IN THE COURT OF APPEAL OF MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO: D-02-1859-08/2012

BETWEEN

YB DATO' HAJI HUSAM BIN HJ. MUSA … APPELLANT
(NO. K/P: 591014-03-5069)

AND

MOHD FAISAL BIN ROHBAN AHMAD … RESPONDENT
(NO. K/P: 740910-03-5115/A2785107)

[In the matter of civil suit no: 23-1-2010
In the High Court of Malaya in Kota Bharu, Kelantan]

Between

YB DATO' HAJI HUSAM BIN HJ. MUSA ...Plaintiff
(NO. K/P: 591014-03-5069)

And

MOHD FAISAL BIN ROHBAN AHMAD … Defendant
(NO. K/P: 740910-03-5115/A2785107)

CORAM:
Azahar bin Mohamed, JCA
Mohamad Ariff bin Md Yusof, JCA
Hamid Sultan Bin Abu Backer, JCA

Hamid Sultan Bin Abu Backer, JCA (Delivering Judgment of The Court)

GROUNDS OF JUDGMENT

[1] The appellantôs appeal against the decision of the learned High Court Judge dismissing the defamation suit (on liability) came up for hearing on 5-3-2014 and upon hearing we allowed the appeal and set aside the judgment and remitted the case for assessment of damages before the High Court. My learned brothers Azahar bin Mohamed JCA and Mohamad Ariff bin Md Yusof JCA have read the draft judgment and approved the same. This is our judgment.

[2] The Memorandum of Appeal reads as follows:

> ñ(1) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan bahawa tuntutan perayu/plaintif ditolak dengan kos.
>
> (2) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan bahawa pihak perayu telah gagal membuktikan bahawa responden/defendan adalah penulis dan pemilik bagi ñruangbicarafaisal. blogspot.comò tersebut walaupun plaintif telah mengemukakan dokumen-dokumen seperti Ekshibit P2 (Third Party Search), dan Ekshibit P6 (Artikel yang bertajuk ñMohon Maaf kepada Rakan Bloggerò dari laman blog Ruang Bicara Faisal Rohban) yang menyokong dakwaan perayu/plaintif bahawa responden/defendan adalah pemilik blogspot rangbicarafaisal.blogspot.com. dan juga turut disokong melalui keterangan SP2 (Penyerah Saman) dan juga SP3 (Doktor yang merawat ayah responden/defendan).

(3) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila gagal mengambil kira berdasarkan bukti-bukti yang telah dikemukakan berserta keterangan melalui saksi-saksi, perayu/plaintif, telah berjaya membuktikan kes perayu/plaintif (Burden of Proof) di atas Imbangan Kebarangkalian (Balance of Probabilities) dan beban pembuktian (onus of proof) telah bertukar kepada pihak responden/defendan namun responden/defendan telah gagal untuk membuktikan kes beliau.

(4) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila gagal mengambil kira fakta bahawa responden/defendan telah gagal untuk memanggil adik responden/defendan untuk membuktikan bahaw no. telefon yang digunakan untuk perayu/plaintiff adalah bukan nombor telefon kepunyaan responden/defendan mahupun adik reponden/defendan dan seterusnya membuktikan bahawa tiada sebarang komunikasi yang telah berlaku di antara plaintif/perayu dengan responden/defendan seterusnya Seksyen 114(g) Akta Keterangan 1950 tidak terpakai terhadap responden/defendan.

(5) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan bahawa pemilikan ke atas suatu blog hanya boleh ditentukan/sahkan melalui operator blogspot.com atau memanggil pihak yang berkuasa seperti Suruhanjaya Komunikasi dan Multimedia Malaysia tanpa mengambil kira keterangan-keterangan ikut keadaan (Circumstantial Evidence) seperti mana yang dikemukakan oleh perayu/plaintif semasa perbicaraan.

(6) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan bahawa Ekshibit P2 adalah suatu keterangan yang tidak boleh diterimapakai (inadmissible) tanpa mengambil kira bahawa responden/defendan telah mengakui bahawa kandungan di dalam Ekshibit P2 tersebut adalah tepat dan betul.

