

PRESS

DALAM MAHKAMAH PERSEKUTUAN MALAYSIA DI PUTRAJAYA

PERMOHONAN SIVIL NO.: 08(L)-4-06/2020 (W)

PEGUAM NEGARA MALAYSIA

... PEMOHON

DAN

**1. MKINI DOTCOM SDN BHD
(No Syarikat: 489718-U)**

2. KETUA EDITOR, MALAYSIAKINI

**... RESPONDEN-
RESPONDEN**

CORAM:

ROHANA BINTI YUSUF, PCA

AZAHAR BIN MOHAMED, CJM

ABANG ISKANDAR BIN ABANG HASHIM, CJSS

HAJI MOHD ZAWAWI BIN SALLEH, FCJ

NALLINI PATHMANATHAN, FCJ

VERNON ONG LAM KIAT, FCJ

ABDUL RAHMAN BIN SEBLI, FCJ

SUMMARY OF DECISION (MAJORITY)

[1] Before us is an application by the Honourable Attorney General (AG) for contempt of court against an online news portal, Mkini Dotcom Sdn Bhd (Malaysiakini) as the First Respondent and its Editor-in-Chief, Gan Diong Keng ('Steven Gan') as the Second Respondent.

[2] The Application pertains to the following comments published on Malaysiakini on 9.6.2020 following a Press Release by the Chief Justice which was republished on Malaysiakini website as " CJ orders all courts to be fully operational from July 1" in line with the recovery phase of the Movement Control Order.

Ayah Punya kata:

***The High Courts are already acquitting criminals without any trial.
The country has gone to the dogs;***

GrayDeer0609:

Kangaroo courts fully operational? Musa Aman 43 charges fully acquitted. Where is law and order in this country? Law of the Jungle? Better to defund the judiciary!

Legit:

This Judge is a shameless joker. The judges are out of control and the judicial system is completely broken. The crooks are being let out one by one in an expeditious manner and will running wild looting the country back again. This Chief Judge is talking about opening of the courts. Covid 19 slumber kah!

Semua Boleh – Bodoh pun Boleh:

Hey Chief Justice Tengku Maimun Tuan Mat - Berapa JUTA sudah sapu - 46 kes corruption - satu kali Hapus!!! Tak Malu dan Tak Takut Allah Ke? Neraka Macam Mana? Tak Takut Jugak? Lagi – Bayar balik sedikit wang sapu – lepas jugak. APA JUSTICE ini??? Penipu Rakyat ke? Sama sama sapu wang Rakyat ke???

Victim:

The Judiciary in Bolihland is a laughing stock.

[3] Malaysiakini admitted that the comments are indeed offensive, inappropriate, disrespectful and contemptuous and regretted the publication of them. Notwithstanding the admission both Malaysiakini and Steven Gan maintained that they both played no role in publishing them. The crux of the Respondents' case in essence is, they cannot be held liable for contempt because the comments were posted by third party subscribers on Malaysiakini website. They were not the author or editor of the impugned comments. In short the Respondents' case is they are not the maker or the publisher of the impugned comments, nor did they have anything to do with the publication of them. They in fact, have no knowledge of the comments till alerted by the Police. After which they promptly took them down.

[4] Whilst the case of a print media publisher the law is clear but the legal position is not as straightforward when it comes to the publication by third party internet postings. The legal liability of publishers and editors in this new media is blurred by the fact that these postings are made directly to the media platform by third parties without the usual editing process.

[5] In this regard, we are mindful that no clear jurisprudence has developed a precise theory to determine when an online platform provider who creates a technology, system or platform that enables wrongful behaviour, will be liable. The blame has now to be considered.

[6] We agree with the AG that section 114A of the Evidence Act presumes Malaysiakini as the publisher of the impugned comments. As publisher Malaysiakini under the law is liable for the contemptuous comments though by its third party subscribers. Malaysiakini however denied liability on the basis that they have no knowledge of the comments. They say they have rebutted the legal presumption because they have taken all the necessary steps to safeguards from liability of their third party subscribers' comments.

