

**IN THE HIGH COURT AT MALAYA AT KUALA LUMPUR
IN THE FEDERAL TERRITORY OF KUALA LUMPUR
CIVIL SUIT NO.: WA-12BNCVC-16-01/2023**

BETWEEN

LOH LI SZE

(IC No.: 800908-02-5108)

...APPELLANT

AND

1) EUGENE CHONG HAOU INN

(IC No.: 940831-14-5439)

2) RICKSMAN MS SDN BHD

(Company No.: 20191034238/1343568-K)

...RESPONDENTS



DALAM MAHKAMAH SESYEN DI KUALA LUMPUR
WILAYAH PERSEKUTUAN KUALA LUMPUR, MALAYSIA

GUAMAN SIVIL NO: WA-A52NCVC-374-06/2020

ANTARA

1) EUGENE CHONG HAOU INN

(No. K/P: 940831-14-5439)

2) RICKSMAN MS SDN BHD

(No. Syarikat: 20191034238/1343568-K) ...PLAINTIF- PLAINTIF

DAN

LOH LI SZE

(No. K/P: 800908-02-5108) ...DEFENDAN

[Diputuskan oleh Hakim Mahkamah Sesyen Kuala Lumpur Puan Hakim
Lailatul Zuraida binti Harron@Harun pada 10 Januari 2023]



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Judgment

Introduction

[1] This is a cautionary tale for all owners of social media accounts like Facebook or Instagram, who fancy themselves as influencers, not to misuse their postings to solicit more followers or hits or likes by sensationalizing their postings to the extent of defaming others. In the internet age, the old adage, “The pen is mightier than the sword”, is even more true.

[2] This is a defamation appeal after a full trial. The appeal is filed by the appellant / defendant / Loh Li Sze against the Sessions Court judge’s decision, given on 10-01-2023, wherein the Sessions Court judge had allowed the respondents’ / plaintiffs’ defamation suit against the appellant with damages of RM 50,000.00 and costs of RM 10,000.00.

[3] For the appeal before me the appellant’s counsel confined himself to only four grounds -

- i. There is no defamation against the 2nd respondent company.
- ii. The appellant’s statements are justified.
- iii. The appellant’s statements are fair comment.
- iv. There are no losses suffered by the respondents.



[4] I heard counsel on 13-07-2023 and dismissed the appeal with costs of RM 10,000 subject to allocatur. The appellant has filed an appeal to the Court of Appeal. These are my Grounds of Judgment.

[5] I will refer to the parties as they were referred to in the court below. That is the appellant as “the defendant” and the respondents as “the plaintiffs”.

Background Facts

The pleaded case of the Plaintiffs

[6] At all material times, the 1st plaintiff is the sole director of the 2nd plaintiff company that is in the business of selling and supplying frozen seafood online through Facebook Live and page under the trade name as “**虾王 Umance**”. (The Chinese wording of “**虾王**” means “prawn king”). The 1st plaintiff is also widely known as “Umance”.

[Refer to the SSM Search of the 2nd plaintiff at Enclosure 5 the Record of Appeal (Part C) pages 55 – 60,]

[7] On 15-01-2020, the defendant had purchased frozen seafood which included frozen prawns, scallops and other seafood for RM 360 from the plaintiffs online through Facebook Live. Dissatisfied with the weight of the prawns and size of the scallops, the defendant had made a complaint to the plaintiffs. Subsequently, the plaintiffs had refunded the money paid for the frozen seafood to the defendant.



[8] However, on or around 07-02-2020, 11-02-2020 and 13-02-2020, the defendant had maliciously published and / or caused to be published three (3) postings in the defendant's Facebook account (known as "Coco Lim (Loh Li Sze)") about the plaintiffs with the photo and/or videos of the 1st plaintiff and / or the workers of the plaintiffs (hereinafter referred to as "**the said Postings**").

[The defendant's Facebook Account, known as "Coco Lim (Loh Li Sze)" can be seen at Enclosure 5 the Record of Appeal (Part C) page 1, and the said Postings can be seen at Enclosure 5 the Record of Appeal (Part C) page 2 – 12].

[9] The first of the three Postings in Mandarin published or caused to be published by the defendant on 07-02-2020 (hereinafter referred to as "**the 1st Posting**") can be seen at Enclosure 5 the Record of Appeal (Part C) page 2.

[10] The Malay translation of the 1st Posting on 07-02-2020 can be seen at Enclosure 5 the Record of Appeal (Part C) page 3 and is reproduced as follows :-

Coco Lim
7 Februari

"Kepada netizen-netizen yang dikasihi:

Untuk menjawab keraguan anda, bahawa mengapa saya memadamkan posting, saya menjawabkan secara ringkas di sini

~~



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Kerana **Encik “Chong Udang”** dari "**Siaran Langsung yang Paling Popular di seluruh Malaysia**" menelifon saya pada hari ketiga selepas saya menerbitkan posting tersebut. Dalam telefon, **dia dengan nada yang perlahan, tak henti-henti meminta saya (emoji)**, kerana dia mengatakan bahawa saya mempunyai jumlah pengikut-pengikut ('followers') surirumah tangga yang banyak, dan pengaruh saya terhadap dia amat besar, dia tak ada perniagaan **(emoji)**, dan kemudian dia tak henti-henti meminta butiran akaun bank saya kata nak mengembalikan wang kepada saya. Sebenarnya, saya tidak begitu kisah beberapa ratus itu, sekarang saya yang tak puas hati~ Saya memberitahu dia dalam telefon, biarkan saya fikir dulu ~ Kemudian dia tetap tidak putus asa tak henti-henti meminta saya berulang-ulang kali, di sebalik telefon saya rasa dengan begitu mendalam **bahawa adakah dia nak menangis? (emoji)** Selepas itu, dia whatapps saya dan meminta butiran akaun bank saya ~ ~ ~

Baiklah... **Sebenarnya hanya seorang lelaki di dunia ini yang pernah meminta kepada saya, iaitu suami saya, Encik “Chong Udang” adalah lelaki kedua (emoji)**, Oleh kerana Encik “Chong Udang” begitu ikhlas, maka saya dengan tidak rela hati menghantarkan butiran akaun bank saya kepada dia, kemudian dia meminta alamat saya dan mengatakan bahawa dia akan menghantar makanan laut sejuk beku kepada saya sebagai ganti rugi **(emoji)** halo ~ Adakah saya orang seperti ini? **mahu rasuah saya?** bercakap perkara baik untuk anda? yerrr~memberikan makanan laut sejuk beku anda kepada saya? Siapa kisah? **(emoji)**



Tidak tahu siapa yang saya merujuk? iaitu "Raja Siaran Langsung" yang memberi kereta percuma

Walaupun posting telah dipadamkan

Tetapi tidak boleh memadamkan memori semua orang

Tutup mulut saya dengan memulangkan wang dan pampasan # lu #dang #gugu

#Ai, anak saya mencium wajah saya sampai piuh

"Syok "

[Emphasis added]

[11] The 1st Posting English translation by Google is as follows :-

Coco Lim

February 7

"To my dear netizens:

To answer your doubts, as to why I deleted the post, I answer briefly here ~~

Because **Mr. "Chong Udang" from "The Most Popular Live Broadcast in Malaysia" called me** on the third day after I published the post. On the phone, **he in a low tone, kept asking me** (emoji), because he said that I have a lot of housewives' followers, and my influence on him is huge, he doesn't have business (emoji), and then he kept asking for my bank account details saying he wanted to refund me. Actually, I don't really care about the few hundreds, now I'm the one who is not satisfied~ I told



him on the phone, let me think first~ Then he still didn't give up and asked me repeatedly, behind the phone I think so deeply **that he wants to cry?** (emoji) After that, he WhatsApps me and asks for my bank account details ~ ~ ~

Well... **Actually only one man in this world has ever asked me, that is my husband, Mr. "Chong Udang" is the second man** (emoji) , Since Mr. "Chong Udang" is so sincere, then I reluctantly send the account details my bank to him, then he asked for my address and said he would send me frozen seafood as compensation (emoji) hello~ Am I this kind of person? **want to bribe me?** talking good things to you? yerrr~give me your frozen seafood? Who cares? (emoji)

Don't know who I'm referring to? which is the "King of Live Broadcasting" that gives free cars

Even though the post has been deleted

But can't erase everyone's memory

Shut my mouth by returning money and compensation # lu

#dang #gugu

#Ai, my children kissed my face until it was soft

"Shiok"

[12] Following the 1st Posting, the defendant had published or caused to be published in Mandarin a second posting on 11-02-2020 with a photo and a video of the 2nd plaintiff's worker which can be seen at Enclosure 5 the Record of Appeal (Part C) page 4 (hereinafter referred to as "**the 2nd Posting**"); and another Mandarin posting on 13-02-2020 with the photo and a video of the 1st plaintiff (hereinafter referred to as "**the 3rd**



Posting”) which can be seen at Enclosure 5 the Record of Appeal (Part C) page 6.