(7) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan bahawa keterangan yang dibuat oleh saksi perayu/plaintif SP2 (Penghantar Saman) tidak selamat untuk diterima secara benar tanpa mengambil kira fakta bahawa SP2 adalah merupakan saksi bebas di dalam kes ini dan beliau merupakan saksi yang kredibel dan keterangan beliau adalah inherently probable berbanding keterangan defendan/responden.

(8) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila gagal mengambilkira keterangan SP2 semasa pemeriksaan balas telah mengakui bahawa gambar Eksibit P3 (a) diambil melalui blog defendan yang sama dengan gambar di Eksibit P4 yang hanya untuk tujuan pengecaman defendan/responden.

(9) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan bahawa SP2 adalah seorang saksi yang tidak ôreliableô dan tidak boleh dipercayai kerana sanggup melakukan ôamperingô keatas dokumen tanpa mengambil kira fakta bahawa semasa pemeriksaan balas SP2 telah mengakui bahawa gambar Eksibit P3 (a) telah diambil melalui blog defendan yang digunakan oleh SP2 untuk tujuan pengecaman sahaja bagi memudahkan utusan serahan saman terhadap responden/defendan.

(10) Yang Arif Hakim telah terkhilaf dari segi fakta dan undang-undang kerana gagal mengambil kira semangat dan tujuan penggubalan dan penambahan Seksyen 114A Akta Keterangan 1950 (Spirit and Purpose of the Inclusion of Section 114A of Evidence Act 1950) semasa memutuskan kes ini pada 17-7-2012 walhal Seksyen 114A telah digubal pada waktu penghakiman tersebut direkodkan dan dikuatkuasakan pada 317-2012.ò

Preliminaries

[3] The central issue and complaint of the appellant in this case in essence is that (i) the learned judge had marked the plaintiffôs documentary evidence as exhibit with no objection from the defendant and subsequently in the judgment resiled from the position and refused to consider some of the marked exhibits on the grounds of hearsay without giving any notice or opportunity to the plaintiff, thereby committing error of law as well as misdirection on the law which has resulted in procedural unfairness of grave nature which has prejudiced the plaintiffôs case and lead to an erroneous conclusion; (ii) the learned judge failed to consider that the defendantôs defence was a mere denial and no particulars were given in the statement of defence to support his defence of denial, more so when the defendant was not relying on the statutory defence and/or common law defence, and the new provision of section 114A of Evidence Act 1950 (EA 1950) assists the plaintiff.

[4] As a general rule in defamation suit relating to libel, once the plaintiff has established by direct and/or circumstantial evidence through documents that the act complained is defamatory, and was published, and it refers to the plaintiff, and the defendant was the author of the misconduct, liability is attached, and the defendantôs defence cannot survive on mere denial, and when it relates to cyber crime, section 114A EA 1950 will assist the plaintiff to force the defendant to exonerate himself from liability.

[5] We do not wish to dwell on the statutory and common law defences of defamation as it has been well articulated by Hamid Sultan JC in the case of *Chew Peng Cheng v Anthony Teo Gin* [2008] 7 CLJ

418, as the instant case relates to a mere denial where no statutory or common law defence has been raised. This case is also not concerned whether the plaintiff has proved the element of defamation but whether it was correct in law to accept the plaintiffôs evidence and exhibits at the stage of plaintiffôs case with the consent of the defendant and subsequently reject without giving notice to the plaintiff, some of the exhibits which is the foundation and/or has nexus to the plaintiffôs case and is a relevant evidence pursuant to section 5 of the EA 1950, which states:

> *"5. Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others."*

[6] It must be noted that the EA 1950 is in essence a departure to a large extent of exclusionary rules at common law and it takes an inclusive approach discarding the common law rules of hearsay, etc.; and giving wide powers to court to admit evidence and/or document if it is relevant and not because it offends any exclusionary rules with a small opening (in practice) in civil cases and rules of procedure by the agreement of parties to allow whatever documents the parties have agreed to be relevant to the subject matter of the suit. It is a cardinal rule of evidence at common law that:

(a) evidence must be confined to matters in issue;
(b) hearsay evidence is not admissible;
(c) in all cases only the best evidence must be given;
(d) the burden of proof generally rests on the person who positively asserts the facts.

