



IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

IN THE FEDERAL TERRITORY, MALAYSIA

[SUIT NO: WA-23CY-58-10/2019]

BETWEEN

DATO' HAJI MAHFUZ HAJI OMAR

... PLAINTIFF

AND

MUHAMMAD SANUSI MD NOR

... DEFENDANT

Grounds of Judgment

A. Introduction

[1] The Plaintiff, a well-known politician, claims that he was defamed by the statements made by the Defendant, another well-known politician, published in the Facebook account of the latter, which bears the name of Muhammad Sanusi Md Nor.

[2] The Plaintiff alleged that the Defendant had published the following words that appeared in the said Facebook account:-

“Sejak menjadi pemimpin PAN dan PH, dihadiahkan jawatan Timbalan Menteri, sensitiviti terhadap judi dan premis perjudian pun hilang, pudar bersama maruah dan kebolehpercayaan.

Tukar parti saja kan – bukan tukar agama pun.....kata mereka itu mewajarkan pengkhianatan....

Kini mereka berkhidmat pula kepada pengundi mereka apabila bermudah-mudahan dengan kemasukan premis sport toto ke Kawasan yang majoritinya adalah umat Islam...

Talkinkan saja jiwamu, hiduplah dengan jasad yang makin kerepot..”

This statement appears together with 2 pictures in the said Facebook account.

- [3] As I have stated earlier, the Plaintiff alleges that the above statement in particular the following statement were defamatory and damages his reputation:-

“Sejak menjadi pemimpin PAN dan PH, dihadiahkan jawatan Timbalan Menteri, sensitiviti terhadap judi dan premis perjudian pun hilang, pudar bersama maruah dan kebolehpercayaan...

Kini mereka berkhianat pula kepada pengundi mereka apabila bermudah-mudahan dengan kemasukan premis sport toto ke Kawasan yang majoritinya adalah umat Islam...”

- [4] The Plaintiff further claims that the statement was directed to him and damaged his reputation. The Plaintiff also contends that the said words bear the following meaning:-

(a) Natural and Ordinary Meaning

- (i) The Plaintiff as the elected representative of the constituency of Pokok Sena was involved directly in the approval and/or licensing of the Sports Toto at the aforesaid area.



- (ii) The Plaintiff, as the representative of Pokok Sena, had encouraged or facilitated the licensing or the building of Sports Toto within the area.
 - (iii) The Plaintiff is not sensitive to the needs of the citizens and in particular, the Malay and Muslim community within Pokok Sena who are opposed to gambling and gaming activity.
 - (iv) The Plaintiff, as Pokok Sena's elected representative, was a treacherous, immoral, and untrustworthy person.
- (b) Innuendo
- (v) The Plaintiff, as a Malay politician from Amanah, had supported gambling activities in Malaysia and within Pokok Sena.
 - (vi) The Plaintiff is not a good Muslim and failed to comply with Islamic teachings that prohibit any form of gambling.
 - (vii) The Plaintiff had betrayed all Muslims by supporting or by encouraging or approving gambling centres in Pokok Sena.
 - (viii) The Plaintiff had betrayed the Pokok Sena populace that is under his authority, the majority of which are Muslims, who oppose the setting up of the gambling den.
 - (ix) The Plaintiff is directly or indirectly responsible for the setting up of the Sports Toto office in the Pokok Sena area.

- (x) The Plaintiff failed to undertake his duty as the Representative of the Constituency at Pokok Sena in Parliament by failing to take into the best interest of the populace or by ignoring the pleas of the individuals at Pokok Sena.
- (xi) The Plaintiff does not have high moral standing and is not trustworthy.
- (xii) The Plaintiff is not a good Muslim by promoting or allowing or encouraging gambling or gambling premises that are rampant at Pokok Sena ; and
- (xiii) The Plaintiff does not have high morals by promoting gambling activities that are not beneficial.

(I also refer to the exact words that appear in the Statement of Claim – the natural and ordinary meaning as well as innuendo as pleaded by the Plaintiff in the Malay language)

- [5] The Plaintiff also alleges that the Defendant had published the said words maliciously, recklessly, without honest belief and he is guilty of gross negligence.
- [6] The Plaintiff also refers to the video published in the same Facebook account on 29-7-2019. This video concerns the demonstration by a group of individuals in front of the Sports Toto shop. They were unhappy with the said shop, and it appears that in many instances, statements were made by unknown individuals concerning the Plaintiff in particular “Tolak-tolak Mahfuz”. I also note that the impugned statements referred to earlier, were published a day after the video was uploaded by the Defendant onto his Facebook account.

- [7] The Plaintiff further referred to the comments contained in the said Facebook account. He alleges that several individuals have also written their comments which are derogatory against the Plaintiff. These comments are however not the subject matter of the defamation suit.
- [8] The Plaintiff states that how the video was published, and the subsequent publication made on Facebook evinces an intention to relate the said statement to the Plaintiff.
- [9] The Defendant does not deny making the said publication.

However, the Defendant states the statements contained in the said publication:-

- (i) Do not refer to the Plaintiff but is a general statement to members of the then Pakatan Harapan (PH) Government and the Amanah Negara Party (PAN).
- (ii) Two members of the Pakatan Harapan Government were appointed as Deputy Ministers at that time – YB Datuk Haji Amiruddin bin Haji Hamzah, who was also the Deputy Finance Minister and the Plaintiff.
- (iii) The statements were directed to the Deputy Minister as he was in charge of the Ministry of Finance as gambling licenses were approved by the said Ministry.
- (iv) The statements were general statements to leaders of the Pakatan Harapan and Amanah Negara Party and / or the Majlis Perbandaran Alor Setar.
- (v) The statements were not defamatory generally and were not intended to defame the Plaintiff either expressly or by way of innuendo.



- (vi) The Plaintiff is responsible collectively for the granting of the license and should be made accountable for the same.
- (vii) The video was a live event under the control of the Defendant's assistant. It was not intended to defame the Plaintiff as alleged. He had no control of the event and should not be made liable for the statements made therein.
- (viii) The statements were fair comments.
- (ix) The statements were true.
- (x) The Defendant also relies on the defence of qualified privilege as they relate to issues that are important to the residents of Pokok Sena and Muslims in the said area. They were intended to object to the setting up of the Sports Toto within Pokok Sena which was objected to by members of the public.
- (xi) The Defendant is a member of the PAS party and as one of its leaders is required to criticize and object to the setting up of the Sports Toto premises within the said constituency.

B. The decision of this Court

[10] Having considered the documents presented, witnesses and submissions filed by both Plaintiff and Defendant, I find that the Plaintiff has shown that the said statements were defamatory and were intended to refer to him. I find that the Plaintiff has proven his claim for libel and his claim for malicious falsehood against the Defendant.

[11] I have also considered the defence presented by the Defendant. However, after considering the same, I find that the Defendant

has failed to prove that any of the said defence raised are applicable.

[12] My reasoning for the above is contained in the following paragraphs.

C. My Reasoning

[13] As stated earlier, the Plaintiff's claim against the Defendant is two-pronged. The first is based on libel and the second is based on the tort of malicious falsehood.

(a) Applicable Law

[14] These are two separate causes of actions as explained by Gopal Sri Ram JCA (as he then was) in *SV Beverages Holdings Sdn Bhd & Ors v. Kickapoo (Malaysia) Sdn Bhd* [2008] 4 CLJ 20 where he stated:-

“[25] Malicious falsehood and libel are distinct torts. In malicious falsehood the burden of proof that the words are false is on the plaintiff. Whereas in libel the plaintiff does not have to prove that the statement is false, for the law presumes that in his favour. In *Drummond - Jackson v. British Medical Association* [1970] 1 All ER 1094, at p. 1099 Lord Denning MR said:

These two actions [of libel and malicious falsehood] must be kept distinct. They have very different consequences. In libel the law presumes everything against the writer; the words presumed to be false and malicious; and it is for the writer to prove, if he can, that the words were true and the comment was fair, or otherwise make good his defence.

But in malicious falsehood the boot is on the other foot. The writer is presumed to be acting honestly and without malice; and it is for the plaintiff to prove, if he can, that the words were written by the defendant falsely and maliciously and were calculated to damage the plaintiff in his calling.