[7] Having considered the defence of no knowledge and the rebuttals raised we are satisfied on the facts and evidence before us that Malaysiakini failed to established that it has no knowledge. We say so because in law knowledge can be inferred from surrounding facts. There is a whole of case authorities on this point. (see **Leow Nghee Lim v R [1956] MLJ 128**; **Parlan bin Dadeh v Public Prosecutor [2008] 6 MLJ 19**; **Victor Chidiebere Nzomiwu & Ors v Public Prosecutor [2013] 2 MLJ 690**; **Public Prosecutor v Hoo Chee Keong [1997] 4 MLJ 451**; and **Public Prosecutor v Abdul Rahman bin Akif [2007] 5 MLJ 1**).

[8] Richard Malanjum FCJ in **Emmanuel Yaw Teiku v Public Prosecutor [2006] 5 MLJ 209** held that proof of intention or knowledge could generally be inferred from proved facts and circumstances. It is difficult to do so by other means unless there is a clear admission by the person himself. The principle of law is that to determine

knowledge, the Court is concerned with reasonable inferences to be drawn from a concrete situation disclosed in the evidence and how it affects the particular person whose knowledge is in issue.

[9] The facts as adduced by Malaysiakini in our view bear testimony to its knowledge. Ultimately, Malaysiakini is the owner of its website, publishes articles of public importance, allows subscribers to post comments to generate discussions. It designs its online platform for such purpose and decides to filter usage of foul words and relies on all the three measures it has taken. In other words, the First Respondent designs and controls its online platform in the way it chooses. It has full control of what is publishable and what is not. In doing so it must carry with it, the risks that follow from allowing the way its platform operates. Malaysiakini cannot be heard to say that its filter system failed to filter offensive comments, when in fact it deliberately chooses to only filter foul language but not offensive substance. Though we remained perplexed how these comments even passed its filter looking at the language of the impugned comments.

[10] The three safeguards adopted by the First Respondent proved to have failed and do not efficiently control or prevent offensive comments from being published. The surrounding circumstances of the present case strongly suggest that the impugned comments were published without reservation and were only taken down upon being made aware of by the police.

[11] We cannot accept such failed measures as a complete defence. Malaysiakini cannot unjustifiably and irresponsibly shift the entire blame

on its third party online subscribers, while exonerating itself of all liabilities. The truth is the postings were made possible only because it provides the platform for the subscribers to post the impugned comments. There being no two ways about it. In short as stated in the Application of the AG, the First Respondent facilitates the publication of the contemptuous comments by the third party subscribers.

[12] We understand that Malaysiakini is a limited company. The persons whose knowledge would be imputed to Malaysiakini would those entrusted with the exercise of the powers and duties of it. For the online news portal, there is a total of 25 staff with about 10 of them being editors and assistant editors. Steven Gan is the Editor-in-Chief of the editorial team, assisted by Mr R K Anand (Executive Director of the First Respondent) and Mr Ng Ling Fong (Managing Editor). The editors of each department report to Mr Ng Ling Fong and Mr R K Anand, who in turn report to the Second Respondent. As can be seen, the First Respondent has a structured, coordinated and well-organised and impressive editorial team and reporting structure. It is inconceivable that in such a structured system it had no notice of the impugned comments.

[13] However none of the editor had explained how these abusive comments escape the attention of the editors. In fact none of the 10 editors came forward to deny knowledge. The person charged with that particular responsibility should be the one who can deny and explain why he was not aware of the impugned comments before being alerted on 12.6.2020. The denial instead came from its director Premesh Chandran who was not involved in editing.

[14] The irresistible inference is that at least one of them had notice and knowledge of these comments. Therefore, it is our finding that the First Respondent cannot deny notice or knowledge of the existence of the contemptuous postings.

[15] Given the fact that the First Respondent's news portal enjoys extensive readership and receives about 2000 comments per day, on top of the fact that it has editorial control over the contents posted in the comments section, the First Respondent must assume responsibility for taking the risk of facilitating a platform for such purpose. The sheer volume cannot be the basis for claiming lack of knowledge, to shirk from its responsibility.