[7] The cardinal rule of the common law has been excluded or whittled down not only by the original Evidence Act 1950 but also through a list of amendments after independence to reach a fair and balanced result and to meet with modern challenges in civil and criminal litigation to attain justice. [See s.73A, 73AA, 90A of EA 1950].

[8] It must also be noted that rules of evidence is not only dependant on the EA 1950 but also other Act or rules and the application of this principle is often cross checked by the courts by looking at the common law principles and cases to ensure and to achieve a fair result. When the Act is silent on its applicability, etc.; the courtôs role is captured in section 136 of EA 1950 which reads as follows:

> ñ**136.** (1) When either party proposes to give evidence of any fact, the court may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the court shall admit the evidence if it thinks that the fact, if proved, would be relevant, and not otherwise.
>
> (2) If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of the fact and the court is satisfied with the undertaking.
>
> (3) If the relevancy of one alleged fact depends upon another alleged fact being first proved, the court may, in its discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

[9] Parliament has entrusted the court the role of deciding what is relevant and the discretion for the court to allow the relevant evidence to be admissible. Just because the evidence is relevant does not mean it is admissible as of right. It is usually the case but not necessarily. The jurisprudence is captured in Janabó Key to the Law of Evidence (2014) at pages 224 and 226 as follows:

> ñIt is trite that relevancy *per se* is not the passport to admissibility. Courts often guards jealously evidence which has the characteristics of hearsay elements or opinion evidence to be admitted if its prejudicial effect will compromise the integrity of the decision making process itself.
>
> Evidence obtained during course of trial is also admissible. Courts have also asserted that the rules governing admissibility of evidence are procedural in nature and not a substantive right. Being procedural in nature the ruling of court during trial on evidential issue will not be a subject matter of appeal without the completion of the trial itself. In addition, courts at appellate stage have jurisdiction and power to expunge inadmissible evidence and/or correct procedural ruling.
>
> What are relevant facts have been defined in section 3. Relevant facts are those facts which render probable or improbable the existence or nonexistence of the fact in issue, because they are connected with the fact in issue. According to section 5 only two kinds of facts may be proved. They are facts in issue and relevant facts. What facts are relevant, are set out in sections 6 and 55. The object of the section is to ensure that irrelevant and unconnected evidence is prohibited from being given in a judicial proceeding so that the courtó time is saved and miscarriage of

justice is avoided. Facts relevant to the issue have been arranged in the Act in the following order:

(a) things connected with the facts in issue as part of the same transaction, occasion, cause effect, motive or conduct, etc.;
(b) admission and confession;
(c) statements of persons who cannot be called as witness;
(d) statements made under special circumstances;
(e) relevancy of judgment;
(f) opinion evidence;
(g) character evidence.ò

[10] Even though relevancy is one of law it is no easy task for trial court to rule on the subject on hotly contested facts as section 5 places the task on the courts to deal with various concepts (as well as difficult concepts) like *res gestae*, hearsay evidence, dying declaration, admission, confession, opinion evidence, character evidence, similar fact, evidence, etc. It has to be taken by at least a three step approach. First stage, the court must prima facie consider whether the fact is relevant. This is more of a common sense approach taken by any person with the most basic legal qualification. The second stage is whether by saying it as relevant, related provisions of the Act are infringed; or to put it in another way whether the person introducing the fact has satisfied the criteria of the Act. If he does not satisfy the criteria that evidence is not relevant. Once this two stage procedure has been satisfactorily dealt with, then the third stage is the admissibility stage which is procedural in nature. Here the court has to look at whether the litigant has satisfied the rules of admissibility. If the litigant has not, the relevant evidence can be rejected, for example, not producing the original document or satisfying the criteria for introducing secondary

evidence. In civil cases, once the court decides that the evidence is relevant and have allowed the exhibits to be marked as exhibit with no objection by the respondent, it cannot be subsequently expunged on the ground that it has failed the admissibility test unless it has been marked as ID only for purpose to determine admissibility.

