Pendakwa Raya
v
Muslim bin Ahmad

High Court, Kuala Lumpur – Criminal Appeal No. 42S-50-2011
Amelia Tee Hong Geok Abdullah J

August 28, 2012

Criminal law *– Improper use of network facilities or network service – Posting of offensive comments – Appeal against acquittal and discharge of accused – Defence of alibi – Failure to serve fresh notice of alibi after hearing was adjourned – Failure to include particulars of place where accused alleged was at time of commission of offence as well as names and addresses of witnesses intended to be called to establish alibi – Whether breach of s 402A of the Criminal Procedure Code – Whether s 402A mandates service of fresh notice of alibi after hearing is adjourned if actual hearing has yet to commence – Whether defence a bare denial and an afterthought – Whether witnesses were interested witness – Whether in absence of proof of relevant professional qualifications and experience, evidence of expert witness to be disregarded – Criminal Procedure Code, s 402A – Communications and Multimedia Act 1998, s 233(1)(a) – Evidence Act 1950, s 45*

Criminal procedure *– Defence – Alibi – Appeal against acquittal and discharge on charges of posting offensive comments on state government's official portal – Failure to serve fresh notice of alibi after hearing was adjourned – Failure to include particulars of place where accused allegedly was at time of commission of offence as well as names and addresses of witnesses intended to be call to establish alibi – Whether breach of s 402A of the Criminal Procedure Code – Whether s 402A mandates service of fresh notice of alibi after hearing is adjourned if actual hearing has yet to commence – Criminal Procedure Code, s 402A – Communications and Multimedia Act 1998, s 233(1)(a)*

The accused ("the respondent") was charged under s 233(1) of the Communications and Multimedia Act 1998 ("the Act"), with three counts of posting offensive comments on the Perak State Government's official portal. The respondent denied the charges and claimed to have been at work at the material time when the offensive comments were posted. In support of his defence of alibi, the respondent called two of his employees ("DW2" and "DW3") to confirm that he was at his workplace at the material time. The respondent also called an expert witness ("DW4") to testify that e-mail spooking had taken place. A notice of alibi was served by the respondent on the prosecution ("the appellant") on November 6, 2009 i.e. three days before the schedule dates of hearing. The matter was however not heard on the scheduled dates but was adjourned and no new notice of alibi was served by the respondent. The respondent was subsequently acquitted and discharged on all counts.

The appellant appealed against the said acquittal and discharge on the ground that no fresh notice of alibi was served by the respondent before the commencement of the actual hearing of the matter and that the notice of alibi

was not in compliance with s 402A of the Criminal Procedure Code ("CPC"). In this respect, it was contended that the respondent had not included in the said notice of alibi, particulars of the place where he allegedly was at the material time of the commission of the offence, nor had he included the names and addressed of the witnesses he intended to call to support his alibi.

Issues

1. Whether the respondent was required to issue a fresh notice of alibi after the hearing which was not heard on the scheduled dates, was adjourned.
2. Whether the respondent's notice of alibi was defective for non-compliance with the strict requirements of s 402A of the CPC.
3. Whether DW2 and DW3 were interested witnesses.
4. Whether DW4 can be regarded as an expert witness within the meaning of s 45 of the Evidence Act 1950.
5. Whether the trial judge had erred in acquitting and discharging the respondent.

Held, accused guilty on all counts and sentenced to a fine of RM10,000 in respect of each charge and in default of each charge, to six months' imprisonment

1. There is nothing in s 402A of the CPC which mandates the service of a fresh notice of alibi after the hearing of the case is adjourned if the actual hearing has yet to commence. In the circumstances, the service of the notice of alibi on November 6, 2009, was well before the date of commencement of the trial and was therefore in compliance with the time requirement for service of the notice as set out in s 402A(1). [*see p 441 para 11 lines 15-29*]
2. It is trite that the provisions of s 402A of the CPC are evidential and not merely procedural and that the failure to comply with the provisions thereunder, would render any alibi evidence adduced, inadmissible. In this respect and contrary to the findings of the trial judge that there had been "substantial compliance" in that the phone numbers of DW2 and DW3 were included in the notice, "substantial compliance" with s 402A(2) of the CPC is insufficient for the purpose of determining whether there has been compliance with the said subsection. Following the Supreme Court's decision in *Vasan Singh v Public Prosecutor* [1989] 1 CLJ 166, the requirements of the pre-trial notice under s 402A of the CPC must be strictly complied with. In this respect and by his failure to state where he and his witnesses were at the material time as well as the addresses of the said witnesses, the respondent had thereby failed to comply with the strict requirements of s 402A. By reason thereof, the respondent's notice of alibi was therefore defective. [*see p 441 para 12 lines 31-38; p 442 para 16 line 18 - para 17 line 36*]
3. Based on their evidence, DW2 and DW3 cannot be regarded as disinterested witnesses. It was not merely the fact that they are employees of the respondent, but rather their clear and professed willingness to render whatever assistance necessary, to the respondent. In light of the finding that the notice of alibi was