[16] With the novel objective of encouraging public discourse on matters of public interest, Malaysiakini must at least ensure that the Malaysian public be exposed to balance discussions on the issues of public concern and not participate in demeaning and ridiculing the Institution of the Judiciary to undermine public confidence. As Lord Hobhouse observed with characteristic pungency in the case of **Reynolds v Times Newspapers Limited and Others [1999] 4 All ER 609 at 657** that, "No public interest is served by publishing or communicating misinformation" and certainly not offensive comments.

[17] It would be expected for Malaysiakini to foresee the kind of comments attracted by the publication of the article on the acquittal of Musa Aman by the Court following the withdrawal of charges, coinciding with the unfortunate timing of the press release by the Chief Justice. Members of the editorial team, in particular, must have been aware of the kind of materials published and would be able to foresee the sort of

comments that it would attract, given their experience in running Malaysiakini for over 20 years.

[18] The European Court of Human Right (EHtHR) had in the case of **Delfi AS v. Estonia** the facts of which bear semblance to the facts before us, when its third party subscribers posted vulgar, humiliating, defamatory statements which impair a person's dignity. It was also found that similar system or safeguard employed by Malaysiakini was not sufficient to exonerate its liability.

[19] In **Re: Prashant Bushan & Anor, Suo Motu Contempt Petition (Crl) No. 1 of 2020**, a lawyer was found guilty of contempt for tweeting contemptuous remarks but not the Twitter account. The Twitter account was found not guilty because the nature of Twitter account is that there is no control whatsoever on what is posted. We do not agree that Malaysiakini is similar to Twitter Account. Malaysiakini has full control on what is publishable and what is not.

[20] The reliance by Malaysiakini that the Malaysian Communications and Multimedia Content Code ('the Content Code') shielded it from liability arose from wrong interpretation of the Code. The Code as well as the Multimedia law has an overarching objective to protect publication against offensive comments be published on multimedia platform

[21] Having considered all the submissions before us and for all the reasons elucidated above, we are firm in our view that the explanation of the First Respondent on lack of knowledge have failed to cast a reasonable doubt on the Applicant's case. The First Respondent has also failed on a balance of probabilities, to rebut the presumption of publication

on the ground that it has no knowledge of the impugned comments. The MCMC Content Code does not provide the First Respondent with any shield of defence.

[22] We find the charge for facilitating the publication of the impugned comments against the First Respondent proved. We therefore hold the First Respondent guilty of contempt of Court.

The Second Respondent

[23] We have difficulty under the law (section 114A) to presume the Second Respondent Steven Gan as publisher. The Applicant has not established the three requirements of section 114A (1) against the Second Respondent. No fact or evidence was adduced that the name of the Second Respondent had appeared on Malaysiakini in such a way that can be attributed to **facilitating** the publication of the contemptuous comments.

[24] We are therefore not satisfied that a case of beyond reasonable doubt had been made out against the Second Respondent. The Second Respondent in our view is not guilty of contempt as alleged by the Applicant.

[25] We are quite certain that this case attracts worldwide attention and is under the watchful eyes of various news and media portals and organisations as well as social media platforms throughout the world. The media has demonstrated their agitation and concern that this case will shackle the media freedom and the chilling impact, this case may have that will eventually lead to a clampdown on freedom of the press.

[26] Nevertheless, this unfortunate incident should serve as a reminder to the general public that in expressing one's view especially by making unwarranted and demeaning attacks on the judiciary in the exercise of the freedom of expression as guaranteed and protected by our Federal Constitution, it must be done within the bounds permissible by the law. And the law does not tolerate contempt of Court as it undermines the system of justice.

[27] The Malaysian public is not known to be rude, discourteous, disrespectful or ill-mannered. Let not the social media change this social landscape of our nation. Malaysiakini too owes that duty to ensure the preservation of this social behaviours in the virtual world. This in fact will go a long way to earn Malaysiakini as a responsible portal, for the purpose of public discourse.

[28] In this vein, we underscore the importance of maintaining public confidence in the Judiciary, the need to protect the dignity and integrity of the courts and the Judiciary as a whole, considering the nature of the office which is defenceless to criticism. As succinctly put by Lord Denning in **Ex parte Blackburn (No. 2) (1968) 2 QB 150** that the nature of the judicial office does not allow replies to criticism. We cannot enter into public controversy and still less into politic. We have to rely on our conduct itself to be its own vindication.