PEGUAM NEGARA MALAYSIA

v.

MKINI DOTCOM SDN BHD & ANOR

Federal Court, Putrajaya
Rohana Yusuf PCA, Azahar Mohamed CJM, Abang Iskandar Abang Hashim CJSS, Mohd Zawawi Salleh, Nallini Pathmanathan, Vernon Ong Lam Kiat, Abdul Rahman Sebli FCJJ
[Civil Application No: 08(L)-4-06-2020(W)]
19 February 2021

Civil Procedure: *Contempt of court — Scandalising the court — Committal proceedings pursuant to O 52 r 3(1) Rules of Court 2012 ("ROC") — Application to set aside leave to commence committal proceedings against respondents for publishing five impugned comments originating from third-party commenters which were contemptuous of Judiciary — Whether non-compliance with O 52 r 2(b) ROC fatal — Whether application to set aside ought to be allowed*

Evidence: *Presumption of Publication — s 114A Evidence Act ("EA") — Whether respondents facilitated publication of impugned comments and presumed to have published the same — Whether respondents had rebutted presumption of publication under s 114A EA — Whether the applicant had made out prima facie case for contempt of court against both respondents*

Civil Procedure: *Contempt of court — Intention to publish — Liability of online intermediary — Whether respondents were liable in contempt for third-party comments — Whether respondents possessed requisite "intention to publish" for purposes of scandalising court contempt*

Civil Procedure: *Contempt of court — Knowledge — Whether 'publication' required element of knowledge to be fulfilled — Whether 1st respondent as host of internet portal news knowingly published said third-party comments — Criterion to establish liability for acts of online intermediary — Whether actual knowledge or constructive knowledge*

The Attorney General of Malaysia ("AG") initiated a contempt proceeding against an online news portal, Mkini Dotcom Sdn Bhd ("Malaysiakini") as the 1st respondent and its Editor-in-Chief, Gan Diong Keng ("Steven Gan") as the 2nd respondent. It all began when Malaysiakini published an article on 9 June 2020 pertaining to the acquittal of the former Sabah Chief Minister Musa Aman of 46 charges of corruption and money laundering. On the same day, the Office of the Chief Registrar issued a press release by the Chief Justice for all Courts to be operational from 1 July 2020, in line with the announcement that the country was moving into the recovery phase of the Movement Control Order. Malaysiakini republished from Bernama that press release as an article entitled "CJ orders all courts to be fully operational from 1 July". This

prompted the third-party online subscribers to make comments ("impugned comments") on the Malaysiakini's website on 9 June 2020 that scandalised the judiciary in general and the Chief Justice of the Federal Court in particular. The respondents were only affixed with knowledge of the impugned comments on 12 June 2020. A week after the impugned comments were published, on 15 June 2020, the AG, by way of an *ex parte* notice of motion in encl 2, applied for leave to commence committal proceedings against both respondents for publishing the impugned comments. The respondents in encl 22 applied to set aside the application of the AG, citing the grounds that the AG's application failed to disclose a *prima facie* case as well as for procedural non-compliance. This court dismissed encl 22 and held that a *prima facie* case had been made out by virtue of s 114A of the Evidence Act 1950 ("EA"), where the respondents were deemed to have published the impugned comments. Consequently, this court granted the AG leave to commence committal proceedings against the respondents, under O 52 r 3(1) of the Rules of Court 2012 ("ROC"). The respondents' line of defence was that they had no knowledge of the impugned comments. The respondents' position was also that neither of them moderated or played any direct role in publishing the impugned comments on the news portal. As for the 2nd respondent, he denied any involvement since he was not the "Content Application Service Provider" within the meaning of s 6 of the Communications and Multimedia Act 1998 ("CMA"). In addition to this, it was the 2nd respondent's position that there was no legal basis to hold him vicariously liable for the 1st respondent's acts.

Held (in finding that a case of contempt beyond reasonable doubt had been made out against the 1st respondent, the 1st respondent was sentenced with a fine of RM500,000):

Per Rohana Yusuf PCA, Azahar Mohamed CJM, Abang Iskandar Abang Hashim CJSS, Mohd Zawawi Salleh, Vernon Ong Lam Kiat, Abdul Rahman Sebli FCJJ (majority judgment)

(1) On the issue of procedural non-compliance, ie for the applicant's failure to issue a formal notice to show cause, it was held that the respondents were aware of the application by the AG when learned counsel for the respondents appeared on the date of the *ex parte* hearing. As such the non-issuance of a formal notice did not prejudice the respondents. There was no denial of the right to appeal open to the respondents as the Apex Court was duty-bound to deal with any scurrilous attacks on the Judiciary to uphold the image, integrity and public confidence in the Judiciary. As for the procedural non-compliance concerning the naming of the 2nd respondent as "Ketua Editor, Malaysiakini" instead of "Editor-in-Chief", it was held so long as the party and the capacity in which he was being sued was identifiable, such error did not cause injustice, hence not fatal to the case. (paras 9-13)

(2) The presumption under s 114A of the EA described the process whereby, upon the proof of the required basic fact or facts, the existence of the presumed

fact might be inferred from it. It was an alternative mechanism to prove a fact other than by adducing direct evidence. This presumption would help to identify and prove the identity of an anonymous person involved in the publication through the internet. It was beyond argument that Malaysiakini, as the 1st respondent depicted itself as the host to the publication. By virtue of s 114A(1) of the EA, Malaysiakini was presumed to have published the impugned comments. With the presumption in place, the AG had overcome the hurdle of imputing responsibility for the publication on the 1st respondent. (paras 45-46)

(3) It was a well-settled legal principle that knowledge was a matter of fact. Proof of knowledge was always a matter of inference. The material from which the inference of the existence of actual knowledge could be inferred varied from case to case. A court might infer knowledge of a person on the assumption that such a person had the ordinary understanding expected of him in his line of business unless he was convinced otherwise. In inferring knowledge, the court might approach the matter in two stages. First, where opportunities for knowledge on the part of the particular person were proved. Second, there was nothing to indicate that there were obstacles to that person acquiring the relevant knowledge and that there was some evidence from which the court could conclude such person had knowledge. (paras 65-69)

(4) The respondents had failed to rebut the presumption under s 114A of the EA. The respondents' explanation on lack of knowledge had failed to cast reasonable doubt on the applicant's case. On a balance of probabilities, the 1st respondent had also failed to rebut the presumption of publication on the grounds that it had no knowledge of the impugned comments. The 1st respondent facilitated the publication of the contemptuous comments by the third-party subscribers. The 1st respondent designed and controlled its online platform in the way it had chosen. It had complete control of what was publishable and what was not. It must carry with it the risks that followed from allowing the way its platform operated. The comment section at the bottom, which accompanied each news report published by the 1st respondent, was only accessible to third party online subscribers. In this regard, the 1st respondent was aware of its role in posting and publications. It would be expected for the respondents to foresee the kind of comments attracted by the publication of the article on Musa Aman's acquittal following the withdrawal of charges, coinciding with the unfortunate timing of the press release by the Chief Justice. (paras 74-86)

(5) The law was trite and settled that the burden of proving contempt of court lay throughout with the party who made the allegation, in this case, the AG as the applicant. The standard of proof required was the criminal standard of proof beyond any reasonable doubt. The test to be applied was the objective test and not the *mens rea* test. The only requirement was that the publication of the impugned articles was intentional. Hence, there was no necessity to prove an intention to undermine public confidence in the administration of justice

or the Judiciary. The alleged contemnor's subjective intention was difficult to establish since it entailed an inquiry into the inner workings of the alleged contemnor's mind. Thus, it would not matter whether the publisher intended the result. It, therefore, was no defence for the publisher to claim that he did not know if the statements would have the effect of undermining or erode the public in the administration of justice. (paras 123-125)

(6) The 1st respondent did not comply with the Communications and Multimedia Content Code (Content Code). Far from complying with the Content Code, Malaysiakini might have breached the Content Code's fundamental objective. The Content Code in s 2.0 of Part 1 imposed a duty on the 1st respondent as an Internet Content Host (ICH) to ensure to the best of its ability that its content and comments contained no abusive or discriminatory material. The precautionary measures taken by the 1st respondent were inadequate to shield itself from liability. The 1st respondent also could not invoke s 3(3) of the Communications and Multimedia Act 1998 ("CMA") to say that they were not allowed internet censorship in order to absolve their responsibilities. Both CMA and the Content Code viewed wholly have the overriding purpose of not only promoting self-regulation by internet service or content providers but also to regulate and ensure that communications that took place on each information platform did not violate the fundamental rights enjoyed by others. A proper balance must be struck between the freedom of speech and expression enunciated and guaranteed in art 10 of the Federal Constitution and the need to protect the dignity and integrity of the courts and the Judiciary. On the facts, a case of contempt beyond a reasonable doubt had been made out against the 1st respondent, and the charge for facilitating the publication of the impugned comments against the 1st respondent had been proven. (paras 127-132)

(7) No evidence was adduced that the name of the 2nd respondent had appeared on Malaysiakini in such a way that could be attributed to facilitating the publication of the contemptuous comments. There was no evidence tendered that the 2nd respondent's name appeared on the publication of the impugned comments to attract a presumption under s 114A. There was no evidence that the 2nd respondent was at all material times named as the owner or the host or the editor on the online news portal owned by the 1st respondent and that there was no evidence that he was the person who reserved the sole discretion to edit or completely remove any comments by a third party. (paras 136-138)

(8) In meting out an appropriate sentence in contempt proceedings, the relevant factors to be considered would include the culpability of the contemnor, the nature and gravity of the contempt, the seriousness of the occasion on which the contempt was committed, the type and extent of dissemination of the contemptuous statements and the importance of deterring would-be contemnors from following suit. In the present case, the comments were scurrilous and reprehensible. The unwarranted attack was incendiary, which exposed the Judiciary to embarrassment, public scandal, contempt and to

the point of belittling the Judiciary. It had tarnished the Judiciary as being guilty of corrupt activity and had compromised its integrity in carrying out judicial functions. Such impugned comments, if allowed to continue, would undermine public confidence in the Judiciary. Public interest demanded a deterrent sentence be meted out against the 1st respondent. (paras 148-158)

Per Nallini Pathmanathan FCJ (dissenting)

(9) Although the impugned comments appeared on the Malaysiakini news portal, it was open to the 1st respondent to adduce evidence to establish that the comments were neither made nor posted by it. Section 114A in no manner imputed guilt or liability on the part of the 'publisher'. It merely altered the normal course of proof such that it became incumbent upon the presumed publisher to explain why he was not responsible for the content on the internet portal or site. With the application of the section, the only conclusion that could be drawn was that *prima facie*, the 1st respondent, was the 'publisher' of the impugned comments but was at liberty to rebut this presumption. (paras 194-198)

(10) The respondents had sought to rebut the presumption by averring to the fact that at the time, and until the subject impugned comments were brought to the attention of personnel of the 1st respondent, the respondents were not aware of the existence, nor the contents, of the impugned statements. There was no evidence put forward to refute or challenge these statements of the respondents. The only conclusion of fact that could be reasonably drawn on the record of evidence was that the respondents did not know, nor were aware of the existence or contents of the impugned comments, at the point in time when they were posted by the third-party commenters. In this context, the suggestion in the majority judgment that all 65 members of the editorial team should each affirm affidavits was not tenable, as the single affidavit had rebutted the presumption. (paras 199-201)

(11) An online content service provider like the 1st respondent became liable as a publisher when it had knowledge or became aware of both the existence and the content of the subject material that was unlawful or defamatory and failed to take down said material within a reasonable time. In other words, knowledge of, and consent to, such content was necessary before an online intermediary became liable as a publisher for such content. Awareness of the content was a prerequisite. (paras 253-255)

(12) Actual knowledge of the existence and content of the impugned statements was necessary. Constructive knowledge inferred from the surrounding circumstances did not establish intent to publish on the part of the respondents for the purposes of liability under 'scandalising the court' contempt. It meant that an online intermediary would only become a publisher from the time it knew the impugned speech. It was only from that point in time that there arose a duty on the part of the online intermediary to remove all unlawful content from its site within a reasonable time. If it failed to do so, it was likely to

be liable for a variety of offences. Until then, it was not a 'publisher'. This was in consonance with the CMA, which regulated the communications and multimedia industries. Parliament had stipulated that an online news portal became a 'publisher' with clear duties upon becoming cognisant of any unlawful comment which needed to be taken down. It was only upon failure to do so that it could be said that the publisher had committed a wrongdoing. Therefore, the imposition of an 'ought to have known' test ran away from the current legislation and the Content Code. (paras 255-258)

(13) The Federal Constitution allowed for freedom of speech and expression subject to such law as Parliament might impose. It was no doubt true that art 10 explicitly recognised that the right to freedom of speech and expression might be restricted, but that curtailment might only be done by way of written legislation passed by Parliament. For the purposes of the present proceedings, it must be emphasised that there was no specific law enacted by Parliament that dealt with contempt of court. It was also significant that s 3(3) of the CMA declared that nothing in the CMA "shall be construed as permitting the censorship of the Internet". The responsibility for online content rested primarily with the content creator (s 4.1(b) of the Content Code). An internet content hosting provider (ICH) should not be required to block access by its users of subscribers to any material unless directed to do so by the Complaints Bureau acting in accordance with the complaints procedure set out in the Content Code (s 11.1(c) and (d) of the Content Code). The enactment of the CMA and the Content Code evinced the intention of Parliament that liability would only be imposed on an online intermediary if it failed to respond to a flag and takedown process, rather than any form of pre-censorship or pre-monitoring basis. (paras 259-261)

(14) The rationale for requiring actual knowledge as a criterion to establish liability for the acts of an online intermediary was to avoid placing an undue burden on entities for the contemptuous publications of others. A risk-averse approach that demanded that liability be imposed on the basis of constructive knowledge might result in the removal of non-contemptuous material, which in turn diluted the protection accorded to freedom of expression under art 10 of the Federal Constitution. If the 'ought to know' test was used to establish 'publication', ie: (i) the fact of the impugned comments appearing on the portal; and secondly (ii) 'constructive knowledge' to establish an 'intention to publish', then it amounted to applying a double inference or presumption against the online portal. Added to that, as liability affixed immediately upon the comment by the third party coming into existence on the portal, there was nothing the portal could do to alleviate its position either in respect of 'publication' nor 'an intention to publish'. There was simply no defence to be availed of if a constructive knowledge test was to be accepted. (paras 264-267)

(15) A criterion of imputed knowledge for the imposition of liability on internet intermediaries in the field of the law of contempt more appropriately belonged to the domain of the legislature. Thus, in the absence of a

statutory yardstick for cases involving internet intermediaries, it was the 'actual knowledge' test that should apply. It, therefore, followed that the 1st respondent was not a 'publisher' when the impugned comments first appeared on 9 June 2020 because it did not have any knowledge of the impugned third-party comments. It was only affixed with knowledge of those comments on 12 June 2020. Those comments were taken down within a timeframe of 12 minutes, falling well within the purview of 'a reasonable time'. As such, the 1st respondent was not a 'publisher' of those impugned comments. The 2nd respondent as the chief editor was further removed as s 114A did not apply to him. Neither did the factual matrix of the case implicate him in such a fashion. (paras 268-270)

(16) The respondents were not 'publishers' of the impugned comments. They did not fulfil either of the elements for the purposes of 'scandalising the court' contempt, ie the *actus reus* of the fact of publishing or making available the impugned comments on their portal and the *mens rea* element of an 'intention to publish. The *actus reus* element required not only the mere appearance of the impugned comments on the portal but also the knowledge of the existence of those comments. The respondents had no such cognisance of the same because they were unaware of the existence and content of those impugned comments until 12 June 2020. They promptly removed the comments, thereby taking themselves outside the purview of being 'publishers' of the impugned comments. As they were not publishers, they did not publish the impugned comments. They had no requisite 'intention to publish', which was the foundational element for the *quasi*-criminal offence of scandalising the court contempt. The standard of proof was beyond a reasonable doubt, and that standard could not be met on the material on record. (paras 271-273)

(17) The repercussions of extending the law of contempt from actual knowledge to constructive knowledge were that there would be a chilling effect on freedom of expression in the media. Even articles or statements expressing valid criticism might be excised or precluded from being published online. There was a grave likelihood that user comments would be disabled. That would be detrimental and anathema to art 10 of the Federal Constitution. Moreover, imposing liability for a portal's negligence, rather than because it intentionally allowed an unlawful comment to subsist after becoming aware of it, was contrary to the CMA as well as the law of contempt, which required a clear intention to publish. Since the respondents had established that they did not know of the existence of the admittedly contemptuous comments until notification of the same and because the impugned comments were removed within a reasonable timeframe, it followed that the applicant had not demonstrated beyond a reasonable doubt that the respondents possessed the requisite intention to publish the impugned material. (paras 279-281)

Case(s) referred to:

Abdullah Atan v. PP & Other Appeals [2020] 6 MLRA 28 (refd)

Abel v. Lee [1871] LR 6 CP 365 (refd)

Ahmad Abd Jalil lwn. PP [2014] MLRHU 1409 (refd)

Alma Nudo Atenza v. PP & Another Appeal [2019] 3 MLRA 1 (refd)

Attorney General Of Malaysia v. Dato' See Teow Chuan & Ors [2018] 4 MLRA 503 (refd)

Attorney General v. Times Newspaper Ltd [1974] AC 273 (refd)

Attorney-General v. Newspaper PLC [1998] Ch 333 (refd)

Bunt v. Tilley & Ors [2006] 3 All ER 336 (refd)

Chan Pean Leon v. PP [1956] 1 MLRH 44 (refd)

Chung Onn v. Wee Tian Peng [1996] 3 MLRH 782 (refd)

Competition and Consumer Commission v. Allergy Pathway Pty Ltd [2011] FCA 74 (refd)

Davison v. Habeeb [2011] EWHC 3031 (refd)

Delfi AS v. Estonia [2015] (ECtHR) (Application No 64569-09) (folld)

Dow Jones & Company Inc v. Gutnick [2002] 210 CLR 575 (refd)

Emmanuel Yaw Teiku v. PP [2006] 1 MLRA 808 (refd)

Ex-Parte Blackburn (No 2) (1968) 2 QB 150 (refd)

Fairfax Media Publications; Nationwide News Pty Ltd; Australian News Channel Pty v. Voller [2020] NSWCA 102 (refd)

Godfrey v. Demon Internet Ltd [2001] QB 201 (refd)

Hoslan Hussin v. Majlis Agama Islam Wilayah Persekutuan [2012] 2 MLRA 701 (refd)

In Re Prashant Bhushan & Anor, Suo Motu Contempt Application (Crl) No 1 of 2020 (refd)

In The Matter of a Special Reference from the Bahama Islands [1893] AC 138 (refd)

Leow Nghee Lim v. Regina [1955] 1 MLRH 614 (refd)

Magyar Tartalomszolgaltatok Egyesulete and Index.hu Zrt v. Hungary, European Court of Human Rights [2016, appeal no 22947-13] (refd)

Malayan Banking Berhad v. Chairman Sarawak Housing Developers' Association [2014] 4 MLRA 493 (folld)

Maria Elvira Pinto Exposto v. PP [2020] 2 MLRA 571 (refd)

Metropolitan International Schools Ltd v. Desightechnica Corporation [2011] 1 WLR 1743 (QB) (refd)

Murray v. Wishart [2014] 3 NZLR 722 (refd)

Navaradnam v. Suppian Chettiar [1973] 1 MLRA 687 (refd)

Oriental Press Group Ltd v. Fevaw orks Solutions Ltd [2013] HKCFA 47 (refd)

Parlan Dadeh v. PP [2008] 2 MLRA 763 (refd)

PCP Construction Sdn Bhd v. Leap Modulation Sdn Bhd; Asian International Arbitration Centre (Intervener) [2019] 3 MLRA 429 (refd)

PP v. Phua Keng Tong & 2 Other Appeals 1986] 2 MLRH 226 (refd)

PP v. Abdul Rahman Akif [2007] 1 MLRA 568 (refd)

PP v. Hoo Chee Keong [1996] 1 MLRH 829 (refd)

PP v. Kenneth Fook Mun Lee @ Omar Iskandar Lee Abdullah (No 2) [2003] 7 MLRH 81 (refd)

R v. Gray [1900] 2 QB 36 (refd)

R v. Metropolitan Police Commissioner ex parte Blackburn (No 2) [1968] 2 QB 150 (refd)

R v. Odham' Press Ltd ex p AG [1957] 1 QB 73 (refd)

Re: Prashant Bushan & Anor, Suo Motu Contempt Petition (Crl) No 1 of 2020 (distd)

RCA Corp v. Custom Cleared Sales Pty Ltd [1978] FSR 576; 19 ALR 123 (refd)

Reynolds v. Times Newspapers Limited and Others [1999] 4 All ER 609 (refd)

S v. Mamabolo (CCT 44-00) [2001] ZACC 17; [2001] (3) SA 409 (CC); [2001] (5) BCLR 449 (CC) (refd)

Shadrake Alan v. Attorney General [2011] SGCA 26 (refd)

Stanislaus J Vincent Cross v. Ganesan Vyramutoo & Anor [2021] 1 MLRH 459 (refd)

Tamiz v. Google Inc [2013] EWCA Civ 68; [2013] 1 WLR 2151 (refd)

Tan Boon Thien & Anor v. Tan Poh Lee & Ors (Encl 81) [2019] MLRAU 446 (distd)

Thong King Chai v. Ho Khar Fun [2018] 5 MLRH 277 (refd)

Tong Seak Kan & Anor v. Loke Ah Kin & Anor [2014] 5 MLRH 709 (refd)

Totalise PLC v. Motley Fool Ltd & Anor [2001] IP & T 764 (refd)

Uthayakumar Ponnusamy v. Abdul Wahab Abdul Kassim & Ors [2020] 2 MLRA 472 (distd)

Victor Chidiebere Nzomiwu & Ors v. PP [2013] 3 MLRA 487 (refd)

Weaver v. Corcoran [2015] BCSC 165 (refd)

Webb v. Bloch [1928] 41 CLR 331 (refd)

Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal [1995] 2 MLRA 684 (refd)

YB Dato' Haji Husam Musa v. Mohd Faisal Rohban Ahmad [2015] 2 MLRA 492 (refd)

Yusof Holmes Abdullah v. PP [2019] MLRHU 1009 (refd)

Zainur Zakaria v. PP [2001] 1 MLRA 341 (refd)

Legislation(s) referred to:

Civil Law Act 1956, s 3

Communications and Multimedia Act 1998, ss 3(3), 6, 95(2), 98(2), 99, 213(1)

Contempt of Court Act 1981 [UK], s 10

Courts of Judicature Act 1964, s 13

Defamation Act 2005 [NSW], s 32

Evidence Act 1950, s 114A(1)

Federal Constitution, arts 10(2)(a), 126, 145(3)

Rules of Court 2012, O 52 rr 2B, 3(1)

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C Tapper, Cross & Wilkins, *Outline of the Law of Evidence*, 6th edn, London: Butterworths, 1986), p 39

European Convention for the Protection of Human Rights and Fundamental Freedoms, arts 10(2), 14, 34

Harvey, DJ, Collisions, *Digital Paradigm: Law and Rule - Making in the Internet Age*, (USA: Bloomsbury, 2017), pp 82-83

Jurate Sidlauskiene & Vaidas Jurkevicius, *Website Operators' Liability for Offensive Comments: A Comparative Analysis of Delfi AS v. Estonia and MTE & Index v. Hungary* [2017] 10 Baltic Journal of Law and Politics 46-75, p 48

M Hirst, Andrews & Hirst, *Criminal Evidence*, 3rd edn (London: Sweet & Maxwell, 1997) p 115

Pappalardo, Kylie and Nicolas Suzor, "*The Liability of Australian Online Intermediaries*" [2018] 40 Sydney Law Review 469-498, p 498

Sir Hari Singh Gour, *The Penal Law of India* , 11th edn, Vol 3, p 2381

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Watching Brief for Centre for Independent Journalism & Gerakan Media Merdeka: Yusmadi Yusoff; M/s Fahda Nur Yusmadi

JUDGMENT

Rohana Yusuf PCA (Majority):

Introduction

[1] The Honourable Attorney General of Malaysia ('AG'), brought this contempt proceeding against an online news portal, Mkini Dotcom Sdn Bhd (Company No 489718-U) ('Malaysiakini') as the 1st respondent and its Editor-in-Chief, Gan Diong Keng ('Steven Gan') as the 2nd respondent.

[2] To draw the chronological background to the Application before us, it all began when Malaysiakini published an article entitled "Musa Aman acquitted

after prosecution applies to drop all charges" on 9 June 2020. In gist, it pertains to the acquittal of the former Sabah Chief Minister Musa Aman of 46 charges of corruption and money laundering. Coincidently on the very same day, the Office of the Chief Registrar issued a press release by the Chief Justice for all Courts to be fully operational from 1 July 2020, in line with the announcement that the country was moving into the recovery phase of the Movement Control Order. Malaysiakini republished from Bernama that press release as an article entitled "CJ orders all courts to be fully operational from July 1".

[3] Following that press release, the following comments ('impugned comments') by third party online subscribers appeared on Malaysiakini's website on 9 June 2020:

(i) Ayah Punya kata:

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

(ii) 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!

(iii) 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!

(iv) 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???; and

(v) Victim:

> The Judiciary in Bolihland is a laughing stock.

[4] A week after the impugned comments were published, on 15 June 2020, the AG by way of an *ex parte* notice of motion in encl 2 applied for leave to commence committal proceedings against both respondents for publishing the impugned comments.

[5] The *ex parte* application was heard on 17 June 2020. Notwithstanding it was an *ex parte* hearing, learned counsel for the respondents attended the court proceeding at *ex parte* hearing for two main reasons. First, to preserve the right

of the respondents to apply for striking out of the AG's *ex parte* application. Secondly, to inform the court of representation made on behalf of the respondents to the AG, seeking for a withdrawal of this contempt application.

[6] Upon hearing the leave application, this court, being satisfied that a *prima facie* case had been made out, granted the AG leave to commence committal proceedings against the respondents, pursuant to O 52 r 3(1) of the Rules of Court 2012 (ROC). The AG then, on 18 June 2020 proceeded with the substantive application in encl 19 for committal orders against the respondents.

The Setting Aside Application

[7] The respondents in encl 22 applied to set aside the application of the AG. Enclosure 22 was supported by an affidavit deposed by the 2nd respondent (encl 23) citing the grounds that the AG's application failed to disclose a *prima facie* case as well as procedural non-compliance. We heard encls 19 and 22 together on 2 July 2020 and dismissed encl 22.

[8] In dismissing encl 22, we held that a *prima facie* case had been made out. And by virtue of s 114A of the Evidence Act 1950, the respondents were deemed to have published the impugned comments.

[9] On procedural non-compliance, it was first alleged by the respondents that the AG failed to adhere to the requirement of O 52 r 2B of the ROC in making a direct application without first giving a formal notice to show cause. Such a failure, it was submitted, rendered the application by the AG a nullity. On the facts of this case, however we held that the failure to show cause as required by O 52 r 2B of the ROC was not fatal or prejudicial.

[10] In this regard, we have considered the two decisions of the Court of Appeal in *Uthayakumar Ponnusamy v. Abdul Wahab Abdul Kassim & Ors* [2020] 2 MLRA 472 and *Tan Boon Thien & Anor v. Tan Poh Lee & Ors (Encl 81)* [2019] MLRAU 446 cited by the respondents to substantiate their case.

[11] In *Uthayakumar (supra)* the Court of Appeal was merely articulating the procedure laid down in O 52 r 2B of the ROC. While in *Tan Boon Thien (supra)* the contemnor complained of the non-compliance of the same Order after leave was granted against him. There was nothing in these two cases to denote that the contemnors were in fact aware of the application made against them, before leave was obtained. On the contrary, the respondents here were fully aware of the application by the AG when learned counsel for the respondents appeared on the date of the *ex parte* hearing, for reasons we have alluded to earlier. Since the respondents were fully aware of the AG's application, in our view the failure of formal notice did not prejudice the respondents.

[12] The respondents further contended that commencing this contempt proceeding at the highest court would deny them of the necessary right of appeal opened to them. Having perused and considered the nature of the

impugned comments which were calculated to implicate the Judiciary as a whole, and which also include the Chief Justice of the Federal Court, this court has no hesitation in holding that it is the correct and appropriate forum to hear the AG's application. This court in fact is duty-bound to deal with such scurrilous attack in order to uphold the image, integrity and public confidence in the Judiciary.

[13] The next procedural non-compliance raised was in relation to the naming of the 2nd respondent. In this Application the AG named the 2nd respondent as "Ketua Editor, Malaysiakini" which was argued as a failure to name the alleged contemnor in his name, as there is no such position in Malaysiakini. Instead, what it has is "Editor-in-Chief", a position held by one Steven Gan. In our view, this non-compliance was a curable technicality. This court took the same position in *Malayan Banking Berhad v. Chairman Sarawak Housing Developers' Association* [2014] 4 MLRA 493. We agree with that decision that so long as the party and the capacity in which he is being sued is identifiable, such error does not cause injustice, hence not fatal to the case. Having dismissed encl 22, we then proceeded to hear the application in encl 19.

The Applicable Laws On Contempt Of Court

[14] Before deliberating on encl 19, this would be a suitable juncture to briefly state the applicable law on the subject of contempt. Power to punish for contempt flows from '*raison d'etre*' for a court of law to uphold the administration of justice. All courts are empowered to punish for contempt committed when the courts are in session. The superior courts are empowered to punish any contempt of itself as provided in art 126 of the Federal Constitution read with s 13 of the Courts of Judicature Act 1964. Article 126 of the Federal Constitution provides specifically for the power to punish for contempt when it states:

> "Power to punish for contempt
>
> 126. The Federal Court, the Court of Appeal or a High Court shall have power to punish any contempt of itself."

[15] As Malaysia does not have any specific legislation to regulate on contempt of court, regard has to be made to the English common law principle by virtue of s 3 of the Civil Law Act 1956. It was elucidated in *R v. Gray* [1900] 2 QB 36, the term 'contempt of court' has always been referred to as:

> "... **Any act done or writing published calculated to bring a court or a judge of the court into contempt, or to lower his authority, is a contempt of court**. That is one case of contempt. Further, **any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the courts is a contempt of court. The former class belongs to the category which Lord Hardwicke LC characterised as scandalising a court or a judge.**"
>
> [Emphasis Added]

[16] Further, Lord Diplock in *Attorney General v. Times Newspaper Ltd* [1974] AC 273 had observed that:

> "... 'Contempt of court' is a generic term descriptive of conduct in relation to particular proceedings in a court of law which tends to undermine that system or to inhibit citizens from availing themselves of it for the settlement of their disputes. Contempt of court may thus take many forms".

[17] It can never be said enough that the purpose of the law on contempt is not to protect the dignity of individual judges but to protect the administration of justice. According to John Donaldson MR in *Attorney-General v. Newspaper PLC* [1998] Ch 333, the law of contempt is based on the broadest principle that the courts cannot permit any interference with the due administration of justice. Its application is universal.

[18] Echoing this stance, this court in *Zainur Zakaria v. PP* [2001] 1 MLRA 341 already emphasised that:

> "the jurisdiction of the courts does not exist to protect the dignity of individual judges personally. It serves to protect the Judiciary as the third arm of government rather than individual judges."

[19] Since its purpose is to maintain public confidence in the administration of justice, it is only logical that criticisms of judges as individuals, rather than as judges, should not be the subject of contempt. The public confidence had, in no uncertain term ruled that criticisms of the Chief Justice which are not directed at him in his official capacity as a judge, are not contempt as explained in *In the Matter of a Special Reference from the Bahama Islands* [1893] AC 138. In such cases, the judge can of course sue for defamation or libel to remedy any damage to his personal reputation.

Liability Of Media Publication

[20] Legal liabilities on publishers of contemptuous and offensive publication need a particular mention. The law on print publication which is regarded as the traditional media before the advent of the modern media and the internet was invented, is somewhat settled.

[21] In *Borrie & Lowe: The Law of Contempt*, 3rd edn, (London: Butterworths, 1996) at p 85, the learned authors opined that a matter can be regarded as "published" when it is made available to the general public or at any rate a section of the public which is likely to comprise those having a connection with the case. The extent of a publication's circulation may be vital. The bigger the media outlet's reach, the less likely that it can successfully argue that its publication is not likely to come to the notice of a witness, etc. In *R v. Odham's Press Ltd ex p AG* [1957] 1 QB 73 at 78, Lord Goddard, in relation to a case of contempt involving the People newspaper said:

> "...considering the proprietors claim a circulation of over four million copies

> a week, there is a strong probability that it would be read by at least some of those summoned as jurors.".

[22] Hence as for the traditional media, where the contempt has been published by a newspaper or broadcasted by television or radio, the settled law is that it is not only the author who may be held liable for the publication of contemptuous statement, but also anyone who plays a significant role in the act of publication or distribution of such statement.

Internet Posting In Other Jurisdictions

[23] The legal position is not as straightforward when it comes to the publication of the modern media, by third party internet postings. The legal liability of editors in the modern media is blurred by the fact that these postings go direct to the media platform without the usual editing process. Some jurisdictions take the view that an important consideration must be placed on whether there is an active or deliberate act in making or allowing the postings of the impugned statements by the internet content provider and its editorial team. The cases below discuss the varied approaches taken on this subject in some jurisdiction.

[24] In *Totalise Plc v. Motley Fool Ltd* [2001] IP & T 764, the High Court of New Zealand found website operators not liable for the publication in contempt of court. The decision was justified on the basis that, unlike a journalist who is at law responsible for the material that he publishes, the website operators exercise no editorial control over what is posted on their discussion boards. Their role being merely to provide facilities for the public at large to convey their views. In other words, the court in *Totalise (supra)* drew a distinction between the journalists who have to take responsibility for the information that he decides to publish in a print media to that of the automated processes of a digital intermediary.

[25] In the United Kingdom case of *Bunt v. Tilley & Ors* [2006] 3 All ER 336, Eady J observed at para 23:

> "Of course, to be liable for a defamatory publication it is not always necessary to be aware of the defamatory content, still less of its legal significance. Editors and publishers are often fixed with responsibility notwithstanding such lack of knowledge. On the other hand, for a person to be held responsible there must be knowing involvement in the process of publication of the relevant words. It is not enough that a person merely plays a passive instrumental role in the process. (See also in this context *Emmens v. Pottle* [1885] 16 QBD 354 at 357 per Lord Esher MR.)"

[26] In the Australian case of *Competition and Consumer Commission v. Allergy Pathway Pty Ltd* [2011] FCA 74, Finkelstein J found the respondent liable for contempt of court for breaching the undertaking by making several publications including testimonials written and posted by a third party on the respondent's Facebook wall. The respondent was held liable on the basis that it had accepted

responsibility for the publications when it knew about the comments and failed to remove them. The judge accepted that to impose legal responsibility on a person for an offence of contempt, it was essential to demonstrate a degree of awareness of the words or an assumption of general responsibility for their publication. This case illustrates a point that knowledge, in the form of 'a degree of awareness' is sufficient to establish the *mens rea* element.

[27] In the Canada case of *Weaver v. Corcoran* 2015 BCSC 165, the Supreme Court of British Columbia had considered the issue of liability for third-party defamatory comments in the reply section of the online edition of the National Post newspaper. The plaintiff was a professor at the University of Victoria and a well-known scientist in the field of climate change. He claimed that four articles published by the newspaper defamed him. He sued the National Post, its publisher, and the journalists who authored the articles. He also claimed that the defendants were liable for numerous reader postings made in response to each of the defaming articles.

[28] To find liability, the Canadian Court held that the plaintiff must prove an active or deliberate to constitute defamation. Until awareness occurred, either by internal review or specific complaints being brought to the attention of the National Post or its columnists, the National Post was considered to be in a passive instrumental role as it had taken no deliberate action amounting to approval or adoption of the contents of the reader posts. Only on failure to act or take immediate action upon being aware, would they be considered publishers as of that date.

[29] *Delfi AS v. Estonia* (Application No 64569-09) [2015] (ECtHR), is a case from Estonia which had gone up to the Grand Chamber of the European Court Human Rights ('ECtHR'). It was decided in 2015. The Grand Chamber affirmed the decision of the Supreme Court of Estonia by a majority of 15:2 in favour of the State of Estonia. It was found that the applicant company had been able to exercise a substantial degree of control over the readers' comments. Hence it was in a position to predict the nature of the comments on a particular article and was therefore liable to promptly take technical or manual measures to prevent defamatory statements from being made public.

[30] A not dissimilar approach was taken in the Australian case of *Fairfax Media Publications; Nationwide News Pty Ltd; Australian News Channel Pty v. Voller* [2020] NSWCA 102. There, the Court of Appeal of New South Wales held that the critical issues on publication rest on whether the applicants were entitled to the defence of innocent dissemination under s 32 of the Defamation Act 2005 (NSW). This was particularly so when the respondents were not instrumental in participating in publishing the defamatory statements. The court in affirming the primary judge's decision applied the test of primary and subsidiary publishers. It held that the respondents were the primary publishers and the commentators were the subordinate or subsidiary publishers. The respondents were found to be primary publishers who participated and were

instrumental in bringing about the publication of the defamatory statements and were liable irrespective of the degree of participation in publication.

[31] This line of cases briefly states the legal position of the various jurisdictions on the subject of internet publication. The courts in the respective jurisdictions resorted to different approaches in determining the liability of internet publication by third party online users. We are mindful of the applicability of decisions from other jurisdictions to ours, given the differences in the legal backgrounds, rules and regulations.

The Case Before Us

[32] We now come to the case before us. First, we note with significance that the contemptuous nature of the impugned comments in this Application is beyond dispute. The respondents had admitted that the comments are indeed offensive, inappropriate, disrespectful and contemptuous. The respondents too regretted the publication of such impugned comments and it was not something the respondents condoned. Given such consensus, we do not intend to deliberate further on what constitutes contempt in law.

[33] The Application by the AG as the Applicant here raises complaint that the respondents facilitated the publication of the impugned comments. It was posited that by facilitating the publication of the impugned comments, s 114A of the Evidence Act came into play to presume that Malaysiakini and the 2nd respondent are under the law the publishers of the impugned comments.

[34] With the invocation of that presumption under s 114A(1) of the Evidence Act coupled with the contemptuous nature of the impugned comments, it was submitted that the applicant had made out a *prima facie* case for contempt of court against both respondents. There would be no requirement for the applicant to prove an intention to publish on the part of the respondents.

[35] Though admitting that the said impugned comments are contemptuous and not condoned by them, the respondents maintained that they both played no role in publishing them. The crux of the respondents' case is in essence; they cannot be held liable for contempt because they were not the direct author or editor of the impugned comments. They emanated from third party online subscribers, *albeit* on the 1st respondent's cyber platform. In short, the respondents were saying that they were not the makers or the publishers of the impugned comments, nor did they have anything to do with the publication of them.

Publisher Of Impugned Comments

[36] The issue confronting this court brings into focus the underlying conflict and tension between imposing responsibility on an internet content provider and the safeguards that it provides. This problem has been the subject of considerable debate for many years. The emphasis placed on freedom of speech

is increasingly controversial in the current cyber world. One popular school of thought is that imposing liability on intermediaries to monitor content is necessary for hate speech, fake news, bullying or invasion of privacy or any area bordering on crime, such as contempt. This concern is needed to ensure and protect the social environment that we inhibit online. It must reflect certain norms of acceptable conduct not only to preserve the rights of individual but also to preserve the social norms of any nation.

[37] One cannot insist on freedom of speech which transgresses on the rights of others in society. Such a right cannot, above all extend to a right to undermine the institution of the Judiciary, which will ultimately bring chaos in the administration of justice.

[38] There is indeed a real need to enforce the law to maintain and uphold social norms in our society. A technological intermediary cannot be allowed to enable its wrongful behaviour to escape liability. However, common law emphasises on personal liabilities. In general term, if a person is not personally responsible for causing harm, he cannot be held accountable for the harmful act.

[39] The question is whether there should there be any differing treatment between the publication of the article by the internet content provider itself and that of the comments published or posted by third party online subscribers. We know that only third party online subscribers can post comments and not the readers at large. The question to be asked is why do platform providers around the world insist on allowing the right to comment only to registered subscribers. The reason has to be for want of control over who and what can be posted, besides perhaps for commercial reasons.

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

[41] It falls on this court now to determine the extent of liability of an intermediary like the 1st respondent here, over the impugned comments. In all the earlier cases of pre-internet days, the liability of the publishers in law is clear. Those were the days when the publishers were directly responsible and liable for whatever they published in the print media. Those materials published were subjected to editing by the editors. In the current arrangement, the 1st respondent was not the one who authored the impugned comments. The authors were their third party online subscribers.

[42] Harkening to the general principle of law that one cannot be held liable for causing harm unless he committed the harmful act, the respondents contended, they cannot be held liable for the acts of others, such as the third party online subscribers.

[43] The cases referred to earlier on online publication demonstrate the difficulties faced by the court in pinning down the role of publication on the internet content provider when the comments were made and posted by third parties.

[44] It must be to resolve this difficulty that the Malaysian Parliament enacted s 114A of the Evidence Act. The provision as the wordings suggests an aim at presuming responsibility of publication on the internet platform provider by dedicating specifically s 114A to such a subject. To better appreciate the law, it is useful to reproduce here that provision in extensor:

> "**Presumption of fact in publication**
>
> 114A. (1) A person whose name, photograph or pseudonym appears on any publication depicting himself as the owner, host, administrator, editor or sub-editor, or who in any manner facilitates to publish or re-publish the publication is presumed to have published or re-published the contents of the publication unless the contrary is proved.
>
> (2) A person who is registered with a network service provider as a subscriber of a network service on which any publication originates from is presumed to be the person who published or re-published the publication unless the contrary is proved.
>
> (3) Any person who has in his custody or control any computer on which any publication originates from is presumed to have published or re-published the content of the publication unless the contrary is proved.
>
> (4) For the purpose of this section:
>
> (a) "network service" and "network service provider" have the meaning assigned to them in s 6 of the Communications and Multimedia Act 1998 [Act 588]; and
>
> (b) "publication" means a statement or a representation, whether in written, printed, pictorial, film, graphical, acoustic or other form displayed on the screen of a computer."

[45] The presumption may be invoked against any person whose name appears on the publication as either the owner, host, administrator, editor, or sub-editor. It is beyond argument that Malaysiakini as the 1st respondent depicted itself as the host to the publication and by virtue of s 114A(1), Malaysiakini is presumed to have published the impugned comments. We will deal with the possible presumption against the 2nd respondent later.

[46] With the presumption in place, in our view the AG had overcome the hurdle of imputing responsibility of the publication on the 1st respondent. The term "presumption" properly describes the process whereby, upon the proof of the required basic fact or facts, the existence of the presumed fact may be inferred from it (see *Alma Nudo Atenza v. PP & Another Appeal* [2019] 3 MLRA 1; *Abdullah Atan v. PP & Other Appeals* [2020] 6 MLRA 28, C Tapper, Cross &

Wilkins *Outline of the Law of Evidence*, 6th edn (London: Butterworths, 1986) at 39; M Hirst, Andrews & Hirst on *Criminal Evidence*, 3rd edn (London: Sweet & Maxwell, 1997) at p 115. It is an alternative mechanism to prove a fact other than by adducing direct evidence.

[47] Section 114A was legislated vide Amendment Act A1432 in 2012. The Explanatory Statement to the Bill outlined the objective of enacting this provision. It sought to provide for the presumption of fact in the publication. This presumption will assist in identifying and in proving the identity of an anonymous person involved in the publication through the internet.

[48] The Hansard of the Dewan Rakyat during the tabling of the amendment on 18 April 2012 revealed that the objective was to alleviate problems and weaknesses that occur in cybercrime activities on the internet. One of the main aims was to tackle the issue of internet anonymity. We refer below to the excerpts of the revealing speech read out in Parliament by the Minister to appreciate the rationale behind s 114A:

> "Perkembangan yang pantas dalam penggunaan internet dan teknologi maklumat pada masa kini telah membawa kepada berleluasanya jenayah siber dan kesalahan jenayah yang dilakukan melalui internet. Sehubungan dengan itu, kerajaan telah mengenal pasti bahawa Akta Keterangan 1950 perlu dipinda bagi menangani isu ketanpanamaan internet iaitu, dengan izin, internet anonymity.
>
> Susan W. Brenner, seorang professor undang-undang dan teknologi di University of Dayton School of Law telah menggambarkan isu internet anonymity, dengan izin, seperti yang berikut, dengan izin. "A man can be a woman, a woman can be a man. A child can be an adult, a foreigner can pass for a native. All of which makes the apprehension of cyber criminal that much more difficult". Penggunaan internet membolehkan sesiapa sahaja menyembunyikan identiti sebenar mereka dan ini menjadikan 'ketanpanamaan' pelaku kesalahan jenayah satu halangan paling besar dalam menangani aktiviti jenayah siber. Jenayah yang dilakukan melalui internet seperti menghasut, menipu, menghina mahkamah, menceroboh dan mencuri maklumat.
>
> ...
>
> **Walaupun dapat dikenal pasti dengan jelas lokasi, alamat IP dan pemiliknya tetapi amat sukar untuk membuktikan siapakah yang sebenarnya menghantar e-mel tersebut. Penyelesaian bagi masalah ini ialah dengan mengalihkan tumpuan kepada pihak lain yang boleh dikenal pasti seperti pemilik komputer, pemilik alamat IP, IP address, dengan izin, pemilik alamat e-mel dan pemilik kelengkapan dan peralatan yang daripadanya kesalahan jenayah dilakukan dan mengenakan anggapan liabiliti ke atas mereka tanpa mengira bahawa penglibatan mereka adalah secara langsung atau tidak langsung.**
>
> **Oleh yang demikian, kerajaan mencadangkan peruntukan sewajarnya mengenai anggapan yang berasaskan owner honest principal dimasukkan**

dalam Akta Keterangan 1950. Tujuan peruntukan anggapan berasaskan owner honest principal, dengan izin, adalah untuk meringankan beban pembuktian berhubung dengan fakta tertentu. Walau bagaimanapun, pihak pendakwa yang ingin bersandar kepada peruntukan anggapan mesti membuktikan terlebih dahulu kewujudan fakta-fakta tertentu sebelum anggapan boleh dibuat terhadap seseorang.

Apabila wujud keterangan yang cukup untuk dibuat anggapan terhadap seseorang dan mahkamah berpuas hati bahawa anggapan boleh dibuat, beban pembuktian untuk membuktikan atau menyangkal anggapan itu berpindah kepada orang yang terhadapnya anggapan dibuat. Beban pembuktian orang yang terhadapnya anggapan dibuat adalah atas imbangan kebarangkalian, dengan izin, balance of probabilities yang lebih ringan daripada beban pembuktian yang diletakkan ke atas pihak pendakwa."

[Emphasis Added]

[49] From the above speech, it is apparent that the challenges in identifying cybercriminal trickle down to tracing the offenders who naturally can hide behind the cloak of internet anonymity. Although the email address, IP address, location, owner of the computer can be traced, the verification of the identity of the sender or commentator remains difficult. This warranted a provision on presumption based on the 'owner's honest principal' to ease the burden of proof in respect of certain facts. At first blush, the principal actor such as the internet owner etc should be the first target to be imputed with liability.

[50] However, the Minister in his statement did caution that the Public Prosecutor must be able to prove the existence of the basic facts before invoking that presumption.

[51] Plainly stated, the presumption in s 114A is a rebuttable one. Rebuttal raised must be on the balance of probabilities.

Rebuttals Raised By The Respondents

[52] The respondents attempted to rebut that presumption, taking the line of defence that they are not to be held responsible simply because they have no knowledge of the impugned comments. After all, they were not originated or authored by them.

[53] The 1st respondent denied having knowledge through an affidavit deposed by its Director, Premesh Chandaran s/o Jeyachandran dated 29 June 2020 (in Encl 32). The denial of knowledge was anchored on the following facts:

(i) there was no requirement under the law which obligates the respondents to moderate every comment posted by the third party subscribers;

(ii) neither of them authored the impugned comments;

(iii) neither of them were involved in the posting of the impugned comments;

(iv) neither of them moderated, or played any direct role in publishing the impugned comments on the news portal unless it was flagged for containing a "suspected word" or was reported by other users;

(v) neither of them had been proven to have been actually aware that the impugned comments had been posted and that the impugned comments did not contain banned words or any "suspected word"; and

(vi) as for the 2nd respondent, he denied any involvement whatsoever, since he was not the "Content Application Service Provider" within the meaning of s 6 of the Communications and Multimedia Act 1988 and he could not be viewed as being a publisher of the impugned comments. Furthermore, there is no legal basis to hold him vicariously liable for the acts of the 1st respondent.

[54] The explanation put forth above can be summed up as this. It became aware of the publication of the impugned comments only upon being alerted by the police. The 1st respondent maintained ignorance of it until 12 June 2020 when the police contacted its Executive Director Mr RK Anand.

[55] In short, the 1st respondent was utterly oblivious to the existence of such comments until being so alerted. It was only after that alert at about 12.50 pm that the 1st respondent became aware and acted responsively. In promptness, the editorial team immediately reviewed the impugned comments and removed them together with other offensive comments at 12.57 pm on the same day.

[56] According to the respondents, third party online subscribers have been allowed to post comments on news reports published on the online news portal of the 1st respondent since August 2009. Currently, the 1st respondent said it receives 2,000 comments each day.

[57] The 1st respondent explained the measures it had taken to safeguard itself from both pre and post-publication comments by third party subscribers. It mainly relies on three safeguards. The first by its Terms and Conditions ('T&C') warning subscribers that abusive posting offending any law or which create unpleasantness would be banned.

[58] Second, it installs a filter programme which disallows the use of certain foul words. Failing that filter any article or comment would not get posted. This filter programme also is used to review third-party comments.

[59] Third is the peer reporting system. This process entails other users or readers of the online news portal to report on offensive comments. Only upon the receipt of such report, will an editor immediately examine and decide on the removal of the same. It is for this reason, the 1st respondent reserves the right to remove or modify comments posted at its discretion. In this way, the 1st respondent's take down policy would be effectively implemented.

[60] The respondents contended in taking the above approach, it had indeed complied with the practice adopted by major online publishers both nationally and internationally.

[61] It was then argued that it would not be practical or possible for the 1st respondent to moderate all the comments posted by third parties. Aggravated by the high volume of about 2,000 comments received per day with 25,000 online subscribers, the respondents' hands are full. The process of peer reporting is thus resorted to. Only upon the receipt of such report, will an editor immediately examine and decide on the removal of the same. It is for this reason, the 1st respondent reserves the right to remove or modify comments posted at its discretion. In this way, the 1st respondent's take down policy would be effectively implemented.

[62] The 1st respondent asserted that its online portal has the objectives of disseminating information and generating public discussion on matters of public interest. It enables its readership to form informed views. The said twin objectives can only be achieved through a free, frank and open discussion on a particular subject. This, the respondent contended is anchored on the protected constitutional guarantee of freedom of expression enshrined in art 10 of our Federal Constitution.

[63] The respondents then contended, to succeed in this Application, it is incumbent on the applicant to demonstrate to this court that the 1st respondent had intended to publish the impugned comments and it is evident, that this was not the case. The respondents therefore submitted that there was no basis in law to presume such an intention on the part of the respondents. In any event, even if there was such basis, all the facts stated above would rebut that presumption.

[64] In summary, the nub of the respondents' defence is that of knowledge, real or inferred. In fact, at the hearing learned counsel for the respondents too presented the position that the respondents' case rests or falls on the issue of knowledge. Countering this legal argument, the applicant argued that knowledge or intention of the respondents can nevertheless be inferred from the very facts and circumstances as adduced by the respondents themselves.

Our Finding On Knowledge

[65] Now, it is incumbent upon this court to ascertain this contentious issue on knowledge. It is a well-settled legal principle that knowledge is purely a matter of fact. As such, knowledge can be deduced or inferred from the circumstances surrounding each particular event. Proof of knowledge is always a matter of inference (see *Leow Nghee Lim v. Regina* [1955] 1 MLRH 614; *Parlan Dadeh v. PP* [2008] 2 MLRA 763; *Victor Chidiebere Nzomiwu & Ors v. PP* [2013] 3 MLRA 487; *Public Prosecutor v. Hoo Chee Keong* [1996] 1 MLRH 829 and *PP v. Abdul Rahman Akif* [2007] 1 MLRA 568).

[66] Succinctly stated by Augustine Paul J in *PP v. Kenneth Fook Mun Lee @ Omar Iskandar Lee Abdullah (No 2)* [2003] 7 MLRH 81 that "knowledge is an awareness of the consequences of an act". His Lordship held that knowledge is a mental act and must be inferred from the facts and circumstances of a particular case.