[26] Similarly, in *Derbyshire County Council v. Times Newspaper Ltd* [1992] 3 All ER 65, at p. 81, Balcombe LJ said:

The distinction between the torts of defamation and malicious falsehood is conveniently summarised in *Duncan and Neill on Defamation* (2nd edn. 1983) para 2.03. The essential differences are: (1) the shift in the burden of proof: in defamation the defendant has to prove that the defamatory words were true; in malicious falsehood the plaintiff must prove that the words are false; (2) in an action for malicious falsehood the plaintiff has to prove malice as part of his cause of action; this is not so in the case of defamation.”

[15] I also refer to the decision of the Court of Appeal in *Abu Hassan Hasbullah v. Zukeri Ibrahim* [2018] 3 CLJ 726 and the recent decision of the Court of Appeal in *Rekha Munisamy v. Ortus Expert White Sdn Bhd & Anor* [2021] 7 CLJ 353.

[16] Ramli Ali FCJ had summarized the applicable law succinctly in *Raub Australian Gold Mining Sdn Bhd v. Hue Shieh Lee* [2019] 3 CLJ 729 as follows:-

“*The Law on Defamation*

[29] Defamation is committed when the defendant

publishes to a third person words or matters containing untrue imputation against the reputation of the plaintiff. Liability for defamation is divided into two categories, that of libel and slander. If the publication is made in a permanent form or is broadcast or is part of a theatrical performance, it is libel. If it is in some transient form or is conveyed by spoken words or gestures, it is slander (see: *Gatley on Libel and Slander*, 9th edn at p. 6).

[30] In *Ayob Saud v. TS Sambanthamurthi* [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321, His Lordship Mohamed Dzaiddin J (as he then was) has clearly laid down the necessary procedure in establishing claim for libel (with which we agree), when he said at p. 155:

In our law on libel, which is governed by the Defamation Act 1957, the burden of proof lies on the plaintiff to show (1) the words are defamatory; (2) the words refer to the plaintiff; and (3) the words were published.

Where a defence of qualified privilege is set up, as in the present case, the burden lies on the defendant to prove that he made the statement honestly, and without any indirect or improper motive. Then, if he succeeds in establishing qualified privilege, the burden is shifted to the plaintiff in this case to show actual or express malice which upon proof thereof, communication made under qualified privilege could no longer be regarded as privileged: *Rajagopal v. Rajan*.

[31] In other words, the plaintiff must prove three elements of the tort of defamation, which are:

(i) the plaintiff must show that the statement bears

defamatory imputations;

(ii) the statement must refer to or reflect upon the plaintiff's reputation; and

(iii) the statement must have been published to a third person by the defendant

[33] Whether the words are defamatory lies in the nature of the statement in that it must have the tendency to affect the reputation of a person. Therefore, the question arises in whose eyes the words complained of must have the tendency to affect the plaintiff's reputation. In the *Law of Defamation in Singapore and Malaysia*, 2nd edn by Keith R. Evans (at p. 10), it is stated that, in applying these various tests, the court must look to a particular control group that is, in whose eyes must the estimation of the plaintiff be lowered before the words are said to be defamatory. In determining the issue, the court does not look to the actual effect of the allegations on the person's reputation, or the meaning of the words actually understood or taken by the listeners (see: *JB Jeyaretnam v. Goh Chok Tong* [1984] 1 LNS 139; [1985] 1 MLJ 334). It is not enough that the listeners actually take the words in a defamatory sense, for they must be reasonably justified in so understanding the words before they are found to be defamatory (see: *The Straits Times Press (1975) Ltd. v. The Workers' Party & Anor* [1986] 1 LNS 65; [1987] 1 MLJ 186).

[34] Assuming the plaintiff in a defamation suit has shown that the words bear some sort of defamatory imputation, he must then proceed to establish that the defamatory words in question were published of and



concerning him. The words must be capable of referring to him or of identifying him.

[35] On this point, the Privy Council in the case of *Knupffer v. London Express Newspaper Limited* [1944] AC 116, had this to say:

It is an essential element of the cause of action for defamation that the words complained of should be published “of the plaintiff”, where he is not named the test of this is whether the words would reasonably lead people acquainted with him to the conclusion that he was the person referred to. The question whether they did so in fact does not arise if they cannot in law be regarded as capable of referring to him.

[36] The final element that the plaintiff must prove is that the words of which he complains have been published to any third party by the defendant. As stated by Lord Esher MR in the case of *Hebditch v. Macilwaine* [1894] 2 QB 54 (at p. 58):

The material part of the cause of action in libel is not the writing, but the publication of the libel.

[37] “Publication” means making the defamatory statement known to some other person other than of whom it is written or spoken. The statement must be published to a third party (see: *S Pakianathan v. Jenni Ibrahim & Another Case* [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233). The uttering of a libel to the party libelled is no publication for the purpose of a civil action (see: *Wennhak v. Morgan* [1888] 20 QBD 634). The fundamental principle is that the statement must be communicated to a third party

in such manner as to be capable of conveying the defamatory imputation about the plaintiff (see: *Gatley on Libel and Slander*, 9th edn at p. 134).

[38] The test involved in determining whether or not the words complained of are defamatory is a two-stage process. Firstly, it must be considered what meaning the words would convey to an ordinary person; and secondly, it must be considered whether under the circumstances in which the words were published, a reasonable man would be likely to understand that in a defamatory way (see: *Wong Yoke Kong & Ors v. Azmi M Anshar & Ors* [2003] 6 CLJ 559).

.....

[43] The Court of Appeal applied the principle and approach in *Jones v. Skelton* [1963] 3 All ER 952 and formed the view that it cannot ascribe to the first article the meanings which the appellant wanted the court to do. The Court of Appeal ruled that the first article was not defamatory and not capable of defamatory meaning ie, the article could not expose the appellant to hatred, contempt or ridicule.

[44] In coming to that determination, the Court of Appeal relied on the three tests set out in *Gatley on Libel and Slander*, 12th edn, at p. 7 as follows:

(i) Would the imputation tend to lower the plaintiff in the estimation of right-thinking members of society generally?

(ii) Would the imputation tend to cause others to

shun or avoid the claimant?

(iii) Would the words tend to expose the claimant to hatred, contempt or ridicule?

[45] The above test is an objective test. In essence, it is a question of law that turns upon the construction of the words published. It is whether, under the circumstances in which the words were published, reasonable men to whom the publication was made, would be likely to understand it in a defamatory or libellous sense. The same test was applied and adopted by the Court of Appeal in *Allied Physics Sdn Bhd v. Ketua Audit Negara (Malaysia) & Anor and Other Appeals* [2016] 7 CLJ 347.

[46] It is an established principle of law that in determining whether the impugned words connote a defamatory meaning, the court must consider the particular circumstance and the context in which the impugned words were used and published (see: (i) *Allied Physics (supra)*; (ii) *Tony Pua Kim Wee v. Syarikat Bekalan Air Selangor Sdn Bhd* [2013] 1 LNS 1433 - a decision of the Court of Appeal which was upheld by the Federal Court; and *Gatley on Libel and Slander*, 9th edn, para. 218 p. 40).

[17] His Lordship in the same case also explained the law applicable in a claim for malicious falsehood where he stated:-

“The Law on Malicious Falsehood

[39] In order to establish a claim under malicious falsehood, it is trite law that the plaintiff bears the burden

of proving the following elements:

- (i) that the defendant published about the plaintiff words which are false;
- (ii) that the words were published maliciously; and
- (iii) that special damage followed as the direct and natural result of the publication.

(see: *Tan Chong & Son Motor Co Sdn Bhd v. Borneo Motors (M) Sdn Bhd & Anor* [2001] 4 CLJ 296; [2001] 3 MLJ 140; *Ratus Mesra Sdn Bhd v. Shaikh Osman Majid & Ors* [1999] 8 CLJ 499; [1999] 3 MLJ 529; *Kaye v. Robertson* [1991] FSR 62 (EWCA)).

[40] “Malice” has been judicially interpreted by the courts as being reckless, unreasonable, prejudice or unfair belief in the truth of the statement. “Malice” may be established by showing that the defendant did not believe in the truth of what he uttered (see: *Horrocks v. Lowe* [1974] 1 All ER 662 and *Watt v. Longsdon* [1930] 1 KB 130 at 154, [1929] All ER 284 at 294).

