DALAM MAHKAMAH RAYUAN, MALAYSIA
(BIDANGKUASA RAYUAN)
RAYUAN SIVIL NO. W-02(NCVC)(W)-996-05/2016

ANTARA

RAUB AUSTRALIAN GOLD MINING SDN. BHD .....PERAYU

DAN

HUE SHIEH LEE .....RESPONDEN

(DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR)
GUAMAN SIVIL NO: 23NCVC-73-09/2013

ANTARA

RAUB AUSTRALIAN GOLD MINING SDN. BHD .....PLAINTIF

DAN

HUE SHIEH LEE .....DEFENDAN

CORAM:

DAVID WONG DAK WAH, HMR
UMI KALTHUM BINTI ABDUL MAJID, HMR
KAMARDIN BIN HASHIM, HMR

JUDGMENT OF THE COURT

Introduction:

1. This is an appeal against the decision of the High Court in which the learned Judge dismissed the Appellant's /Plaintiff's claims premised on the tort of defamation and malicious falsehood in respect of two alleged publications by the Respondent/Defendant.
2. We heard the appeal and after due consideration to respective submissions of counsel, we reserved our decision and grounds which we now give.

Background facts:

3. The Appellant is the only gold processing company in Bukit Koman, Raub, Pahang.
4. The Respondent has a residential address in Bukit Koman and is the vice president of the Pahang Raub Ban Cyanide in Gold Mining Action Committee (BCAC) which was formed undoubtedly to look after the health and welfare of the residents in Bukit Koman.
5. What had happened was that the Respondent in her task as the vice president of the BCAC allegedly uttered defamatory words in two articles, the first one is set out at paragraph 6 of the Statement of Claim which reads as follows (First Article):

(a) "A random survey covering households in the area was conducted in May 2012 and the survey done by interviewing the residents from house to house and the interview was based on a standardize questionnaire with a total of 383 residents responded as the results were tabulated in the appendix page."

(b) "So survey results show that, 50% of the residents suffering from skin diseases and eye irritation and another 40% of the respondent has coughing, these results suggest that a possible cause is an air borne irritant affecting these respondents and there were 8 cases of cancer among the respondent."

(c) "As specified complaints such as giddiness and lethargy was also high and above 35% and the residents are aware of the business of the gold mine and the gold extracting facility RAGM near to their home. Persistent and strong cyanide like odour has been detected by majority of the residents since the Raub plant started operation in February 2009, such odour has been never present in Bukit Koman in prior times."

6. The second article is as set out in paragraph 9 which reads as follows (Second Article):

The 2nd Article contains the following passages which were derived from the words spoken, uttered and/or published by the Defendant to persons from Free Malaysia Today (FMT) website knowing and expecting the said words to be reported on the FMT website and are prima facie defamatory of the Plaintiff in the way of its trade and business:

(a) "According to Sherly, RAGM has even claimed that they have generated many jobs for the villagers who number a little over 1,000 people. When asked how many villagers work at the mine, Sherly said that it was less than 10 people."

Our grounds of decision:

7. In any action for defamation, the Court is generally tasked with three issues which are these:

   (i) Whether the published words are defamatory and the burden is on the Plaintiff (the Appellant here) to prove the same?

   (ii) Whether the published words refer to the Plaintiff (the Appellant)?

   (iii) Whether the published words were in fact published to a third person by the Defendant (the Respondent here) and the burden is on the Plaintiff (the Appellant) to prove the same?

8. Before we deal with the aforesaid issues, we think that it appropriate to first deal with one of the complaints of learned counsel for the Appellant and that is the learned judge had the burden of proof wrong in a defamation action. At pages 43 – 44 of the submission,

learned counsel for the Appellant had submitted that the learned judge erred (i) when she required the Appellant to prove the veracity of the alleged result of the survey report, (ii) when she required the Appellant to call the 383 residents as witnesses to testify that they did not suffer any health problem, and (iii) when she required the Appellant to call any of ordinary and reasonable third party readers or hearers to prove that the words are defamatory in nature. Learned counsel for the Respondent had rightly and appropriately conceded that the learned judge had got the burden of proof wrong. With that, we just add that this complaint by the Appellant has merits and accordingly we set aside that part of the judgment. With that we now deliberate on the three issues set out above to the two articles complained of by the Appellant.

First Article:

9. At the High Court, the learned judge found that the words were not defamatory at all but unfortunately in her process of deliberation she wrongly put the burden on the Appellant to prove matters in the manner set out earlier. That being the case, we are now given the task of determining whether the words in the 1st Article are defamatory.