His Lordship also further elaborated on the manner of ascertaining knowledge by citing learned author Sir Hari Singh Gour on *The Penal Law of India* (11th Edn) Vol 3, at p 2381 where it was observed:

> "**Criminal knowledge, is then, in such cases demonstrated a posteriori. It takes into account not only knowledge but means of knowledge, not only the knowledge which is, but which, judging from the effect, ought to have been in the accused.** A person may then truthfully declare that he did not know that his act was likely to cause death and yet he may be rightly found to have had that knowledge. **The truth is that in civil cases arising out of tort as well as in criminal cases, the standard which the court fixes before itself is that of a reasonable man and the question it ultimately asks itself is, not whether the accused had the knowledge, but whether as a reasonable man he could have had that knowledge. And for this purpose, the act itself is the real test.**"
>
> [Emphasis Added]

[67] Further at p 2387 the learned author remarked that:

> "**It has been said that in inferring knowledge the court looks to the result. If it is one which could not have been arrived at without fore-knowledge, the court presumes it.** Such knowledge may be legitimately presumed where the assault is committed with an axe or a dao or other deadly weapon, or where a man is hit with great force on a vital part of his body."
>
> [Emphasis Added]

[68] In the same case, Augustine Paul J went on to observe that "it can be presumed that a person had knowledge of the danger of his act and every person is presumed to have some knowledge of the nature of his act." Thean J, in elaborating on the manner of inferring knowledge said in *Public Prosecutor v. Phua Keng Tong & 2 Other Appeals* [1986] 2 MLRH 226 that "proof of knowledge or belief on the part of an accused is a matter of inference from facts."

[69] Thean J, went on to quote the case of *RCA Corp v. Custom Cleared Sales Pty Ltd* [1978] FSR 576; 19 ALR 123, a decision of the Court of Appeal in New South Wales in dealing with the question of knowledge of infringement of copyright. He said that "proof of knowledge is always a matter of inference, and the material from which the inference of the existence of actual knowledge can be inferred varies infinitely from case to case." Further, he held that a court is entitled to infer knowledge of a person on the assumption that such a person has the ordinary understanding expected of him in his line of business, unless he convinced otherwise.

[70] In the same vein, Richard Malanjum FCJ in *Emmanuel Yaw Teiku v. PP* [2006] 1 MLRA 808 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. His Lordship quoted the case of *Chan Pean Leon v. PP* [1956] 1 MLRH 44 where Thomson J observed that:

> "Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case."

[71] The principle of law to be deduced from the decisions is that 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. Therefore, in inferring knowledge the court may approach the matter in two stages. First, where opportunities for knowledge on the part of the particular person are proved. Second, where there is nothing to indicate that there are obstacles to that person acquiring the relevant knowledge, and that there is some evidence from which the Court can conclude that such person has knowledge.

[72] The salient facts as adduced by the 1st respondent in our view have a bearing on the 1st respondent's knowledge. As stated, the objective of the 1st respondent's website is to encourage its users to indulge and participate in the discussion on its online news portal. As the respondents have conceived in their written submissions, a fact verified by an expert, third party online subscribers can leave comments on articles published on its website. The right and freedom to comment according to the respondents is a significant feature of its online media as it allows for discussions about topical matters of public interest which enable the readers to develop informed views, or opinions, on such issues.

[73] Time and time again, the 1st respondent fielded its defence by contending that it does not play any role in the posting of comments mainly due to the volume of such comments, it is therefore impossible for the 1st respondent to moderate comments prior to them being uploaded and to monitor every comment that is published.

Whether Presumption Rebutted

[74] In determining knowledge on the part of the respondents we too had given our utmost consideration on the rebuttals raised before against the legal presumption on the 1st respondent. In our view to avoid liability, the 1st respondent must have in place a system that is capable of detecting and rapidly remove offensive comments. The 1st respondent cannot just wait to be alerted, because such alert may never come. Such a system if in place will go a long way in deflecting any allegation that publishers like the 1st respondent have a guilty mind in posting the impugned comments. It is not enough for the 1st respondent to merely rely on its T&C to online subscribers, or to say that it cannot edit a comment once posted or that they cannot monitor every comment published, due to sheer volume.

[75] The three safeguards adopted by the 1st respondent have proved to fail and do not efficiently control or prevent offensive comments from being published.

The 1st respondent's responsibility cannot end by putting in place a T&C with such self-serving caveat for its own self-protection without regard to injury to others. 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.

[76] To accept such measures as a complete defence will be to allow it to 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 by the AG, the 1st respondent facilitates the publication of the contemptuous comments by the third party subscribers. The 1st respondent cannot be allowed to turn their news portal into a runaway train, destroying anything and everything in its path, only because their riders are the ones creating such havoc *albeit* made possible by their train.

[77] Given the fact that the 1st respondent's news portal enjoys extensive readership and receives about 2,000 comments per day, on top of the fact that it has editorial control over the contents posted in the comments section, the 1st respondent must assume responsibility for taking the risk of facilitating a platform for such purpose. Sheer volume cannot be the basis for claiming lack of knowledge, to shirk from its responsibility.

[78] Ultimately, Malaysiakini is the owner of its website, publishes articles of public importance, and allows subscribers to post comments to generate discussions. It designs its online platform for such purpose and decides to filter foul words and rely on all the three measures it has taken. In other words, the 1st respondent designs and controls its online platform in the way it chooses. It has full control of what is publishable and what is not. 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 comment when it deliberately chooses only to 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.

[79] To fortify the aforementioned argument regarding knowledge, it is equally important to note that the 1st respondent is a limited company. The persons whose knowledge would be imputed to the 1st respondent would be those who were entrusted with the exercise of the powers of the 1st respondent (see *Yue Sang Cheong Sdn Bhd v. Public Prosecutor* [1973] 1 MLRA 495). In this regard, it is significant to appreciate the role of the 1st respondent's editorial team and process.

[80] The 1st respondent said it operates three different websites; online news portal (English news), a portal for news in Bahasa Malaysia and a portal for news in Mandarin while Kinitv Sdn Bhd operates a separate portal for video news. The editorial team consists of four departments for each news portal

above. Each department is headed by an editor and assisted by a group of assistant editors and journalists. There is a total of 65 people working in the editorial team.

[81] For the online news portal, there is a total of 25 staff with about 10 of them being editors and assistant editors. The 2nd respondent is the Editor-in-Chief of the editorial team. He is assisted by Mr RK Anand (Executive Director of the 1st respondent) and Mr Ng Ling Fong (Managing Editor). The editors of each department report to Mr Ng Ling Fong and Mr RK Anand, who in turn report to the 2nd respondent. As can be seen, the 1st respondent has a structured, coordinated and well-organised editorial team. It is inconceivable that in such a structured system the 1st respondent had no notice of the impugned comments.

[82] The comments section at the bottom which accompanies each news reports published by the 1st respondent is only accessible to third party online subscribers. In this regard, the 1st respondent is fully aware of its role in posting and publications. It even reserves the right to disclose the subscription profile to law enforcement agencies should they require it for valid purposes. The 1st respondent no doubt has a very impressive reporting structure.

[83] With such a structure, how do impugned comments such as these escape the attention of the editors? No explanation has been afforded by any of them. And none of the 10 editors denied 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 June 2020. The denial instead came from its director Premesh Chandran who was not involved in the editing process. And of course the 2nd respondent as the Editor-in-Chief denied knowledge on his part.

[84] The irresistible inference is that at least one of them had notice and knowledge of these impugned comments. Therefore, it is our finding that the 1st respondent cannot deny notice or knowledge of the existence of the postings. On the facts before us the 1st respondent cannot rely on mere denial to avail itself of the defence of ignorance.

[85] The stated objective of the 1st respondent's portal is to allow public discourse on matters of public interest. This noble objective must surely include fair and balance discussion on the issues of public concern. As Lord Hobhouse observed with characteristic pungency in the case of *Reynolds v. Times Newspapers Limited and Others* [1999] 4 All ER 609 at p 657 that, "No public interest is served by publishing or communicating misinformation" and certainly not offensive comments.

[86] It would be expected for the respondents 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.

[87] It cannot be overemphasised that the impugned comments were posted on a platform of which the 1st respondent has complete control. The 1st respondent had developed the necessary device for subscribers to post the impugned comments. It has therefore facilitated the publication of the impugned comments. And before they were removed, the glaring impugned comments were on the platform for three days and viewed by 20,000 readers daily locally and abroad.

[88] In stating so, we have further considered the following observations by Eady J in *Bunt v. Tilley (supra)* at p 149, for the proposition by learned counsel for the respondents that for there to be legal responsibility, there must have been awareness or an assumption of responsibility so as to show knowing involvement. It was stated in that case that to determine liability for publication in the context of the law of defamation, it would be important to focus on what the person did, or failed to do, in the chain of communication and knowledge can be an important factor. That is a correct proposition. However Eady J qualified his statement when he said that if a person knowingly permits another to communicate information which is defamatory, when there should be an opportunity to prevent its publication, there would be no reason as a matter of principle why liability should not accrue. Applying that principle to the facts of this case it cannot therefore, be said that the 1st respondent had no opportunity and only played a passive instrumental role in the publication process.

[89] We find the case of *Delfi (supra)* particularly instructive because the facts in that case bear semblance to the facts before us. The facts were these. The applicant company was the owner of Delfi, one of the largest internet news portals in Estonia that published up to 330 news articles a day. It allowed its readers to comment on the comments section of its news articles published on Delfi portal. An article entitled "SLK Destroyed Planned Ice Road" was published on 24 January 2006. This resulted in a member of the supervisory board and SLK's sole majority shareholder, L to be the subject of some 20 out of 185 comments posted. The comments contained personal threats and offensive language. L's lawyers then requested the applicant company to remove the offensive comments. Only then were these comments taken down. It was taken down on the same day of the request, but six weeks after the article was published.

[90] The applicant company refused to compensate L. At first instance, L's claim was dismissed on the basis of exclusionary clause of the applicant company's liability under the Estonian Information Society Service Act ("ISSA"). L appealed to the Court of Appeal and succeeded. The decision of the County Court was quashed and the case was referred back to the first instance court for new consideration. Upon re-examination of the case, the

County Court decided that the ISSA was not applicable but the Obligations Act.

[91] The court also decided that the disclaimer on Delfi portal could not be relied on to avoid responsibility for the content of the comments which were found to be vulgar in form, humiliating, defamatory and impairing L's dignity and reputation. The system that was put in place by the applicant company whereby users can notify the applicant company of such comments (quite akin to peer reporting in Malaysiakini) was held to be insufficient and inadequate to protect the rights of others.

[92] The court viewed the offensive comments as going beyond justified criticism and amounted to simple insults. The County Court held that the applicant company was the publisher of the offensive comments and it cannot therefore avoid responsibility for those comments.

[93] The decision of the County Court was upheld subsequently by the Court of Appeal as well as the Supreme Court. The applicant company then filed a complaint to the European Court of Human Rights ('ECtHR'), asserting that their freedom of expression (right to impart information) under art 10 of the European Convention for the Protection of Human Rights and Fundamental Freedom ("the Convention") was impaired by the State of Estonia.

[94] In upholding the decision of the Supreme Court which had affirmed the decision of the Court of Appeal, the ECtHR recounted what transpired in the County Court and the Court of Appeal and held *inter alia*:

i. The nature of the comments was vulgar, humiliating and defamatory and had impaired, the dignity of L's honour and reputation which cannot be protected by freedom of expression and went beyond justified criticism and amounted to simple insults which cannot be said to had been done in exercise of freedom of expression;

ii. Delfi had not required the exercise of prior control over comments posted on its portal and having chosen not to do so it should have created some other effective system which would have ensured the rapid removal of defamatory comments;

iii. The measures taken were not sufficient and contrary to the principle of good faith to place the burden of monitoring comments on potential victim;

iv. Delfi was not a mere technical intermediary and that its activity was not mere technical or passive in nature but instead it invited users to post comments;

v. Delfi could have foreseen the negative reactions and should have exercised caution to avoid being held liable for damaging the reputation of others;

vi. Delfi has a substantial degree of control over readers' comments and it had been in the position to predict the nature of the comments;

vii. The fact that the online media was an unprecedented platform for the exercise of freedom of expression provided by the internet provider was fully acknowledged however, cautioned that alongside these benefits, dangers do arise. Defamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence, can be disseminated like never before, worldwide, in a matter of seconds, and sometimes remain persistently available online;

viii. When Delfi provided for a platform that generated user comments for economic purposes, Delfi had control over the comment section, and cannot be shielded by art 10 § 2 of the Convention;

ix. Delfi was a large professionally managed Internet news portal that operated on a commercial basis with wide readership and there was a known public concern regarding the controversial nature of the comments it attracts; and

x. It is recognised that publishing of news and comments on an Internet portal is a journalistic activity in the nature of Internet media.

[95] Having considered the above factors, the ECtHR then concluded that there had accordingly been no violation of the right to freedom of expression in art 10 in holding Delfi liable for defamation.

[96] Applying the decision in *Delfi (supra)* to the case before us, we see lots of semblance that we can compare between Delfi and Malaysiakini. We are however aware that Delfi dealt with defamation and not contempt. However, we are here looking at the responsibility of an online news portal. The same principles should therefore apply.

[97] Malaysiakini is also a commercial entity like Delfi. This was deposed to by the 1st respondent in encl 57 at para 18 and as also reflected in its Financial Statement that the revenue sources of the 1st respondent are derived substantially from subscription fees paid by users and revenue from advertising. Almost 70% of the 1st respondent's revenue is from advertising and about 30% is derived from the subscription fees by users.

[98] The 1st respondent contended that it did not derive any direct commercial benefit from the comments section. True, no direct commercial benefit may come from the comments section. However, it would not be wrong to assume that having more subscribers will enhance the revenue of the 1st respondent. So there is economic justification in fact to encourage more subscribers rather than restricting them.

[99] It is to be borne in mind that *Delfi* does not concern other fora such as Facebook, Twitter, Instagram etc on the Internet where third-party comments can be disseminated, for example an Internet discussion forum or a bulletin board where users can freely set out their ideas on any topic without the discussion being channelled by any input from the forum's manager; or a social media platform where the platform provider does not offer any content and where the content provider may be a private person running the website or blog as a hobby.

[100] Echoing similar decision as *Delfi (supra)*, the case of *Fairfax Media Publications (supra)* had unanimously held that the online media is liable as publisher of third-party comments. In this case, Fairfax Media Publications, Nationwide News Pty Ltd, and Australian News Channel Pty Ltd ("the applicants") published newspapers in NSW and operate television stations. The applicants maintain Facebook pages on which they publish newspaper articles with an accompanying comment, image and headline. From December 2016 to February 2017 the applicants posted news items concerning the incarceration of the respondent, Mr Dylan Voller, in a juvenile justice detention centre in the Northern Territory. Third parties posted comments critical of the respondent. The respondent commenced defamation proceedings against the applicants claiming that particular comments posted by third parties were defamatory of him, and that the applicants were liable as publishers of the third-party comments.

[101] The trial court found the respondent liable for third-party comments. The decision was affirmed on appeal where the Court of Appeal held that a person who participates in and is instrumental in bringing about the publication of defamatory matter is potentially liable for having done so notwithstanding that others may have participated in that publication in different degrees.

[102] The court found that they were the primary publishers and cannot rely on the defence of innocent dissemination under s 32 of the Defamation Act 2005 since they facilitated the posting of comments on articles published in their newspapers and had sufficient control over the platform to be able to delete postings when they became aware that they were defamatory. The court distinguished between primary and subordinate distributors of defamatory matter; it operates as a defence against liability, not a denial of publication. The meaning of publication in *Webb v. Bloch* [1928] 41 CLR 331 was referred to.

[103] We also refer to the case of *Murray v. Wishart* [2014] 3 NZLR 722, the New Zealand Court of Appeal where it applied the "actual knowledge" test as opposed to "constructive knowledge" test. The case concerns the determination of the question whether a Facebook host is a publisher. It was in this legal context that the court decided that the only test to be applied is whether or not the Facebook host has "actual knowledge".

[104] Further application went to the European Court of Human Rights. At the ECtHR, the case was heard by a panel of seven judges sitting as a Chamber. It decided that in addition to what was decided in *Delfi (supra)* the ECtHR looked at the context of the comments. The court resorted to the "proportionality test" which includes assessment on contribution to a public interest debate, the subject of the report, the prior conduct of the person concerned, the content, the form and consequences of publication including the gravity of the penalty imposed on the journalists or publishers.

[105] The court found that the content of the statements in the article and comments thereof were not defamatory. The statements were of value judgments or opinions in that they are a form of denouncement of a commercial conduct that has already taken place and been publicly known; of which also contained the commenters' personal frustration of being tricked by the company.

[106] It was held that consequences of the comments must nevertheless be put into perspective. This case is of no relevance to our case as the facts differ materially.

[107] Learned respondents' counsel had brought to our attention the latest decision by the Supreme Court of India by a letter dated 1 September 2020. The case is *Re: Prashant Bushan & Anor, Suo Motu Contempt Petition* (Crl) No 1 of 2020 which decided on the subject of contempt on Twitter account. The Supreme Court took a *suo motu* cognisance of the offending tweets and issued notices to the author of the offending tweets, a lawyer Prashant Bushan. The Twitter Inc California was also made a respondent. It was lodged on the basis that the tweets brought disrepute to the administration of justice and undermined the dignity and authority of the Supreme Court in public eyes. The Supreme Court whilst finding the lawyer guilty of criminal contempt held the Twitter Company not guilty.

[108] At paragraph 76, the Supreme Court found the Twitter company as intermediary, has no control on what the users post on its platform. We agree with the Supreme Court that a Twitter platform is a completely uncontrolled platform. Unlike Malaysiakini, which has control over who can post comments and has installed filter on certain prohibitive comments hence it cannot be said that anything published on its portal is beyond control. Therefore, the case is distinguishable on its facts. The twitter platform is totally different from Malaysiakini platform.

[109] Having analysed the above cases, we bear in mind that in all the above decisions there are no provisions similar to s 114A of our Evidence Act that come into play. Hence, it can be seen that the approach taken by the courts in other jurisdictions in determining the test applicable was developed through case law based on various considerations. Those approaches vary according to the facts, circumstances and peculiarity of the case. Our Parliament had resolved it by presuming who is a publisher by enacting s 114A.