defective and that any alibi evidence adduced should be disregarded, the issue as to the value of the alibi evidence of DW2 and DW3 became moot and ought not to be considered. [*see p 443 para 22 lines 26-33*]

4. No evidence was led as regards DW4's professional qualification if any, especially in the field of computer forensics. DW4's claim that he is an expert in the field of information security and computer forensics and to having been actively involved with the Cyber Terrorism Unit of Interpol since 2000, without more, is insufficient to establish his experience. Having admitted to not carrying out any analysis of the exhibits and the server in this instance, and apart from merely stating that e-mail spoofing can be done and showing how it is done, no proof was adduced by DW4 to show that such e-mail spoofing had in fact taken place. In the circumstances, DW4's evidence ought to be disregarded. [*see p 446 para 34 line 18 - para 35 line 37*]

5. The decision of the trial judge was clearly in error and against the weight of the admissible evidence as the respondent had not cast any reasonable doubt on the appellant's case. Accordingly, the said decision ought to be set aside and substituted with a finding of guilty and conviction on all three charges. [*see p 447 para 37 line 7 - para 38 line 21*]

Cases referred to by the court

Davendar Singh a/l Sher Singh v PP [2012] 3 AMR 489; [2012] 3 AMR 489, CA *(foll)*
PP v Kandasamy a/l Muniandy [2005] 4 AMR 169, HC *(ref)*
PP v Lim Chen Len [1981] 2 MLJ 41, HC *(ref)*
PP v Lin Lian Chen [1991] 1 MLJ 316, HC *(ref)*
PP v Ling Tee Huah [1982] 2 MLJ 324, HC *(foll)*
Vasan Singh v PP [1989] 1 CLJ 166, SC *(foll)*

Legislation referred to by the court

Communications and Multimedia Act 1998, s 233(1)(a), (3)
Criminal Procedure Code, ss 294, 402A, 402A(1), (2)
Evidence Act 1950, s 45

Diar Isda Yasmin, DPP (AG's Chambers) for appellant
K Periasamy (Periasamy & Co) for respondent

Judgment received: October 4, 2012

Amelia Tee Hong Geok Abdullah J

[1] The respondent, Muslim bin Ahmad, was charged before the Sessions Court at Kuala Lumpur for three offences under s 233(1)(a) of the Communications and Multimedia Act 1998 for posting offensive comments on the Perak State Government Official Portal on February 7, 2009 and February 8, 2009. The three charges were amended twice. The final charges against the respondent read as follows:

Pertuduhan Pindaan Pertama (Pindaan)

Bahawa kamu pada 7 Februari 2009 jam lebih kurang 2.21 petang di alamat No. 1, Jalan 5/26, Taman Sri Rampai, Setapak, dalam Wilayah Persekutuan Kuala Lumpur didapati menggunakan perkhidmatan aplikasi iaitu internet melalui alamat Internet Protocol 202.190.131.200 secara sedar membuat dan memulakan penghantaran komen yang jelik sifatnya iaitu, "**damn your sultan**" di Portal Rasmi Kerajaan Negeri Perak iaitu http://www.perak.gov.my dengan niat untuk menyakitkan hati orang lain. Oleh itu, kamu telah melakukan satu kesalahan di bawah Seksyen 233(1) (a) Akta Komunikasi Multimedia 1998 [Akta 588] dan boleh dihukum di bawah Seksyen 233(3) Akta yang sama.