[11] However, if the relevancy and/or admissibility has been challenged throughout the trial, the court may deal with the issue at the end of the trial marking it first as ID and subsequently as Exhibit. There is no discretion vested in the trial court to exclude relevant and admissible evidence marked as Exhibit and/or ID or whatever label it may have been given, that too when there was no objection taken by the parties when the Exhibit or ID is marked. This is not the position in criminal cases. In criminal cases, the court has wide discretion to exclude relevant and admissible evidence under the fairness rule. This jurisprudence has been captured in the case of *Liang Weng Heng v Public Prosecutor* [2014] 5 CLJ 401, where the quorum consisted of Azahar bin Mohamed, Mohtarudin bin Baki and Hamid Sultan bin Abu Backer, and we do not wish to repeat the same.

[12] In the instant case, the complaint of the appellant is that the learned judge had accepted the evidence as relevant and admitted it and marked as exhibit and subsequently in the judgment refused to consider the evidence, in consequence of lack of satisfaction on the admissibility procedure employed by the appellant. That the learned trial judge cannot do. Once it is marked as exhibit, the court in deliberating that fact can give low probative value but cannot exclude. The only court which in civil case can consider the evidence or accept a document as an exhibit in a limited sense is the Appellate Court under section 167 of EA 1950 or

if it is Court of Appeal also pursuant to section 69 Courts of Judicature Act 1964 which reads as follows:

Section 167 of EA 1950

"The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision."

And section 69 of the Courts of Judicature Act (CJA)1964:

*"**69.** (1) Appeals to the Court of Appeal shall be by way of rehearing, and in relation to such appeals the Court of Appeal shall have all the powers and duties, as to amendment or otherwise, of the High Court, together with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner.*

(2) The further evidence may be given without leave on interlocutory applications, or in any case as to matter which have occurred after the date of the decision from which the appeal is brought.

(3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, the further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court of Appeal.

(4) The Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.

(5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and the powers may also be exercised in favour of all or any of the respondents or parties although the respondents or parties have not appealed from or complained of the decision."

[13] It is also a must in the event the Exhibit is marked as ID only or if the evidence is by way of statement or oral evidence, it must form part of the Appeal record as of right as section 167 of EA 1950 as well as section 69 CJA 1964 makes it mandatory for the Appellate Court to revisit the issue if necessary.

Brief Facts

[14] The plaintiff is a well known PAS politician. The defamation suit alleges that the defendant is a blogger and circulated an article titled ñ*Husam Dan Tamrin Balun Balak 15 Juta"* via blogspot óruangbicarafaisal.blogspot.comô on 3-10-09. The defendant denies writing the article and owning the said blogspot.

[15] The learned trial judge had found the article to be defamatory and it referred to the plaintiff but says the plaintiff did not establish that defendant is the writer in the blog without considering section 114A of the EA 1950. The relevant finding of the learned judge as to the issue of liability reads as follows:

"16.(iii) Saya mendapati bahawa kandungan artikel tersebut adalah palsu, tidak benar dan memfitnah beliau di mana ianya jika dibaca secara objektif akan memberikan gambaran/maksud bahawa plaintif adalah seorang pemimpin yang korup (corrupt), tidak jujur, tamak, hipokrit dan yang telah menyalahgunakan kuasa dan kedudukan dalam Kerajaan Negeri Kelantan untuk kepentingan peribadi beliau.

"18. Persoalan seterusnya yang relevan dan lebih penting ialah adakah defendan pemilik blog tersebut? Berdasarkan kepada keterangan yang dikemukakan saya mendapati bahawa plaintif gagal membuktikan bahawa defendan adalah penulis blog tersebut."

