IRENE FERNANDEZ A

v.

UTUSAN MELAYU (M) SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR B
TEE AH SING J
[CIVIL SUIT NO: (S7) S4-23-14-1996]
26 OCTOBER 2007

TORT: *Defamation - Newspaper publication - Libel - Whether impugned article bore defamatory meanings alleged by plaintiff - Whether defendants failed to establish defence of justification - Evidence of malice - Whether defence of fair comment available - Whether impugned article a piece of responsible journalism - Defence of qualified privilege - Whether rejected - Whether impugned words in impugned article defamatory of plaintiff - Whether defendants liable* C D

The plaintiff, a director of Tenaganita Sdn Bhd (Tenaganita), a public figure and well known social activist in primarily migrant workers' rights and women's rights, was claiming for damages and a permanent injunction for defamation. The first defendant, publisher and owner of the newspaper Utusan Malaysia, had published a publication ('the impugned article') which was featured in the said newspaper on 20 September 1995 written by the second defendant, an employee of the Utusan Malaysia. The heading of the impugned article 'Sikap Irene Lengahkan Siasatan' was made by the third defendant, the acting Ketua Meja Rencana of Utusan Malaysia at the material time. The plaintiff claimed that the impugned article was defamatory of the plaintiff and that it conveyed the following to a reasonable reader: (i) the police was investigating into the matters raised by the plaintiff, *ie*, mistreatment of migrant workers and the abuse by the police officer charged with handling the migrant workers; (ii) the matters raised national and international interests and had created a controversy and that the plaintiff was responsible for the ensuing controversy; (iii) the police had contacted the plaintiff for assistance in the said investigation and that the plaintiff had deliberately avoided the police for interview and to that end, lied about her health; (iv) the plaintiff had intentionally refused to meet the police and was adamant in her position; (v) the plaintiff had no real good reason not to meet the police as her reason, *ie*, illness E F G H I

was untrue as she had actually left for Chiang Mai, Thailand for her own purposes thereafter; (vi) the plaintiff must have had no basis in raising allegations of corruption and mistreatment of migrant workers, otherwise she would be co-operating. As such, the plaintiff was to be blamed for stalling the police investigation by not cooperating with the police when so requested. The plaintiff alleged that she was painted as a trouble maker who was prepared to recklessly threaten national interests and as such had acted in a treasonous manner against the government of Malaysia. The issue before the court was whether the impugned article and the impugned words in their natural and ordinary meaning in the context of the impugned article as a whole was simply capable of bearing the defamatory meanings alleged by the plaintiff. The defendants pleaded that in view of the gravity of the allegations made publicly by the plaintiff and/or Tenaganita of the ill treatment of illegal immigrants and corruption of the Semenyih Detention Camp which had become a national and international issue, and which had adversely affected the image of Malaysia, the plaintiff ought to have extended her fullest cooperation to the police in their investigation. The defendants also claimed the alternative imputation was in the nature of a statement and not a charge of allegation. In other words, the alternative was mild, vague and non-offensive of the defamatory meanings which arose from the impugned article and the impugned words. The defendants also pleaded defence of justification, defence of fair comment and defence of qualified privilege.

Held (judgment for the plaintiff):

(1) The alternative imputation did not sit with the entire impugned article looking at the language, the theme and underlying negative suggestions of the article. The alternative imputation pleaded by the defendants was a contrived and strained meaning. Therefore, the alternative imputation was rejected as being utterly unreasonable interpretation. Further, in a defence of justification on the alternative imputation the defendants had to show that: (a) the police investigation was into the matters raised in a press release and a memorandum entitled 'Abuse, Torture and Dehumanized Treatment of Migrant Workers at Detention Centres' by Tenaganita and/or the plaintiff and not the plaintiff herself; (b) the plaintiff did not make herself available for the police interview in preference to

her other engagements; (c) the plaintiff did not surrender all the relevant documents and materials in support of Tenaganita/ plaintiff's allegation to the police; and (d) that the police investigation into the matters was hampered by the refusal of the plaintiff to surrender documents and material. The defendants have failed to establish the foregoing. Instead, the police investigation was into the plaintiff and not into the matters raised by Tenaganita and the plaintiff. (paras 32, 40 & 41)

(2) The plaintiff had at all times cooperated with the police. The defendants have failed to sufficiently show that the plaintiff did not have any acceptable excuse to not attend the interview at various times. The defendants have not shown that the plaintiff deliberately avoided the police. The defendants have not shown that the police investigation would have been expedited or had any real tangible progress had the interview been conducted. Further, even if the alternative imputation was treated as comment: (a) the facts upon which the comment was based were not true or substantially true; and (b) some were not in existence at the time of publication of the impugned article. Therefore, the defence of justification was rejected. (para 89)

(3) The impugned words were manifest statement of fact in both form and substance and not comments. The impugned words contained many factual assertions and conclusions which were stated as factually rather than as being derived or based on other facts. They were defamatory of the plaintiff. The factual assertions that the plaintiff deliberately avoided the police in the impugned article were untrue. The plaintiff also never said that she would refuse handing over document and materials to the police at any time prior to publication of the impugned article. The interview only commenced on 26 September 1995 while the impugned article was published on 20 September 1995. The police did not prior to the interview request for documents or material pertaining to the matters raised by Tenaganita in the press release and the memorandum. As such, the defendants could not rely on the refusal by the plaintiff to provide relevant documents and materials to the police. (paras 102, 103, 105)

(4) According to Kamus Perwira Bahasa Melayu, the word 'helah', which was used in the impugned article, is 'muslihat, tipu daya' meaning trick or with deceit. The impugned article and impugned words also contained sarcasm with expressions such as 'berjaya dalam usaha' to describe her efforts in exposing the ill treatment and 'pendedah kemungkaran' pejuang hak asasi manusia dan sebagainya' in inverted commas in describing her experience of work. Words such as 'apakah sebenarnya helah' and 'lengahkan' suggested wrongdoing or unjustifiable conduct on the part of the plaintiff. The general tone of the impugned article was more accusatory than conciliatory. The comment was not fair and honestly made. Further, there was sufficient evidence of malice on the part of the defendants and thus the defence of fair comment was not available to the defendants on account of malice. (paras 105, 106, 108 & 109)

(5) The impugned article read in its entirely clearly placed the blame entirely on the plaintiff, taking sides with the police. The plaintiff was never interviewed prior to the impugned article being published. There was never any attempt to verify the truth of the defamatory imputations with the plaintiff. There was no urgency to have published the impugned article. The defendant also did not give the plaintiff any opportunity to comment before the publication of the impugned article. The impugned article was not a piece of responsible journalism. Thus, the defence of qualified privilege was rejected. (para 131)

(6) The impugned words in the impugned article were capable of and were defamatory of the plaintiff. All the defences pleaded by the defendants were rejected. The defendants herein were liable. It must be taken into account that the plaintiff was and is a person of public standing and well known as an activist having represented Malaysia and spoken and presented papers at various international conferences. She had suffered adverse consequences because of the publication of the impugned article in one of the largest Malay Language daily newspaper in Malaysia which had a nationwide circulation. The impugned article and the impugned words levelled serious allegations of dishonesty and lack of integrity. The plaintiff was therefore awarded a sum of RM200,000 as general damages for libel. An

injunction to restrain the first defendant by itself, its agents, officers or employees from publishing or causing to be published the same or any similar libel of and concerning the plaintiff was also awarded. (paras 132, 145 & 146)

Case(s) referred to:

Abdul Khalid Bakar Shah v. Party Islam Se Malaysia (PAS) & Ors [2001] 4 CLJ 15 HC ***(refd)***

Abdul Rahman Talib v. Seenivasagam & Anor [1964] 1 LNS 2 HC ***(refd)***

Hall-Gibbs Mercantile Agency Ltd v. Dun [1910] 12 CLR 84 ***(refd)***

Hasnul Abdul Hadi v. Bulat Mohamed & Anor [1977] 3 LNS 2 HC ***(refd)***

Jameel and Others (Respondents) v. Wall Street Journal Europe Sprl (Appellants) [2006] UKHL 44 ***(refd)***

Reynolds v. Times Newspapers Ltd and Others [2001] 2 AC 127 ***(refd)***

Slim v. Daily Telegraph Ltd [1968] 2 QB 157 ***(refd)***

Tun Datuk Patinggi Hj Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors [1995] 1 LNS 304 HC ***(refd)***

Wong Yoke Kong & Ors v. Azmi M Anshar & Ors [2003] 6 CLJ 559 HC ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 51, 112

Penal Code, s. 500

Other source(s) referred to:

David Price & Korieh Duodu, *Defamation Law, Procedure and Practice,* 3rd edn, para. 9-043

Gatley on Libel and Slander, 7th edn, para 93, p 75

Gatley on Libel and Slander, 9th edn, para 3.22, p 88

Gatley on Libel and Slander, 9th edn, para 12.14, p 257

Halsbury's Laws of Malaysia, vol 2: Defamation, para 30.089, p 437

For the plaintiff - Malik Imtiaz (M Moganambal with him); M/s Daim & Gamany

For the defendants - Mubashir Mansor (Trevor Padasian with him); M/s Skrine

Reported by Suhainah Wahiduddin

A

JUDGMENT

Tee Ah Sing J:

[1] The plaintiff's claim is a claim for damages and a permanent injunction for defamation.