[110] For all the reasons elucidated above, we are firm in our view that the explanation of the respondents on lack of knowledge has failed to cast a reasonable doubt on the applicant's case. The 1st respondent had 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 Communications And Multimedia Content Code

[111] Learned counsel for the respondents in their revised submission had sought to rely on the Malaysian Communications and Multimedia Content Code ('the Content Code') contending that the law as it stands does not require Malaysiakini as an internet content provider to censor comments prior to their being uploaded. Reliance was placed on s 1.1, Part 5 of the Content Code which states:

> "In adhering to this and relevant parts of this Code, no action by Code subjects should, in any way contravene s 3(3) of the Act, which states that **"Nothing in this Act shall be construed as permitting the censorship of the Internet"**".
>
> [Emphasis Added]

[112] Malaysiakini considers itself an "Internet Content Hosting Provider ('ICH')" under s 10.0, Part 5 of the Content Code. They claimed that the responsibility for any content of a publication primarily rests with the creator of the content. It is not required to monitor activities. Essentially, it construed the above section to say that the liability of the third-party comments does not rest with them.

[113] The relevant provisions of the Communications and Multimedia Act 1998 ('CMA') and the Content Code require our close examination. The CMA is "an Act to provide for and to regulate the converging communications and multimedia industries, and for incidental matters". CMA seeks to provide a generic set of regulatory provisions based on generic definitions of market and service activities and services. The Content Code is an example of the said regulatory provisions, created pursuant to s 213(1) of CMA by the Communications and Multimedia Content Forum Malaysia ("the Forum").

[114] Section 3.1, Part 1 of the Content Code, states that the Code has an overriding purpose of providing guidelines relating to online contents. The regulation of online contents is made through self-regulation by the communications and multimedia industry in a practical and commercially feasible manner while fostering, promoting and encouraging the growth and development of the industry.

[115] Section 6.0, Part 1 of the Content Code stipulates that the Code shall take effect upon the registration of an online content provider with MCMC. Any non-compliance or breach of the Code entails enforcement by MCMC and may render a person liable to a fine.

Compliance Of The Code A Defence

[116] Malaysiakini first argued that it is not mandatory to comply with the Content Code but yet contended that compliance with the Code is a defence against any action or prosecution in court or other forum as provided in ss 98 and 99 of CMA. It is the 1st respondent's case that they are not required to monitor the activities of users and subscribers until being prompted by complaints. Hence it was contended that the 1st respondent was not in breach of the Code. It was further contended that the 1st respondent had complied with it, thereby affording it a defence under the law.

[117] The contention of the 1st respondent above is bereft of merit and had, in our view, disregarded the overarching intent of the Content Code. The scope of the Content Code must be interpreted in the light of its general principles as provided in s 2.0. The Code declares that there are sets of general principles that must apply to all that is displayed on or communicated and which is subject to the Act. This includes:

i. the need to balance between the desire of the viewers, listeners and users to have a wide range of Content options and access to information on the one hand, and the necessity to preserve the law, order and morality on the other;

ii. the principle of ensuring that Content shall not be indecent, obscene, false, menacing or offensive; and

iii. to ensure the content contains no abusive or discriminatory material or comment on matters of, but not limited to, race, religion, culture, ethnicity, national origin, gender, age, marital status, socio economic status, political persuasion, educational background, geographic location, sexual orientation or physical or mental ability, acknowledging that every person has a right to full and equal recognition and to enjoy certain fundamental rights and freedoms as contained in the Federal Constitution and other relevant statutes.

[118] Section 5.0 prohibits content that contains hate propaganda, which advocates or promotes genocide or hatred against an identifiable group. Such material is considered menacing in nature and is not permitted. Information which may be a threat to national security or public health and safety is also not permitted.

[119] Section 6.0 prohibits bad language. Under s 7.0, it is stated that content which contains false material and is likely to mislead due to incomplete information is to be avoided. Content providers must observe measures outlined in specific parts of the Code to limit the likelihood of perpetuating untruths via the communication of false content.

[120] Apart from this, it must also be noted that under s 10.1, Part 5 of the Code, Malaysiakini must ensure that its users or subscribers are aware of the requirement to comply with Malaysian law including, but not limited to the

Code. No prohibited content nor any content in contravention Malaysian law are condoned.

[121] With respect, the respondents had misconstrued the true position of the law found both in CMA and the Code. We are of the considered view that the 1st respondent was in fact not in compliance with the Code and shields its liabilities by its piecemeal reading of its provisions.

[122] The overriding general principles and the underlying purpose of the Content Code should be viewed holistically. Far from complying with the Content Code, Malaysiakini may have breached the real objective of the Content Code. Viewed in this way, we are unable to accept that this Code can act as an armour to protect the respondents or any publisher being an ICH from any liability in the event where contemptuous comments were made by a third party subscribers that were published by the said ICH.

Finding Of Liability Of The 1st Respondent

[123] The law is trite and settled that the burden of proving contempt of court lies throughout with the party who makes the allegation, in this case the AG as the applicant. The standard of proof required is the criminal standard of proof of beyond any reasonable doubt (see *Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal* [1995] 2 MLRA 684).

[124] We have not overlooked that it being criminal in character, there is a need to proceed cautiously before making a finding of guilt in this case. For, ultimately a person who is held in contempt is liable to be imprisoned or fined. This Court in *PCP Construction Sdn Bhd v. Leap Modulation Sdn Bhd; Asian International Arbitration Centre (Intervener)* [2019] 3 MLRA 429 held that the test to be applied is the objective test and not the *mens rea* test. It is stated at para 61 that the only requirement is that the publication of the impugned articles is intentional. Hence there is no necessity to prove an intention to undermine public confidence in the administration of justice or the Judiciary.

[125] A subjective intention of the alleged contemnor is difficult to establish since it entails an inquiry into the inner workings of the alleged contemnor's mind. Thus it would not matter whether the publisher intends the result. It therefore is no defence for the publisher to claim that he did not know if the statements would have the effect of undermining or erode public in the administration of justice.

[126] The facts before us are that the 1st respondent having designed its own internet platform cannot rely on the failure of its self-designed safeguards both at pre and post-publication stage as its defence. Its well-structured reporting had also failed to alert them of the danger and failed in exonerating it from being guilty of publishing contemptuous comments. There was nothing else to suggest of any other effort on the part of the 1st respondent except to remain oblivious to such danger with the hope of passing that responsibility to its own third party subscribers.

[127] The Content Code in s 2.0 of Part 1 imposes a duty on the 1st respondent as an ICH to ensure to the best of its ability that its content and comments contain no abusive or discriminatory material. The act of relying on its luck that others will alert it, cannot be the best that the 1st respondent can do. The precautionary measures taken by the 1st respondent are obviously inadequate to shield itself from liability. The 1st respondent must take responsibility for the impugned comments published in its platform.

[128] The 1st respondent also cannot invoke s 3(3) of CMA to say that it is not allowed internet censorship in order to absolve its responsibilities. Both CMA and the Content Code viewed wholly have the overriding purpose of not only promoting self-regulation by internet service or content providers, but also to regulate and censure that communications that take place on each information platform do not violate the fundamental rights enjoyed by others.

[129] The 1st respondent cannot insist on exercising its fundamental right and at the same time violate the right of others. A proper balance must be struck between the freedom of speech and expression enunciated and guaranteed in art 10 of the Federal Constitution and the need to protect the dignity and integrity of the courts and the judiciary. Case law are replete with this entrenched principle of law that the exercise of this right is never absolute given the phrase 'subject to' provision appearing at the forefront of art 10.

[130] We acknowledge that the 1st respondent, Malaysiakini is recognised to have published matters of public interest. It had succeeded in promoting and cultivating the culture of expressing one's thought on the subject of the articles published in line with its twin objectives of encouraging readership and generating public discussion for the purpose of giving its readers to form informed views.

[131] The 1st respondent ought to have known that by allowing so, it is exposed to the real risk of the nature and content of comments on the articles that it published. The 1st respondent agreed that the nature of the impugned comments is so offensive and not something that it condones.

[132] On the facts before us and for all the reasons we have elucidated above, we are satisfied that a case of contempt beyond reasonable doubt had been made out against the 1st respondent. In this, we reiterate that the explanations put forth by the 1st respondent that it had no knowledge, had failed to rebut the presumption against it, and hence failed to cast any reasonable doubt on the applicant's case.

[133] We find the charge for facilitating the publication of the impugned comments against the 1st respondent proved. We therefore hold the 1st respondent guilty of contempt of court.

The 2nd Respondent

[134] Having found the 1st respondent guilty of contempt, we will now deal with the case against the 2nd respondent. The application by the applicant lodges similar complaint against both the 1st and the 2nd respondents. To recapitulate, the complaint is that both of them facilitated the publication of the impugned comments. Whilst s 114A of the Evidence Act has been invoked against the 1st respondent, we do not find this similar invocation may be made against the 2nd respondent.

[135] Section 114A of the Evidence Act provides three types of presumptions of fact in publication of contents on the internet. The wordings in s 114A(1) clearly establish the following requirements:

i. A person's name, photograph or pseudonym ('identity');

ii. The identity must appear on any publication depicting the said person to have some connection with the publication either as the owner, host, administrator, editor or sub-editor of the publication; and

iii. The said person will be presumed to have facilitated in publishing or re-publishing the contents of the publication unless and until the contrary is proved.

(See: *YB Dato' Haji Husam Musa v. Mohd Faisal Rohban Ahmad* [2015] 2 MLRA 492; *Ahmad Abd Jalil lwn. PP* [2014] MLRHU 1409; *Stanislaus J Vincent Cross v. Ganesan Vyramutoo & Anor* [2021] 1 MLRH 459; and *Yusof Holmes Abdullah v. PP* [2019] MLRHU 1009).

[136] The issue to be determined is whether the applicant has established any of the above three requirements of s 114A(1) against the 2nd respondent. No fact or evidence was adduced that the name of the 2nd respondent had appeared on Malaysiakini in such a way that can be attributed to facilitating the publication of the contemptuous comments. There was no evidence tendered that the 2nd respondent's name appears on the publication of the impugned comments to attract a presumption under s 114A.

[137] The wordings of s 114A(1) are very clear and unambiguous to warrant other interpretations. It is also settled that when the language of the statute is clear and unambiguous, the court must give effect to its plain meaning. It is not competent for a judge to modify the language of an Act in order to bring it in accordance with his views of what is right or reasonable. (See: *Abel v. Lee* [1871] LR 6 CP 365; and *Navaradnam v. Suppian Chettiar* [1973] 1 MLRA 687).

[138] There was no evidence before us that the 2nd respondent was at all material times named as the owner or the host or the editor on the online news portal owned by the 1st respondent; and that there was no evidence before us that he is the person who reserves the sole discretion to edit or completely remove any comments by a third party. In our view therefore, s 114A(1) could not be extended to the 2nd respondent.

[139] In his affidavit, the 2nd respondent contended that he is not a Content Application Service Provider within s 6 of the Content Code and cannot be viewed as a publisher in relation to the impugned comments.

[140] We are therefore not satisfied that a case of beyond reasonable doubt had been made out against the 2nd respondent. The 2nd respondent in our view is not guilty of contempt as alleged by the applicant.

Conclusion

[141] We are 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 its 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. Seemingly, this case has also been alleged to have intimidated and threatened media independence especially so when online news portals allow for free discussion and robust debate and comments by users on various issues and public interest matters.

[142] 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, it should not be made at one's whims and fancies as which can tantamount to scandalising the court. Whilst freedom of opinion and expression is guaranteed and protected by our Federal Constitution, it must be done within the bounds permissible by the law.

[143] That said, we are not here objecting to public disclosure on judicial decision, nor are we saying that the judiciary is beyond reprieve. Constructive comments and criticisms are often made and it is not the policy of this court to jump into the foray and move a contempt proceeding against those criticism.

[144] The Malaysian public must use their discretion rationally and wisely especially when it comes to posting on the internet as it will remain in posterity in the virtual world. The Malaysian public is not known to be rude, discourteous, disrespectful or ill-mannered. This social norm is to be treasured and preserved at all costs. Let not the social media change the social landscape of this nation. The respondents too owe that duty to ensure the preservation of this social behaviours. It will go a long way to earn Malaysiakini as a responsible portal, for the purpose of public discourse.

[145] 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:

> "All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticism. We cannot enter into

public controversy. Still less into political. We must rely on our conduct itself to be its own vindication."

[146] After weighing the submissions and hearing the oral submissions made before this court, we find the charge for facilitating the publication of the impugned comments against the 1st respondent had been proved, hence we find the 1st respondent guilty of contempt of court. The 2nd respondent in our view, cannot be held guilty for facilitating the publication of the impugned comments. The application by the AG against the 2nd respondent is dismissed. We then invite parties to submit on sentence.

Sentence

[147] Learned counsel for the respondents urged upon us to consider the apology extended on behalf of the 1st respondent by its Director. The apology was extended in his affidavit in encl 57 at para 21. The respondents' counsel explained that despite apologising, the respondents wanted to continue with the hearing in order for this court to set out the law in this area. Again in the open court after this court made a finding of guilt against the 1st respondent, Mr Anand tendered his apology in the open court on behalf of the 1st respondent. It was further urged upon us to also give due regards to the cooperation extended by the respondents both to the police and to the court. Learned counsel suggested a fine of RM30,000.00 would therefore suffice. Learned Senior Federal Counsel then submitted that a fine of RM200,000.00 would be appropriate.

[148] Sentencing is always a prerogative of court to be exercised upon settled principles. In meting out an appropriate sentence the court is bound to consider the general principles involved which may be categorised as the extent and seriousness of the offence committed, the guilty person's antecedent conduct and the public interest factor.

[149] In sentencing for contempt cases, it falls back to the facts and context of each case. The Singapore case of *Shadrake Alan v. Attorney General* [2011] SGCA 26 merits attention. There, the Court of Appeal of Singapore outlined factors to be considered in the context of contempt proceedings, which include the culpability of the contemnor, the nature and gravity of the contempt, the seriousness of the occasion on which the contempt was committed, the type and extent of dissemination of the contemptuous statements and the importance of dettering would-be contemnors from following suit. The Court of Appeal also put emphasis that those categories of guidelines or factors would not be closed but depend on the facts and context concerned.

[150] We then re-examine the impugned comments once again. The comments as we see it are simply scurrilous and irreprehensible. The unwarranted attack are incendiary which expose the Judiciary to embarrassment, public scandal, contempt and to the point of belittling the Judiciary. Not only that, it had tarnished the Judiciary as being guilty of corrupt activity and had compromised

its integrity in carrying out judicial functions. As submitted by the Applicant, the comments were not made within the limit of reasonable courtesy or decency and far from good faith. Such impugned comments if allowed to continue would undermine public confidence in the Judiciary. It will ridicule, scandalise and offend the integrity of this institution.

[151] There is no maximum or minimum sentence to be imposed for a person who commits contempt of court. In deciding an appropriate sentence on the facts of this case, foremost is public interest. In *Chung Onn v. Wee Tian Peng* [1996] 3 MLRH 782, Low Hop Bing J (later JCA) held that under art 126 of the Federal Constitution and s 13 of the Courts of Judicature Act 1964, there is no statutory limit on fine. In assessing the appropriate fine, what must be taken into account would be the damage done to public interest, in addition to the seriousness of the contempt. His Lordship also went on to observe that the offence of the contempt of court is an interference with the administration of justice and the punishment to be meted out is not for the purpose of vindicating the dignity of the court, but to prevent the improper interference.

[152] In our view an appropriate sentence serves public interest in two ways. It may deter others from the temptation to commit such crime where the punishment is negligible, or it may deter that particular criminal from repeating the same crime. Not only regarding each crime, but in regard to each criminal the court always has the right and duty to decide whether to be lenient or severe.

[153] In *Attorney General Of Malaysia v. Dato' See Teow Chuan & Ors* [2018] 4 MLRA 503, two lawyers Mr VK Lingam, Mr Thisinayagam plus 20 company contributories were committed for contempt of court. In a review application before this Court, the contributories (about 20 of them) through their lawyers VK Lingam and Thisinayagam cited the basis for review was anchored on alleged plagiarism and substantially a reproduction without attribution to the liquidators' written submission. The complaint against the contemnors being that the relevant affidavits filed was affirmed on the advice of their lawyers contained statements in contempt of the Federal Court, which would scandalise the Federal Court and subvert the administration of justice. After various postponements, lawyer Thisinayagam and all the contributories except three conceded to the contempt charges.

[154] After hearing the mitigation in that case, this court ordered all the contributories present be fined with RM100,000.00 each and in default eight months' imprisonment. Lawyer VK Lingam and three other contributories were absent. Relying on decided authority this court proceeded to impose sentence *in absentia* to the absent contemnors the similar sentence of RM100,000.00 or in default eight months' imprisonment. Against VK Lingam a sentence of six months' imprisonment was imposed.

[155] Reference is also made to the cases of *Hoslan Hussin v. Majlis Agama Islam Wilayah Persekutuan* [2012] 2 MLRA 701. This was a conviction for contempt in the face of the court when the contemnor had thrown a pair of shoes towards

the bench in the course of hearing, to express displeasure on the decision against him. He was convicted and sentenced to one-year imprisonment. In passing such a sentence, the court held that the stiff custodial sentence meted out would redeem the dignity of the apex court. And mere apology would not lessen the gravity of the offence. The sentence was to protect and preserve the power, respect and dignity of the apex court.

[156] In *PCP Construction (supra)*, the contemnor published two contemptuous articles on Aliran Website, alleging misconduct, improprieties including corruption against this court in the hearing of an application to expunge part of dissenting judgment. He was given an imprisonment sentence of 30 days with a fine of RM40,000.00 or 30 days' imprisonment in default.

[157] The gravity of the contempt committed here is very much more severe than the above cases, including the baseless allegation of corruption. The language used and the allegation made are beyond any bound of decency. It was targeted at the Judiciary as a whole and the wild suggestion of the Chief Justice being corrupt. The impugned comments which were facilitated to be published by the 1st respondent have besmirched the good name of the Judiciary as a whole and have subverted the course of administration of justice, undermined public confidence, offended the dignity, integrity and impartiality of the Judiciary.

[158] Having weighed the mitigating factors as submitted by the respondents against the seriousness of the offence committed, it is only right that the sentence must not be too lenient. Public interest demands a deterrent sentence be meted out against the 1st respondent. We therefore hold that a fine of RM500,000.00 is appropriate. We accordingly make an order for the fine to be paid within three days from Monday, 22 February 2021.

[159] My learned brothers Justice Azahar Mohamed (CJM), Justice Abang Iskandar Abang Hashim (CJSS), Justice Mohd Zawawi Salleh, Justice Vernon Ong Lam Kiat and Justice Abdul Rahman Sebli have read my judgment in draft and have expressed their agreement and have agreed to adopt the same as the majority judgment of this court.

Nallini Pathman Athan FCJ (Dissenting):

Introduction

[160] This matter involves a novel point. The respondents, namely Mkini Dotcom Sdn Bhd and the Editor of Malaysiakini operate an online news portal, which allows for the publication of comments by third parties in response to online news articles. This is done by way of online forum postings. The issue that arises for consideration is whether the respondents are liable in contempt for those third-party comments. The species of contempt in question is that known as 'scandalising the court'. The respondents unequivocally accept that the comments in question are contemptuous.

Salient Background Facts

[161] On 9 July 2020, the respondents through their online news portal, Malaysiakini published an article entitled "CJ orders all courts to be fully operational from July 1". On the same day the following five third-party comments were published in the online comments section operated by Malaysiakini. The comments are as follows:

(a) Ayah Punya kata: The High Courts are already acquitting criminals without any trial. The country has gone to the dogs;

(b) 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?

(c) 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!

(d) Semua Boleh - Bodoh pun Boleh: Hey Chief Justice Tengku Maimun Tuan Mat - Berapa JUTA sudah sapu - 46 corruption - satu kali Hapus!!! Tak Malu dan Tak Takut Allah Ke? Neraka Macam Mana? Tak Takut Jugak? Lagi - Bayar balik sedikit wang sapu - legal jugak. APA JUSTICE ini??? Penipu Rakyat ke? Sama sama sapu wang Rakyat ke???

(e) Victim: The Judiciary in Bolihland is a laughing stock."

[162] As a consequence, the Attorney-General in the exercise of his discretion under art 145(3) of the Federal Constitution applied for leave to commence contempt proceedings against Mkini Dotcom and its chief editor in this court, which was granted on 17 June 2020.

[163] The respondents applied to set aside the leave for contempt granted to the Attorney-General. We heard the respondents' application on 2 July 2020, and dismissed the same. We determined that a *prima facie* case of contempt in the form of scandalising the court had been made out.

[164] In so deciding we held, *inter alia*, that this court would not venture into or purport to decide the substantive merits of the committal application, which was properly the subject matter of the second stage of adjudication.

[165] The reasons why we concluded on 2 July 2020 that a *prima facie* case had been made out was premised on the facts as we understood them then, namely that:

(a) The 1st respondent facilitates publication;

(b) The editorial policy of allowing editing, removing and modifying comments;

(c) The fact that upon being made aware by the police, the 1st respondent removed the comments; and

(d) Evidence revealing that the editors of the 1st respondent review postings on a daily basis.

Based on these matters, we took the view that the respondents had published the impugned comments and that a *prima facie* case had been made out.

[166] We were further supported in our view of 'publication' by s 114A of the Evidence Act 1950 pursuant to which the respondents are presumed to have published the impugned comments. However, the presumption is a rebuttable one.

[167] It therefore followed that as the five statements were by admission contemptuous, there had been *prima facie* publication by Malaysiakini through the respondents, of these five statements, notwithstanding the fact that the comments had originated from third party subscribers.

[168] We concurred with the Attorney-General that these five impugned comments clearly carried the meaning that the Judiciary had committed gross wrongdoings, was involved in corruption, did not uphold justice and had compromised its integrity as an institution.

[169] It was equally clear that these comments implicated the judiciary as a whole, including the Chief Justice of the Federal Court. Accordingly, we ordered the respondents to respond to the *prima facie* case and fixed 13 July 2020 for the continued hearing of this matter. As we understand it, the respondents did not dispute that these comments do indeed bear such a meaning, as they agreed that the comments were contemptuous in nature.

Hearing On 13 July 2020

[170] On 13 July 2020, we heard the substantive merits of the committal application. Prior to this hearing, the respondents filed further affidavits. In summary, the respondents filed two further affidavits, one from an information technology expert who examined and explained the system adopted by the 1st respondent for its news portal, more particularly the system adopted for the posting of comments.

The Expert's Affidavit

[171] The 1st respondent utilises two independent and different systems, one for its "stories" or articles which it determines ought to be published, and another system called "Talk" in respect of comments by third party subscribers;

(a) The software "Talk" ('Talk') allows for the screening of a comment against a list of banned and suspected words by comparing the exact words typed against the words in the list. If there is a match

with a banned word, users are precluded from posting content that carries the banned word.

(b) The position is different with a suspected word. The comment with the suspected word is published and automatically flagged for review by a comments administrator;

(c) However the software Talk only allows a comment administrator to approve or reject comments after publication. The comment with the suspected word would therefore be visible to readers. A comment which is flagged by Talk by reason of a suspected word and which is then reviewed by the administrator and rejected, is removed;

(d) It was also explained that the software cannot detect more complex concepts involving sentences and words which are linked together. Such monitoring by software would require advances in artificial intelligence.

(e) The editors of Malaysiakini are not aware of these comments until a suspected word is detected by Talk and dealt with by an administrator;

(f) In short, there is no provision for pre-monitoring of suspected words in third-party comments. Banned words are however pre-monitored and removed prior to publishing.

The Affidavit Of The Director Of The 1st Respondent

[172] Premesh Chandran a/l Jeyachandran the director of the 1st respondent filed a further affidavit. He explained the human resource aspects and staffing of the 1st respondent. Of significance is the fact that the editorial team comprises 65 persons. He explained how articles are edited and adapted for publication on the news portal. With respect to comments, he explained that the 1st respondent does not tolerate profanity, vulgarity, slander, personal attacks, threats, sexually orientated comments or any communication that violates the law. He reiterated the expert's explanation on the use of software.

[173] In essence it is clear that there is no part played by the editorial room in the filtering or pre-censoring of comments, save for the banned words as contained in a list utilised by the software, Talk.

[174] Therefore the primary mode of dealing with offensive comments which fall into the 'suspected' category is the flag and take down policy. This is also in keeping with the Code under the Communications and Multimedia Act 1998 ('CMA').

[175] But key to all of this is the fact that all these measures only come into play after the publication of the comments, such that they are visible to the

public. The offensive comments are only taken down after notification is given by either an editorial administrator or a reader. Control is therefore limited to post- publication review, largely at the behest of readers.

My Analysis And Decision

The Law Relating To Contempt – Scandalising The Court

[176] The rationale underlying this species of contempt, namely scandalising the court needs to be emphasised. In this context, I can do no better than to paraphrase the underlying philosophy enunciated by Kriegler J of the South Africa Constitutional Court in *S v. Mamabolo* (CCT 44-00) [2001] ZACC 17; [2001] (3) SA 409 (CC); [2001] (5) BCLR 449 (CC) (11 April 2001).

[177] In that case, the learned judge first explained why in this day and age of constitutional democracy, the offence of scandalising the court even exists. Why are judges or the Judiciary sacrosanct? Are they holding on to this form of contempt as a legal weapon to uphold a status and seeming untouchability that is unavailable to other persons?

[178] On the contrary, should the judges who hold and wield a great deal of power not be accountable to the public on whose behalf they carry out their functions and from whom their payment is received? And added to this is the fact that they are not elected, and are not easily removed, unlike the other two arms of government. In these circumstances should they not come under constant public scrutiny and criticism?

[179] Kriegler J answered these questions by explaining that the constitutional position of the judiciary is fundamentally different from the other two arms, the executive and the legislature. The Judiciary is an independent arm of the State which is constitutionally mandated to exercise judicial authority without fear and impartially.

[180] It stands on an equal footing with the executive and the legislature under the doctrine of the separation of powers, but, as this court has previously pointed out in *Arun Kasi*, it is the weakest of the three as it has no political, financial or military power in its armoury. The sole weapon in its armoury on which it must rely is its moral authority. Such moral authority is achieved by its true independence and authority.

[181] Without such morality it would be unable to carry out its important function of acting as a check and balance against the other two arms, and of being the defender of the people's rights as protected and preserved in the Federal Constitution, even against the state.

[182] Therefore attempts to, or acts calculated to destroy or grind down this moral authority and thereby public confidence in the institution need to be arrested. This in turn is because a loss of confidence in the institution will inevitably result in the erosion of the rule of law.

[183] In the absence of any other 'weapons' so to speak, the law of scandalising contempt is necessary to protect that moral authority of the Judiciary to perform its crucial function of serving as a check and balance against the other pillars of Government. Ultimately this is for and in the interests of the citizens of the country. Not for the dignity of individual judges, but the institution as a whole.

[184] We said as much in *PCP Construction Sdn Bhd v. Leap Modulation Sdn Bhd; Asian International Arbitration Centre (Intervener)* [2019] 3 MLRA 429. The reason why the contempt of scandalising the court remains relevant today, particularly in the absence of any legislation whatsoever providing for a statutory form of contempt, is "to ensure that the right of the citizens of Malaysia to have recourse to the courts of the nation to obtain justice is not put at risk. Such a risk arises where confidence in the institution is imperilled or actively eroded to the point where the authority of the courts is no longer recognised nor adhered to. That can only lead to chaos and anarchy."

[185] We examined and dealt with the constitutionality of this type of contempt. This court stated in that case that this form of contempt needed to be retained in the context of our local circumstances and conditions, when compared (as is usually done) to that of England and Wales.

[186] Secondly as stated by Lord Denning in *R v. Metropolitan Police Commissioner Ex-Parte Blackburn (No 2)* [1968] 2 QB 150 judges, by the very nature of our office, cannot reply to criticism, far less verbal abuse and scurrilous allegations of corruption. We cannot enter into public controversy, far less political issues. It is our conduct that is our vindication.

[187] We have also emphasised that the jurisdiction to prosecute for contempt should not be utilised, as we have said on several occasions, to restrict honest criticism, no matter how bluntly or sometimes crudely put, provided it is premised on rational grounds and is calculated to provide feedback on the functioning of the courts, the administration of justice or the basis or result of a particular judgment. Any such discussion conducted *bona fide*, for and in the public interest is entirely warranted. I say this to re-emphasise the fact that these cases of scandalising the court contempt should in point of fact be an extremely rare occurrence.

[188] The instant case is a clear example of third-party commentators utilising their anonymity to direct unwarranted abuse, amounting to contempt, at the Judiciary.

The Issues Before Us

[189] The issues that arise for consideration are:

(a) Have the respondents rebutted the presumption of publication under s 114A of the Evidence Act?

(b) Does 'publication' require the element of intention and/or knowledge to be fulfilled?

(c) Did the 1st and/or 2nd respondents possess the requisite "intention to publish" for the purposes of scandalising the court contempt?

Issue (a): Have The Respondents Rebutted The Presumption Of Publication Under Section 114A Of The Evidence Act?

[190] This brings to the fore the purpose and function of s 114A of the Evidence Act which reads as follows:

> "A person whose name, photograph or pseudonym appears on any publication depicting himself as the owner, host, administrator, editor or sub-editor, or who in any manner facilitates to publish or re-publish the publication is presumed to have published or re-published the contents of the publication unless the contrary is proved."
>
> [Emphasis mine]

[191] The effect of s 114A, which is applicable to the 1st respondent, which facilitated the publication of the comment, establishes *prima facie* that the 1st respondent did as a matter of fact publish the impugned comments.

[192] It is of equal importance to consider what the presumption does not establish:

(a) It does not establish that the 1st respondent had actual knowledge of the existence or content of the impugned comments;

(b) It does not establish guilt on the part of the 1st respondent in relation to such publication;

(c) The section does not affect the 2nd respondent.

[193] What is the effect in law of the presumption? As highlighted by Faizah Jamaludin JC (now J) in *Thong King Chai v. Ho Khar Fun* [2018] 5 MLRH 277 quoting from the book *Defamation Principles and Procedure in Singapore and Malaysia* by Doris Chia:

> "The applicable provision (s 114A) essentially reverses the burden of proof onto the defendant to show for example that even though the defamatory statement originated from his computer, it was not sent by him."

[194] In the instant case it means that although the impugned comments appeared on the Malaysiakini news portal, it is open to the 1st respondent to adduce evidence to establish that the comments were neither made nor posted by it.

[195] This is actually not in dispute, as all parties accept that the comments were made by third parties. That is the extent of the application of s 114A.

As submitted by learned counsel for the respondents, its applicability in this matter is limited for the reason stated above.

[196] It is equally important to state that s 114A in no manner imputes guilt or liability on the part of the 'publisher'. It merely alters the normal course of proof such that it becomes incumbent upon the presumed publisher to explain why he is not responsible for the content on the internet portal or site. In this context the finding of Abdul Rahman Sebli J (now FCJ) in *Tong Seak Kan & Anor v. Loke Ah Kin & Anor* [2014] 5 MLRH 709 warrants reassertion:

> "[22] Clearly the legislative scheme of s 114A(2) is merely to presume or presuppose that the registered owner of the blog is the publisher of the publication and the presumption is rebuttable by proof to the contrary. It is by no means an irrebuttable presumption and neither does it finally determine the publisher's liability or guilt. No one can be found liable in a civil claim nor guilty in a criminal prosecution on account of s 114A(2) standing alone unless of course there is total failure of rebuttal."

[197] As further pointed out by counsel for the respondents, s 114A was intended to address the mischief posed by internet anonymity. This is borne out by the Hansard where the then Minister moving the bill explained that the rapid developments in the use of the internet and information technology at the time had given rise to cybercrime and other criminal offences through that medium. In line with this, the amendment introducing s 114A, was necessary to control or deal with the issue of internet anonymity.

[198] As such, with the application of the section, the only conclusion that can be drawn is that *prima facie*, the 1st respondent is the 'publisher' of the impugned comments but is at liberty to rebut this presumption.

The Rebuttal Afforded By The Respondents

[199] The respondents have sought to rebut the presumption by the adducing of further affidavits. This evidence all points to the fact that at the time, and until the subject impugned comments were brought to the attention of personnel of the 1st respondent, the respondents were not aware of the existence, nor the contents, of the impugned statements.

[200] There is no evidence put forward to refute or challenge these statements of the respondents. In these circumstances, it follows that as a matter of fact both the respondents had no knowledge of, and were not aware of the existence or content of the impugned comments posted on 9 June 2020, until 12 June 2020, when they were advised of the existence of the comments by the police.

[201] The only conclusion of fact that can reasonably drawn on the record of evidence before us is that the respondents did not know, nor were aware of the existence or contents of the impugned comments, at the point in time when they were posted by the third-party commenters. In this context, the suggestion in the majority judgment that all 65 members of the editorial team

should each affirm affidavits is not tenable, as the single affidavit has rebutted the presumption.

[202] This brings us to the heart of the case here. If the respondents were not aware of the existence nor the contents of the impugned comments until 12 June 2020 notwithstanding the posting on 9 June 2020 then can it be concluded that:

(a) The 1st respondent is a publisher of the impugned comments in the sense that it intentionally and knowingly did publish the third-party comments appearing on the news portal; and more pertinently,

(b) Whether the 1st respondent intended to publish the impugned comments, simply by reason that it is the host of an internet portal news site.

[203] Element (b) relating to the intention to publish is the key element in establishing the contempt of scandalising the court, as we stated in *Arun Kasi*. Therefore the answer to these issues is determinative of two legal issues, namely whether the 1st respondent is a 'publisher' and secondly whether the 1st and 2nd respondents can be liable for the contempt of scandalising the court.

(The 2nd respondent plays a considerably lesser role because he does not fall within the definition of a publisher. He is the Editor in Chief.)

[204] It must be borne in mind that here the 1st respondent is an online intermediary which merely supplied the means for the publication of the impugned statements and is not the author of the comments. This distinction warrants an examination of the exact degree of knowledge required to attract liability on the part of an online intermediary.

[205] In answering these questions it must be borne in mind that there is a scarcity of case-law on this subject. Most of the older case-law deals with the more traditional forms of media and not the internet. To that extent the case-law is limited in its application.

[206] One should be cognisant that while analogies may be of assistance, great care must be taken in making reference to authorities involving pre-internet forms of communication. Indeed, the advent of the internet has created novel and unprecedented methods of communication that bear little resemblance to traditional modes of communication. Rules which were made to fit a certain paradigm may not be suited to a new model: see Harvey, DJ, Collisions in the *Digital Paradigm: Law and Rule - Making in the Internet Age*, (USA: Bloomsbury, 2017), pp 82-83.

[207] It was this realisation that prompted Kirby J to comment in *Dow Jones & Company Inc v. Gutnick* [2002] 210 CLR 575 at para [129] that:

> "[t]here are a number of difficulties that would have to be ironed out before the settled rules of defamation law... could be modified in respect of publication of allegedly defamatory material on the Internet."

[208] A similar sentiment was expressed in *Murray v. Wishart* [2014] 3 NZLR 722, where the New Zealand Court of Appeal acknowledged that publication cases involving traditional media require the court to employ reasoning based on "strained analogy" as they do not involve publication on the internet.

[209] There are some case-law from other jurisdictions on the liability of online news portals and other internet intermediaries for third-party comments in defamation. I immediately appreciate that defamation is far removed from contempt, as it is a civil wrong attracting civil remedies, largely damages, while contempt is *quasi*-criminal in character and carries penal consequences.

[210] That notwithstanding, the legal rationale relating to whether, and if so, how and why a news portal may be liable in defamation for third-party comments is relevant to some extent in the instant case relating to contempt.

[211] This is because it explains how the law of defamation has dealt with this novel medium of communication, where control of commentary is difficult, and where an onslaught of third party information results, ranging from the informative and useful, to abuse and worse. In this environment the courts in other jurisdictions have sought to draw up guidelines to balance the freedom of speech and expression against the damage and hurt arising to victims of such abuse, again, it must be stressed, in defamation.

[212] The analogies that may be drawn are useful for comprehending the countervailing policies that subsist as well as the controls available to online news portals to control such input, particularly when it relates to violence, hate speech or religious blasphemy. Contempt of court being unlawful and encouraging the erosion of confidence in the Judiciary, falls within that class of commentary that requires vigilance. However it must equally be borne in mind that contempt requires a far higher standard of proof than does defamation.

Issue (B): Does Publication Require The Element Of Intention And/Or Knowledge To Be Fulfilled?

[213] The crux of the issue is whether an online content service provider such as Malaysiakini is a publisher only if it has knowledge of the existence and content of information or comments posted by third parties. And secondly whether the respondents are liable in contempt for the impugned comments posted by third party subscribers only if they had actual knowledge of the existence and content of those comments.

[214] I now turn to examine some of the relevant case-law from other jurisdictions.

1) United Kingdom

***Totalise Plc v. Motley Fool Ltd & Anor* [2001] IP & T 764**

[215] In this case the defendants operated websites containing discussion boards on which members of the public were able to post material. An anonymous contributor, Z, posted material about the claimant on the defendants' notice boards. The claimant contended that some of the materials were defamatory and sought an order for disclosure of Z's identity from the defendants. The defendants argued that they came under the scope of s 10 of the United Kingdom Contempt of Court Act 1981 which protected persons responsible for publication from disclosing their sources unless the court felt that such disclosure was necessary. It was held that the defendants exercised no editorial control and took no responsibility for what is posted on their discussion boards. They simply provided a facility by means of which the public at large could communicate its views.

***Godfrey v. Demon Internet Ltd* [2001] QB 201**

[216] This case concerned a statement alleged to be defamatory in a posting on an online bulletin board provided by a news provider. It could be accessed by subscribers to Demon's service. Demon was asked to remove the statement but did not do so. Demon argued that it was not a 'publisher' under the relevant UK statute, but this argument failed. However the claim itself was framed to impute liability only from the date after Demon had been notified of the existence of the statement, and not the period before such notification. Demon was found to be a publisher.

***Bunt v. Tilley* [2006] 3 All ER 336**

[217] Here it was held that an internet service provider which performed no more than a passive role in facilitating postings on the internet could not be deemed to be a publisher at common law, and thus no liability for libel could attach to such a person. Eady J took the view that to impose legal responsibility upon anyone under common law for the publication of words it was essential to demonstrate a degree of awareness or at least an assumption of general responsibility; such as had long been recognised in the context of editorial responsibility. Although to be liable for defamatory publication it was not always necessary to be aware of defamatory content, still less of its legal significance, for a person to be held responsible there had to be knowing involvement in the process of publication of the relevant words. It was not enough that a person had played merely a passive instrumental role in the process.

***Metropolitan International Schools Ltd v. Designtechnica Corporation* [2011] 1 WLR 1743 (QB)**

[218] In this case a defamatory statement appeared as a small part of the result of a Google search. The court found that Google, as operator of the

search engine was not a publisher as there was no human input into the selection of search results. This is despite the fact that Google was notified of the defamatory portion of the statement when a certain search was undertaken. The court rejected the proposition that between notification and "take down" Google became or remained liable as a publisher as there was no approval, authorisation or acquiescence by Google in relation to the offending material.

***Davison v. Habeeb* [2011] EWHC 3031**

[219] This case took a different approach. There too a statement in a blog hosted by Blogger.com (a service provided by Google) was alleged to be defamatory. The court held that Blogger.com would not be regarded as a publisher of a statement posted on the site until it had been notified that it is carrying the defamatory material. Only then could it be fairly be stated to have accepted and participated in the publication by the third party. In other words, actual knowledge was a crucial element in determining whether a internet service content provider is a publisher. The mental element was found to be crucial in determining whether the blog was a publisher or a mere facilitator.

***Tamiz v. Google Inc* [2013] EWCA Civ 68, [2013] 1 WLR 2151**

[220] Here, the claimant sought to bring a claim in libel against the defendant in respect of eight comments posted anonymously on a blog hosted on a blogging platform operated by the defendant. The platform was provided on the defendant's own terms and the defendant could remove or block access to material failing to comply with its terms once its attention was drawn to it. The defendant was first notified of the claimant's complaint about the comments when it received the letter of claim, some two months after the comments were posted. Five weeks later the defendant forwarded the complaint to the blogger who three days later voluntarily removed the comments complained of. The English Court of Appeal held that an online intermediary cannot be a secondary publisher in respect of the time before notification of the impugned statement as it lacks the requisite knowledge, but may be a secondary publisher of impugned speech if it fails to remove the offending material after notification of the same.

2) Hong Kong

***Oriental Press Group Ltd v. Fevaw Orks Solutions Ltd* [2013] HKCFA 47**

[221] The Hong Kong Court of Final Appeal had to determine whether a host of an internet discussion forum is a publisher of defamatory statements posted by users of the forum. On the issue of being a publisher the court considered that the forum host played an active role in encouraging and facilitating the postings on its forum. They were therefore participants in the publication of postings by forum users and were therefore publishers.

3) *Delfi AS v. Estonia* [2015] (ECtHR) (Application No 64569-09)

[222] Delfi is an internet news portal that publishes up to 330 news articles a day. It made provision for both registered subscribers and unregistered readers to comment. The commenters had the option of leaving their names and e-mail addresses or not. The third-party comments were uploaded automatically. The consequence was that they were not edited nor moderated by Delfi.

[223] A notice-and-take-down system had however been implemented for insulting, mocking or hate messages as well as "a system of automatic deletion of comments that included certain stems of obscene words", ie a preventive filtering system. The system adopted bears considerable similarity to the present case before us.

[224] The applicant company published an article on the Delfi portal. The article attracted 185 comments and about 20 of them included "personal threats and offensive language" directed against a person. It is of relevance that the comments in issue violated Estonian law on hate speech.

[225] The Estonian Supreme Court held that Delfi, a large online news portal registered in the Republic of Estonia, was liable in defamation for third-party comments posted by unregistered users on its site in response to an article. Such liability was premised on the law prohibiting hate speech in Estonia. Liability was affixed on the news portal for the unlawful statements and hate speech of third parties, despite Delfi having an automated filtering system and a notice and takedown procedure in place.

[226] Dissatisfied with this decision, Delfi made an application against the republic of Estonia to the European Court of Human Rights ('ECtHR') under art 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[227] Before the ECtHR, Delfi's complaint was that its freedom of expression had been violated in breach of art 10 of the Convention by the fact that it had been held liable for the third-party comments posted on its Internet news portal.

[228] Delfi sought to argue that it was a passive intermediary which was simply making it possible for third parties to exercise their freedom of speech and expression. However this contention was rejected.

[229] The ECtHR gave considerable weight to the nature and context of the third-party comments. It also took into account the fact that Delfi was a professionally managed Internet news portal run on a commercial basis, which sought to attract a large number of comments on news articles published by it. It noted that Delfi had an economic interest in the posting of the comments. The authors or generators of the comment had no control over the comments after they had been posted, but Delfi did. It could delete or modify the posts.

[230] The ECtHR upheld the decision of the Estonian Supreme Court determining that Delfi was liable as a publisher for third party 'hate' and defamatory comments did not amount to a violation of art 10 of the European Convention for the Protection of Human Rights in relation to freedom of speech.

[231] As such the ECtHR agreed with the Estonian Supreme Court that although Delfi was not the actual author of the comments, it did retain control over the comments section and by reason of it being involved in facilitating the comments in relation to its article being made public, it was not a passive technical service provider but had gone beyond that.

[232] Therefore the level of moderation retained by Delfi in controlling its third-party comments allowed the ECtHR to conclude that Delfi owed a duty or responsibility to the 'victim' of the article (art 14) which had to be balanced against the freedom of expression contained in art 10.

[233] Although the ECtHR accepted that there was interference with freedom of expression it ultimately concluded that such interference was justified.

The Dissenting Judgments In Delfi

[234] The dissenting judgments in the judgment of the ECtHR warrant study. The dissenting judges accepted that a relevant consideration for extending the liability of an active intermediary includes the fact that by creating a comment section and inviting users to participate in the internet service provider or online news portal assumes some degree of responsibility. However they point out that "…the nature of the control does not imply identification with a traditional publisher." They referred to the difference between a traditional publisher such as a newspaper editor and an active intermediary. In the former case the content provider such as a journalist is an employee and the editor is in a position to know in advance the content of the article and exercises a decision making power and thereby controls the publication in advance. However these elements are missing in the case of active intermediaries who host only their own content and data, but who do not have such control in the case of third-party commenters. The degree of control they have is only in the filtering system they employ.

[235] In summary, the majority judgment in Delfi identified *inter alia* the following criteria as being relevant to an assessment of an online intermediary's liability for unlawful material posted on its site:

(i) The context of the comments;

(ii) The measures applied by the intermediary to prevent or remove defamatory comments; and

(iii) The liability of the actual authors of the comments as an alternative to the intermediary's liability.

[236] The majority decision in *Delfi* has been criticised as stifling the freedom of expression: see Jurate Sidlauskiene and Vaidas Jurkevicius, "*Website Operators' Liability for Offensive Comments: A Comparative Analysis of Delfi AS v. Estonia and MTE & Index v. Hungary*" [2017] 10 Baltic Journal of Law and Politics 46-75 at 48.

***Magyar Tartalomszolgaltatok Egyesulete and Index.hu ZRT v. Hungary, European Court of Human Rights* [2016] (Appeal No 22947-13)**

[237] A softening of the stance of the ECtHR can be seen in the subsequent case of *Magyar Tartalomszolgaltatok Egyesulete and Index.hu Zrt v. Hungary, European Court of Human Rights* [2016] (appeal no 22947-13) ('*MTE*'). In *MTE*, the applicants had allowed third-party comments on publications appearing on their portals. Comments could be uploaded following registration and there was no prior editing or moderation by the applicants. Readers of the sites were advised by disclaimers that comments did not reflect the portals' own opinions and that authors of comments were responsible for the content. There was a notice and takedown procedure where readers could notify the internet portals of comments of concern and request their deletion.

[238] The ECtHR in *MTE* stressed that although internet news portals were not publishers in the traditional sense, they must in principle assume duties and responsibilities and because of the particular nature of the internet, those duties and responsibilities may differ to some degree from that of a traditional publisher notably with regard to third-party comments.

[239] The ECtHR in *MTE* drew a distinction between *Delfi* and the instant appeal on the ground that the former involved a commercial news site where users had engaged in clearly unlawful expressions amounting to hate speech and incitement to violence. The ECtHR found that although the comments in *MTE* were vulgar and offensive, they were not hate speech or unlawful. In addition, the titular applicant was a non-profit body of internet service providers with no economic interests.

[240] The ECtHR categorised the internet portals' provision of a third-party comment platform as a "journalistic activity" and in line with existing ECtHR jurisprudence, advocated against the imposition of liability on the applicants on the ground that "punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so."

4) Australia

***Fairfax Media Publications; Nationwide News Pty Ltd; Australian News Channel Pty v. Voller* [2020] NSWCA 102**

[241] In the Australian case of *Fairfax Media Publications; Nationwide News Pty Ltd; Australian New s Channel Pty v. Voller* [2020] NSWCA 102 the facts

were that one Dylan Voller was imprisoned in a juvenile detention centre. Fairfax Media Publications, Nationwide News Pty Ltd, and Australian News Channel Pty Ltd ('News Outlets') reported on his detention at that facility including by way of publishing articles on Facebook.

[242] In response, Facebook users who were members of the general public left comments relating to those reports on the News Outlets Facebook pages. Voller alleged that ten of those comments were defamatory. These comments were promptly removed when the news outlets became aware of them.

[243] Mr Voller began defamation proceedings against the News Outlets, and argued that they were liable as the publishers of the third-party comments. A threshold element that had to be published was that the news outlets were in fact primary publishers. The trial judge determined this issue as a preliminary one, prior to the full trial. He found that the News Outlets were 'publishers'. The issue went on appeal.

[244] On appeal, the News Outlets argued that they were not publishers in respect of comments third parties made on Facebook pages that they administered. They further maintained that they were not the originators of the defamatory posts. Neither had they participated in the publishing process and therefore there should be no liability in defamation against them. Finally they pointed out that as they had promptly removed the posts on being advised of the same, they could not be regarded as having adopted those comments.

[245] However the NSW Court of Appeal agreed with the trial judge and held that the News Outlets were publishers of the comments. It went on to state that in the context of an internet platform, a party who encourages and facilitates the leaving of comments on a discussion forum is a publisher.

[246] The court found that the News Outlets were publishers because each one of them had subscribed to a facility enabling them to have an 'official' Facebook page for the newspaper. They had expressly or impliedly allowed or encouraged discussion in the comments section; and they all had editorial control to monitor and delete user comments.

[247] The court considered that in the context of establishing whether the News Outlets were publishers, it was immaterial that the relevant comments were promptly removed because the News Outlets had facilitated the publication of them in the first place.

5) India

***In Re Prashant Bhushan & Anor, Suo Motu Contempt Application* (Crl) No 1 of 2020**

[248] In this case, the alleged contemnor no 1, an advocate, posted on Twitter the following tweets about the Chief Justice of India and the Indian Supreme Court:

(i) "CJI rides a 50 Lakh motorcycle belonging to a BJP leader at Raj Bhavan Nagpur, without a mask or helmet, at a time when he keeps the SC in Lockdown mode denying citizens their fundamental right to access justice!"

(ii) "When historians in future look back at the last six years to see how democracy has been destroyed in India even without a formal Emergency, they will particularly mark the role of the Supreme Court in this destruction, & more particularly the role of the last 4 CJIs."

[249] Twitter Inc as the alleged contemnor no 2 submitted that it had not authored or published the tweets in question. Twitter also submitted that it was merely an 'intermediary' within the meaning as provided under the Information Technology Act 2000 and was thus not the author or originator of the tweets posted on its platform. Twitter submitted that it had no editorial control of the tweets and merely acted as a display board. Twitter pointed out that it had after the order of the Indian Supreme Court dated 22 July 2020, taken cognisance of the impugned tweets, and had blocked access to, and disabled the same. The argument by Twitter that it was an 'intermediary' found favour with the Indian Supreme Court which held that Twitter had shown "*bona fides*" by suspending the impugned tweets immediately after the court took cognisance of them. Twitter was therefore absolved of liability in contempt for the statements made by the advocate. Malaysiakini is in the same position as Twitter in the instant case. In point of fact, Twitter has a wider global reach than the 1st respondent on an international basis. Based on its first quarter earnings report for 2019, the platform boasted of 330 million monthly users and 134 million monetisable daily active users. Despite this, Twitter was absolved of contempt by the Indian Supreme Court.

[250] Here the respondents employ a filtering system known as Talk. They have no other means of control over persons leaving comments on their platform. As stated by way of affidavit in the instant case, a post can come in at anytime and sometimes even months or years later. The commenter is not the employee of the publisher and is not known to the publisher. Importantly the posting of the comment and thereby 'publication' on the portal is done without the knowledge of either of the respondents. As such the level of knowledge and thereby the ability to control differ significantly in the case of traditional media as compared to the internet.

[251] In order to control these comments, it appears to me that there must be knowledge, which enables the controls to come into play. That is achieved with the flag and take-down approach enacted by Parliament in the CMA and the Code which affix an internet intermediary such as Malaysiakini with liability as a publisher from the point in time when they actually know of the existence and content of the comments in question.

[252] To suggest that intermediaries such as the respondents are bound to take steps to prevent such comments from appearing on the site means that

apart from the filtering system, the respondents (and all other intermediaries with a comments section including Facebook users etc) will have to provide supervision throughout the day and night. This is in light of the evidence from the respondents that comments may arise at anytime during the day or night and in the future. This would appear to be untenable. That is why Parliament in its wisdom adopted the flag and take-down approach that enables the intermediaries to respond as soon as they acquire knowledge.

Conclusion On Whether Publication Requires The Element Of Intention And/Or Knowledge To Be Fulfilled

[253] Having reviewed the case-law in other jurisdictions, I am of the considered view that an online content service provider like the 1st respondent that operates an online news portal and provides content in various forms including the invitation of comments from third party users becomes liable as a publisher when it has knowledge or becomes aw are of both the existence and the content of the subject material that is unlawful or defamatory, and fails to take down said material within a reasonable time.

[254] In other words knowledge of, and consent to, such content is necessary before an online intermediary becomes liable as a publisher for such content. Awareness of the content is a pre-requisite, to my mind.

[255] In so saying, I reject the proposition that an 'ought to know' test or a 'constructive knowledge' test is the applicable test in determining whether a news portal like the 1st respondent is a 'publisher'. It should be noted that during the hearing on 13 July 2020 counsel for the applicant conceded that actual knowledge is required to establish the offence of scandalising contempt.

Reasons For The Rejection Of The 'Constructive' Or 'Ought To Know' Test

[256] I am persuaded in my reasoning by the excellent analysis of this same issue in the leading case of *Murray v. Wishart* [2014] 3 NZLR 722, a decision of the Court of Appeal of New Zealand. The Court of Appeal of New Zealand was concerned that the 'ought to know' or 'constructive knowledge' test puts an online news portal that posts third-party comments in a worse position than an online news portal that actually knows of the impugned comments.

[257] Under the 'ought to know' test, an online news portal is affixed with liability as a publisher as soon as the third part y impugned comment appears on the portal and will be unable to avoid that consequence, even if it removes the impugned comment, because it will be caught by the test that it ought to have known and anticipated that comment before it could be posted. This means that as soon as a comment is posted, an online intermediary cannot do anything to avoid being treated as a 'publisher'. If it is contended that the 'ought to know' test is tenable because it only applies where the circumstances are such that the online portal should anticipate the posting of unlawful material, that is effectively making an online intermediary liable for not taking

steps to prevent unlawful comments being made. This is not in accordance with the legislation subsisting at present in this jurisdiction.

[258] Conversely, the application of the 'actual knowledge' test would not leave unlawful comments unchecked. It simply means that an online intermediary will only become a publisher from the time it had knowledge of the impugned speech. It is only from that point in time that there arises a duty on the part of the online intermediary to remove all unlawful content from its site within a reasonable time. If it fails to do so, it is likely to be liable for a variety of offences. Thus, an online news portal becomes a 'publisher' upon becoming aware of the existence and content of an impugned comment. Until then it is not a 'publisher'. This is consonant with the CMA which regulates the communications and multimedia industries.

[259] Central to this discussion is the Federal Constitution and the CMA. The Federal Constitution allows for freedom of speech and expression subject to such law as Parliament may impose. It is no doubt true that art 10 explicitly recognises that the right to freedom of speech and expression may be restricted, but that curtailment may only be done by way of written legislation passed by Parliament: art 10(2)(a) Federal Constitution. For the purposes of the present proceedings, it must be emphasised that there is no specific law enacted by Parliament that deals with contempt of court. It is also significant that s 3(3) of the CMA declares that nothing in the CMA "shall be construed as permitting the censorship of the Internet". A perusal of the Malaysian Communications and Multimedia Content Code ("the Code") prepared by the Malaysian Communications and Multimedia Forum ("the Forum") and registered by the Malaysian Communications and Multimedia Commission ("MCMC") under s 95(2) of the CMA discloses that:

(i) Responsibility for online content rests primarily with the content creator: s 4.1(b) of the Code;

(ii) An Internet content hosting provider (ICH) shall not be required to block access by its users or subscribers to any material unless directed to do so by the Complaints Bureau acting in accordance with the complaints procedure set out in the Code, or be required to monitor the activities of its users and subscribers: s 11.1(c) and (d) of the Code;

(iii) Where an ICH is notified by the Complaints Bureau that its user or subscriber is providing prohibited content and the ICH is able to identify such user or subscriber, the ICH has 2 working days to inform said user or subscriber that it has 24 hours to take down the prohibited content, failing which the ICH shall have the right to remove such content: s 10.2 of the Code.

[260] More pertinently s 98(2) of the CMA stipulates that compliance with the Code "shall be a defence against any prosecution, action or proceeding of any nature, whether in a court or otherwise, taken against a person (who is subject to the voluntary industry code) regarding a matter dealt with in that code."

[261] The enactment of the CMA evinces the intention of Parliament that liability will only be imposed on an online intermediary if it fails to respond to a flag and takedown process, rather than any form of pre-censorship or pre-monitoring basis. In doing so, Parliament has defined the boundaries in this area of the law with proper regard to the right of freedom of speech and the inflicting of damage on persons and institutions.

[262] Parliament has stipulated that an online news portal becomes a 'publisher' with clear duties upon becoming cognisant of any unlawful comment which needs to be taken down. It is only upon failure to do so that it can be said that the publisher has committed a wrongdoing. Therefore, the imposition of a 'ought to have known' test runs awry of the current legislation and the Code.

[263] To suggest that intermediaries such as the respondents are bound to take steps to prevent such comments from appearing on the site means that apart from the filtering system, the respondents (and all other intermediaries with a comments section including social media users) will have to provide round- the-clock supervision. This would appear to be untenable. That is why Parliament in its wisdom adopted the flag and takedown approach that enables the intermediaries to respond as soon as they acquire knowledge.

[264] The other rationale for requiring actual knowledge as a criterion to establish liability for the acts of an online intermediary is to avoid placing an undue burden on entities for the contemptuous publications of others. A risk-averse approach that demands that liability be imposed on the basis of constructive knowledge may result in the removal of non-contemptuous material which in turn dilutes the protection accorded to freedom of expression under art 10 of the Federal Constitution.

[265] Furthermore, the 'ought to know' test gives rise to considerable uncertainty in its application. Given the widespread use of comments on the internet, particularly on social media websites, it is best that the boundaries are defined with clarity so that both online portals and citizens understand the boundaries of what is permissible and what is not with clarity, and arrange their affairs accordingly.

[266] In the context of contempt as in this case, to utilise the 'ought to know' test, in construing the elements of 'publication' as well as 'intent to publish', there arise several hurdles to online news portals where third-party comments appear. If the 'ought to know' test is used to establish 'publication', ie: (a) the fact of the impugned comments appearing on the portal; and secondly (b) 'constructive knowledge' to establish an 'intention to publish', then it amounts to applying a double inference or presumption against the online portal.

[267] Added to that, as liability affixes immediately upon the comment by the third party coming into existence on the portal, there is nothing the portal can do to alleviate its position either in respect of 'publication' nor 'an intention to

publish'. The harshness of the rule is especially apparent when applied to the technologically inept, and to users who utilise various internet platforms in a personal capacity. There is simply no defence to be availed of, if a constructive knowledge test is to be accepted. That cannot be right.

[268] As can be seen above, the identification of when an online intermediary that is not directly responsible for a wrong is expected to rectify it, is an issue that has long beleaguered courts around the world. Because complex policy questions are involved, it has been argued that courts are not able to adequately deal with the same as we have to act within the constraints of existing doctrine: see Pappalardo, Kylie and Nicolas Suzor, "*The Liability of Australian Online Intermediaries*" [2018] 40 Sydney Law Review 469-498 at p 498. It is therefore my considered opinion that any attempt to introduce a criterion of imputed knowledge for the purposes of imposition of liability on internet intermediaries in the field of the law of contempt more properly belongs to the domain of the legislature. Thus, in the absence of a statutory yardstick for cases involving internet intermediaries, it is the 'actual knowledge' test that should apply. There must be actual knowledge of the impugned material before liability can be attached to an online content provider in respect of contemptuous speech.

[269] It therefore follows that the 1st respondent was not a 'publisher' when the impugned comments first appeared on 9 June 2020 because it did not have any knowledge of the impugned third-party comments. It was only affixed with knowledge of those comments on 12 June 2020. Those comments were taken down within a timeframe of 12 minutes, falling well within the purview of 'a reasonable time'. As such the 1st respondent was not a 'publisher' of those impugned comments.

[270] The 2nd respondent as the chief editor is further removed as s 114A does not apply to him. Neither does the factual matrix of the case implicate him in such fashion.

Contempt

[271] The essential elements of contempt as we have stated in *Arun Kasi* include:

(i) The *actus reus* of the fact of publishing or making available the impugned comments on their portal;

(ii) The *mens rea* element of an 'intention to publish'.

[272] It follows from the analysis above that as the respondents are not 'publishers' of the impugned comments, they do not fulfill either of the elements for the purposes of 'scandalising the court' contempt. The *actus reus* element requires not only the mere appearance of the impugned comments on the portal but also the knowledge of the existence of those comments. The respondents had no such cognisance of the same because they were unaware of the existence and content of those impugned comments until 12 June 2020.

They promptly removed the comments thereby taking themselves outside of the purview of being 'publishers' of the impugned comments.

[273] As they are not publishers, they did not publish the impugned comments. Far less then can it be said that they had the requisite 'intention to publish' which is the foundational element for the *quasi*-criminal offence of scandalising the court contempt. The standard of proof required moreover is beyond reasonable doubt. That standard cannot be met on the material before us on record. The respondents have rebutted and clarified how the impugned comments remained on their portal for three days prior to removal.

Is The Doctrine Of Constructive Knowledge Sufficient To Establish Liability For Contempt?

[274] Even if I am wrong in concluding that the respondents are not 'publishers' and that the 'ought to know' test suffices to affix them with liability as publishers, the question of whether they had the requisite 'intention to publish' for the purposes of fulfilling the elements of scandalising the court contempt needs consideration.

[275] It may well be argued that intent to publish may be inferred from the surrounding circumstances. In this regard, analogies such as the doctrine of 'wilful blindness' and 'constructive knowledge' which feature in other areas of criminal law may sought to be utilised in determining liability for contempt. I am of the view that these doctrines have no place in the law of contempt.

[276] The foundational element to establish contempt is an actual intent to publish. The doctrine of wilful blindness or constructive knowledge is often applied in drug cases where the accused, who is himself charged with possession or trafficking of drugs, is inferred to have the requisite *mens rea* element because he wilfully turns a blind eye to clearly suspicious circumstances under which he personally carries or retains possession of unlawful substances. This Court has recognised that the wilful blindness doctrine is invocable in very limited circumstances where the obvious facts are such that the accused must be imputed with a greater mental state of knowledge and therefore must be taken to have actual knowledge, if not for his or her deliberate refusal to make inquiries: see *Maria Elvira Pinto Exposto v. PP* [2020] 2 MLRA 571. The facts of the present proceedings do not support such an inference.

[277] In the instant case, the notion of constructive knowledge or wilful blindness is sought to be applied against a party once removed from the main perpetrator, and not the party or person who committed the primary offence. This is because the 1st respondent is not the primary perpetrator. The individuals who posted the comment are the primary perpetrators and so the doctrine is, by analogy, applicable to them, rather than the online intermediary. In my view, the imposition of the constructive knowledge doctrine to an online intermediary is comparable to making an airline and airport operator complicit in the offence of drug trafficking, just because a certain drug mule chose to fly

to an airport managed by a particular airport operator, using a specific airline. That to my mind is not tenable.

[278] I am of the view that actual knowledge meaning actual awareness of the existence and content of the impugned statements is necessary, and that constructive knowledge inferred from the surrounding circumstances is insufficient to establish intent to publish on the part of the respondents, for the purposes of liability under 'scandalising the court' contempt.

[279] The repercussions of extending the law of contempt from actual knowledge to constructive knowledge is that there would be a chilling effect on freedom of expression in the media in that even articles or statements expressing valid criticism may be excised or precluded from being published online. There is a grave likelihood that user comments would simply be disabled. That would be detrimental and anathema to art 10 of the Federal Constitution.

[280] Moreover, imposing liability for a portal's negligence rather than because it intentionally allowed an unlawful comment to subsist after becoming aware of it, is contrary to the CMA as well as the law of contempt, which requires a clear intention to publish.

[281] Since the respondents have established that they did not know of the existence of the admittedly contemptuous comments until notification of the same, and because the impugned comments were removed within a reasonable timeframe as discussed above, it follows that the applicant has not demonstrated beyond reasonable doubt that the respondents possessed the requisite intention to publish the impugned material.

[282] That having been said, contempt of court is a serious offence and all online portals ought to be vigilant of, and act to prohibit any attempts to erode the confidence of the public in this august institution, as soon as any such attempts are brought to their notice. The respondents have established that this is what they did. The respondents also unreservedly delivered their apologies for indirectly being involved in the airing of these contemptuous statements. In these circumstances, I find that the respondents are not liable in contempt and dismiss the application for committal against them.

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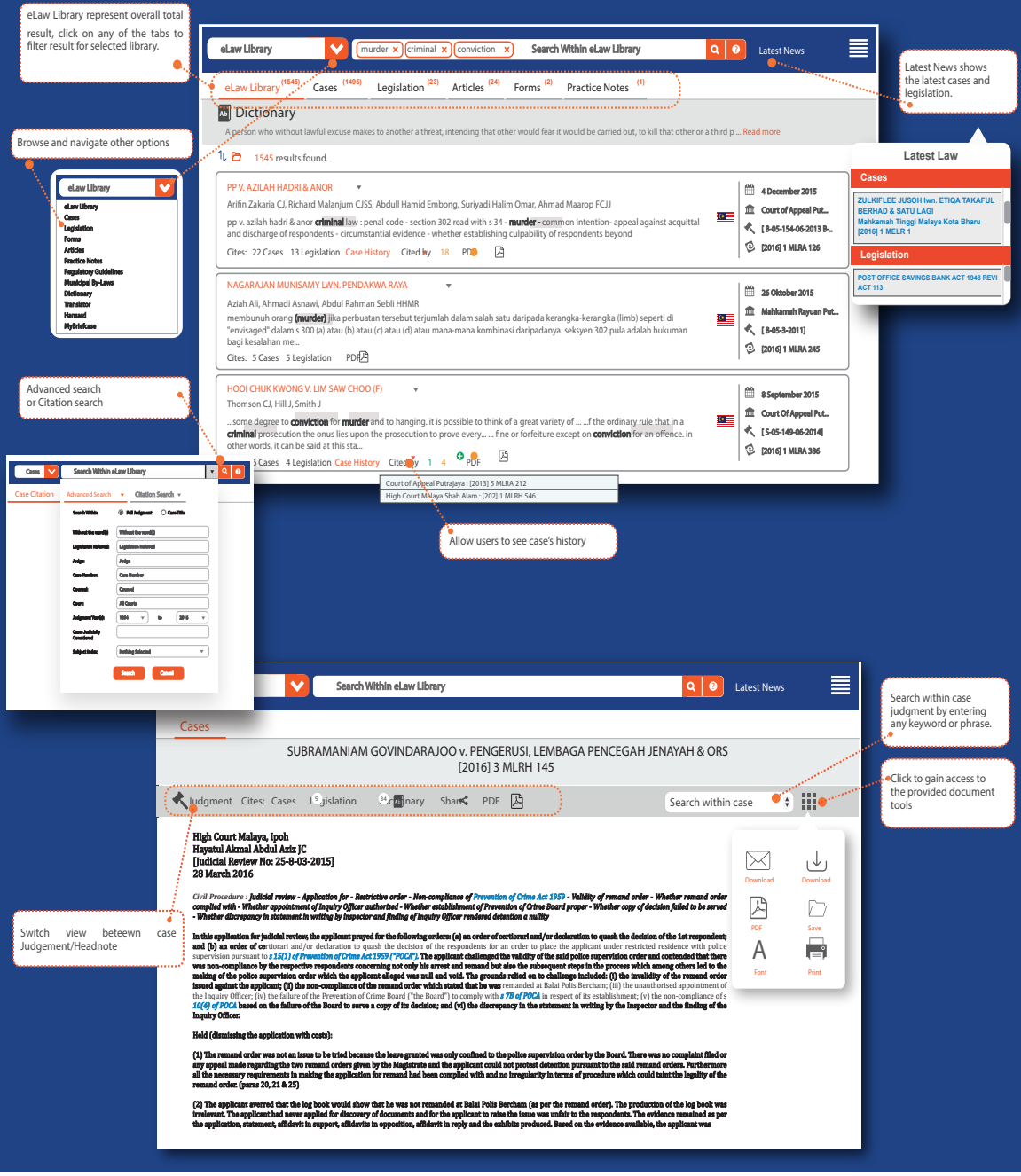

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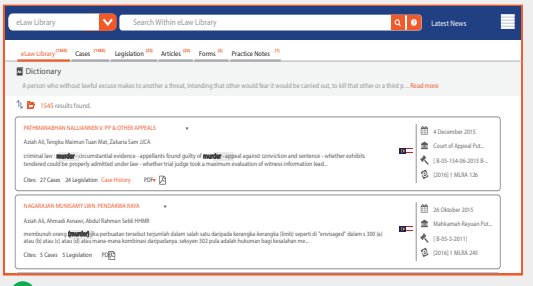

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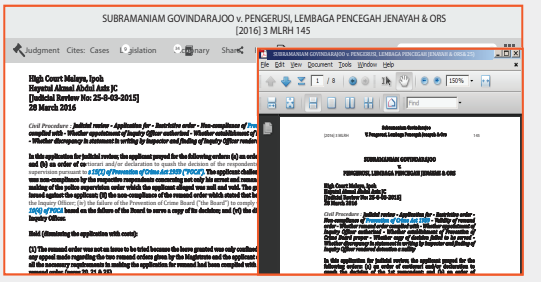

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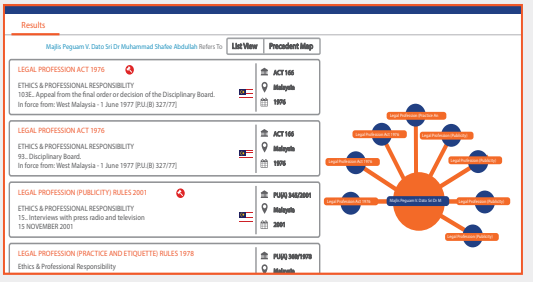

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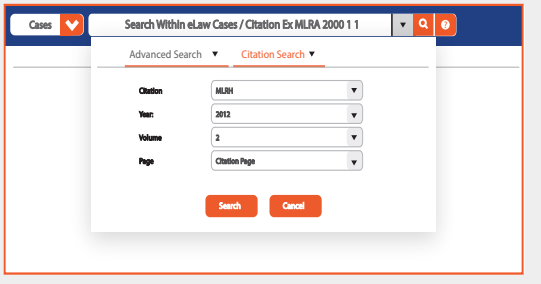

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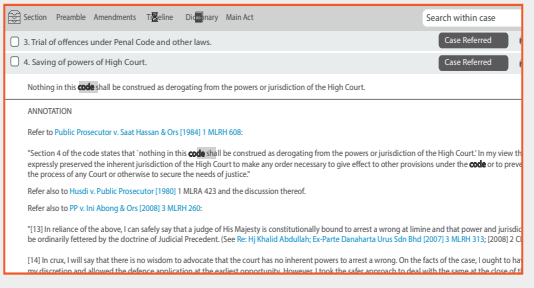

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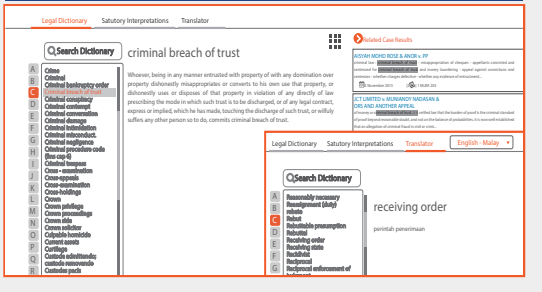

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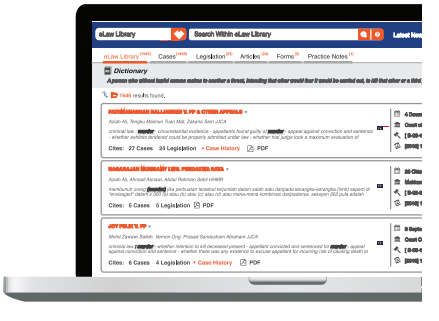

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