[41] As defined in the *Osborn’s Concise Dictionary* (7th edn.), the word “malice” means:

Ill-will or evil motive: personal spite or ill-will sometimes called actual malice, express malice or malice in fact. In law an act is malicious if done intentionally without just cause or excuse. So long as a person believes in the truth of what he says and is not reckless, malice cannot be inferred from the fact that his belief is unreasonable, prejudiced or unfair (*Horrocks v. Lowe* [1972] 1 WLR 1625).

[42] In law, an act is malicious if done intentionally without just cause or excuse. So long as a person believes in the truth of what he says and is not reckless, “malice” cannot be inferred from the fact that his belief is unreasonable, prejudiced or unfair (see: *Anne Lim Keng See v. The New Straits Times Press (M) Bhd & Anor And Other Appeals* [2008] 6 CLJ 697; [2008] 3 MLJ 492, *Horrocks v. Lowe (supra)*).

[18] Therefore, it is for the Plaintiff to prove the following:-

(I) Claim in Libel

- (1) the words complained of are defamatory either expressly or bears defamatory imputations.
- (2) the statement must refer to or reflect upon the plaintiff’s reputation.
- (3) the words were published to a third party.

Once the Plaintiff proves the above 3 requirements, it is for the Defendant to prove that the words are true or any of the other defences recognised under the common law.

(II) Claim for Malicious Falsehood

- (1) that the defendant published about the plaintiff words which are false.
- (2) that the words were published maliciously; and
- (3) that special damage followed as the direct and natural result of the publication.



Unlike a claim for libel or slander, the burden lies solely on the Plaintiff to prove these elements in a claim for malicious falsehood.

(b) Applying the applicable law libel to the facts

Plaintiff's Claim for libel

Whether the statements are defamatory

[19] I will first deal with the Plaintiff's claim for libel.

[20] For this purpose, (i) I must consider what do the words that were published by the Defendant mean, both in their natural and ordinary meaning or by way of innuendo, and (ii) whether the said words are defamatory of the Plaintiff, in the context of the entire article or publication that they appear. This must be determined by me objectively, i.e., how would an ordinary, reasonable person, not unduly suspicious or avid for scandal understand or ascertain the meaning of the words.

[21] To ascertain the meaning that I should attribute to the impugned article contained in the Defendant Facebook account, I have considered the explanation espoused by the Defendant in paragraphs 35 to 54 of the Defendant's submissions.

[22] Essentially, he alleges that the said statements were not directed towards the Plaintiff but was intended toward either (i) to all leaders of the Pakatan Harapan Government and PAN, (ii) the Deputy Finance Ministers at that time - YB Datuk Haji Amiruddin bin Haji Hamzah or (iii) to leaders of PAN, the leaders of Pakatan Harapan or the local authority in question responsible for the said reallocation of the Sports Toto outlet. This could also be seen in the answers provided by the

Defendant in questions 8 to 12 of his witness statement.

[23] The Plaintiff on the other hand opines that the article contained in the Facebook posting when read as a whole, in its natural and ordinary context, would potentially lower the Plaintiff's reputation in the eyes of a reasonable reader. He points to the comments that appear in the said Facebook account to show the effect of the statements complained of and the context in which the said words appear.

[24] On this issue, I am guided by high authority that the subjective intention of the Defendant is irrelevant for the purposes of determining whether the said statements are defamatory of the Plaintiff. Please refer to Lord Reid's judgment in *Rubber Improvement Ltd v. Daily Telegraph Ltd* [1964] AC 234 at page 258 This Court must discern the meaning of the words, either in its normal or ordinary language or by of innuendo, based on the objective test stated above.

[25] I am further guided by the decision of the Malaysian Court in *Abdul Khalid @ Khalid Jafri bin Bakar Shah v. Party Islam Se Malaysia* [2002] 1 MLJ 160, *Ummi Hafilda bte Ali v. Karangkrak Sdn Bhd* [2000] 3 MLJ 684 and *Gwee Tong Hiang v. Boo Cheng Hau* [2016] 6 CLJ 494.

[26] In *Gwee Tong Hiang v. Boo Cheng Hau (supra)*, Prasad Sandosham Abraham JCA (as his Lordship then was) delivering the judgment of the Court of Appeal stated:-

“[11] This principle in law was never addressed by the learned judge in that there was no necessity from the impugned articles to refer specifically to the plaintiff. We refer to the case of *DHKW Marketing & Anor v. Nature's Farm Pte Ltd* reported in [1999] 2 SLR 400 a decision of

the High Court in Singapore where it was held by Judith Prakash J and we quote:

Quite apart from being a member of the class that was defamed, since the advertisement did not specifically name them, the plaintiffs would have to show that it or words therein referred to or were understood as referring to the plaintiffs. The test on reference is set out in *Gatley* at pp. 162-163 as follows:

The test of whether words that do not specifically name the plaintiff refer to him or not is this: Are they such as reasonably in the circumstances would lead persons acquainted with the plaintiff to believe that he was the person referred to? That does not assume that those persons who read the words know all the circumstances or all the relevant facts. But although the plaintiff is not named in words, he may, nevertheless, be described so as to be recognised; and whether that description takes the form of a word picture of an individual or the form of a reference to a class of persons of which he is or is believed to be a member, or any other form, if in the circumstances the description is such that the person hearing or reading the alleged libel would reasonably believe that the plaintiff was referred to, that is a sufficient reference to him.

In fact, as Mr Thio submitted, even if the plaintiffs in a defamation case do not call or are unable to call witnesses to give evidence of reference, the court can still make a finding of reference. It is sufficient for the plaintiffs to allege and prove that there are persons who know the special facts and so might understand the words

complained of in the defamatory sense without proving that any person did in fact understand them in that sense. See *Hough v. London Express Newspaper Ltd* [1940] 2 KB 507. Also as *Gatley* states in the passage cited at para 18 above, where the words refer to a class, the question is whether a reasonable reader could conclude that each of the plaintiffs, as an individual was pointed at.

(emphasis added)

[12] This approach was followed in the case of *Ahmad bin Said v. Zulkiflee Bakar & Yang Lain reported in* [1997] 1 LNS 427; [1997] 5 MLJ 542 where it was held by Mohd Saari J (as he then was) and we quote:

The plaintiff's statement that no group from another division in Terengganu had toured Europe during the same time could be treated as an admission by the defendant since no evidence to the contrary was adduced. Therefore, although the first report AS1 did not mention the plaintiff as a member of the group which visited Europe, since there was no other group from another division in Terengganu touring Europe during that period the plaintiff was easily identifiable as one of the participants in that group, bearing in mind also he was a member of the State Legislative Council, of the State Exco and an UMNO Youth Leader for the Kemaman Division. Therefore, the statement 'UMNO leaders and members from a division in Terengganu' undoubtedly referred to the plaintiff (see pp 546F-I and 547A-C); *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609; [1995] 1 MLJ 281 and *Knuppfer v. London Express Newspapers Ltd* [1943] 1 KB 8 followed.

[13] The learned judge had found the impugned statements to be defamatory but dismissed the claim because there was no reference to the plaintiff. Based on the aforesaid authorities, the learned judge erred in law and we find the impugned statements on gangsterism defamatory and actionable by the plaintiff.”

[27] Guided by the above authorities, when I consider the exact words and the article as a whole as they appear on the Facebook posting by the Defendant, I am of the opinion that the words, in their natural and ordinary meaning, are defamatory of the Plaintiff. For ease of reference, I reproduce the words that were complained by the Plaintiff:-

“Sejak menjadi pemimpin PAN dan PH, dihadiahkan jawatan Timbalan Menteri, sensitiviti terhadap judi dan premis perjudian pun hilang, pudar bersama maruah dan kebolehpercayaan.

Kini mereka berkhidmat pula kepada pengundi mereka apabila bermudah-mudahan dengan kemasukan premis sport toto ke Kawasan yang majoritinya adalah umat Islam...”

[28] I find that a reasonable person when reading the said article and the words that they appear, would have understood that the person that the article is referring to is a treacherous, immoral, and untrustworthy person. I further opined that the words utilized when considered holistically and in the context they were published will lead to a reasonable person to believe that the said person is not a trustworthy Muslim and has assisted or been involved in the licensing of the Sports Toto and its movement from its original premises to that of its new location within the Pokok Sena’s parliamentary constituency.