Pertuduhan Pindaan Kedua (Pindaan)

Bahawa kamu pada 7 Februari 2009 jam lebih kurang 2.27 petang di alamat No. 1, Jalan 5/26, Taman Sri Rampai, Setapak, dalam Wilayah Persekutuan Kuala Lumpur didapati menggunakan perkhidmatan aplikasi iaitu internet melalui alamat Internet Protocol 202.190.131.200 secara sedar membuat dan memulakan penghantaran komen yang jelik sifatnya iaitu, "**your sultan kantoi**" di Portal Rasmi Kerajaan Negeri Perak iaitu http://www.perak.gov.my dengan niat untuk menyakitkan hati orang lain. Oleh itu, kamu telah melakukan satu kesalahan di bawah Seksyen 233(1) (a) Akta Komunikasi Multimedia 1998 [Akta 588] dan boleh dihukum di bawah Seksyen 233(3) Akta yang sama.

Pertuduhan Pindaan Ketiga (Pindaan)

Bahawa kamu pada 8 Februari 2009 jam lebih kurang 4.39 petang di alamat No. 1, Jalan 5/26, Taman Sri Rampai, Setapak, dalam Wilayah Persekutuan Kuala Lumpur didapati menggunakan perkhidmatan aplikasi iaitu internet melalui alamat Internet Protocol 202.190.131.200 secara sedar membuat dan memulakan penghantaran komen yang jelik sifatnya iaitu, "**what\'s the kantoi with your sultan**" di Portal Rasmi Kerajaan Negeri Perak iaitu http://www.perak.gov.my dengan niat untuk menyakitkan hati orang lain. Oleh itu, kamu telah melakukan satu kesalahan di bawah Seksyen 233(1) (a) Akta Komunikasi Multimedia 1998 [Akta 588] dan boleh dihukum di bawah Seksyen 233(3) Akta yang sama.

[2] At the close of the prosecution's case, the learned Sessions Court judge had acquitted and discharged the defendant on all three charges without calling for his defence. Upon appeal by the Public Prosecutor, the decision was reversed and the High Court had directed that the defence be called in respect of all the charges.

The respondent's defence

[3] The respondent's defence was that he did not post the offensive comments. He denied using his computer to send the offensive comments. In his defence, he testified that he was at his factory in Batu Caves on February 7, 2009 and February 8, 2009 and that it was usual for him to go to work on weekends since the factory belonged to him. In support of his defence, he called DW2, Mohd Hisyam bin Nor, and DW3, Mohd Shahrom bin Mohd Rosly, both employees at his factory, to confirm that he had gone to work during that weekend.

[4] The respondent had also called one Krishnan a/l Raja Gopal ("DW4") as his expert witness. He talked about IP spoofing and email spoofing and demonstrated how IP Spoofing is done. Based on his examination of the report P20, he was of the view that the evidence was insufficient to determine who posted the offensive comments. It is worth noting that DW4 came to his conclusions without actually examining any exhibits or the server.

[5] At the close of the defence case, the Sessions Court judge found that the defence had raised a reasonable doubt on the prosecution's case and acquitted and discharged him on all three charges. The Public Prosecutor, being dissatisfied with the aforesaid decision, has lodged an appeal against the said decision.

The broad grounds of appeal

[6] From the petition of appeal, it can be seen that the appellant has raised five broad grounds of appeal, namely:

(i) That the respondent's alibi defence was in breach of s 402A of the Criminal Procedure Code;

(ii) That the respondent's defence was but a bare denial and not to be believed;

(iii) That the respondent's defence is an afterthought;

(iv) DW2 and DW3 were interested witnesses and not to be believed; and

(v) The evidence of DW4, the respondent's expert witness, should be disregarded.

The court will deal with each of these broad grounds in turn.

The notice of alibi – s 402A of the CPC

[7] The appellant submits that the respondent's alibi defence had not complied with s 402A of the Criminal Procedure Code. According to the appellant, the respondent had on November 6, 2009 served them with a notice of alibi dated October 28, 2009. This was three days before the commencement of the hearing which was initially scheduled from November 9 to 13, 2009. From the grounds of decision of the learned Sessions Court judge, the prosecution had informed the court that that they had just been served with the alibi notice and had not had time to verify the particulars and information given in the notice. The court had then adjourned the hearing of the case to June 14 to 25, 2010.

[8] The appellant contends that the notice of alibi was invalid because:

(i) No fresh notice was served by the respondent before the hearing commenced on June 14 to 25, 2010;

(ii) The notice of alibi was defective as there was non-compliance with s 402A(2).