[16] In the instant case, three witnesses including the plaintiff gave evidence for the plaintiff and two for the defendant. The evidence of the plaintiffôs second and third witnesses (SP2 and SP3) evidence and some of the documents tendered through them did not find favour with the learned judge. These two witnessôs evidence and documents tendered were crucial to establish the culpability of the defendant. The learned trial judge preferred to accept the bare denial defence and evidence of the defendant (SD1) story as well as his witness SD2 who purportedly gave evidence on a subject matter of documents when both parties have agreed to be marked as exhibits. SD2 evidence in the instant case may have been relevant if the documents which SD2 attempted to discredit was at ID stage.

[17] In addition, the appellant complains that the learned judge has failed to consider or reject the appellantôs evidence to show nexus to the defendant, which after much deliberation, we find has merits. That part of the submission of the appellant reads as follows:

ñ6. The learned judge had failed to consider the following evidence tendered by the plaintiff and his witnesses in satisfying the balance of probability test:

(a) SP1ôs evidence of the defendantôs communication (sms) with the plaintiff via handphone numbers 019-2708767 on 5-10-09 and 012-3317211 on 7-10-09 registered in the name of the defendantôs sibling.

(b) SP3ôs entire evidence in relation to exhibit P6 and P7 i.e. similarities and timing of the defendantôs father operation/treatment at HRPZII i.e. OA is dated 3-10-09, P6 is dated 6-10-09 and P8 confirm dated of admission on 27-9-09.

(c) Consider/sufficiently consider the difficulty in establishing cyber identity of bloggers and, therefore, one has to fall back on common law proof of the same by considering circumstantial evidence, such as the hand phone numbers and exhibits 3 to 8 tendered through SP2 and SP3 respectively.

(d) The learned trial judge failure to sufficiently consider and evaluate the plaintiffôs witnessesô evidence in the light of contemporaneous documents (Exhibits 2-8 and hand phone numbers 019-2708767 and 012-3317211) in failing to hold that the plaintiff had satisfied both the legal and evidential burden of proof that the defendant was indeed the writer of the offending article.ò

[18] SP2 was a process server and through him the exhibit ôP2ò, ôP3 to P3AMôExhibit ôP4ôwere marked. His evidence and documents without objection from the defendant links the defendant. SP3 was a doctor who links the defendant by virtue of treating his father in the hospital and through him Exhibit ôP3ôwas marked. Again there was no objection and no request was made to mark the documents as ID by the defendant. All the said exhibits and the evidence of SP2 in actual fact stands as strong

circumstantial evidence against the defendant and the ϕphone smsô gives added probative force to the plaintiffôs claim. The learned trial judge on this issue relating to SP2 and SP3 evidence stated as follows:

> *"6.(iii) Artikel tersebut diterbitkan dan disiarkan melalui blog RBF (ruangbicarafaisal.blogspot.com) sepertimana Exhibit "P1". (Ikatan Dokumen "B" di m.s. 5-18).*
>
> *(iv) Plaintif mendakwa blog tersebut adalah milik Defendan hasil siasatan yang beliau buat antar lain, melalui carian oleh rakan/kenalan beliau sepertimana Ekshibit "P2" (Third Party Result).*
>
> *7. Menurut SP2 beliau telah diarahkan oleh peguam Tetuan Hisham Fauzi untuk menyerahkan Writ Saman kes ini ke atas Defendan. Untuk itu, beliau telah pergi ke rumah kediaman Defendan di mana beliau berjumpa Defendan pada sebelah malam dan dalam perjumpaan tersebut beliau telah merakamkan sejumlah 13 keping gambar-gambar Defendan dan rumah kediaman beliau seperti Ekshiti "P3A" – "P3M". Menurut SP2 dalam pertemuan tersebut Defendan telah dengan bangganya mengaku kepada SP2 bahawa beliau adalah pemilik blog tersebut. Selain itu menurut SP2 beliau telah memuat turun gambar Defendan dari blog yang sama sepertimana Ekshibit "P4".*
>
> *8. SP3 adalah Pakar Perubatan dan juga kenalan Plaintif. Beliau telah mengemukakan rekod perubatan pesakit Rohban Ahmad itu bapa kepada Defendan yang menunjukkan bahawa penama tersebut telah menjalani rawatan/pembedahan di Hospital Raja Perempuan Zainal II, Kota Bharu (HRPZ II) pada 6.10.2009 sepertimana Ekshibit "P8"."*