[13] The Malay translation of the 2nd Posting on 11-02-2020 with a photo and a video of the 2nd plaintiff’s worker can be seen at Enclosure 5 the Record of Appeal (Part C) page 5. In summary, in the 2nd Posting the defendant made fun of the plaintiff’s explanation for the difference in weight based on the fact that it was packed in ice, requested her many followers to viral her posting and the video so that viewers can determine whether there was cheating or not and tell her who was the one who shared the video the most.

[14] The Malay translation of the 3rd Posting on 13-02-2020 with the photo and a video of the 1st plaintiff can be seen at Enclosure 5 the Record of Appeal (Part C) page 7. In summary, in the 3rd Posting the defendant asked her many followers whether they had bought stale products from the plaintiff, bought size L but given size S, bought fishes that smelled and have been cheated by the plaintiffs. The defendant urged her followers to lodge reports. The defendant urged her followers to viral her posting.

[15] Under the “comment section” of the said 2nd and 3rd Postings, the defendant in her replies to her followers had published the following statements in Mandarin (which can be seen at Enclosure 5 the Record of Appeal (Part C) page 8 – 9. The Malay translation of the defendant’s statements is reproduced (can be seen at Enclosure 5 the Record of Appeal (Part C) as follow :-



Reply to Shirlyn Tab Bee Hoon

“Ingatan proses dia meminta peluang dengan saya masih terang, rasa syok”

Reply to Yu Kai Li

“10 ayat yang dia katakan, 9 ayat adalah tipu, 2.5kg bebola udang, ketulan ais adalah 1.6kg, bebola udang hanya 900g. teringat pun berasa marah, pulangkan wang pun tidak akan ‘memadamkan api’ saya”

Reply to May Choo

“Tak tahu isterinya boleh dapat menerima dia meminta dengan wanita yang lain? (emoji)”

Reply to Ting Kwaifan

“berulang-ulang kali meminta berulang-ulang kali meminta, air mata pun sudah nak keluar (emoji)”

Reply to Caca Erica

“Dia mahukan wang tak mahu maruah, dan dia menyangka bahawa dia memohon kepada saya secara tertutup, tiada orang tahu, sekarang semua orang tahu”



Reply to Hong Kim

“Terima kasih kerana berkongsi ~ “Encik Chong Udang” ini mengambil ketulan ais yang paling banyak 60% punya, Betul-betul “buaya besar”

Reply to Cindy Ho

“Dia meminta butiran akaun bank saya untuk mengembalikan wang kepada saya ~ Tetapi adakah ini bermaksud dia tidak menipu? Dia hanya mahu menutup mulut saya, dan kemudian terus menipu~ ada keperluan untuk saya berkongsi, adalah supaya semua orang tidak tertipu”

Reply to Cecilia Chiew

“walaupun ada pemulangan wang tetapi ia juga tidak dapat menyembunyikan fakta bahawa dia menipu. Dia memulangkan wang kepada saya secara tergesa-gesa untuk menutup mulut saya, supaya dia boleh terus menipu dengan lebih banyak, ingin menggunakan helah ini menipu, dia adalah yang paling tidak bermoral ~”

“Jangan lupa “Unfollow/Unlike” Penipu”

[16] The English translation by Google of the defendant’s replies to her followers in the “comment section” of the said Postings, which the defendant had published is as follows :-



Reply to Shirlyn Tab Bee Hoon

"The memory of the process of him asking for a chance with me is still vivid, a sense of shiok"

Reply to Yu Kai Li

"10 sentences he said, 9 sentences are lies, 2.5kg shrimp balls, ice cubes are 1.6kg, shrimp balls are only 900g. remember and feel angry, even returning the money will not 'put out my fire'"

Reply to May Choo

"I don't know if his wife can accept him asking with another woman? (emoji)"

Reply to Ting Kwaifan

"repeatedly asking repeatedly asking, tears are about to come out (emoji)"

Reply to Caca Erica

"He wanted money not dignity, and he thought that he begged me in private, no one knew, now everyone knows"

Reply to Hong Kim



"Thank you for sharing ~ This "Mr. Chong Udang" took the largest chunk of ice 60% had, Really a "big crocodile"

Reply to Cindy Ho

"He asked for my bank account details to refund me ~ But does this mean he's not cheating? He just wants to shut me up, and then continue to deceive~ there is a need for me to share, is so that everyone is not deceived"

Reply to Cecilia Chiew

"even if there is a refund but it also cannot hide the fact that he cheated. He returned the money to me in a hurry to shut me up, so that he can continue to cheat more, wanting to use this trick to cheat, he is the most immoral~"

"Don't forget to "Unfollow/Unlike" Cheaters"

[Emphasis added]

[17] The said Postings went viral and were shared by netizens for more than 5,088 times in Facebook. The said Postings were still shareable and accessible by the general public at large as of 10-01-2023 (i.e. the date of Session Court's judgment).