[9] Section 402A of the Criminal Procedure Code reads as follows:

> 402A. (1) Where in any criminal trial the accused seeks to put forward a defence of alibi, evidence in support of it *shall not be admitted* unless the accused shall have given notice in writing of it to the Public Prosecutor at least ten days before the commencement of the trial.
>
> (2) The notice required by subsection (1) shall include particulars of the place where the accused claims to have been at the time of the commission of the offence with which he is charged, together with the names and addresses of any witnesses whom he intends to call for the purpose of establishing his alibi.

[10] The notice of alibi does not appear to have been marked as an exhibit. It has not been included in the appeal record and is therefore not before the court. However, both parties as well as the learned Sessions Court judge had referred to it and its existence is therefore not in doubt.

[11] On the issue of whether the respondent is required to serve a fresh notice of alibi after the hearing was adjourned from November 9 to 13, 2009 to June 14 to 25, 2010, the court is of the view that there is nothing in s 402A of the Criminal Procedure Code which mandates the service of a fresh notice of alibi after the hearing of the case is adjourned if the actual hearing has yet to commence. Reference is made to the case of *PP v Lim Chen Len* [1981] 2 MLJ 41 where His Lordship, Mohamed Azmi J (as His Lordship then was) held that the words "commencement of the trial" meant the *commencement of the actual trial* and not the date when the accused was first charged in court. It follows therefrom that the date of commencement of the trial would not be November 9, 2009, the initial date scheduled for the commencement of the hearing, but June 14, 2010 when the trial actually started. The court finds that the service of the notice of alibi on the appellant on November 6, 2009 was well before the date of the commencement of the trial and would therefore be in compliance with the time requirement for service of the notice as set out in s 402A(1).

[12] However, it must be noted that s 402A contains a subsection (2) which requires the notice under subsection (1) to include particulars of the place where the accused claims to have been at the time of the commission of the offence as well as the names and addresses of any witnesses whom he intends to call for the purpose of establishing his alibi. It is trite that the provisions of s 402A are evidential and not merely procedural and that the failure to comply with the provision would render any alibi evidence adduced to be inadmissible.

[13] In the case of *Vasan Singh v PP* [1989] 1 CLJ 166, the Supreme Court in dealing with the issue of alibi notice under s 402A of the Criminal Procedure Code had held as follows:

There is certainly now abundant authority that if witnesses are to be called in support of an alibi defence, then the requirements of a pre-trial notice must be complied with – *strictly*. (Emphasis added.)

[14] In our present appeal, the appellant's complaint is that the respondent's notice of alibi was not in compliance with s 402A(2) of the CPC in that the notice had only stated that the respondent was together with his employees without stating the place where they were at. Further, the addresses of the witnesses were not stated in the said notice. The court finds this fact to be undisputed where the learned Sessions Court judge had stated that "It is not in dispute that the notice of alibi served on the prosecution merely mentioned that the defendant was with his employees and disclosed their names and handphone numbers."

[15] The court notes that this assertion of non-compliance with s 402A(2) of the Criminal Procedure Code was never responded to at all by the respondent in his submissions which had only dealt with the issue of whether a second notice of alibi had to be served on the appellant.

[16] In her grounds of decision, the learned Sessions Court judge had agreed that the notice of alibi in the present case "did not state with clarity and precisely the particulars stated in subsection (2)". However, she was of the view that there was "substantial compliance" as the phone numbers of DW2 and DW3 were given in the notice. She went on to say that "It would be reasonable and safe to infer that the defendant must have given a statement to the police that he was at the factory in view of the fact that the prosecution did not apply to impeach his credit when he alleged this in court."

[17] In respect of this issue, the court finds that "substantial compliance" with s 402A(2) of the Criminal Procedure Code is insufficient for the purposes of determining whether there has been compliance with that subsection. Following the Supreme Court's decision in *Vasan Singh v PP* (supra), which decision this court is bound to follow, the requirements of the pre-trial notice under s 402A must be strictly complied with. The court finds that by not stating the place where the respondent and his witnesses were supposed to be at the time of the commission of the offence, and the addresses of the said witnesses, the respondent had failed to comply with the strict requirements of s 402A. As such, the court finds that the respondent's notice of alibi, with its several deficiencies, to be defective.

