IN THE HIGH COURT OF MALAYA IN JOHOR BAHRU

IN THE STATE OF JOHOR DARUL TAKZIM

CRIMINAL APPEAL NO: JA-42(Ors)-6-11/2021

BETWEEN

TEOH KAH YONG

AND

PUBLIC PROSECUTOR

BEFORE YA NOOR HAYATI BINTI HAJI MAT

JUDICIAL COMMISSIONER

IN OPEN COURT

GROUNDS OF JUDGEMENT

INTRODUCTION

[1] The Appellant filed a Notice of Application at the Session Court, Johor Bahru on 8 September 2020 to refer a constitutional question to the High Court pursuant to s. 30 of the Court of Judicature Act (CJA).

[2] The question posited was as follows:

> *"Whether sections 233(1)(a) and 233(3) of the Communication and Multimedia Act 1998 are inconsistent with Article 5, Article 8 and Article 10 of the Federal Constitution and are therefore null, void and unconstitutional"*

[3] His application was dismissed by the Session Court Judge (SCJ) on 17 November 2021, thus this instant appeal.

[4] The Appellant was charged under s. 233(1)(a) of the Communication and Multimedia Act 1998 (CMA) and the charge reads as follows:

> *"Bahawa kamu pada 8/5/2020 jam lebih kurang 5.00 petang di alamat Southern Tigers Sdn Bhd, Aras 1, Stadium Tan Sri Haji Hassan Yunos Stadium, Jalan Dato Jaafar 80350 Johor Bahru Di dalam Daerah Johor Bahru Selatan Dalam Negeri Johor telah menggunakan laman Facebook page "Patrick Teoh" secara sedar membuat dan memulakan penghantaran komen yang jelik sifatnya iaitu "Can anyone workout what this Prince fler is trying to achieve with his video? If your initial reaction to watching it is what the fuck!!! You're spot on. Niamah!!!' dengan niat untuk menyakiti hati orang lain. Oleh yang demikian kamu telah melakukan satu kesalahan dibawah subsekyen 233(1)(a) Akta Komunikasi dan Multimedia 1998 (Akta 588) dan boleh dihukum dibawah subsekyen 233(3) Akta yang sama".*

[5] The Appellant states in his affidavit in support, of the grounds contending that the abovesaid sections are unconstitutional as follows:

> *(a) The sections are uncertain, wide and vague. They do not provide sufficient and fair notice with regard to the prohibited restrictions.*
> *(b) The said provisions are too wide prompting to abuse of powers and allowing arbitrary action by the authorities with respect to powers to arrest, investigate and prosecution provided within.*
> *(c) The section curtails freedom of speech. Both sections 233(1)(a) and 233(3) are not saved by any of the 8 subjects covered in Articles 10(2) and 10(4) of the Federal Constitution.*
> *(d) Section 233(1)(a) is overbroad and disproportionate to the objective it seeks to achieve.*
> *(e) The said section falls foul of Articles 5 and 8 of the Federal Constitution.*

[6] The learned SCJ disallowed the application on the grounds, briefly:

1. Quoting the Federal Court case of ***Gan Boon Aun v PP (2016) 4 MLJ 265*** the SCJ was of the view that the application for constitutional questions to be referred to the High Court under s 30 of CJA was not automatic and must be meritable.
2. There are no merits in the application as the same issue had been determined and decided by the High Court, citing the case of ***Norhisham Osman v PP (2010) 19 MLRH 662***.
3. The Session Court is bound by the principle of *stare decisis* by the said High Court case.
4. Further, in reliance on the case of ***Syarul Ema Rena Binti Abu Samah v PP (2018) MLRHU 890***, the SCJ held that s.233 of CMA passed the proportionality test and is reasonably clarified.
5. The charge preferred against the Appellant was clear and specific. The alleged acts to have been committed were clearly stated and are sufficient

for the Appellant to understand the offence against him and to prepare his defence.

[7] The Appellant in his Petition of Appeal listed the following as the basis of his appeal:

1. That the SCJ was wrong and erred in law when he held that the Session Court was bound by the decision of the High Court in the case of ***Nor Hisyam*** following the principle of *stare decisis*.
2. SCJ failed to appreciate the existence of a Federal Court case which held that the Subordinate Court and the High Court do not have the jurisdiction and power to determine a constitutional reference under s.30 and s.84 of CJA.
3. The SCJ was wrong in deciding that there are no merits in the Appellant's application based on a decision of one of the High Court case determining the same question.
4. The SCJ failed to consider the development and existence of various cases discussing the same provisions.
5. The SCJ had erred in law in considering the requirements and procedures in relation to constitutional reference under s.30 and s.84 of CJA and Rule 31 of the Federal Court Rules 1995.

Evaluation and Findings

[8] First and foremost, it should be noted that the evaluation and discussion below are not intended to resolve the constitutional issue raised by the Appellant. It is merely an appeal from the decision of the learned SCJ dismissing the Appellant's application to refer the matter to the High Court under s. 30 of the CJA. In other words, this Court will decide only whether the SCJ was correct in not referring the question being lacking in merits.