[19] Exhibit P6 has much relevance to this case and the evidence of SP3 and the learned trial judge has captured that part of the evidence as follows:

> *"9. Peguamcara yang terpelajar Plaintif berhujah bahawa Plaintif Berjaya membuktikan bahawa Defendan adalah pemilik blog tersebut dan bertanggungan ke atas artikel yang disiarkan di dalamnya. Plaintif berdasarkan antara lain, kepada keterangan ikut keadaan (circumstantial evidence) berikut:-*
>
> *(i) Keunikan nama Defendan di mana Plaintif mendakwa nama "Rohban Ahmad" adalah satu nama yang amat unik dan jarang digunakan.*
> *(ii) Penulisan bertarikh 6 Oktober 2009 (Ekshibit "P6") dimana dalam blog yang sama penulis (Defendan) memberitahu kepada rakan-rakan 'bloggers' beliau bahawa pada masa itu berada di Kota Bharu kerana menjaga bapa yang sedang mendapat rawatan di hospital di kampung beliau.*
> *(iii) Laporan perubatan (Ekshibit "P8") dan keterangan SP3 di mana menurut SP3 mengesahkan seorang pesakit bernama Rohban Ahmad ada menjalani rawatan/pembedahan di HRPZ II pada masa yang sama sepertimana yang dinyatakan dalam artikel Ekshibit "P6".*
>
> *10. Selain itu, Plaintif juga merujuk kepada keterangan SP2 iaitu, penghantar saman dan juga kenalan beliau yang mana menurut SP2 semasa penyerahan Writ Saman dilakukan, Defendan telah dengan bangganya mengaku beliau adalah Faisal Rohban yang menulis dalam blog "ruangbicarafaisal"."*

[20] The learned trial judge has also documented the defendant's case as follows:

> *"11. Berdasarkan kepada Pernyataan Pembelaan dalam Pliding, Defendan tidak bersandarkan kepada mana-mana pembelaan undang-undang yang diperuntukan di bawah Akta Fitnah 1958. Keterangan pihak Defendan dikemukakan melalui 2 saksi iaitu, Defendan sendiri (SD1) dan En. Mohd Fadzil Arsady, pakar IT (SD2).*
>
> *.*
>
> *12. Secara ringkasnya, keterangan Defendan (SD1) adalah sebagaimana berikut:-*
>
> *(i) Defendan menafikan bahawa beliau adalah pemilik blog "ruangbicarafaisal.blogspot.com" tersebut. Beliau juga menafikan mempunyai kepentingan dan pengetahuan ke atas penulisan artikel tersebut.*
>
> *(ii) Berhubung Ekshibit "P2" (Third Party Result) yang dikemukakan oleh Plaintif untuk mengaitkan beliau dengan blog tersebut, menurut Defendan selain daripada nama, nombor kad pengenalan, jantina dan nombor kenderaan, ke semua butir-butir peribadi yang tercatat dalam dokumen adalah salah dan tidak tepat dan bukan berkaitan/merujuk kepada beliau.*
>
> *13. Berhubung Ekshibit "P2" menurut SD2 ianya adalah merupakan satu dokumen yang dimuat turun dan dicetak dari "File F:/" computer seseorang dan bukannya dicetak terus dari internet. Menurut SD2 suatu dokumen yang disimpan dalam computer boleh dipinda/diubah oleh sesiapa sahaja yang membuka fail tersebut. Berhubung pemilikan suatu blog menurut SD2 ianya boleh ditubuhkan oleh sesiapa sahaja dan pemilik (blogger) tidak diperlukan untuk menggunakan nama sebenar bagi alamat blog beliau tersebut. Penulis/pemilik blog boleh menggunakan nama samaran atau pseudonym. Menurut SD2 hanya syarikat pengendali (operator)*

laman seb berkenaan sahaja yang dapat memberikan maklumat sahih pemilik suatu blog tersebut."