[18] And what are the consequences of a defective notice of alibi? It is trite law that where no notice of alibi under s 402A of the Criminal Procedure Code is given or where the notice is defective for failure to comply strictly with the said provision, any evidence in support of the alibi must be excluded from the consideration of the defence evidence. In such a situation, the court has no discretion to waive the requirement of a pre-trial notice. In this case the court finds that the learned Sessions Court judge was clearly in error when

she accepted the notice of alibi as being in "substantial compliance" of the provisions of s 402A of the Criminal Procedure Code.

Are DW2 and DW3 interested witnesses and not to be believed?

[19] In light of the court's finding as regards the respondent's notice of alibi as being defective and to be excluded from the consideration of the court, it would be expedient now to deal with the fourth broad ground as regards the evidence of DW2 and DW4 and whether they are interested witnesses and not to be believed.

[20] DW2, Mohd Hisyam bin Nor, is a welder working in Ultimate Engineering Sdn Bhd, the respondent's company, since 2000. DW3, Mohd Shahrom bin Mohd Rosly, has been a QC supervisor with the respondent's company since 2003. At p 141 of the appeal records, the court notes the following evidence from DW2:

> En Muslim ada beri bantuan kepada saya iaitu kemudahan kerja. Buat masa sekarang saya ada tolong dia. Jika dia susah saya akan tolong. *Apa-apa sahaja bantuan yang diminta saya akan tolong*. (Emphasis added.)

[21] And at p 145 of the appeal records, the court notes the following evidence from DW3:

> Hubungan saya dan Majikan adalan sangat rapat. Majikan selalu membantu saya jika saya dalam kesusahan. Majikan adalah seorang yang bertanggungjawab dan menjaga kebajikan pekerja-pekerja.
>
> *Jika majikan ada meminta bantuan, saya sanggup memberi bantuan yang dimaksudkan* (Emphasis added.)

[22] From the above evidence of DW2 and DW3, the court is of the view that these two witnesses cannot be regarded as disinterested witnesses. It is not just the fact that they are employees of the respondent, but rather their clear and professed willingness to render the respondent whatever assistance necessary that makes the court cautious in viewing their evidence. Be that as it may, in light of the court's finding that the notice of alibi served by the respondent was defective and that any alibi evidence adduced should be disregarded, the issue about the value of the alibi evidence of DW2 and DW3 becomes moot.

[23] As such, on this issue, the court finds that in respect of the evidence of DW2 and DW3, their evidence insofar as they amount to alibi evidence for the respondent will not be considered by the court. DW2's evidence to the effect that on February 7, 2009 and February 8, 2009 (a Saturday and a Sunday) he had worked the whole of those two days and that he saw that the respondent was in the office should not be considered. DW3's evidence is more ambivalent. In the final analysis, taking into account the entirety of DW3's evidence, he was not able to say if the respondent had come to work on the February 7, 2009 and February 8, 2009.

Whether the respondent's evidence is a bare denial and an afterthought?

[24] The court notes that with the exclusion of the alibi defence from the testimony of the respondent, the evidence of the respondent becomes in effect a bare denial. The court has carefully perused the testimony of the respondent appearing in the appeal records. He admitted that he had a computer at home and had known how to use the internet since 1999. He admitted surfing the internet for his business. He claimed that he had gone into the PM's website but that was only to request for assistance. However during cross-examination, he admitted that he had visited the PM's website and had posted comments on the said website.

[25] According to the respondent, he works every weekend. He would usually arrive at the office at 8.30 a.m. and work until 4.00 p.m. and sometimes even into the night. The court notes his initial evidence that:

> Pada 7 dan 8/2/2009 *saya tidak ingat* bila tapi Saturday dan Sunday biasanya saya bekerja di office.

which evidence would show that the respondent did not in fact remember about the two dates in question. However, he admitted that he could leave the office at any time as "*saya bekerja sendiri dan ia adalah company saya*." The journey from his home to his office takes about 15 minutes.

[26] The respondent denied posting the offensive comments at http://www.perak.gov.my. Whilst he agreed that there were Saturdays and Sundays in 2009 when he did not work, however he denied that he *did not* work on February 7, 2009 and February 8, 2009.

[27] This then is the sum total of the respondent's testimony.

