

**DALAM MAHKAMAH RAYUAN MALAYSIA
(Bidang Kuasa Rayuan)**

RAYUAN SIVIL NO. _____ - 2009

ANTARA

ABDUL AZIZ BIN MOHD ALI ... PERAYU

DAN

- 1. NORAISHAH BINTI ABDUL AZIZ**
- 2. UTUSAN MELAYU (M) BERHAD (7170-V) RESPONDEN-**
- 3. TENGKU KHALIDAH TENGKU BIDIN ... RESPONDEN**

**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(CIVIL DIVISION)
CIVIL SUIT NO : S5-23-15-2005**

Antara

Abdul Aziz bin Mohd Ali.....Plaintiff

Dan

- 1. Noraishah bt Abdul Aziz**
 - 2. Utusan Melayu (M) Bhd (7170-V)**
 - 3. Tengku Khalidah Tengku Bidin.....Defendan-Defendan**
-

GROUNDS OF JUDGMENT

This is an appeal by the Plaintiff against my decision in allowing the application by the 2nd and 3rd defendants under O 14A Rules of High Court 1980. The following are my grounds for the said decision.

By a writ and Statement Of Claim, the Plaintiff claims against the Defendants damages for libel in respect of an article published in Mingguan Malaysia dated 24.10.2004 under the caption “Nasha Aziz- Jangan Tanya Hal Peribadi”.

The 2nd and the 3rd defendants filed Enclosure 20 applying under O 14A RHC for an order to dismiss the Plaintiff’s claim with costs upon the determination of the following issues, which is being reproduced verbatim from the said application:

“ 1. Bahawa soalan undang-undang seperti yang dinyatakan dalam Apendiks 1 disini yang dibangkitkan dalam pliding-pliding dalam tindakan ini ditentusahkan menurut Aturan 14A Kaedah-Kaedah Mahkamah Tinggi 1980.

Apendiks 1

Soalan Undang-Undang Yang Di cadangkan

1. Samada tindakan ini yang berasaskan satu Artikel bertajuk “Nasha Aziz- Jangan Tanya Hal Peribadi” yang di terbitkan di akhbar Mingguan Malaysia pada 24.10.2004 (“Artikel tersebut”) boleh dilangsungkan atau diteruskan sama sekali walau pun Artikel tersebut dengan jelas merujuk kepada atau adalah berkenaan seseorang individu yang lain daripada Plaintiff.

Background Facts:

Plaintiff is the biological father of the 1st defendant, who is an actress and a model. Pursuant to an article “Jangan Tanya Hal Peribadi” written by the 3rd defendant in the newspaper of “Mingguan Malaysia” dated 24.10.2004, the 1st Defendant had allegedly uttered certain statement of the Plaintiff, which constitutes libel and was published by the 2nd Defendant. The said article which was published are as follows:

“Lalu, apabila kehilangan ayahnya Abdul Aziz Hathim yang pulang ke rahmatullah pada Mei lalu, banyak perubahan dirasakan berlaku dalam kehidupannya. Saya hanya ada satu ayah saja, kami sangat rapat,”....”Selepas ayah pergi barulah kami tahu bahawa perpisahan kerana kematian itu membangkitkan rindu yang sangat sarat.”

Plaintiff alleged that the said article which was published by the 2nd Defendant, in its natural and ordinary meaning imputes that the Plaintiff had passed away and that the Plaintiff is not the biological father of the 1st Defendant. As a result of the said statements, the Plaintiff’s reputation had been adversely affected and the Plaintiff’s reputation in that he had been put to extreme hardship and embarrassment.

Plaintiff through his solicitors had issued a letter dated 3.3.2005 to all the defendants demanding for an apology to be published in Mingguan Malaysia. Until the filing of this Writ of Summons, the defendants failed to accede to the demand of the Plaintiff which had contributed to the Plaintiff’s aggravated hardship and embarrassment. Hence the Plaintiff claims for:

- a) General damages;
- b) Aggravated damages;
- c) Interests and Costs.