10. In performing that task, we adopt the approach of Lord Morris in ***Jones v Skelton (1963) 3 All ER 952*** at page 958:

> *"The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words (see Lewis v. Daily Telegraph Ltd [1963] 2 All ER 151). The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader, guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction, would draw from the words. The test of reasonableness guides and directs the court in its function of deciding whether it is open to a jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense. In my judgment, the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory."*

11. It is the submission of the Appellant as per paragraph 7(a) of the amended statement of claim that the words in their natural and

ordinary meaning and/or by way of innuendo bear the following defamatory meanings:

(a) The Appellant has been negligent in handling sodium cyanide in its plant by allowing it to escape from the Plant causing 383 residents of Bukit Koman to suffer illnesses;

(b) The ill health of the 383 residents are due to the direct actions of the Appellant at its CIL Plant;

(c) That the Appellant utilises unsafe trusties practice that compromises the health and safety of people, animals and environment;

(d) The Appellant is irresponsible and does not employ safe mining operations;

(e) The Appellant is an irresponsible and reckless company that prioritises profit over the health and safety of the residents of Bukit Koman;

(f) The Appellant is an irresponsible and reckless company that prioritises profit over sound and/or safe mining practices;

(g) The Appellant has caused the air in the Bukit Koman area to be polluted due directly and/or solely to presence of sodium cyanide which has escaped from the Appellant's

CIL Plant which in turn caused the residents to suffer from skin and eye irritation.

12. Applying the approach of Lord Morris in **Jones v Skelton (supra)** and keeping foremost in our minds what the Appellant had alleged in paragraph 7(a) of the amended statement of claim as to meaning of the words in the 1st Article, we read and re-read those words and form the view that we cannot ascribe to them the meanings which the Appellant want this Court to do.

13. In construing those words, this Court must look at them in a holistic manner. The Respondent holds herself as the vice president of BCAC which is an activist group. This fact is not disputed; hence she is a bona fide activist which by definition is a person who campaigns for some kind of social change. In the context of this case, she chose to take up the cause of the residents Bukit Koman who were fearful for their health. Towards that end, a survey on the health of the residents was done and premised on the findings of the survey, the Respondent called a press conference to inform the public the result of the survey. Learned counsel for the Appellant during submission had conceded that had the press statement stopped at paragraph 6(b) of amended statement of claim, the words therein would not be defamatory. What learned counsel finds

objectionable is paragraph 6(c) of the amended statement of claim which talks of the presence of cyanide odour which had caused sickness among the residents.

14. To recapitulate, these are the exact words of paragraph 6(c):

> "As specified complaints such as giddiness and lethargy was also high and above 35% and the residents are aware of the business of the gold mine and the gold extracting facility RAGM near to their home. Persistent and strong cyanide like odour has been detected by majority of the residents since the Raub plant started operation in February 2009, such odour has been never present in Bukit Koman in prior times."

15. With respect to learned counsel, what the Respondent was saying was simply that the survey commissioned by the villagers had discovered that there is some sort of cyanide like odour had been detected since 2009 and this odour was not present prior to 2009. In our view, she was only stating a finding of the survey and expressing her concern for the health of the residents. By expressing her concern for the residents, she was only exercising

her rights as an activist to bring to the attention of the relevant authorities to allay the residents' fear. That was what happened. The Department of Health did an investigation and found that the ill health of the residents was not abnormal. But that does not make the statement by the Respondent defamatory. In fact, we say that she should be commended for doing her social duty to bring to the attention what was the fear of the residents at Bukit Koman which is a village next to the plant owned and built by the Appellant. We must also not lose track of the context in which the statements were made. The context being the press conference and a survey report of the residents concerning their health in which the Respondent wanted to highlight to the press and the public.

16. Further, looking at the press statement as a whole in a reasonable and objective manner, we, with respect, cannot see how those words had exposed the Appellant to hatred, contempt or ridicule or lowered the Appellant in the estimation of the society at large. We must also not lose sight of the fact that the existence of activists group is very much part of today's society, so much so that it is undeniable that they have contributed much to the general well-being of the society at large. That said, we are mindful of the obvious fact that they do not have a licence to defame. In the case at hand,

the most it can be said, is that what was said may not be "music to the ear" or "irritating" to the Appellant but that cannot be equated to defamatory utterances. We now live in a much more liberal society where the concept of transparency and accountability are very much part and parcel of our lives. Hence the freedom of speech entrenched in our Constitution must be construed in that context. As aptly put by the late Raja Azlan Shah Ag LP (as he then was) in ***Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29:***

> *In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way – "with less rigidity and more generosity than other Acts". A constitution is sui generis, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation."*

17. What His Royal Highness said was simply that values of society change as time progresses and it is incumbent on the Courts to interpret the fundamental right of freedom of speech to reflect the present day values of the society. Of late our Courts have

recognised the right to life in the framework of our constitution (see ***Tan Teck Seng v Suruhanjaya Perkhimatan Pendidikan & Anor (1998) 3 MLJ 289 and Nor Anak Nyawai v Borneo Pulp (2001) 6 MLJ 241)*** which in our view includes the right to live in a safe and healthy environment. We have taken on board the advice of His Royal Highness when deliberating this appeal. With that we now deliberate on the words of the second article.