[28] His wife, Aziah binti Mohd Khalid (PW5), is a technician with Jabatan Penyiaran. She testified that on February 7, 2009 and February 8, 2009, she was on shift duty and had gone to work. According to her, she should work until 5.00 p.m. but on weekends was allowed to leave early, usually at about 4.00 p.m. On February 7, 2009 and February 8, 2009, her daughter Qhadijah had borrowed her car and as such she had to be sent to and fetched from work by her husband, the respondent. Before leaving the office she would call him and he would be waiting when she was ready to leave the office. It takes between 30 to 45 minutes from the house to Angkasapuri.

[29] Usually, the respondent would invite her to have a drink first before going home. On February 7, 2009 and February 8, 2009, they had gone for a drink before going home and, as such, had gone home late. She could not recall the shop where they had the drinks.

[30] The court notes that although his wife had suggested that the respondent had picked her up from her office at Angkasapuri and that they had gone from drinks, the respondent himself had *NOT* testified that he had fetched his wife from work on the material dates. As the court has stated earlier, the

respondent's defence is but a bare denial. And, as held by Yusioff Mohamed J in *PP v Ling Tee Huah* [1982] 2 MLJ 324, "A mere denial without other proof to reasonably dislodge the prosecution's evidence is not sufficient".

The evidence of DW4, the respondent's expert witness

[31] The final broad ground of appeal raised by the appellant relates to the evidence of DW4, the respondent's expert witness. The appellant raises the query as to whether Krishnan a/l Rajagopal (DW4) can be regarded as an expert within the meaning of s 45 of the Evidence Act 1950. The appellant submits that DW4 was held out to be an expert witness without the respondent first establishing his expertise. In the case of *PP v Lin Lian Chen* [1991] 1 MLJ 316, His Lordship Mokhtar Abdullah J (as His Lordship then was) found that the prosecution had failed to prove a prima facie case based on inter alia the failure to prove the expertise of the chemist. And at p 317, His Lordship had this to say:

> The prosecution had elected to call Mr Primulapathi Jaya, the government chemist (PW2) to give expert opinion that the drug examined by him (and which formed the subject matter of the charge) was heroin.
>
> All that the prosecution had adduced to show that PW2 was an expert was PW2's testimony, as follows:
>
> > "I have been with the Chemistry Department for 13 years. I have a BSc (Hons) degree majoring in Chemistry. I have done a Diploma in Blood Seriology."
>
> That is all. Apart from the fact that PW2 was a graduate in Chemistry with 13 years experience in the Chemistry Department, no evidence was led at all by the learned deputy public prosecutor that this witness had the necessary experience or the experience in the analysis of dangerous drugs, especially heroin, or for that matter, had given evidence in court on the analysis of drugs, especially heroin, or that his expert testimony had been accepted by the court. Therefore, had the prosecution in this particular case proved PW2 to be an expert whose opinion and finding could be considered and accepted by the court? Strictly speaking, the prosecution had failed in law to provide the basis for the reception of the expert opinion of PW2 under s 45 of the Evidence Act 195. The learned deputy public prosecutor was either unaware or unmindful of the salutary advice of Hashim J in *Wong Chop Saow v PP*:
>
> > "May I, with respect, suggest that to avoid confusion the expert witness should give his evidence as follows. He should first state his qualifications as an expert. He shall then state that he has given evidence as an expert in such cases and that his evidence has been accepted by the courts."
>
> It is only after these basic steps have been established that the expert witness then proceeds to describe the subject matter examined by him and accordingly gives his opinion based on such examination.

[32] The court has carefully perused the appeal records and the evidence of DW4. As can be seen at p 148 of the appeal records, all that DW4 has stated as regards his alleged expertise is as follows:

> Basically what I do is that I'm an expert witness in the field of Information Security and Computer Forensics.
>
> I started in 1998 but officially and actively in 2000 in Cyber Terrorism Unit of Interpol. I've been in this field 11 years.
>
> My experience covers five continents and across 30 countries. Some of the countries in which I constantly train and handhold are Kingdom of Saudi Arabia, Irish Guardia, Nigeria, Ghana, Policia Federal in Mexico and etc.

[33] During cross-examination, DW4 had admitted at p 156 of the appeal record that he had never given evidence in court before although he claimed that he had "buat domestic inquiry" and forensic investigations in Malaysia. He had also confirmed that his opinion in court was based on his experience *without carrying out any analysis on the exhibit and server*.