1st defendant's defence:

- a) Plaintiff is the biological father to the 1st defendant. At the age of 3 years, Plaintiff had given the 1st defendant to his sister, Habibah bt Mohd Ali whose husband by the name of Abdul Aziz Hathim was the "ayah" whom the 1st defendant referred to at the material time.
- b) The words alleged are not defamatory and the 1st defendant raises the defence of fair comment and justification.
- c) It is not wrong for the 1st defendant to refer to Abdul Aziz Hathim as her only father due to the following reasons:
 - (i) From small until her adult years the 1st Defendant referred to Abdul Aziz Hathim as "ayah";
 - (ii) Reference of "ayah" is not only limited to having the same DNA but also includes one who is responsible for raising, educating, loving and caring. Thus, 1st defendant states that Abdul Aziz Hathim is her father in actual sense of the word;
 - (iii) 1st Defendant has no moral or legal obligation to refer to Abdul Aziz Hathim as her "adopted father."
- d) The interpretation of the said alleged article as libelous is without basis as it expressly states that the person who has passed away was Abdul Aziz Hathim and not the Plaintiff;

- e) 1st defendant, via an article in Berita Minggu dated 20.2.2005, had apologized to the Plaintiff. This was well before the demand letter from the Plaintiff's solicitors dated 3.3.2005 demanding for an apology from all the defendants to be published publicly;
- f) Further and in the alternative, the 1st Defendant alleged that the claim by the Plaintiff is mala fide and an abuse of the process of court.

2nd & 3rd defendants' defences

- a) The said article is not defamatory. It is a fair and accurate reporting of what was said by the 1st defendant to 3rd defendants, who is a reporter;
- b) The said article is correct in its factual contents wherein the 1st defendant referred to Abdul Aziz Hathim as "ayah" and Plaintiff as "daddy";
- c) Further or in the alternative, in the event liability is against the 2nd and 3rd defendants. The 1st defendant is to indemnify the 2nd and 3rd defendant against any claims of damages and costs which may accrued.

Applicable test under Order 14A of the RHC 1980

Order 14A rule 1 of the RHC 1980 provides that:

"(1) The Court may upon the application of a party ... determine any question of law ... arising in any cause or matter at any stage of the proceedings where it appears to the Court that -

- (a) Such question is suitable for determination without the full trial of the action; and

- (b) such determination will finally determine the entire cause or matter or any claim or issue therein.
- (2) Upon such determination, the Court may dismiss the cause or matter or make such order or judgment as it thinks just;
- (3) The Court shall not determine any question under this Order unless the parties have had an opportunity of being heard on the question.”

The Court of Appeal in ***Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu*** (2004)1 MLJ 8 (pages 28, 31-32), held that in the exercise of discretion in an application for an order under O14A/033 r 2 of the Rules of High Court, the court should at the outset, scrutinize the pleadings to discover what material facts are not obviously in dispute. The court must not shun away from considering the applicability of O14A or O 33 r 2 Rules of High Court in relation to the questions of law posed which are clear and definite and the issues are clear cut. The court must take a real and serious attempt to identify the material facts pleaded which are obviously undisputed or which should not have been disputed and then to apply the relevant rule to the facts as found. Further the court should not refused an application merely because it takes a little longer to determine any issue of law presented by the parties.

In the case of ***Kamla Lal Hiranand v Harilela Padma Hari*** [2001] 3 SLR 696 in which a similar approach was adopted by the Singapore Court of Appeal which held that:

“ To come within O 14 r 12 (1) (which is in pari material with O 14A r 1 of the Malaysian Rules of the High Court 1980) the question must first be one suitable for determination without the need for a full trial.

....Secondly , o 14 r 12 does not require that the determination will fully determine the entire cause or matter in the action. It may be invoked to determine any claim or issue raised in the action.

... The English Court of Appeal had the opportunity to review the scope of O14A in the unreported 1994 case *Korso Finance Establishment Anstalt v John Wedge*. The principles which it laid down are as follows:

- (1) *An issue is a disputed point of fact or law relied on by way of claim or defence;*
- (2) *A question of construction is well capable of constituting an issue;*
- (3) *If a question of construction will finally determine whether an important issue is suitable for determination under O14A and where it is a dominant feature of the case a Court ought to proceed to so determine such issue.”*

Applying the principles as set above, what can be discerned from the pleadings as to undisputed facts are as follows;