[9] In discussing the merits of an application, this Court is reminded of the meaning of the term "meritable grounds". The term "merit" comes from the Old French *merite*, meaning "reward" or "moral worth" (source: Wikipedia). The Macmillan English Dictionary defines merits as "to deserve or be worth something" and the Oxford Dictionary defines the same as the quality of deserving well. In Osborn Concise Law Dictionary, merits in law mean "the real matters in question as opposed to technicalities".

[10] Keeping this in mind is important for this Court to correctly consider only relevant factors as to whether such merits existed without interfering with the substance, as this Court should not decide the constitutional question itself. It is a fine line, but this Court is mindful of its deference.

[11] S.30(1) of the CJA provides *where in any proceedings in any subordinate court any question arises as to the effect of any provision of the Constitution the presiding officer of the court may stay the proceeding and may transmit the record thereof to the High Court.*

[12] The decision of the SCJ only relates to s.30(1). Upon deciding on the Appellant's application, if allowed, he may stay the proceeding and may transmit the record to the High Court. In making that decision, the SCJ is bound by the principle enumerated in the Federal Court case of ***Gan Boon Aun*** in particular, that the Subordinate Court does not have the jurisdiction to decide on constitutional matters and the court must *ensure that there is merit in such application.* Paragraph 33 of the case, states as follows:

> *"**[33]** We would like to state here and advise all Sessions Court Judges and Magistrates when dealing with any application made by any party under s. 30 of the CJA **to properly ensure that there is merit in such application**. It may be just a frivolous application to delay the conduct of the hearing of the trial. **If there is no merit in such application the case should proceed to a final conclusion of the trial.** A trial should be conducted on a continuous basis without interruption and delay..."*
>
> [Emphasis added]

[13] The Federal Court in ***Gan Boon Aun*** emphasized and highlighted the requirement of having merits in the application as a prerequisite for the matter to be referred to the High Court for consideration by the judge. Thereafter, if it is necessary for the determination of the matter, the judge will deal with the case in accordance with s.84 of the CJA (see s.30(2) of the CJA). Thus, not all applications need to be transmitted to the High Court simply because a constitutional issue has been raised. Valid and meritable grounds are required before a constitutional issue can be advanced.

[14] In referring to the existence of valid grounds, the Appellant has extensively submitted, which this Court had evaluated each and every points explained and elaborated upon, even if it is not specifically mentioned in this grounds of judgement. This Court appreciates the comprehensiveness of both parties' written submissions on the matter. However, the Court will focus only on the most relevant and sufficiently cogent arguments to derive its final decision.

[15] For ease of reference, s.233 of CMA is reproduced below:

> ***Improper use of network facilities or network service, etc.***

233. (1) A person who—

(a) by means of any network facilities or network service or applications service knowingly—

(i) makes, creates or solicits; and

(ii) initiates the transmission of, any comment, request, suggestion or other communication which is obscene, indecent, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass another person; or

(b) initiates a communication using any applications service, whether continuously, repeatedly or otherwise, during which communication may or may not ensue, with or without disclosing his identity and with intent to annoy, abuse, threaten or harass any person at any number or electronic address, commits an offence.

(2) A person who knowingly—

(a) by means of a network service or applications service provides any obscene communication for commercial purposes to any person; or

(b) permits a network service or applications service under the person's control to be used for an activity described in paragraph (a), commits an offence.

(3) A person who commits an offence under this section shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding one year or to both and shall also be liable to a further fine of one thousand ringgit for every day during which the offence is continued after conviction.

Merits of the application – stare decisis

[16] When the SCJ decided that the application is unfounded because the same question has already been decided by a High Court, this does not mean that it considers the application has no merits solely because it is bound by the decision of the higher court. In his ground of judgement, he states that the High Court (in ***Nor Hisyam***) held that s.233 was not vague as it was clear and specific and contained sufficient particulars of the alleged violation, citing the case of ***Yii Hung Siong v. PP (2005) MLJU 349***. Moreover, in ***Nor Hisyam*** and ***Syarul Ema***, the question raised was answered by the presiding judges who held that the restriction under s.233 was reasonable, justified and proportionate to the legislative objectives.

[17] This Court held that the SCJ was not wrong in agreeing with or considering himself bound by the High Court's decision, which he rightly

should. Whether the High Court's decision was correct or otherwise is not relevant consideration by the SCJ. The SCJ agreed with the decision in ***Nor Hisyam***, and therefore held that the claim was without merit. There is no error in this application of the law by the SCJ.

Uncertain, wide and vague charge

[18] Every citizen has the right to freedom of speech and expression (Article 10(1)(a) – Federal Constitution (FC)). However, restrictions may be imposed *if necessary or expedient in the interest of the security of the Federation, public order or morality and to provide against defamation or incitement to any offence* (Article 10(2)(a)).