[18] Further, the defendant had also published or caused to be published the personal phone numbers of the plaintiffs (i.e. +6010-919 3194 and +6014-991 3144) in the said Postings (which can be seen at Enclosure



5 the Record of Appeal (Part C) page 14) which had caused disturbance to the plaintiffs and/or the plaintiff's workers by the netizens and/or unknown strangers.

[19] On 13-02-2020, the plaintiffs had instructed their lawyer to send a Letter of Demand to the defendant to immediately cease and desist from further defaming the plaintiffs, and to immediately remove the said Postings. However, the defendant had failed to reply and / or comply with the plaintiffs' demands as per the said notice. A copy of the Letter of Demand dated 13-02-2020 and AR Acknowledgment Card can be seen at Enclosure 5 the Record of Appeal (Part C) page 15 – 23.

Suit filed in the Session Court of Kuala Lumpur

[20] Thereafter, the plaintiffs proceeded to file a defamation suit against the defendant on 10-06-2020 in the Session Court of Kuala Lumpur.

[21] In the Amended Statement of Claim the plaintiffs pleaded that the postings by the defendant were defamatory of the plaintiffs as in their natural and ordinary meanings the postings referred to the 1st plaintiff as a dishonest, greedy and without dignity person, the 2nd plaintiff and its employees are dishonest, not trustworthy and do not have a good business reputation and the plaintiffs jointly and / or severally are fraudsters and have defrauded its customers and / or committed fraud against its customers; and / or the plaintiffs' products are sub-standard.

[22] The plaintiffs also pleaded that the three postings and replies to comments on the postings by the defendant were actuated by malice.



Amended Defence filed by the defendant

[23] In its Amended Defence the defendant pleaded that there was no defamation against the 2nd plaintiff company and as against both plaintiffs the defendant relies on the defence of justification and fair comment.

Trial at the Sessions Court

[24] The trial was held on 17-12-2021, 07-01-2022, and 05-09-2022 with 4 witnesses testifying. The Sessions Court on 10-01-2023 allowed the plaintiffs' defamation claim against the defendant.

[25] In arriving at her decision the trial judge Puan Lailatul Zuraida Binti Harron @ Harun made the following findings of fact :-

- a) The publication of the impugned statements by the defendant in the said Postings was never disputed. Further, the defendant had admitted that she had published the said Postings despite and after the plaintiffs having refunded to the defendant the money paid for the disputed frozen seafood [See Enclosure 6 Ground of Judgment paragraph 18];
- b) The defendant did not deny that the said Postings referred to the 1st plaintiff. [See Enclosure 6 Ground of Judgment paragraph 19].
- c) The Session Court found that the said Postings referred to the 2nd plaintiff based on the following reasons :-



- i) The 1st plaintiff is the sole director and sole shareholder of the 2nd plaintiff;
- ii) It is an agreed fact that the 2nd plaintiff is in the business of selling frozen seafood online;
- iii) The defendant had published the photos, videos and / or personal phone numbers of the 2nd plaintiff's workers in the said Postings; and
- iv) The defendant had reported and complained about the 2nd plaintiff to the National Consumer Action Council.

[See Enclosure Ground of Judgment paragraph 20-21]

- d) The publication of the statements, especially the word "*cheat*", in the said Postings is defamatory of the plaintiffs because it tends to affect / lower the plaintiffs' image and reputation in the estimation of right-thinking members of society generally and it will prejudice the business prospect of the 2nd plaintiff including its customers and potential customers. [See Enclosure 6 the Ground of Judgment paragraph 22].
- e) The Session Court found that the defendant's allegations that the plaintiffs were cheats were bare allegations and not proven. The Sessions Court also noted that the plaintiffs were not charged or prosecuted with any offences committed under the relevant legislation. Until and unless it was proven, the defendant should not simply make such criticism, accusation, or words to humiliate



the plaintiffs. [See Enclosure 6 the Ground of Judgment paragraph 23].