- 1) That the said article refers to an individual by the name of Abdul Aziz Hathim;
- 2) That Abdul Aziz Hathim has passed away;
- 3) Abdul Aziz bin Mohd Ali (Plaintiff) is the biological father to the 1st defendant;
- 4) Plaintiff refers to Abdul Aziz Hathim as “ayah”

The relevant law

Mohamed Dzaidin J (as he then was) in the case of ***Ayob bin Saud v TS Sambanthamurthi*** (1989) MLJ 315 clearly laid down the necessary burden in establishing a claim for libel which is:

“In our law on libel, which is governed by the Defamation Act 1951, the burden of proof lies on the plaintiff to show:

- (a) the words are defamatory,*
- (b) the words refer to the plaintiff; and*
- (c) the words were published.*

The plaintiff must first discharge the onus of proving that the words complained of were defamatory of the plaintiff. Only upon the plaintiff establishing this does the burden then rests on the defendant to prove that those words are in substance and in fact true (see Supreme Court Decisions in ***S Pakianathan v Jenni Ibrahim*** [1988] 2 MLJ 173; and ***Abdul Rahman Talib v Seenivasagam & Anor*** (1966) 2 ML166) .

The case of ***Ummi Hafilda Ali v Ketua Setiausaha Parti Islam Se Malaysia (PAS) & Ors*** [2006] 3 CLJ 252 at page 262 the Court held that:

“ It is essential that the words complained of must refer to the Plaintiff and not some other person, real or imaginary.”
(emphasis added)

The said Article refers to Abdul Aziz Hathim who has passed away and the 1st defendant refers to this individual as “ayah”. Nowhere in the said article does it refer to the Plaintiff. It is just unfortunate that Plaintiff and Abdul Aziz Hathim has the same first names, but the article is clear that it does not refer to the plaintiff at all.

The court refers to the case of **Morgan v. Odhams Press Ltd** [1971]1 WLR 1239, where Lord Donovan stated thus at page 1263:

“ It is always for the Plaintiff to prove that the defamatory words were published of and concerning him. The onus is firmly upon him, and if he does not discharge it he has no cause of action.”

The clarification on this issue of determining whether the defamatory words refers to the plaintiff found its way in the case of **David Syme & Co. & Another v. Canavan** [1918] 25 CLR 234 at page 238 , where the Court held that:

“ 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 person 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 recognized; and whether that description takes the form of a word picture of an individual or the form of a reference to a class of person of which he is or is believed to be a member, or any other form, if in the circumstances the description is such that a person hearing or reading the alleged libel would reasonably believe that the Plaintiff was referred to, that is a sufficient reference to him.(emphasis mine)’

The case of **Chew Sew Khian @ Chew Hua Seng v. Saniboey Mohd Ismail & 3 Ors** [2003] 1 AMR 411 is similar to the facts with our present case. The cause of action relates to an article in a newspaper bearing the caption “ Polis buru Jurujual”, and the article stated that the District Police was pursuing a salesman by the name of “Chew” aged 56 years for cheating a timber merchant at Wisma Chew An Ting, Segamat, Johore. The Plaintiff was an established businessman in Segamat involved in various business activities, He was 56 years old and was the chairman and director of the Hotel which was situated at Wisma Chew An Ting, Segamat, Johore and was known as “Chew” in the business circle. The Plaintiff claimed that the article was understood by readers to mean that the plaintiff was the person referred to in the said article. The relevant passage of the judgment is found at page 412 as follows:

“The cumulative effect of the evidence as presented would to my mind lead to the conclusion that a fair minded reader upon reading the article objectively would understand the article refer to a salesman involved in a timber business who is being sought by the police and hence the Plaintiff cannot be said to fit in any of the descriptive category aforesaid.”

Although the case of **Chew Sew Khian @ Chew Hua Seng v. Saniboey Mohd Ismail & 3 Ors** can be distinguished from our present case in that that case was decided after a full trial, nevertheless it is relevant to show how the tests was carried out in determining whether the article which was published refers to the plaintiff. The facts in our present case stands on a stronger footing than the facts in **Chew Sew Khian@ Chew Hua Seng v. Saniboey Mohd Ismail & 3 Ors** in that, the said article published by the 2nd and 3rd Defendant specifically states the name of the individual that had passed away was Abdul Aziz Hathim, not the Plaintiff, as compared to **Chew Sew Khian’s** case, the said article just mention one by the name of “Chew”.