- [29] Further to the above, I also find that the evidence produced also shows that the said words also bear the natural and ordinary meaning, in the context of the entire article, that the person that is being referred to was at that time the Deputy-Minister from Parti Amanah Negara (PAN), a religious Muslim party, and he was involved in the licensing or the approval of the license to Sports Toto or its movement to its new location within Pokok Sena.
- [30] I note that throughout the trial, the Defendant did rely heavily on the word “mereka” that appears in the said Facebook posting. He argues that the said posting should therefore mean and refer to a group or party or the Government responsible for the said Sports Toto and not the Plaintiff personally. He relies on the grammatical meaning of the word “mereka” in the posting “**Kini mereka berkhidmat pula kepada pengundi mereka apabila bermudah-mudahan dengan kemasukan premis sport toto ke Kawasan yang majoritinya adalah umat Islam...**”.
- [31] The Defendant also suggests that the statements complained could not bear any defamatory meaning as he had uploaded the letter of approval from the Ministry of Finance. It was put to this Court that if there was an intention to defame the Plaintiff, the statements would have been accompanied with pictures of the Plaintiff. It was also ingeniously argued that once the whole article is read together with the aforesaid letter of approval, a reasonable person would conclude that the main thrust of the Facebook posting is not defamatory but deals with the Muslim genuine concern of the reallocation of the Sports Toto that was allegedly disregarded by the then Federal Government and local authority.
- [32] Counsel for the Defendant also contends that the word “Khianat” in particular only concerns the political hoping that is

prevalent within the Malaysian political scene. This was also made to address the concern of the Defendant's political party against Parti Amanah Negara at that time. The Defendant's counsel goes on arguing, that this should not be extended beyond the current context and it would be wrong to make the imputations as proposed by the Plaintiff.

[33] However, I cannot accept the arguments posed by the Defendant, and to read that Facebook posting in isolation as suggested by Defendant's solicitors would be wrong. I must consider the whole publication and the context in which they were made. The said Facebook posting when read objectively refers to an individual. I say this for the following reasons:-

(a) It refers to a Deputy Minister from PAN and from PH as seen in the following post - **“Sejak menjadi pemimpin PAN dan PH, dihadiahkan jawatan Timbalan Menteri, sensitiviti terhadap judi dan premis perjudian pun hilang, pudar bersama maruah dan kebolehpercayaan.**

(b) It also refers to an individual who changed parties from PAS to PAN –**“Tukar parti saja kan – bukan tukar agama pun.....kata mereka itu mewajarkan pengkhianatan....”**

(c) The statement also refers to last rites that should be read on the said individual **“Talkinkan saja jiwamu, hiduplah dengan jasad yang makin kerepot.”**

A reasonable person reading the statement would surely not understand these terms or words to refer to a Government, Political party, or group of individuals. Surely one only reads last rites to an individual who has passed away or is about to knock on heaven's door. These statements when read collectively would suggest that the target of the said words is a particular

individual and not that of association or political party.

[34] I also do not agree that the statements allegedly concern the decision of the Federal Government to move the Sports Toto shop and allegedly only to raise the concerns of the Muslim community. I believe that a reasonable person would not understand the words to mean as that suggested by the Defendant.

[35] I, therefore, find that a reasonable man reading the said words in the context that they appear would have also understood to mean that the person identified in the said Facebook posting, by way of innuendo:-

- (i) That the person is a Muslim and belonged to a Muslim political party, PAN.
- (ii) That the person had supported or approved the grant of the license to Sports Toto and its reallocation of the said entity's office within the Pokok Sena's constituency.
- (iii) That the person is not a good Muslim as he had approved or encouraged gambling activities within the said Pokok Sena constituency.
- (iv) That the person cannot be trusted based on the allegation that he ran under the banner of a Muslim political party and at the same time approved or assisted in the licensing and reallocation of the Sports Toto into the Pokok Sena parliamentary constituency.

Whether the Statement is targeted at the Plaintiff

[36] On the issue as to the identity of the person defamed, I have considered the following factors adduced from the evidence

tendered before me that are relied on by the Plaintiff:-

- (i) The context in which the said statements were published by the Plaintiff on the Facebook posting.
- (ii) The said statements were published on 30-7-2019. Before the said date, the Plaintiff had also uploaded a video containing a public demonstration opposing the setting up of the Sports Toto shop at Pokok Sena.
- (iii) In the said video posting, it was clearly stated by the said individuals that they blame the Plaintiff as being responsible for the said Sports Toto shop and had said “Tolak-tolak Mahfuz”.
- (iv) The Plaintiff was the elected representative of the Pokok Sena Constituency and was the sole Deputy Minister to be appointed from PAN under the Pakatan Harapan Government at the material time.
- (v) The Sports Toto shop complained off was situated at Pokok Sena and the Defendant had published pictures of the shop situated within the said area making part of the whole publication.
- (vi) The statement complained off clearly referred to the Deputy Minister from PAN under the Pakatan Harapan and made reference clearly to Pokok Sena.
- (vii) At the material time, the Plaintiff was the elected representative for the Pokok Sena constituency and was a Deputy Minister.
- (viii) The other parts of the statement also referred to a former member of PAS, who has since migrated to PAN. The



Plaintiff was also a former member of PAS who has since left the party and joined PAN

[37] I note that the Defendant has put substantial reliance on the following:-

- (i) The Plaintiff was not named personally
- (ii) That the word “mereka” appears in the impugned article and should therefore be referring to a group and not to the Plaintiff
- (iii) That the sting of the complaint should be in the context of the Approval letter to relocate the Sports Toto premises
- (iv) That the article should be read as a whole

The Defendant contends again that all the above factors would indicate that the impugned article is not defamatory and did not refer to the Plaintiff.

[38] However, I agree with the Plaintiff that the statements challenged are targeted towards him. I opine that a reasonable person when reading the impugned article, would understand that the (i) statements were referring to the Plaintiff, as the elected representative of Pokok Sena and a former member of PAS, and (ii) that the statements would lower the Plaintiff’s reputation and may cause the Plaintiff to be subject to ridicule and being shunned by the public.

[39] I, therefore, opine that concerning the defence referred to in paragraph 9 (i) to (v) and paragraph 29 above, that a reasonable person reading the said Facebook posting would have understood that the statement was directed towards the Plaintiff. The words utilized specifically refer to a leader of PAN who

was appointed as a Deputy Minister under the previous PH Government. The statement was also made in the context of the Pokok Sena parliamentary constituency and related to the movement or reallocation of the Sports Toto shop within the said constituency.

[40] As said earlier, the Facebook posting was posted after the video posting on 29-7-2019 that referred to the Plaintiff, where the individuals demonstrating were seen to be saying “Tolak-tolak Mahfuz”. This is an important factor. The context and how the said article was published would be an important consideration to determine whether a reasonable reader would have inferred that the Plaintiff was liable as alleged by the Defendant.

[41] Even those who read the Facebook posting and subsequently made various comments, understood that the said posting was referring to the Plaintiff. I provide a few examples of the comments that were made by individuals in response to the said Facebook posting:-

“Hindon Nizar Tahir – Sepatutnya pindah pi rumah mahfuz...

Jamaludin Saleh Al-Kisah “Sport Toto” di Pokok Sena

.....

Berbalik kepada pendemo yang mengangkat sepanduk bertulis “Apa Pendirian Yb Mahfuz”, sedah Ahli Majlis pun tidak tahu bila MBAS luluskan permohonan itu, tambah-tambahlah Dato Mahfuz.”

[42] Given the above, when I consider the publication as a whole and in the context of the said representations, one cannot escape that they objectively refer to the Plaintiff and no one else. I do not accept the arguments raised by the Defendant on this issue. I

also repeat my finding as to the meaning of the said Facebook posting as I have stated earlier.

[43] I, therefore, make the following finding:-

(i) the statements complained by the Plaintiff contained in the Facebook posting dated 30-7-2019 bears defamatory meaning or imputations as alleged in paragraphs 12.1, 12.2, 12.3, 12.4, 13.1, 13.2, 13.3, 13.7 and 13.8 of the Statement of Claim.