- f) Further, the Session Court found that upon receiving the complaint from the defendant that the goods supplied were not satisfactory, the plaintiffs had immediately refunded the full payment of the frozen seafood products to the defendant. Whereas, the defendant did not return the frozen seafood products to the plaintiffs despite receiving a full refund. Therefore, in this case, the defendant cannot be considered a victim of any fraud. [See Enclosure 6 the Ground of Judgment paragraph 23].
- g) The Sessions Court rejected the defence of fair comments and justification. [See Enclosure 6 the Ground of Judgment paragraph 24].
- h) The Sessions Court judge made a specific finding of fact that the defendant was actuated by malice (in Malay terminology- *niat jahat*) in her three postings and replies to comments by her followers. [See Enclosure 6 the Ground of Judgment paragraph 24].

[A copy of the Grounds of Judgment dated 30-03-2023 written by the Learned Judge, Puan Lailatul Zuraida Binti Harron @ Harun can be seen at Enclosure 6 The Supplementary Record of Appeal Page 1 – 25]

Appeal before me



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[26] As stated earlier, the defendant's counsel confined himself to only four grounds -

- i. There is no defamation against the 2nd plaintiff company.
- ii. The defendant's statements are justified.
- iii. The defendant's statements are fair comment.
- iv. There are no losses suffered by the plaintiffs.

[27] Before I consider these four issues, I will set out the law on when can there be appellate intervention on a trial judge's findings of fact.

The law on appellate intervention on a trial judge's findings of fact

[28] In **Yahaya bin Mohamad v Chin Tuan Nam** [1975] 2 MLJ 117 Privy Council the trial judge had ruled in favour of the plaintiff. On appeal the Federal Court had allowed the appeal. On appeal, the Privy Council allowed the appeal and reversed the decision of the Federal Court. The Privy Council said at 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.

[Emphasis added]

[29] In **UEM Group Bhd v Genisy Integrated Engineers Pte Ltd & Anor** [2018] Supp MLJ 363 FC Rauf Sharif FCJ said -

[26] ...the prime issue is whether the Court of Appeal had erred in interfering with the findings of facts of the trial judge. It is well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence.

[Emphasis added]

[30] In a fairly recent case of **Ng Hoo Kui & Anor v Wendy Tan Lee Peng, Pentadbir Kepada Harta Pusaka Tan Ewe Kwang, Simati & Ors** [2020] 12 MLJ 67 the Federal Court held that :-

“THE LAW IN APPELLATE INTERVENTION

*[33] It was a long-settled principle, stated and restated in domestic and wider common law jurisprudence, that an appellate court should not interfere with the trial judge’s conclusions on primary facts unless satisfied that he was plainly wrong’ (the Supreme Court of United Kingdom in **McGraddie v McGraddie and another** [2013] 1 WLR 2477).”*



*“(5) The ‘plainly wrong’ test operated on the principle that the trial court had had the advantage of seeing and hearing the witnesses on their evidence as opposed to the appellate court that acted on the printed records. The ‘plainly wrong’ test was not intended to be used by an appellate court as a means to substitute its own decision for that of the trial court on the facts. **As long as the trial court’s conclusion could be supported on a rational basis in view of the material evidence, the fact that the appellate court felt like it might have decided differently was irrelevant.** In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed. **The trial judge should be accorded a margin of appreciation when his treatment of the evidence was examined by the appellate courts** (see paras 34, 76 & 148).”*

[Emphasis added]

[31] The following principles on when an Appellate Court can intervene in a trial judge’s findings of fact can be distilled from the above three Apex Courts’ decisions -

- i. The starting premise must be that as the trial judge had based his finding on the evidence of the witnesses, his finding should not be disturbed;
- ii. It is only in the rare cases where an Appellate Court, lacking the advantage of seeing and hearing the witnesses, is justified in coming to a different conclusion from the trial judge on a question of credibility.



- iii. It is well-settled law that an Appellate Court will not, generally speaking, intervene with the decision of a Trial Court unless the Trial Court is shown to be plainly wrong in arriving at its decision.
- iv. As long as the Trial Court's conclusion can be supported on a rational basis in view of the material evidence, the fact that the Appellate Court feels like it might have decided differently is irrelevant. The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the Appellate Court.

Defence that there is no defamation against the 2nd plaintiff company

The law - Meaning of 'publication' in defamation law

[32] "Publication" means making the defamatory statement concerning the plaintiff known to some other person other than of whom it is written or spoken. The statement must be published to a third party. [**Raub Australian Gold Mining Sdn. Bhd. v Hue Shieh Lee** [2019] 3 CLJ 729 (Federal Court)].