[34] In the case of *PP v Lin Lian Chen* (supra), the High Court had found that merely stating that he had a BSc (Hons) degree majoring in Chemistry, a Diploma in Blood Seriology and 13 years of working experience with the Chemistry Department was insufficient to establish the chemist with the status of an expert. In our present case, far less has been established from DW4. The court agrees that no evidence has been led as regards DW4's professional qualifications, if any, especially in the field of computer forensics. The court is of the considered view that merely stating that he is an expert in the field of Information Security and Computer Forensics and has been actively with the Cyber Terrorism Unit of Interpol, allegedly since 2000, *without more*, is insufficient to establish his experience. Further, the court expresses more than a little scepticism as regards this evidence. From the appeal records, DW4 was 32 years of age in 2011. If he had been with the Cyber Terrorism Unit of Interpol since the year 2000, this would mean that he had been actively with Interpol since the age of 21 years. The court finds this extremely difficult to believe in the absence of proof of relevant professional qualifications and experience.

[35] The court further notes that DW4 had admittedly not carried out any analysis of the exhibits and server in this case. In effect, DW4's evidence was in fact based on his study of PW9's case report (P20). The court is of the considered view that apart from merely saying that email spoofing can be done and showing how it could be done, no proof has been advanced by DW4 to show that email spoofing *had in fact taken place* in this particular case. As such, on this issue, based on the evidence and decided authorities, the court is constrained to disregard the evidence of DW4.

Conclusion

[36] The court is fully aware that a High Court hearing an appeal is generally reluctant to disturb a finding of fact by the trial judge as the trial judge would have had the advantage to seeing and hearing the witnesses first hand. However, there are circumstances where it would still be proper for the court

to do so. In the Court of Appeal case of *Davendar Singh a/l Sher Singh v PP* [2012] 3 AMR 489, His Lordship Azahar Mohamed JCA held that:

> … it would be open to us to upset the findings made by a trial judge if such a finding is not supported by evidence or the decision is against the weight of the evidence or there is no proper judicial evaluation of the evidence or there is misdirection in law or the trial court has fundamentally misdirected itself.

[37] In this case, the learned Sessions Court judge was clearly in error when she accepted the respondent's alibi notice as having complied with s 402A of the Criminal Procedure Code and accepted the alibi defence. She was also in error when she accepted DW4 as an expert witness and relied on his alleged expert evidence. Such errors would directly impact on the final decision arrived at by the learned Sessions Court judge in acquitting and discharging the respondent on all the charges. The decision of the learned Sessions Court judge was clearly against the weight of the admissible evidence adduced.

[38] Based on the court's findings as stated above, the learned Sessions Court's decision to acquit and discharge the respondent on all three charges was clearly in error as the respondent had not cast any reasonable doubt on the appellant's case. The court finds that the appellant had proved its case beyond reasonable doubt. The court would therefore set aside the order of acquittal and discharge and substitute it with a finding of guilt and conviction on all three charges.

[39] In mitigation, learned counsel for the respondent told the court that the respondent was 55 years old at the time of the offence. He had no previous convictions. As a businessman, a term of imprisonment would have an adverse effect on his business. In urging the court for a binding over under s 294 of the Criminal Procedure Code, learned counsel cited the case of *PP v Kandasamy a/l Muniandy* [2005] 4 AMR 169. On the contrary, the learned deputy public prosecutor submitted that the offences committed by the respondent were serious offences as the offensive comments were made against the Sultan of Perak and she urged the court to impose a custodial sentence.

[40] The court is of the view that s 294 of the Criminal Procedure Code has no place in offences of this nature. A binding over order would send the wrong message to would be offenders and the public at large that offensively uncontrolled and virulent comments can be indiscriminately posted on the internet without any or serious repercussions. And that is not a message that this court would like to send out.

[41] An offence under s 233(1)(a) of the Communications and Multimedia Act 1998 is punishable under s 233(3) with a fine of not exceeding fifty thousand ringgit or imprisonment for a term not exceeding one year or to both. The court imposed a sentence of a fine of RM10,000 in respect of each charge, and in default of each fine, to six months' imprisonment which it views as fit and proper in all the circumstances of this case.