(ii) the said Facebook posting refers to or reflect upon the plaintiff's reputation; and

(iii) the said Facebook posting was published to third parties by the Defendant. This is clear as the statements were commented by various third parties which had specifically referred to the Plaintiff and made further remarks against him relating to the same allegation.

[44] As the Plaintiff has proven his case against the Defendant for libel, it is for the Defendant to prove that he is entitled to rely on any one of the defences pleaded in his Defence.

(i) Defendant's Defences to the claim of libel

[45] The Defendant's defence is summarized in paragraph 9 earlier and could be categorized as follows:-

(i) Justification

(ii) Fair Comment / Criticism

(iii) Qualified Privilege

I will consider the above defences in the following paragraphs.

(i) Justification

[46] As I have said earlier, once a Court of law accepts that the statements complained are defamatory of the Plaintiff, if the defence of justification is raised, it is for the Defendant to prove that the said statements are true. The Defendant relies on this defence as seen in paragraphs 63 to 79 of his written submission.

[47] I refer to section 8 of the Defamation Act and the decision of Mary Lim JCA (as her Ladyship then was) in *Raja Syahrir Abu Bakar & Anor v. Manjeet Singh Dhillon & Ors* [2019] 4 CLJ 301, where her Ladyship stated:-

“[54] First, the defence of justification, a complete defence if the defendants can establish that the defamatory words are true in substance and in fact. Such defence however, has to be specifically pleaded with full and clear particulars of the facts and matters relied on. In considering this defence, s. 8 of the Defamation Act 1957, where it is relied on, as is the case here, must be taken into account. Section 8 provides that a defendant who is unable to prove the truth of all the material statements in the alleged libel may nevertheless succeed in the defence of justification where the defendant can show that the words not proved to be true or truthful do not materially injure the plaintiff’s reputation. It is the truth of the imputations of the overall statement and not the truth of every word that is material - see Chong Swee Huat & Anor v. Lim Shian Ghee t/a L & G Consultants & Education Services [2009] 4 CLJ 113.”

[48] In this case, the Defendant alleges that, albeit in an interesting twist to the pleaded case, that the statements were true as they

indicate the insensitivity of the authorities in approving and allowing the relocation of the Sports Toto shop and this constitute political criticism.

[49] On this issue, as I have found that the statements were defamatory as alleged by the Plaintiff, this cannot be the meaning attributed to the Facebook posting. The Defendant is correct to show that the Sports Toto shop was moved from its original location to Pokok Sena. However, as the Defendant did allege that it was the Plaintiff who had approved or had been party to the said reallocation, he must show that this statement is true. To merely rely on the truth of the reallocation of the Sports Toto shop by the authorities misses the point and does not justify the statements complained of.

[50] I find that the Defence failed to prove that the contents of the Facebook postings are true. I find that it was not shown by the Defendant that the Plaintiff was responsible for the licensing or for the movement of the Sports Toto outlet from its former site to its new premises within Pokok Sena. Any lottery-related activities are regulated under the Lotteries Act 1952 and the Malaysian Common Gaming Houses Act 1953. The power to issue licenses and regulate the said activities fall within the purview of the Minister of Finance under section 3 of the Lotteries Act or under section 27A of the Malaysian Common Gaming Houses Act 1953. The power relating to the said act is specifically allocated to the Minister of Finance and not to any other Minister or Deputy Minister.

[51] I, therefore, find, based on the evidence tendered, that the grant of any license relating to gambling or lottery does not fall within the purview of the Plaintiff's then responsibility or knowledge at the material time. He was not a Minister or Deputy

Minister within the Ministry of Finance. Neither was there any evidence put forward to show that he had approved any such license or even assisted in the licensing and movement of the Sports Toto premises into the Pokok Sena constituency. The said decision was not undertaken by him personally or even by his office.

[52] I also find that no evidence was shown how this decision could be said to have been derived from the collective decision of the Cabinet of the then Government of Malaysia under Pakatan Harapan. The power to make such a decision was specifically afforded to the Minister of Finance at the material time.

[53] The same applies regarding the allegation that the Plaintiff is a person who cannot be trusted and is a bad Muslim. These allegations were not proven by the Plaintiff. Although the Plaintiff did run under PAN, a Muslim-based party, there is no evidence that he had assisted in the licensing of the Sports Toto or its movement to Pokok Sena. There is not a single iota of evidence brought forward by the Defendant to prove the said defence.

[54] Given the above, I reject the defence of justification put forward by the Defendant.

(ii) Fair Comment / Criticism

[55] The defence of fair comment/criticism is provided for in *section 9 of the Defamation Act* which is reproduced herein:-

“In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair

comment having regard to such of the facts alleged or referred to in the words complained of as are proved.”

[56] For this defence to succeed, it is for the Defendant to prove that (i) that the statements contained material facts that are true and (ii) that the statement contains an opinion that a fair-minded person can honestly make on a matter of public interest.

[57] I again refer to *Raja Syahrir Abu Bakar & Anor v. Manjeet Singh Dhillon (supra)* where on the issue of the defence of fair comment, Mary Lim JCA stated:-

“[65] As we will see, the first defendant failed in establishing the truth of the facts relied on, and that the extent of the failure was such that he could not avail himself of the benefit of s. 9 of the Defamation Act.

[66] Now, in order to succeed, the first defendant will have to establish that the comments, although consisting or including inferences of fact, are actually expressions of opinion which a fair-minded person can honestly make on a matter of public interest and that such opinion is based on true facts. No person, including the first defendant is entitled to suggest or invent facts and then comment upon them, assuming that they are true. If the facts upon which the comments purport to be made do not exist, then this defence fails, as opined by the Privy Council in *Joshua Benjamin Jeyaretnam v. Goh Chok Tong* [1989] 1 LNS 34; [1989] 3 MLJ 1, 3. Context would therefore be relevant.”

[58] On this issue, I am also guided by the decision of Abdul Malik Ishak JCA in *S Ashok Kandiah & anor v. Dato’ Yalumallai Muthusamy & anor* [2011] 1 CLJ 460, where he stated:-

“[38] This is the defence to an action of libel or slander in that the words complained of are fair comment on a matter of public interest. To succeed in this defence, the defendants must show that the words are fair comment and not a statement of fact. There are *dicta* to the effect that fair comment is not defamatory (*Campbell v. Spottiswoode* [1863] 122 ER 3 B. & S. 769).

[39] The defendants too must show that there is a basis for the comment to the extent of indicating that what is being stated is fair comment. And, finally, the defendants must also show that the comment is on a matter of public interest.”

Also, refer to *Dato’ Seri Mohammad Nizar Jamaluddin v. Sistem Televisyen Malaysia Bhd & Anor* [2014] 3 CLJ 560.

[59] I also refer to the decision of the High Court in *Govt of the State of Sarawak v. Dato Sri Wong Soon Koh* [2021] MLJU 764 acknowledge the important role of the opposition. However, I am of the opinion that the duties imposed on opposition leader’s does mean that the right to comment and criticise the Government outside of Parliament is absolute. For any opposition leader to rely on the defence of fair-comment, the applicable test as stated earlied are relevant and applicable.

[60] In this case, I find that the evidence produced by the Defendant has failed to prove all the ingredients required to enable him to rely on the said defence.

[61] The Defendant must prove that the criticism, if any, must be based on material facts that are true. In this case, it must be shown by the Defendant that the Plaintiff was responsible or assisted in the licensing or the movement of the Sports Toto

outlet into Pokok Sena. If that was proven, then he could argue that the rest of his statement constitutes his criticism of the Plaintiff's conduct in allowing for the licensing or movement of the Sports Toto into the said constituency and that the said action is not in the best interest of the community.

[62] As I have found earlier, the facts relied on the said posting were not proven by the Defendant. The Sports Toto license and the movement of its premises are not within the purview of the Plaintiff's powers and lie solely with the Minister of Finance. Therefore, the said criticism, even if this Court were to accept such argument, is not valid as there were no material facts to support the same.

[63] The Defendant argued that he is entitled to rely on the fact that there was a movement of the Sports Toto shop from its original location to Pokok Sena. This was also supported by the letter of approval by the Ministry of Finance agreeing to the said reallocation. However, the sting of the statement is not the fact that there was the reallocation of the Sports Toto shop but that it was the Plaintiff who had approved or assisted in the said relocation. Therefore, it is wrong for the Defendant to merely rely on the two facts referred to earlier. It is the allegation that the Plaintiff approved the said reallocation or assisted the said step that must be proved.

[64] Therefore, having failed to prove this important fact, the defence of fair comment fails.

[65] Even if I am wrong to make the above finding, I believe the defence of fair comment is dependent on whether the Court finds that the said comments are fair and reasonable. I refer to the direction given by Diplock J to the Jury in *Silkin v. Beaverbrook Newspaper Ltd* [1958] 1 WLR 743 and the decision of Richard

Malanjum J in *Tun Datuk Patinggi Haji Abdul Rahman Yakub v. Bre Sdn Bhd* [1996] 1 MLJ 393. The statements must not be so repugnant that no reasonable person could have made such statements.

[66] Because of the above, I believe the alleged opinion or comment, even if one were to accept the same, published by the Defendant does not fall within what would be considered as fair comment. No reasonable person would have used the words “khianat” and “pudar Bersama maruah dan kepercayaan” even if the facts were true. The comments contained in the posting were unfair and extreme, to say the least. The context of the statements is also material, as they impute that the Muslim leader has since forgotten or failed to adhere to Islamic teachings by being friendly to gambling activities.

[67] Therefore, I reject the defence of fair comment/criticism relied on by the Defendant.

(iii) Qualified Privilege

Publication to the world at large

[68] The final defence raised by the Defendant to the claim of libel is that of qualified privilege under the common law.

[69] To establish the defence of qualified privilege, the Defendant must show to the satisfaction of Court that (i) the said publication was made on accession where he has an interest or duty, legal, social, or moral obligation to make it to the person to whom it is made, and (ii) the person to whom it is made has a corresponding interest or duty to receive it. Please see the celebrated case of *Adam v. Ward* [1917] AC 309.

[70] I am also guided by the decision of the Federal Court in *Financial Information Services Sdn Bhd v. Hj Salleh Hj Janan* [2012] 8 CLJ 885 where the Court stated:-

“[17] The conditions for qualified privilege to arise as a defence was laid out long ago in *Toogood v. Spyring* [1834] 1 CM & R 181 and from this passage of Baron Parke’s which has been described by Lindley L.J in *Stuart v. Bell* [1891] 2 QB 341 as having “been frequently quoted, and always with approval.” That illustrious passage speaking of the publication of statements false in fact and injurious to the character of another states:

The law considers such publication as malicious unless it is **fairly made by a person in the discharge of some public or private duty**, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice, which the law draws from unauthorised communications, and affords a qualified defence depending on the absence of actual malice. If **fairly warranted by any reasonable occasion or exigency, and honestly made**, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits.”

[71] This Defence was raised by the Defendant in paragraphs 46 to 50 of his Defence and in answer to questions 18, 23 24 and 28 of his witness statements. This also appears in paragraphs 120 to 140 of the Defendant’s written submissions.

[72] He relies on the fact that he is a leader of the Muslim community and an elected representative within the State of

Kedah. He states that the statements were intended to raise the issue of the licensing and movement of the Sports Toto premises into an area where the majority of the residents were Muslims. As such, the statement was allegedly intended to address a social and moral concern for which he has a serious interest to vouch for. He further states that the statements were directed towards Muslims and all members of the Malaysian and Kedah population, who would also have a corresponding interest in the said statement and the issues raised therein.

[73] I accept that the Defendant as the elected member of the Kedah state legislative assembly and a leader from the Muslim community has a legitimate interest and moral obligation to raise the issue of the licensing and movement of the Sports Toto into the Pokok Sena constituency.

[74] However, when I consider the pleaded case by the Defendant and the exact Facebook posting one could see that the said Facebook posting was published to the world at large and not to a specific member of the community or a group of persons or an individual.

[75] In instances, where the publication is made to the world at large, as in this case, the Defendant will then have to show that the requirements laid down in *Reynolds v. Times Newspaper Ltd* [1999] 4 All ER 609 are fulfilled before he could rely on the defence of qualified privilege. See *Malik v. Newpost Ltd* [2007] EWHC 3063, *Bray v. Deutsche Bank AG* [2008] EWHC 1263, *Seaga v. Harper* [2008] UKPC 9 and *Syarikat Bekalan Air Selangor Sdn Bhd v. Tony Pua Kiam Wee* [2015] 8CLJ 477.

[76] Azahar Mohamed FCJ (as his Lordship then was) in *Syarikat Bekalan Air Selangor Sdn Bhd v. Tony Pua Kiam Wee* (*supra*), stated:-

“[32] Nearer home, we were informed that the only reported decision on this issue was the High Court decision of *Sivabalan P Asapathy v. The New Straits Times Press (M) Bhd* [2010] 7 CLJ 885; [2010] 9 MLJ 320, which cited with approval the judgment of *Jameel And Another v. Wall Street Journal Europe (supra)* to the effect that the defence is available to anyone who publishes material of public interest in any medium.

[33] In our view, the public interest defence should by no means synonymous with journalists or media publications. On the ground of public interest, there is a sufficient basis it should be in the same way extended to anyone who publishes or discloses material of public interest in any medium to assist the public better comprehend and make an informed decision on matters of public interest that affects their lives. To safeguard the extension of this privilege is not abused, as a necessary balance, it is the duty of the court to robustly ensure that anyone who is accorded with the privilege meet the test of responsible journalism, about which more will be said later in this judgment. This, in our view, underpins the significance of protecting the right of freedom of expression on public interest matter and at the same time providing adequate protection for reputation. Freedom of expression is not absolute. Indeed, freedom of expression and the responsibilities that comes with it is enshrined in art. 10 of the Federal Constitution. We should like to emphasise here that the *Reynolds* privilege defence places a considerable role in the hands of judges to deliberate fairly and come to a just decision with utmost care whether the impugned publication amount to an

occasion of privilege.”

[77] I will therefore have to decide whether that the nature of the subject matter of the publication was such that it was in the public interest for it to be published and whether the test of responsible journalism is satisfied based on the evidence presented before me.

[78] There are several factors that I must consider. I refer to Lord Nicholls’ judgment in *Reynolds v. Times Newspaper Ltd (supra)* where he stated:-

“Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only.

1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
2. The nature of the information, and the extent to which the subject- matter is a matter of public concern.
3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
4. The steps are taken to verify the information.
5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.
6. The urgency of the matter. News is often a perishable commodity.

7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.

8. Whether the article contained the gist of the plaintiff's side of the story.

9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.

10. The circumstances of the publication, including the timing.

59. This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case. Any disputes of primary fact will be a matter for the jury, if there is one. The decision on whether, having regard to the admitted or proved facts, the publication was subject to qualified privilege is a matter for the judge. This is the established practice and seems sound. A balancing operation is better carried out by a judge in a reasoned judgment than by a jury. Over time, a valuable corpus of case law will be built up.”

The above was considered and accepted by the Malaysian Federal Court in *Syarikat Bekalan Air Selangor Sdn Bhd v. Tony Pua Kiam Wee (supra)*.

[79] An important aspect of the Reynold's defence is the requirement that the party relying on the defence must have taken all steps necessary to verify the information, whether all relevant information has been disclosed in the said publication and

whether he had acted reasonably in view of the potential harm of the statement (i.e., what is commonly referred to as responsible journalism).

[80] Azahar Mohamad FCJ, in the same case quoted above, stated:-

“[39] In our judgment, the submissions of learned counsel for the defendant pose at least two problems. In the first place, the responsible journalism guidelines have consistently been upheld since *Reynolds v. Times Newspapers Ltd (supra)* was decided by the House of Lords. As we see it, the “circumstantial test” and the “reasonable journalism test” was not the same. In fact, as pointed out by Lord Hope in *Reynolds v. Times Newspapers Ltd (supra)* “the circumstantial test is confusing and it should not be adopted”. The guidelines as advocated by Lord Nicholls set out a number of important relevant matters to be taken into consideration in deciding whether the publication of impugned statements was privileged for the reason of its significance to the public at large. The list was not all-inclusive, but was explanatory only and the weight to be given to those and other pertinent aspects would vary from case to case. Secondly, according to the Court of Appeal, a defendant relying on the *Reynolds* privilege defence was absolved from proving that he took responsible and fair steps to gather, verify and publish the information, by simply claiming that he had an honest belief in the truth of the statements he made. With respect, this is plainly wrong. We agree with the submissions of learned counsel for the plaintiff that these new propositions by the Court of Appeal are diametrically opposed to the guidelines on responsible journalism as set out in *Reynolds v. Times Newspapers Ltd (supra)*. In our



view the guidelines on responsible journalism as espoused in *Reynolds v. Times Newspapers Ltd (supra)* is important because there is now a much more extensive protection for publications to the public at large where the matter is of sufficient public concern. For that reason, as a counter-balance, publishers must meet the test of responsible journalism to ensure that the privilege is not abused. Rights and responsibilities must go hand in hand. Freedom of speech is not an end in itself; it must be exercised with a sense of responsibility. This point has already been made earlier but ought to be restated.

[40] As noted earlier, the Court of Appeal held that “once all relevant information is in the public domain, then, the defendant is not obliged to satisfy the further *Reynolds* requirements”. Emphasizing this point, to support this proposition of law, the Court of Appeal in its judgment cited para. 14.3 of *Gatley on Libel & Slander*, 11th edn. On this, it is instructive to refer to said paragraph, which reads as follows:

If the requisite duty and interest can be found in a public communication the defendant is not obliged to satisfy the further *Reynolds* requirements, though in determining whether qualified privilege applies questions of reasonableness of conduct may be relevant and this may require a court to take account of factors such as whether any steps have been taken to verify the information being communicated.

[41] As submitted by learned counsel for the plaintiff, a closer reading of the above passage did not support the Court of Appeal proposition of law. Clearly, the opinion in

Gatley went further to say that parts of the *Reynolds* privilege test dealing with issues of reasonable of conduct (for example, whether steps have been taken to verify the information) were relevant. He further argued that a far-reaching implication of the Court of Appeal’s proposition was that it would allow defendants to publish untrue defamatory statements, simply because the state of affairs had already been published before in the public domain. We see much force in this argument. We agree with the submissions of learned counsel for the plaintiff that this cannot be right as such a proposition runs counter to the very concept of fair and responsible journalism.”

[81] I have considered the evidence tendered by the Defence and I find that he has failed to satisfy the requirements to justify his reliance on Reynold’s defence. There is no evidence that he had made any reasonable enquiry to investigate as to whether the Plaintiff was responsible for the reallocation of the Sports Toto outlet and whether the said licensing could be attributed to him. There is no attempt by the Defendant to confirm any of the facts to justify the disparaging remarks that were made against the Plaintiff.

[82] On this issue, I refer to the answer to questions 7, 8, 9, 12, 13 and 14 of the Plaintiff’s witness statement. The answers provided by the Plaintiff indicated that he was not involved in the licensing and the reallocation of the Sports Toto premises. This was also explained by the Plaintiff during cross-examination, parts of which are extracted from the notes of evidence below:-

“...PD: Soalan saya simple sahaja Dato’, setuju dengan saya bahawa melalui video ini pada 29/07/2019 ini

adalah kali pertama Dato' menyuarakan ketidakpuashatian Dato' atas isu ini setelah, betul eh? Ini kali pertamalah?

SP2: Baik Yang Arif boleh saya berikan keterangan?

PD: Atau pun tunggu soalan saya habis dulu. Ini kali pertama Dato' menyuarakan ketidakpuashatian setelah surat dikeluarkan pada April 28 2019?

SP2: Saya tidak mengetahui ini kali pertama kerana saya tidak pun mengetahui tentang surat yang dikeluarkan oleh Kementerian Kewangan kerana Kementerian Kewangan tidak pun merujuk meminta persetujuan daripada pihak saya sendiri. Saya hanya mengetahui apabila dihebohkan dikatakan pada 29 itu akan diadakan satu demonstrasi membantah. Jadi barulah saya tahu tentang bahawa akan ada kewujudan pemindahan Kedai Judi Sports Toto ke dalam kawasan Parlimen Pokok Sena. Jadi saya tidak membantah dalam tempoh 3 bulan itu kerana saya tidak mengetahui tentang pergerakan pemindahan tersebut, permohonan dan kebenaran yang diberikan oleh Kementerian Kewangan.

PD: Baik. Tapi Dato' boleh setuju dengan saya bahawa keputusan ini kalau dibaca secara kolektif adalah keputusan kerajaan, yang mana Dato' berada di dalamnya? Ia adalah keputusan kerajaan?

YA: Counsel, did you plead this as part of your defense?

PD: Yes, we plead collective responsibility Yang Arif. We plead a part of collective responsibility of the

members.

YA: Dekat mana?

PD: Kejay ya Yang Arif. Muka surat 28 perenggan 30 (a), (b) dan (c). Soalan saya berdasarkan kepada Pembelaan kita, Dato' setuju atau tidak bahawa keputusan ini adalah keputusan Kerajaan Persekutuan yang mana Dato' sebagai ahli kepada Kerajaan Anggota Pentadbiran mempunyai tanggungjawab bersama iaitu collective responsibility terhadap keputusan Kerajaan Persekutuan?

SP2 : Yang Arif, saya tidak bersetuju kerana ini merupakan prosedur di peringkat pegawai kerajaan. Proses pemindahan akan dipohon kepada bahagian-bahagian tertentu di bawah Kementerian Kewangan, kemudian Kementerian Kewangan akan mendapat persetujuan terlebih dahulu daripada pihak Polis dan juga daripada pihak PBT maka barulah peringkat bahagian tersebut akan memberikan persetujuan kebenaran kepada Sports Toto Malaysia untuk membuat pindahan. Jadi ini tiada kaitan dengan soal pengetahuan dalam pengetahuan Menteri atau pun Timbalan Menteri...”

[83] Whereas, when I consider the evidence of the Defendant, I find that he did not undertake any of the inquiries that would have been legally expected under the circumstances of this case. He had simply not investigated and gone ahead to make the publications that defamed the Plaintiff. I reproduce parts of the evidence extracted from the notes of evidence:-

“PP : Kemudian, dalam jawapan ini, YB sebut pemimpin-

pemimpin PH dan PAN yang berdiam diri dan tidak membantah”. Ini juga saya cadangkan adalah tidak betul kerana sebelum demonstrasi itu, macam yang YB sebut awal-awal tadi, YB Mahfuz dia keluarkan satu video dan video itu dikemukakan oleh pihak YB sendiri di Mahkamah hari ini, ya.

SD1: Ya.

PP: Dalam video tersebut, memang Dato’ Mahfuz membantah terhadap pembukaan premis tersebut

SD1: Ya, ya

PP: Jadi, jawapan ini, saya cadangkan tidak betul, lah sebab dia kata berdiam diri dan tidak membantah ini? Setuju?

SD1: Keputusan bulan April, dia buat video dia itu, bulan Julai. Kan dia diam diri 3 bulan tu. Dia kalau rujuk kepada dia, lah. Kalau rujuk pada dia. Jadi, saya rujuk jawapan ini kepada kerajaan. Siapa yang ada dalam kerajaan semua kena. Semua tanggung dosa itu.

PP: Kita ambil itu jawapan YB, ya.

SD1: Ya, itu jawapan saya.

PP : YB saya cadangkan bahawa, sebelum posting 30hb itu dikeluarkan, YB tidak pun membuat pengesahan fakta terhadap posting tersebut dengan Plaintiff, setuju?

SD1: Tak ada, setuju. Sah apa, bukan kata kat dia...”

[84] Therefore, I think that the Defendant is not entitled to rely on the defence of qualified privilege based on the legal proposition as referred to earlier.

[85] I also note that if this defence is not absolute. If it is shown that the statement was made maliciously or in instances where it was made recklessly, without caring whether it is true or not, then the said defence falls. I refer to the decision of Lord Diplock in *Horrocks v. Lowe* [1975] AC 135 and Hepworth J in *Abdul Rahman Talib v. Seenivasagam & Anor* [1964] 1 LNS 2.