[21] The learned trial judge in saying that the plaintiff had not proved that the defendant is the blogger says:

"Setelah menimbang keterangan yang dikemukakan oleh kedua-dua pihak, saya mendapati bahawa adalah tidak selamat untuk saya menerima keterangan pada Ekshibit "P2" tersebut sebagai keterangan di Mahkamah."

[22] The learned trial judge also relies on section 114(g) EA 1950 for not calling the maker of Exhibit P2 and also says section 90A EA1950 requirement was not satisfied. In addition, the learned trial judge says that the plaintiff failed to satisfy that the defendant was the person who wrote on the blog, and refused to accept the photograph Exhibits as P3 as well as P4.

[23] The appellant also complains that the provision of 114A EA 1950 was not considered by the learned judge. On this point, the learned counsel for the appellant says:

"1. When the amendment to section 114 EA was first debated in Parliament, the Legislature had focused their attention on 'internet anonymity' where they said, "Pelbagai teknik boleh digunakan oleh penjenayah untuk menyembunyikan identity mereka dan ada kalanya mustahil untuk menentukan punca sebenar sesuatu emel atau data komunikasi elektronik yang lain".

2. In passing the bill, Parliament acknowledged the parameters of proof being on a balance of probability but much lower than the criminal standard

required in establishing identity calling in aid the following presumptions. They were as follows:

2.1. If the name, photograph or pseudonym appeared in a publication, depicting said person to have some connection with the publication, said person was presumed to have published or re-published the contents of the publication;

2.2. If a publication originates from a network service that a person has registered, said person is presumed to have published or re-published the contents of the publication; or

2.3. If a publication originates from a computer which a person has custody or control of, said person is presumed to have published or re-published the contents of the publication.

3. It is submitted that the 1st presumption under section 114A, impacts on the defendant in that his photographs (exhibit 3-4), the defendant's letter to his follows blogger (exhibit P6) and OA linking the defendant to the blogspot (exhibit 1) thereby invoking the presumption of publication and connection to the OA.

4. In light of the foregoing, there is a proper basis for arriving at a presumption as the connection between the evidence tendered and the presumption relied on is not too remote and uncertain. For this, it is wise to heed the words of Devlin LJ in Berry v British Transport Commission [1962] 1 QB 306."

[24] We have read the appeal record, the submission of the parties in detail. After much consideration to the submission of the respondent, we take the view that there are serious errors of law and misdirection on the face of record and the judgment per se is perverse and ought to be set aside, and judgment on liability be entered in favour of the plaintiff with

an order for assessment before the High Court. Our reasons *inter alia* are as follows:

(a) In the instant case, the learned judge's rejection of Exhibit P2 and failure to take into consideration the relevant exhibits for reasons stated earlier in the judgment is bad in law and must be seen as perverse.

(b) Invoking section 114(g) EA 1950 in not calling the maker of Exhibit P2 is bad in law when the document has already been tendered and marked as Exhibit. Once it is marked as Exhibit, the application of section 114(g) will not be applicable at all.

(c) Invoking section 90A of EA 1950 after the Exhibit P2 has been marked is bad in law. Section 90A should have been applied before it is marked as Exhibit. After having it marked and excluding it in evidence will lead to perverse judgment.

(d) The rejection of SP3 evidence on the face of record is perverse. In the instant case, SP3 evidence, Exhibit P8 and the article Exhibit P6 ñ*Mohon Maaf Kepada Rakan Rakan Blogger"* has nexus to link the blogger and his father. And also the telephone number of the blogger in his profile No. 019-2708767 is the same number as that of the defendant's younger brother, Fakhrul Rohban, which the defendant was using and from which the plaintiff has received a number of sms. Exhibit P6 reads as follows:

"Tuesday, October 6, 2009
MOHON MAAF KEPADA RAKAN-RAKAN BLOGGER

Terlebih dahulu saya memohon maaf kepada semua rakan-rakan blogger kerana tidak dapat turut serta bersama kalian di Bagan Pinang.