Second Article (paragraph 9 of amended statement of claim):

18. The learned Judge found as a matter of fact that the Appellant had failed to prove that it was the Respondent who had published the words in the Second Article as set out in paragraph 6 above premised primarily on the rationale that the words set out in the amended statement of claim were not proved as the actual words which were uttered by the Respondent when the reporter by the name of Aneesa Alphonsus who wrote that article in FMT was not called to verify what was uttered by the Respondent.

19. Learned counsel for the Appellant however submitted that the learned Judge erred when she failed to realise that there was no direct plea of denial of paragraph 9 of the amended statement of claim. Put in another way, the Respondent is deemed to have

admitted to the publication when she did not specifically deny paragraph 9 in her defence.

20. Further, the Court during submission had asked as to whether paragraph 59 of the Amended Defence would remedy the lack of direct denial of publication. Paragraph 59 reads as follows:

> 59. In addition to the defences raised, save where expressly admitted herein, the Defendant denies each and every allegation of the Plaintiff as they are set out henceforth and traversed seriatim.

Learned counsel, by way of further submission, refers us to Bullen & Leake & Jacob's Precedents of Pleadings, 17th Edition (Vol1) page 641 – Pleading to "falsely and maliciously" in particulars of claim.

21. Learned counsel for the Respondent in response submits three grounds:

(a) Paragraph 59 though in a form of a "catch all" denial is an effective denial of any allegation of publication;

(b) The 2nd Article is contained in Part B of the Agreed Bundle of Documents;

(c) There was no admission of publication in the Statement of Agreed Facts filed with the Court prior to trial.

22. Having considered respective submissions of learned counsel, we agree with the position taken by the Respondent for the simple reason that the second Article was a document in Bundle B documents which contain documents that are agreed as to their authenticity but not as to their contents. What that means is that the existence and the genuineness of the documents are agreed upon and required no proof. As for the contents, they must be proved.

23. Taking that in the context of a defamation action as we have here and bearing in mind that the burden of proof is on the Appellant to prove publication of the exact words uttered by the Respondent, the way paragraph 9 of the amended statement of claim is crafted or fashioned does not in any way directly state what exactly the words uttered by the Respondent. In fact, the manner it was fashioned or pleaded was in the form of hearsay evidence. Bundle B documents require proof as to what was heard by the reporter was the same as was reported. Hence we agree with the learned Judge when she said as follows:

> *"47. In my opinion, the 2nd set of words complained of are not the actual or uttered or published by the Defendant to a third party against the Plaintiff. Instead, the 2nd set of words complained of is in fact a report or statement by FMT and/or Aneesa Alphonsus. The*

Plaintiff failed to call Aneesa Alphonsus of FMT, the reporter or publisher of the 2nd set of word complained of, as a witness to prove that she had interviewed the Defendant and the Defendant, did say that RAGM/the Plaintiff had even claimed that they have generated a little over 1000 jobs for the villagers, and the Defendant then said that RAGM generated jobs for less than 10 people."

24. For the aforesaid reason, we say that there was no proof of publication by the Respondent as held by the learned Judge.

25. Assuming we are wrong that there was no publication, we now look at the words complained of in the Second Article. According to the Appellant, those words contain defamatory meaning in that "the [Appellant] is a **dishonest company** who represented that it had generated many jobs for the villagers when in fact only **less than 10 individuals from the village work at the Appellant's Carbon in Leach Plant"** and "the [Appellant] is a company that practices deceit and always misrepresents facts" (see page 72 of submission of Appellant's counsel).

26. Again applying the approach of Lord Morris, we, with respect, do not find that the meaning as ascribed to by learned counsel for the Appellant as a reasonable interpretation. The Respondent in our view was saying that there are 1000 villagers living a Bukit Koman and the Appellant had only employed less than 10 villagers in its plant there. The number "1000" cannot refer to the number of jobs generated by the Appellant. Hence we agree with learned counsel for the Respondent that the Appellant was putting words into the mouth of the Respondent. Again, we must not lose sight that the Respondent was protecting the welfare of the residents there and was merely expressing a view on the Appellant. That view may not be accurate but it can easily be corrected by the Appellant through a press release but in no way, does it turn those words into meanings as subscribed to by the Appellant.

Conclusion:

27. For reasons stated above, we do not find the words in the First Article to be defamatory. As for the words in the Second Article, the Appellant has failed to prove that there was publication by the Respondent of the same and in any event we find those words not to be defamatory. In view of our findings on the two articles, the plea of malicious falsehood is without merit. Further, though the

learned judge erred in the process of arriving to her decision, we however agree with her conclusions.

28. Accordingly, we dismiss the appeal with costs in the sum of RM20,000.00 subject to payment of allocatur fees. We also order that the deposit be refunded to the Appellant.

Dated: 21 October 2016

(DAVID WONG DAK WAH)
Judge
Court of Appeal Malaysia

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Salinan Diakui Sah.

ANTHEA GENNAVERA SAMUIN
Setiausaha Kepada
YA Datuk David Wong Dak Wah
Hakim Mahkamah Rayuan Malaysia

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision.