DALAM MAHKAMAH TINGGI MALAYA DI KOTA BHARU

DALAM NEGERI KELANTAN, MALAYSIA

RAYUAN JENAYAH NO: 42S(A)-39-7/16

(MAHKAMAH SESYEN KOTA BHARU, KELANTAN

[NO. SKB(A):61-11-09/16]

BETWEEN

NIK ADIB BIN NIK MAT ... APPELLANT

AGAINST

PUBLIC PROSECUTOR ... RESPONDENT

GROUNDS OF JUDGEMENT
(ON SENTENCE)

A. BACKGROUND

[1] The Accused/Appellant was charged before the Sessions Court for an offence of posting pictures and comments regarding certain leaders on the website which were offensive and false, an offence under subsection 233(1)(a) of the "Communication and Multimedia Act 1998" (Act 588) and punishable under subsection 233(3) of the same Act.

[2] The Accused was also charged for having in his possession obscene films and photographs, an offence under section 5(1)(a) of the "Film Censorship Act 2002" (Act 2002) punishable under section 5(2) of the same Act.

[3] At the conclusion of the case, the learned Sessions Judge found him guilty and convicted him and sentenced him to 1 year imprisonment for the 1st charge from the date of sentencing, and 1 year imprisonment for the second charge which was to be served upon completion of the first imprisonment.

[4] Dissatisfied, the Accused/Appellant filed an appeal before this court on both conviction and sentence. Upon hearing the appeal, this court had allowed the Accused/Appellant's appeal in part whereby the appeal against conviction was dismissed but the appeal against sentence was allowed.

[5] This court had set aside the sentence imposed by the learned Sessions Judge and substituted it with 1 week imprisonment and a fine of RM3,000 in default 3 months imprisonment for the first charge and a fine of RM10,000 in default 1 ½ years imprisonment for the second charge.

[6] Dissatisfied, the Public Prosecutor filed an appeal to the Court of Appeal. Hence here are the grounds for that decision.

B. THE CHARGES

[7] The charges are as follows:

First Charge

> *"Bahawa kamu pada 08/08/2014 jam lebih kurang 9.00 malam di alamat Lot 2137 Jalan Maahad Saniah dalam daerah Pasir Puteh, dalam Negeri Kelantan telah menggunakan perkhidmatan aplikasi internet secara sadar membuat dan memulakan penghantaran gambar bertajuk 'Pesta Bogel' yang berunsur lucah dan palsu sifatnya di https://www.facebook.com/kopi.rajaakar dengan niat untuk menyakitkan hati orang lain. Oleh itu kamu telah melakukan satu kesalahan di bawah subseksyen 233(1)(a) Akta Komunikasi dan Multimedia 1998 (Akta 588) dan boleh dihukum di bawah Subseksyen 233(3) akta yang sama."*

Second charge

> *"Bahawa kamu pada 21 Ogos 2014 jam lebih kurang 4.45 pagi di alamat Lot 2137, Jalan Maahad Saniah dalam daerah Pasir Puteh, dalam Negeri Kelantan telah ada dalam milikan kamu filem-filem dan bahan publisiti filem yang lucah. Dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 5(1)(a) Akta Penapisan Filem 2002 yang boleh dihukum di bawah seksyen 5(2) akta yang sama."*

C. THE FACTS OF THE CASE

[8] The facts of the Prosecution's case can be gleaned from the learned judges grounds of judgment at pages 24 to 26 of the Appeal Record as follows:

> *"Keterangan pihak pendakwaan ialah pada 8/8/2014, jam lebih kurang 9.00 malam, semasa SP3 membuka Facebook beliau melihat maklumat yang dihantar oleh 'friend' di dalam Facebook beliau. Antaranya beliau melihat satu gambar jelik beberapa pemimpin negara di atas nama 'friend' "Kopi Raja Akar". Beliau telah membuat salinan kepada gambar tersebut yang bertajuk "pesta bogel" (P8) dan juga membuat laporan polis (P9). Pada 30/8/2014 dan 31/8/2014, SP3 telah menerima beberapa sms dari seseorang yang menggunakan nombor telefon 01125070528 (salinan sms - P10). SP3 mengagak ianya berkait dengan laporan polis yang dibuatnya.*
>
> *Pada 21.8.2014, lebih kurang 4.45 pagi, SP2 bersama beberapa anggota termasuk SP4 telah rumah Lot 2137, Jalan Maahad Saniah, Pasir Puteh, Kelantan. SP2 telah mengetuk pintu di mana OKT telah muncul memperkenalkan dirinya. SP2 telah memaklumkan tujuan penangkapan dan OKT telah membenarkan SP2 masuk. OKT telah menunjukkan sebuah 'laptop' (P6) dan sebuah 'adaptor' (P7) di dalam sebuah bilik. Semasa dirampas P6 dalam keadaan 'off' dan berada di atas meja dalam bilik yang ditunjukkan oleh OKT. Keadaan skrin terbuka sepenuhnya. Menurut SP4 terdapat retakan pada skrin P6. SP2 telah merampas P6 dan P7. OKT dan barang-barang kes*

telah dibawa ke IPD Pasir Puteh dan satu laporan polis (P4) telah dibuat oleh SP2. Pada 25/8/2014, SP8 telah menerima P6 dan P7 dari SP1. SP8 telah menjalankan analisa terhadap 'hard disk' dalam P6 dan telah menyediakan laporan bertarikh 4.9.2014 (P25). Menurut SP8 beliau telah menjumpai gambar P8. SP8 juga telah menemui beberapa video berunsur lucah. SP8 telah pindahkan video lucah tersebut ke dalam DVD (P17). Menurut SP8 skrin laptop telah rosak. Gambar barisan kabinet bogel telah diedit. P25 menyatakan imej P8 dipercayai di 'download' dari sumber luar dan bukannya dibuat pengubahsuaian menggunakan laptop P6 kerana hanya terdapat satu imej yang berkaitan ditemui dalam laptop P6.

Analisis telah dijalankan oleh SP7. SP7 telah menyediakan satu laporan bertarikh 4.4.2015 (P21). Hasil analisis yang dijalankan oleh SP7 menunjukkan akaun Facebook "Kopi Raja Akar" di alamat https://facebook.com/kopi.rajaakar adalah akaun untuk mempromosikan Kopi Raja Akar yang diuruskan oleh OKT yang memiliki akaun Facebook "Adib Raja Akar" di alamat https:/www.facebook.com/profile.php?id=100004123603276.

SP11 telah menjalankan analisa digital forensik melalui data dalam 'hard disk' dari P6. SP11 telah menyediakan laporan bertarikh 3.5.2016 (P38). Berdasarkan analisa yang dijalankan SP11 menyatakan laman Facebook "Kopi Raja Akar" adalah laman Facebook yang sama dengan Laman Facebook "Adib Raja Akar". Kedua-dua akaun laman Facebook adalah akaun yang sama. OKT adalah pemilik dan orang yang menguruskan akaun Facebook "Kopi

Raja Akar". SP11 juga telah menemui 883 video lucah dalam hard disk tersebut. SP11 telah ekstrak dan letakkan video-video lucah tersebut di dalam satu pen drive (P36)."

D. THE LAW ON APPEAL AGAINST SENTENCE

[9] The law on appeal against sentence is trite that the appellate court should be slow to interfere or disturb with the sentence passed by the court below unless it is manifestly wrong or unsuitable to the proved facts and circumstances of the case. The mere fact that another court might pass a different sentence, provides no reason for the appellate court to interfere if the trial court applies the correct principles of sentencing.

[10] Although there is a plethora of authorities on this point, suffice for this Court to apply the principles of sentencing as enunciated in the decision of the Court of Appeal in **PP v Ling Leh Hoe (2015) 4 CLJ 869** viz:

"[14] The appellate court can and will interfere in the sentence imposed by the lower court if it is satisfied that any of the following four grounds are made out:

(a) The sentencing judge had made a wrong decision as to the proper factual basis for the sentence;
(b) There had been an error on the part of the trial judge in appreciating the material facts placed before him;
(c) The sentence was wrong in principle; or

(d) The sentence imposed was manifestly excessive or inadequate. (See R v. Ball [1951] 35 Cr App. R 164; Loo Weng Fatt v. Public Prosecutor [2001] 3 SLR 313 at para [65]; Public Prosecutor v. UI [2008] 4 SLR (R) 500)."

[11] To generalize it, whilst an appellate court should be slow in interfering the sentence imposed by the trial court in the exercise of their discretion as sentencing is not a science of mathematical application, an appellate court can interfere on the sentence if it is wrong in principle or the sentence imposed is manifestly excessive or manifestly inadequate. In fact the court of Criminal Appeal in **Dookes v PP (2010) SCJ 71** said:

"However, even if there is nothing wrong with the principle, the sentence may be increased by the appellate court if it is unduly lenient."

E. THE GROUNDS OF JUDGMENT OF THE SESSIONS JUDGE

[12] The learned judge gave quite a brief ground of judgment regarding sentence where he said at pages 46 to 47 of the Appeal Record as follows:

"Peguambela OKT telah mengemukakan rayuan agar mahkamah menjatuhkan hukuman denda yang paling minima bagi kedua-dua pertuduhan. OKT yang berumur 43 tahun merupakan seorang guru sekolah Yayasan Islam Kelantan (YIK). Kesalahan pertama. Mempunyai 4 orang anak. Isteri OKT juga bekerja sebagai guru. OKT

juga menanggung seorang ibu yang sudah tua dan menanggung ekonomi adik.

Pihak pendakwaan memohon hukuman yang berat bagi kedua-dua pertuduhan.
Mahkamah telah sabitkan OKT di atas kedua-dua pertuduhan dan menjatuhkan hukuman penjara 1 tahun dari tarikh hukuman dijatuhkan (20.7.2016) bagi pertuduhan pertama. Bagi pertuduhan kedua, OKT dijatuhkan hukuman penjara 1 tahun bermula selepas menjalani hukuman pertuduhan pertama.

Mahkamah telah meneliti dan mempertimbangkan faktor-faktor rayuan oleh peguambela OKT dan hujahan pemberatan hukuman oleh pihak pendakwaan. Mahkamah berpendapat selain dari menimbangkan faktor-faktor rayuan berkenaan kepentingan OKT dan keluarga OKT, mahkamah juga hendaklah menimbangkan faktor kepentingan awam. Mahkamah berpendapat kepentingan OKT dan keluarga OKT tidak dapat mengatasi kepentingan awam. Mahkamah berpendapat hukuman yang berat amat penting supaya OKT dan orang lain tidak melakukan kesalahan-kesalahan yang sama. Hukuman denda tidak sesuai diberikan kerana OKT telah melakukan kesalahan yang serius. Pertuduhan pertama melibatkan pemimpin-pemimpin negara yang mempunyai unsur lucah dan palsu manakala pertuduhan kedua juga melibatkan unsur yang lucah OKT sebagai seorang guru yang mengajar di sebuah sekolah agama sepatutnya memberikan teladan kepada anak-anak, pelajar-pelajar dan masyarakat secara amnya, tidak sepatutnya melakukan kesalahan

dalam pertuduhan pertama dan pertuduhan kedua. OKT sepatutnya memikirkan kesan perbuatan beliau sebelum melakukan kesalahan-kesalahan tersebut. Mahkamah berpendapat hukuman yang telah dijatuhkan adalah setimpal dengan kesalahan-kesalahan yang telah dilakukan oleh OKT dan ianya dapat memberikan pengajaran kepada OKT dan orang lain agar tidak melakukan kesalahan-kesalahan tersebut lagi."

F. SUBMISSIONS BY PARTIES

[13] The Defence submitted at the court below that the accused was 43 years old at the time of committing the offence. He worked as a teacher with a salary of only RM1,500.00 a month and has 4 children. He is the sole bread winner of the family.

[14] The Defence further submitted that the accused was a first offender and has no criminal record. A second chance should be given to him to mend himself.

[15] The learned counsel also submitted that the offence under section 233(1)(a) of the Act carries a maximum sentence of 1 year imprisonment with a provision of a fine of not more than a fifty thousand ringgit. Hence to sentence the accused to a maximum sentence is very harsh and excessive being a first offender. Meanwhile for the second offence, the section provides a sentence of a fine of not less than RM10,000 and not more than RM50,000 or an imprisonment of not more than 5 years or both. Hence to

impose a sentence of 12 months imprisonment likewise is harsh and excessive being a first offender.

[16] The Defence futher submitted that the accused did not profit from the acts done. Further there was no violence involved and that the accused gave all his cooperation to the authorities whilst under investigation.

[17] Infact the accused regretted and was remorseful of his act and promise not to repeat the mistakes.

[18] The Prosecution on the other hand submitted inter alia that these 2 offences are serious offences. The public interest should supersede the personal interest of the accused before meting out the sentence. An appropriate sentence should be meted out.

G. ANALYSIS AND FINDING OF THE COURT

[19] This court shares the view that cyber offences are serious offences especially the offence at hand, as those offensive materials could be easily disseminated to the public at large within seconds at a touch of a button.

[20] The Sessions Judge was right in complying with the principles of sentencing that the public interest is of paramount importence and should supersede the interest of the Accused/Appellant.

[21] However this court was of the considered opinion that the personal interest of the Accused should not be disregarded at all (**Tan Sri Abdul**

Rahim Noor v PP (2001) 1 MLJ 193). There are circumstances in which public interest itself warrants that an accused should not be put behind bars for far too long as that will do more harm than good as it might cause a crushing effect on him and could turn him into a hardened criminal instead.

[22] Thus, this court was inclined to hold the view that a sentence that could reform him and turn his life from a criminal to an honest life must be favoured. In the words of Hashim Yeop Sani, High Court Judge Malaya, as he then was in the case of **Loo Choo Fatt (1976) 2 MLJ 256** who said:

> *"The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living".*

[23] Hence, this court had to strike a balance in order to do justice to the Accused/Appellant and to the public. Towards that end, this court had taken into account of the fact that the Accused/Appellant had repented and was remorseful, and regretted what he had done and also of the fact that he has many children to take care and the sole bread winner of the family. Further, he had lost his present job as a teacher.

[24] In meting out the sentence this court had also taken into consideration the circumstances surrounding the offence committed by him. The offence was committed by using his own laptop/computer, forwarding and disseminating information regarding his part time business i.e. selling and promoting coffee products, including the unlawful dissemination of images and materials that was the subject of the first charge. Everyone would know that the images were photographs of naked

children superimposed with the images of national leaders, amongst others. Little did he realize that this would land him in trouble with the authorities that eventually led to his being arrested and later charged.

[25] Whilst the court does not condone this act, this court was of the considered view that the circumstances surrounding the committing of these 2 offences should be considered as there were no violence involved as the accused "went on a frolic of his own". Further the accused did not profit from this unlawful acts.

[26] This court also had considered the trend of sentencing for these 2 offences. From the various authorities, the sentencing trend seems to show that the sentence imposed were mainly fines or bound over for good behavior. In the case of **PP v Muslim Ahmad (2013) 5 CLJ 822**, the accused was fined RM10,000 for the charge under Act 588. In the case of **Ahmad Abdul Jalil v PP (2015) 5 CLJ 580**, the accused was fined RM20,000 for the same offence. Likewise for the second charge, the trend showed that fines of between RM10,000 to RM20,000 were usually imposed.

[27] This court had also considered that the Accused/Appellant was a first offender. As a first offender, this court took into consideration that this was the only crime he committed as he has no criminal record before. Hence a special consideration should be given to him in so far as sentencing is concerned so that he can mend his ways and "turn over a new leaf". Further this court took into consideration that he would face difficulties in finding a new job, after serving his time in prison.

[28] The court also took cognizance that the maximum sentence for the first charge was 1 year imprisonment. Yet the learned judge sentenced him for the maximum sentence even though he was a first offender. This was a misdirection on the part of the learned judge which warranted appellate intervention.

[29] After considering all the factors aforesaid, this court opined that a fine or a bound over were not suitable but it warranted some form of custodial sentence and fines.

H. CONCLUSION

[30] In the upshot for the aforesaid reasons, this court allowed the Accused's/Appellants appeal and substituted it with 1 week imprisonment and a fine of RM3,000 in default 3 months imprisonment for the first charge and for the second charge, a fine of RM10,000 in default 1 ½ years imprisonment.

Dated: 16 November 2017

(DATO' AHMAD BIN BACHE)
Pesuruhjaya Kehakiman
Mahkamah Tinggi Kota Bharu
Kelantan.

Pendakwa Raya/Responden:	TPR Puan Ainul Wardah binti Shahidan, Pejabat Penasihat Undang-Undang Negeri Kelantan, Blok 5, Tingkat Bawah, Kota Darulnaim, 15050 Kota Bharu, Kelantan.
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