facts and the application of laws and there was no misdirection of the trial judge to warrant appellate intervention. The evidence against the Appellant was overwhelming. For all the reasons stated above, we unanimously dismissed the appeal and affirmed the conviction.

[42] As regards the sentences, given the circumstances of the present case, the imprisonment term of ten (10) years for each charge (from the date of arrest) and a total number of 12 strokes meted out by the learned Judicial Commissioner is affirmed and would serve its purpose.



[43] All imprisonment terms to run concurrently.

[44] Other additional orders imposed be maintained.

**Date: 1 July 2024**

- sgd -

**Azmi bin Ariffin**

**Judge**

**Court of Appeal Malaysia**

**Counsel**

**For the Appellant** : 1. Jefri Bin Jaafar  
2. Muhammad Nazmi Bin Hanafi  
[Abdullah Maznah & Jefri]

**For the Respondents** : Eyu Ghim Siang  
[Deputy Public Prosecutor]