Application to facts

[33] The defendant admitted publication against the 1st plaintiff but say that there is no publication against the 2nd plaintiff company on the ground that she did not name the 2nd plaintiff.



[34] At the appeal before me, learned counsel for the defendant in reply to a question by me admitted that the defendant had posted a photo of the 2nd plaintiff's employee in her second posting on 11-02-2020.

[35] The second posting on 11-02-2020 had a photo and a video of the 2nd plaintiff's worker. [See Enclosure 5 the Record of Appeal (Part C) page 4].

[36] It is also an Agreed Fact in The Supplementary Record of Appeal (2) at Enclosure 11 paragraph 2 and 3 that the 2nd plaintiff was selling frozen seafood online through Facebook Live which was where the defendant had bought the seafood.

[37] The 1st plaintiff in his witness statement Q and A No. 9 - 10 had also testified that "the 2nd plaintiff's brand name is "the king of prawn." and that the defendant had published a photo and video of the 2nd plaintiffs' worker and the telephone number.

[38] The defendant in her 1st Posting had also published of the 2nd plaintiff the following words - "**# Don't know who I'm referring to? which is the "King of Live Broadcasting" that gives free cars."**

[39] The defendant in her witness statement Q and A No. 3 had also admitted that the 2nd plaintiff was selling frozen seafood online through Facebook Live which was where the defendant had bought the seafood. [See Enclosure 4 the Record of Appeal Part B page 299].



[40] The Sessions Court judge after hearing the witnesses and perusing the evidence had made a finding of fact that the defendant had indeed made defamatory statements against the 2nd plaintiff company.

[41] Based on the case of **UEM Group Bhd v Genisy Integrated Engineers Pte Ltd & Anor** [2018] Supp MLJ 363 FC Rauf Sharif FCJ there is no reason for me as an Appellate Court to interfere with such finding of fact as the Trial Court is not shown to be plainly wrong in arriving at its decision.

[42] Further as stated by the Federal Court in **Ng Hoo Kui & Anor v Wendy Tan Lee Peng, Pentadbir Kepada Harta Pusaka Tan Ewe Kwang, Simati & Ors** [2020] 12 MLJ 67 as long as the Trial Court's conclusion can be supported on a rational basis in view of the material evidence, the fact that the Appellate Court feels like it might have decided differently is irrelevant. The trial judge should be accorded a margin of appreciation when her treatment of the evidence is examined by the Appellate Court.

Defence that the defendant's statements are justified

The law on the defence of justification

[43] In **Tun Datuk Patinggi Haji Abdul-Rahman Ya' Kub v Bre Sdn Bhd & Ors** [1996] 1 MLJ 393] the court held -

But in order to succeed in the defence of justification a defendant must establish the truth of all the material statements in the words complained of which may include



defamatory comments made therein. And in order to justify such comments, it is necessary to show that the comments are the correct imputations or conclusions to be drawn from the proved facts.

[Emphasis added]

Application to facts

[44] The Sessions Court judge had made a finding of fact that the defendant had failed to prove her postings that the plaintiffs are cheats.

[45] This finding was made after the court below had seen and heard the witnesses.

[46] The Sessions Court judge had accepted the explanation by the 1st plaintiff that *“as a responsible businessman / corporation, we have a Return and Refund Policy to ensure that our customers are happy with their purchase, where our customers can return the goods or get a full refund if they are not satisfied with any frozen seafood bought from us.”* [See Enclosure 4 Record of Appeal Part B Witness Statement Q and A No. 12 and 13 of 1st plaintiff in page 295].

[47] Further, in the 3rd Posting the defendant asked her many followers whether they had bought stale products from the plaintiff, bought size L but given size S, bought fishes that smelled and have been cheated by the plaintiffs. The defendant urged her followers to lodge reports. The defendant urged her followers to viral her posting.



[48] I find that the defendant had failed to prove these statements of hers are true.

[49] I therefore reject the defence of justification pleaded by the defendant.

Defence that the defendant's statements are fair comment

The law on the defence of Fair Comment

[50] To succeed in a defence of Fair Comment the posting by a defendant must be a comment on facts and not a statement of fact. [See **Dato' Sri Dr Mohamad Salleh bin Ismail & Anor v Mohd Rafizi bin Ramli** [2022] MLJU 720 FC at paragraphs 30 and 31 Azahar Mohamed CJ [Malaya]].

[51] If it's a statement of fact, the defence to be invoked is Justification and not Fair Comment.

[52] Failure to give particulars as required under Order 78 rule 3 (2) Rules of Court 2012 is fatal to the defence of Fair Comment. [See **Crowd Care Sdn Bhd & Anor v Ling Lek Foo** [2021] MLJU 2831 at paragraph 101-103 Faizah Jamaludin J].

[53] Proof of malice by a defendant defeats a defence of fair comment because a comment that is made maliciously is not fair comment.



[See **Dato' Sri Dr Mohamad Salleh bin Ismail & Anor v Mohd Rafizi bin Ramli** [2022] 4 MLRA 718 & [2022] MLJU 720 FC at paragraph 62 Azahar Mohamed CJ [Malaya].

[54] In **Dato' Seri Mohammad Nizar Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor** [2014] 3 CLJ 560 CA Abang Iskandar JCA explained what is malice in these terms -

[37] *We are of the view that **malice, not unlike intention, is a state of mind. Invariably, unless there is an express admission by the defendant that he has been malicious in his conduct, then the presence of malice can only be deduced or inferred from the circumstances obtaining in each case.** In the case of **S Pakianathan v. Jenni Ibrahim & Another Case** [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233; [1988] 2 MLJ 173 Wan Hamzah J [as he then was] had this to say on the subject matter of malice, at p. 179 of the report:*

Where the defendant purposely abstained from inquiring into the facts or from availing himself of means of information which lay at hand when the slightest inquiry would have shown the true situation, or where he deliberately stopped short in his inquiries in order not to ascertain the truth, malice may rightly be inferred.

*[38] The English case of **Lee v. Ritchie** [1904] 6F (Ct of Sess) 642 was cited as authority for such legal proposition. With respect, the position as stated by learned Justice Wan Hamzah J still remains good law.*



[Emphasis added]

Application to Facts

[55] The Sessions Court judge had made a specific finding of fact that the defendant was actuated by malice (in Malay terminology niat jahat) in her three postings and replies to comments by her followers. [See Enclosure 6 Ground of Judgment paragraph 24].

[56] An Appellate Court – with only the benefit of reading cold print - should not and would not interfere with such finding of fact especially after the trial judge had heard and seen the witnesses. [See **UEM Group Bhd v Genisy Integrated Engineers Pte Ltd & Anor** [2018] Supp MLJ 363 FC Rauf Sharif FCJ].

[57] In addition, reading the melodramatic postings and the defendant's numerous urgings to her followers to viral her postings the defendant's motive was clearly to solicit more followers through her postings and she was delighted in gloating on the plaintiffs' predicament. There is a basis for the Sessions Court judge to find niat jahat / malice based on the testimonies of the witnesses and the following postings of the defendant –

1st Posting

Because **Mr. "Chong Udang" from "The Most Popular Live Broadcast in Malaysia" called me** on the third day after I published the post. On the phone, **he in a low tone, kept asking me** (emoji), **because he said that I have a lot of housewives'**



followers, and my influence on him is huge, he doesn't have business (emoji), ...

#Ai, my children kissed my face until it was soft

"Shiok"

Defendant's replies to her followers in the "comment section" of the said Postings

Reply to Shirlyn Tab Bee Hoon

"The memory of the process of him asking for a chance with me is still vivid, a sense of shiok"

Reply to May Choo

"I don't know if his wife can accept him asking with another woman? (emoji)"

Reply to Ting Kwaifan

"repeatedly asking repeatedly asking, tears are about to come out (emoji)"

Reply to Caca Erica

"He wanted money not dignity, and he thought that he begged me in private, no one knew, now everyone knows"



[58] As long as the Trial Court's conclusion on malice could be supported on a rational basis in view of the material evidence, the fact that an Appellate Court might have decided differently was irrelevant. [See the decision of the Federal Court in **Ng Hoo Kui & Anor v Wendy Tan Lee Peng, Pentadbir Kepada Harta Pusaka Tan Ewe Kwang, Simati & Ors** [2020] 12 MLJ 67].

[59] Further, the postings by the defendant that the plaintiffs are cheats are not comments on facts but a statement of fact. Therefore, the defence of fair comment is not available to the defendant. [See **Dato' Sri Dr Mohamad Salleh bin Ismail & Anor v Mohd Rafizi bin Ramli** [2022] MLJU 720 FC at paragraph 30 and 31 Azahar Mohamed CJ [Malaya] and **Al Maarif Travel & Tours Sdn Bhd v Nur Farhana bt Yeop Hussin & Anor and another case** [2022] MLJU 43 at paragraph 36 - 38 Su Tiang Joo JC].