[86] Furthermore, the Plaintiff did raise the issue of express malice in paragraph 14 of his Statement of Claim and paragraphs 29 to 37 in his Reply to the Defence to defeat the reliance on the defence of qualified privilege.

[87] I am also of the view that the Defendant was reckless in publishing the words contained in the Facebook posting. As I have said earlier, he did not ascertain whether the statements were true, and it would not have been difficult to ascertain who had the authority to approve the movement of the Sports Toto shop and its licensing. A quick reading of the applicable laws would have indicated that the said power lies with the Minister of Finance.

[88] Secondly, the way the said statement was published, and the words have chosen to appear in the said posting indicate such intent. The Defendant had used the word “khianat” and “pudar Bersama maruah dan kepercayaan”, indicating that the Plaintiff’s character was so repugnant as he is now assisting those involved in what is deemed illegal within the Islamic community - gaming or gambling. Therefore, these chosen words and the way they were published, indicate to me that the Defendant wanted to extract maximum damage towards the



Plaintiff's reputation. At the very least, I find that this shows reckless regard to the truth.

[89] Thus, I find that the Plaintiff has shown on the balance of probabilities, that the said statements were published maliciously or recklessly by the Defendant. The Defendant is therefore not entitled to rely on the defence of qualified privilege.

(j) Malicious Falsehood

[90] I also find that the Plaintiff has shown that the Defendant is liable for the tort of malicious falsehood for the same reason as provided earlier. Once it is shown that the said statements were made recklessly, without caring whether it is true or not, then this will be virtually conclusive evidence entitling this Court to infer malice on the part of the Defendant as seen in the English Court of Appeal decision in *Spring v. Guardian Assurance Plc* [1993] 2 All ER 273.

[91] Based on the above-referred finding, I, therefore, find that the Defendant had published the said Facebook posting and the words appearing therein maliciously against the Plaintiff. I also find that the Plaintiff did prove that the said statements were untrue. The evidence tendered by the Plaintiff showing that the said statements were incorrect was unrebutted by the Defendant. The Defendant himself accepts that the Plaintiff was not responsible for the licensing or even the movement of the Sports Toto premises into the Pokok Sena constituency.

[92] The Plaintiff is also entitled to rely on **section 6 of the Defamation Act**. For ease of reference, I reproduce the said statutory provision:-

“ 6. (1) In any action for slander of title, slander of goods or other malicious falsehood, it shall not be necessary to allege or prove special damage-

(a) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form; or

(b) if the said words are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication.

(2) Section 3 of this Act shall apply for the purposes of this section as it applies for the purposes of the law of libel and slander.”

[93] When I consider the words published by the Defendant, the said words were directed towards the Plaintiff in his capacity as the representative of Pokok Sena. The words were calculated to cause pecuniary damage to the Plaintiff in respect of his office as the representative of the Pokok Sena constituency. To repeat, he had specifically stated the following:-

“Kini mereka berkhianat pula kepada pengundi mereka apabila bermudah-mudahan dengan kemasukan premis sport toto ke Kawasan yang majoritinya adalah umat Islam...”

Therefore, the Plaintiff need not prove or plead that he had suffered special damage that arise as a result of the said Facebook posting.

[94] Thus, I find that this was calculated by the Defendant to cause

damage to the Plaintiff's reputation and pecuniary interest of his office as the representative of the Pokok Sena constituency. Therefore, I opine that the Plaintiff's has proven his claim for malicious falsehood against the Defendant. I also repeat my finding as stated earlier, that the Defendant has failed to prove any of the defences stated earlier.

Remedies available to the Plaintiff

[95] Given the above finding, the Plaintiff is entitled to be compensated for the damage to his reputation and his office because of the libel and malicious falsehood by the Defendant.

[96] In this regard, I have considered the conduct of the Plaintiff, his position and standing, the nature of the libel and malicious falsehood, the extent of publication and the absence of refusal or any retraction by the Defendant. I refer to *Dato Seri Anwar Ibrahim v. The New Straits Times Press (M) Sdn Bhd* [2010] 2 MLJ 491 and *Nurul Izzah Anwar v. Tan Sri Khalid Abu Bakar* [2018] 7 CLJ 622.

[97] The said Facebook posting only garnered 32 comments and was shared 53 times. It did not attract a wide readership from the public. I, therefore, grant general damages of RM 50,000.00 against the Defendant to be paid to the Plaintiff.

[98] I make the following orders:-

- (i) Damages to be paid to the Plaintiff by the Defendant of the sum of RM 50,000.00 within 14 days from the date of this order.
- (ii) An injunction to prevent the Defendant and/or its agent from repeating the same words or similar words against the



Plaintiff.

- (iii) The Defendant is to provide a written apology to the Plaintiff on the above statements to be published on the Facebook account of the Defendant within 14 days from the date of this order.
- (iv) Interest on the sum of RM 50,000.00 at 5% per annum from the date of judgment to the date of full realization of the same.
- (v) Costs of RM 15,000.00 subject to allocator to be paid by the Defendant to the Plaintiff.

Dated: 8 NOVEMBER 2021

(MOHD ARIEF EMRAN ARIFIN)
Judicial Commissioner
High Court Malaya Kuala Lumpur
NCvC 8

COUNSEL:

For the plaintiff - Noorazmir Zakaria & Nusaibah Mohd Nasir; M/s Akram Hizri Azad & Azmir

For the defendant - Yusfarizal Yusoff, Faizi Che Abu & Puan Nurul Atiqah Badrul Hisham; M/s Tengku Amalin & Faizi

Case(s) referred to:

SV Beverages Holdings Sdn Bhd & Ors v. Kickapoo (Malaysia) Sdn Bhd [2008] 4 CLJ 20

Abu Hassan Hasbullah v. Zukeri Ibrahim [2018] 3 CLJ 726



Rekha Munisamy v. Ortus Expert White Sdn Bhd & Anor [2021] 7 CLJ 353

Raub Australian Gold Mining Sdn Bhd v. Hue Shieh Lee [2019] 3 CLJ 729

Rubber Improvement Ltd v. Daily Telegraph Ltd [1964] AC 234

Abdul Khalid @ Khalid Jafri bin Bakar Shah v. Party Islam Se Malaysia [2002] 1 MLJ 160

Umni Hafilda bte Ali v. Karang kraf Sdn Bhd [2000] 3 MLJ 684

Gwee Tong Hiang v. Boo Cheng Hau [2016] 6 CLJ 494

Raja Syahrir Abu Bakar & Anor v. Manjeet Singh Dhillon & Ors [2019] 4 CLJ 301

S Ashok Kandiah & anor v. Dato' Yalumallai Muthusamy & anor [2011] 1 CLJ 460

Dato' Seri Mohammad Nizar Jamaluddin v. Sistem Televisyen Malaysia Bhd & Anor [2014] 3 CLJ 560

Govt of the State of Sarawak v. Dato Sri Wong Soon Koh [2021] MLJU 764

Silkin v. Beaverbrook Newspaper Ltd [1958] 1 WLR 743

Tun Datuk Patinggi Haji Abdul Rahman Yakub v. Bre Sdn Bhd [1996] 1 MLJ 393

Adam v. Ward [1917] AC 309

Financial Information Services Sdn Bhd v. Hj Salleh Hj Janan [2012] 8 CLJ 885

Reynolds v. Times Newspaper Ltd [1999] 4 All ER 609

Malik v. Newpost Ltd [2007] EWHC 3063

Bray v. Deutsche Bank AG [2008] EWHC 1263, *Seaga v. Harper* [2008] UKPC 9



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Legal Network Series

Syarikat Bekalan Air Selangor Sdn Bhd v. Tony Pua Kiam Wee [2015] 8CLJ 477

Horrocks v. Lowe [1975] AC 135

Abdul Rahman Talib v. Seenivasagam & Anor [1964] 1 LNS 2

Spring v. Guardian Assurance Plc [1993] 2 All ER 273

Dato Seri Anwar Ibrahim v. The New Straits Times Press (M) Sdn Bhd [2010] 2 MLJ 491

Nurul Izzah Anwar v. Tan Sri Khalid Abu Bakar [2018] 7 CLJ 622

Legislation referred to:

Defamation Act 1957, ss. 6, 8, 9

Lotteries Act 1952, s, 3

Malaysian Common Gaming Houses Act 1953, s. 27A