Saya sekarang berada di kampung halaman kerana menjaga ayah yang sedang dirawat di Hospital. Hidupku sekarang siang di hospital, malam di hospital dan tidur pun di hospital.

Sebelum ini beberapa kali ayah saya pernah dimasukan ke hospital, tetapi kebiasaannya saya hanya pulang melawat hari sehari dua sahaja. Tetapi kali ini naluri saya merasa 'lain macam' sikit, kerana sakit ayah saya juga Nampak 'lain macam' kali ini. Jadi, sebelum menyesal kemudian hari lebih baik saya luangkan masa cukup-cukup bersama ayahanda tercinta pada kali ini. Lagi pun saya anak yang sulong.

Saya rasa amat terpanggil untuk menjaga beliau kali ini, tidak seperti sebelum ini. Apa pun hidup mati ditangan Allah SWT. Ayah saya telah selamat menjalani pembedahan kecil semalam. Cuma sakitnya masih terasa sehingga kini. Masih belum dapat berjalan lagi.

Sudah hamper dua minggu saya meninggalkan kerja saya. Tapi, inilah pengorbanan kecil yang kita terpaksa bayar kepada ibu bapa kita. Pengorbanan yang kita lakukan ini kecil berbanding dengan apa yang telah dilakukan oleh ibu bapa terhadap kita selama ini.

Setiap kali saya mengambil bekas apabila bapa saya hendak membuang air kecil, saya terus terbayangkan di zaman saya kanak-kanak dulu, apabila saya hendak ke tandas di tengah

malam, ayahlah yang sering menemani saya. Pada waktu itu rumah saya tidak mempunyai tandas di dalam rumah. Tandas berada 100 meter dari rumah. Ayah dengan penuh kasih saying dalam kesejukan malam mendukung saya ke tandas kerana bimbang pacat menggigit kaki saya. Begitulah kasih dan sayangnya seorang ayah kepada anaknya. Boleh kah kita semua membuat begitu kepada ibu bapa kita?

Terima kasih saya ucapkan kepada rakan-rakan blogger yang menghubungi dan bertanya khabar tentang keadaan ayah saya. Keprihatinan kalian semua saya hargai. Ternyata anda semua mempunyai semangat setiakawan yang tinggi."

(e) The court under section 114 EA 1950 is obliged to consider the evidence of SP2, SP3, the Exhibits, in particular Exhibit 8 and Exhibit P2 inclusive of the sms, etc. in totality. Section 114 EA 1950 states:

> ñ**114.** The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.ò

[25] There was failure of proper judicial appreciation on the above issues related to 114 EA 1950 making the judgment perverse.

[26] We have gone through the evidence repeatedly and we are satisfied that on the balance of probabilities, the plaintiff has made out a case against the defendant. The defendant in this case has also failed to rebut the presumption under section 114A EA 1950 and the defence of

mere denial is not acceptable on the facts of the case as identity has been established on the balance of probabilities; and in defamation suit it need not be on beyond reasonable doubt. Such a proposition is also consistent with section 114(h) of EA 1950 which states:

> ñ*(h)* that if a man refuses to answer a question which he is not compelled to answer by law, the answer if given would be unfavourable to him.ò

[27] We are satisfied that the learned trial judge had misdirected himself as averred in the Memorandum of Appeal. In the instant case, we are satisfied that the learned trial judge had not directed his mind to the relevant issues and had not acted in accordance with the law and the decision does not pass the acid test of reasonableness. [See *Damusa Sdn Bhd v. MRCB Prasarana Sdn Bhd* [2012] 1 LNS 994].

[28] For reasons stated above the appeal is allowed with cost of RM50,000.00 to the appellant here and below and the order of High Court is set aside and the matter be remitted to the High Court for assessment of damages. The deposit to be refunded to the appellant.

We hereby ordered so.

Dated: 12 January 2015

Sgd
(DATUK DR. HJ. HAMID SULTAN BIN ABU BACKER)
Judge
Court of Appeal
Malaysia.

Note: Grounds of judgment subject to correction of error and editorial adjustment etc.

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