[19] A question arises as submitted by the Appellant, whether the restrictions imposed are reasonable and have significant proximity to the purpose set out in Article 10(2)(a) (see ***Sivarasa Rasiah v Badan Peguam Malaysia (2012) 6 MLRA 375***).

[20] As explained above, this Court need not answer the said question or decide whether the restriction was reasonable and had substantial proximity to the purpose of Article 10(2)(a). This Court need only decide whether a valid reason existed for the Federal Court to determine the constitutionality of the Act (s.233 CMA).

[21] Freedom of speech in accordance with the FC is not absolute. There are permissible restrictions as set out in Article 10(2) which reads:

> *Parliament may impose such restrictions as it deems necessary or expedient in the interest of:*
>
> *i) The security of the Federation or any part thereof;*
> *ii) Friendly relations with other countries;*
> *iii) Public order or morality;*
> *iv) Restrictions designed to protect the privileges of parliament or any legislative assembly; and*
> *v) To provide against contempt of court, defamation or incitement to any offence*

[22] The purpose of s.233(1)(a) of the CMA is to criminalise the misuse of *network facilities, network services and application services*, particularly for the transmission of communications of *an obscene, indecent, false, menacing or offensive in character with the intent to annoy, abuse, threaten or harass another person*. This restriction was enacted to ensure public or moral order.

[23] The enumeration of the terms or objects which are offensive acts shows the clear intention of the legislature to limit it to such acts only. This

cannot be construed as too broad or open for possible abuse by the authority as the individual act of the offender are still subject to evaluation and interpretation by the court as to whether the content or acts falls under the types of offensive content/acts in s.233.

[24] CMA does not define any of the above-mentioned terms or objects except for the term "content" which is defined in s. 6 of CMA as:

> *"any sound, text, still picture, moving a picture or other audio-visual representation, tactile representation or any combination of the preceding which is capable of being created, manipulated, stored, retrieved or communicated electronically".*

[25] However, this Court is of the view that not defining specifically the terms, will not automatically trigger vagueness or make it so *devoid of precision in its content that a conviction will automatically flow from the decision to prosecute* – (see ***R v Nova Scotia Pharmaceutical Society (1992) SCJ No 67***).

[26] Rather than viewing it as vague, this Court believes that it allows for flexibility and still permits the courts to exercise their interpretive function. Thus, there is no *lack of precision*, as it does provide sufficient guidance for judicial debate (reference is made to ***R v. Nova Scotia*** for the test of vagueness).

[27] Let us not forget that the right to freedom of expression includes not only to the person who expresses it but also the person who receives it, that is, the person who is criticized or rebuked. Again, the right to freedom of expression is not absolute, but relative. Another person's right to privacy, dignity and even the right to free speech is valid only in a limited way. The rights granted to one person apply to others as well.

[28] The Appellant argues that the vagueness of the section potentially criminalizes all comments on topics of public interest. This is not a valid argument. S.233 applies only to a class of persons who use network facilities, network services and application services to make an obscene, indecent, false, menacing or offensive character with the intent to annoy, abuse, threaten or harass another person. It is not a total prohibition on all citizens and all acts but is subject to certain restrictions and limitations outlined in the provision of s.233(1)(a) itself. The section is intended only to prevent abuse in order to preserve the importance of public order and to achieve reasonable morality.

[29] S. 233 has been successfully tested in many cases after it's coming into force. Any kind of restriction on the personal right to freedom of

expression was never positively accepted, without challenge, which is understandable. However, such restrictions were permissible and served to maintain respect within the community, public order and morality.

[30] The Appellant also refer to the case of ***Nik Nazmi Nik Ahmad v PP [2014] 4 CLJ 944*** as an authority that by imposing certain restrictions, any breach or attempted breach should not give rise to criminal prosecution or sanction. Thus, the word *"restriction" does not imply to power to criminalise the breach of any such "restrictions".*

[31] At the risk of being repetitive, in reviewing the constitutionality of the statutory provision, this Court will not give its opinion as to what the proper policy should be. If s.233 is intended to criminalise an act as debated and enacted by the legislature, as long as it passes the test of vagueness and proportionality, the FC empowers Parliament to legislate on any matter listed in clause (1) Article 74 of the FC and the Federal List in the Ninth Schedule (see the case of ***Letitia Bosman v. PP (2020) MLJU 1186***).

[32] The Court, therefore, finds that the grounds put forward by the Appellant as a basis for the constitutional complaint are not valid and lack merits.

Conclusion

[33] For the foregoing reasons, the Court finds that the SCJ was not erroneous in holding that the application was lacking in merits to refer the question to the High Court for consideration under s.30 of the CJA.

[34] The appeal is hereby dismissed.

Dated : 18 December 2022

(NOOR HAYATI BINTI HAJI MAT)
Judicial Commissioner
High Court of Malaya
Johor Bahru

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