Thus, if the court is to apply the test as propounded in the case of **David Syme & Co. And Another v. Canavan** i.e. whether “such as reasonably in the circumstances would lead person acquainted with the Plaintiff to believe that he was the person referred to?”, then obviously the answer is a definite “no”.

In Gatley on Libel and Slander (9th Ed) at p 96 and 97 the learned author states:

“It is necessary to take into consideration, not only the actual words used, but the context of the words.....”

It follows from the fact that the context and circumstances of the publication must be taken into account and that the plaintiff cannot pick and choose parts of the publication which, standing alone, would be defamatory . This or that sentence may be considered defamatory, but there may be other passages which take away the sting. “

The case of **Ratus Mesra Sdn Bhd v Shaik Osman Majid & Ors** [1999.1 3 MLJ 529, had applied the objective test to determine whether the words are defamatory, it must be given a meaning in which a reasonable man would understand it and that for this purpose,(i.e. in considering whether the words complained of contained any defamatory imputation), it is necessary to consider the whole article.

Gatley states at page 81 of his book that the right question one should asked in trying to get the natural and ordinary meaning of the words complained of is:

“What would the words convey to the mind of the ordinary reasonable, fair-minded reader? “

The decision of Suriyadi Halim Omar J in ***Pong Fee Voon v Piong Kien Siang & Ors*** [1999] 8 CLJ 383. In that case it was held:

“How to arrive at their natural and ordinary meaning again is no easy matter, but necessitates the presiding judge to scrutinize the words. There should not be any unnecessary intellectual exercise to arrive at the meanings of those words. In other words, the whole process should be effortless. For this purpose courts must reject meanings which can only emerge as a product of some strained or forced or utterly unreasonable interpretation.”

It is to be noted that in most cases,(if not all), relating to defamation, the reason why the courts has devised the tests for it to arrive at a decision as to whether the defamatory words/article refers to the plaintiff is simply because the alleged defamatory words/article, more often than not does not directly refer to the plaintiff. In such situation it requires the court to interpret and evaluate in the context of the whole article and evidence, whether the alleged defamatory words/article, refers to the plaintiff. A good example is the case of ***Chew Sew Khian @ Chew Hua Seng v. Saniboey Mohd Ismail*** where the alleged defamatory article refers to one “Chew”. The article did not refer to the plaintiff’s name directly. Thus in that case the court looks at the cumulative effect of the evidence in interpreting whether the article refers to the plaintiff. However in our present case, there is no need for the court to go beyond what is already stated in the article. It is clear that the article does not refer to the plaintiff i.e. it refers to Abdul Aziz Hathim.

In this case, a reader need not ponder strenuously or venture through an intellectual exercise to determine whether it refers to the plaintiff. The article refers to Abdul Aziz Hathim who has passed away and whom the 1st defendant refers to as “ayah”. “Ayah” is one of the terms that may be used to call one’s own biological father or an adopted father. In this case the 1st defendant chose to refer to Abdul Aziz Hathim as “ayah”. That, by itself cannot by implication reduced the plaintiff to other than the 1st defendant’s biological father. Thus, there is no need to look for extrinsic evidence or to go for a full blown trial to determine whether the article refers to the plaintiff. That would certainly be a waste of the court’s time.

That brings us to the question of whether the Plaintiff has a cause of action against the 2nd and 3rd defendants which is related to the determination of the questions posed in appendix 1 of the 2nd and 3rd defendants prayers in the Summons in Chambers. Consequently, whether the determination of the said question in appendix 1 will fully determine the entire cause or matter in the action.

From the aforementioned, there is no doubt that the said article does not refer to the plaintiff, hence it fails the test of whether “the words complained of were defamatory of the plaintiff”. Consequently, there is no cause of action by the plaintiff against the 2nd and 3rd defendants. O 14A RHC is applicable in this case and there is no necessity to go for a full blown trial. The answer to the question in appendix 1 is in the negative.

Therefore I order in terms for enclosure 20 prayer 1. The writ and statement of claim against the 2nd and 3rd defendants is dismissed with costs.

t.t Y.A Datin Zabariah bt. Mohd Yusof
Tarikh : 31 Mac 2009