[60] In addition, the defendant in her Amended Defence at paragraph 8 [iv] had failed to state which of her words are comments and which are facts as required under O 78 r 3[2] ROC 2012.

[61] Order 78 Rule 3 (2) Rules of Court 2012 states –

“Obligations to give particulars (O. 78, r. 3)

(2) Where in an action for libel or slander the defendant alleges that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, **he must give particulars**



stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true.”

[62] Failure to give particulars as required under Order 78 Rule 3 (2) Rules of Court 2012 is fatal to the defence of Fair Comment. [See **Crowd Care Sdn Bhd & Anor v Ling Lek Foo** [2021] MLJU 2831 at paragraph 101-103 Faizah Jamaludin J].

Defence that there are no losses suffered by the plaintiffs

[63] This is a frivolous defence.

[64] In **Al Maarif Travel & Tours Sdn Bhd v Nur Farhana bt Yeop Hussin & Anor and another case** [2022] MLJU 43 Su Tiang Joo JC said -

*“[68] This Court agrees that express defamatory averments of cheating, has cheated people, being dishonest and deceitful **entitles AMTT to damages without need of proof.***

*[69] It is settled law, that the conduct of Farhana post-publication of the defamatory statements up until the day of the decision can and ought to be taken into account, see the Court of Appeal authority of **Mahadevi Nadchatiram v. Thiruchelvasegaram Manickavasegar** [2001] 3 CLJ 65, where it was held that: “In considering an award for damages for defamation, we are guided by the long established factors as set out by the Federal Court in MGG Pillai ‘s case as was followed by the learned judge. They are :*



1. *The position and standing of the plaintiff*
2. *The extent of the publication.*
3. *The mental distress, hurt, anxiety and mental anguish caused to the plaintiff as a result of the libel.*
4. *The uncertainty undergone in the litigation.*
5. *The conduct of the defendant from the time of the libel down to the very moment of the verdict.*
6. *The absence and refusal of correction, retraction or apology.”*

[65] In my view the damages awarded by the court below of RM 50,000 cannot be challenged by the defendant. I would have awarded more based on the postings and behaviour of this defendant.

Decision

[66] Appeal is dismissed with costs of RM 10,000 subject to allocatur.

.....(signed).....

Leong Wai Hong
Judicial Commissioner
High Court of Malaya
Kuala Lumpur (NCVC 10)

Dated: 16th August 2023



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COUNSEL:

- 1) Loh Cien Zen for Appellant.
(*Zen, Chyuan & Co. (Penang)*)

- 2) Stephen Lee for Respondent.
(*Lee Khim Huei & Partners (Kajang)*)

CASES REFERRED TO:

- 1) Al Maarif Travel & Tours Sdn Bhd v Nur Farhana bt Yeop Hussin & Anor and another case [2022] MLJU 43.
- 2) Crowd Care Sdn Bhd & Anor v Ling Lek Foo [2021] MLJU 2831.
- 3) Dato' Seri Mohammad Nizar Jamaluddin v Sistem Televisyen Malaysia Bhd & Anor [2014] 3 CLJ 560 CA.
- 4) Dato' Sri Dr Mohamad Salleh bin Ismail & Anor v Mohd Rafizi bin Ramli [2022] 4 MLRA 718 & [2022] MLJU 720 FC.
- 5) Lee v. Ritchie [1904] 6F (Ct of Sess) 642.
- 6) Mahadevi Nadchatiram v. Thiruchelvasegaram Manickavasegar [2001] 3 CLJ 65.
- 7) McGraddie v McGraddie and another [2013] 1 WLR 2477.
- 8) Ng Hoo Kui & Anor v Wendy Tan Lee Peng, Pentadbir Kepada Harta Pusaka Tan Ewe Kwang, Simati & Ors [2020] 12 MLJ 67.
- 9) Raub Australian Gold Mining Sdn. Bhd. v Hue Shieh Lee [2019] 3 CLJ 729 (Federal Court).
- 10) Tun Datuk Patinggi Haji Abdul-Rahman Ya' Kub v Bre Sdn Bhd & Ors [1996] 1 MLJ 393.
- 11) S Pakianathan v. Jenni Ibrahim & Another Case [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233; [1988] 2 MLJ 173.



12) UEM Group Bhd v Genisy Integrated Engineers Pte Ltd & Anor
[2018] Supp MLJ 363 FC.

13) Yahaya bin Mohamad v Chin Tuan Nam [1975] 2 MLJ 117.

LEGISLATION REFERRED TO:

1) Order 78 Rule 3 (2) Rules of Court 2012.



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