B

[2] The plaintiff was and is a public figure. She was and is a well known social activist in primarily the migrant workers' rights as well as women's rights. She is a director of Tenaganita Sdn. Bhd. ("Tenaganita") a well known non-profit organization of which the plaintiff was a founding member.

C

[3] The 1st defendant is the publisher and owner of the newspaper Utusan Malaysia. The 1st defendant published a publication ("The Impugned Article") which featured in the Utusan Malaysia of 20 September 1995 in focus written by the 2nd defendant. The 2nd defendant was the author of the Impugned Article. The 2nd defendant was at the material time and still is an employee of the Utusan Malaysia. The heading of the Impugned Article "Sikap Irene lengahkan siasatan" was made by Noor Hazani bt. Musa (DW3) who was the acting Ketua Meja Rencana of Utusan Malaysia at the material time.

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[4] The plaintiff claims that the Impugned Article is defamatory of the plaintiff and gives rise to several imputations as pleaded in the amended statement of claim.

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[5] Paragraphs 4 and 6 of the amended statement of claim reads as follows:

> 4. The Second Defendant wrote an article entitled "Sikap Irene Lengahkan Siasatan" and the First Defendant printed and published or caused to be printed and published of an article concerning the Plaintiff, the following words under the column known as "Fokus" in the issue of the said newspaper dated 20th September, 1995:
>
> (a) APAKAH sebenarnya helah Irene Fernandes, Presiden sebuah pertubuhan bukan kerajaan (NGO) Tenaganita, bila beliau menolak permintaan polis untuk memberi kenyataan mengenai dakwaan rasuah dan layanan buruk terhadap pendatang asing di Kem Tahanan Sementara Semenyih.

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(b) Ketua Polis Negara, Tan Sri Rahim Noor memang ada sebab untuk berasa amat marah dan memberi tempoh kepada Irene supaya berbuat demikian pada atau sebelum 26 September ini, kerana Irene yang mulanya memberi alasan tidak sihat kini dilaporkan berada di Chiang Mai, Thailand pula.

(c) Sudahlah ketika isu tersebut hangat dengan campur tangan parti pembangkang Irene berada di Beijing, China (kerana menyertai Persidangan Wanita Sedunia Keempat), tetapi beliau tetap enggan menemui polis sekembalinya dari persidangan itu.

(d) Beliau tidak sepatutnya betindak begitu. Setelah berjaya dalam usahanya mengetengahkan kajian yang dibuat di kem tahanan tersebut kepada perhatian media-media masa tempatan – sehingga dibawa ke Parlimen – Irene harus bertanggungjawab.

(e) Media Barat – yang sikapnya sudah lama 'dikenali' umum sejak isu Malaysia memutuskan hubungan dagangan dengan Britain dulu – berebut-rebut mahu membuat liputan mengenai dakwaan itu (dan memutarbelitkannya).

Beberapa pegawai Kementerian Dalam Negeri ketika membicarakan isu itu dengan Utusan berkata, segala-galanya kini terletak kepada Irene – dia yang memulakan maka itu jugalah dia yang harus menamatkannya.

(f) Justeru itu, di sinilah letaknya kepentingan Irene memainkan peranannya supaya menyelesaikan segera kemelut itu bagi mengurangkan kerosakan ke atas negara.

Dengan pengalamannya sebagai 'pendedah kemungkaran, pejuang hak asasi manusia dan sebagainya' selama ini, Irene sudah cukup faham dan menyedari betapa mustahaknya menjaga nama baik negara. Beliau tentunya tidak memerlukan perintah mahkamah untuk hadir memberi keterangan kepada polis mengenai dakwaannya itu ("The Impugned Words")."

6. In their natural and ordinary meaning, the said words meant and were understood to mean by reasonable and ordinary readers of the article that the plaintiff:

(a) was deliberately avoiding the police for the purposes of delaying the giving of a statement to the authorities;

A (b) had lied about her health in order to avoid the police;

(c) was dishonest, and lacking in integrity; and

(d) was irresponsible and uncooperative;

B (e) was a disloyal citizen and/or treasonous.

[6] The plaintiff only relies on the natural and ordinary meaning of the impugned words as pleaded in paras. 4 and 6 of the amended statement of claim.

C **[7]** The issue before the court is whether the Impugned Article and the Impugned Words in their natural and ordinary meaning and in the context of the Impugned Article as a whole are simply capable of bearing the defamatory meanings alleged by the plaintiff.

D **[8]** In para. 5(c) of the respective reamended statement of defence it is averred that further or alternatively that words complained of as set out in para. 4 of the amended statement of the claim in the context of the whole article and in their natural and ordinary meaning meant or were understood to mean as E follows. In view of the gravity of the allegations made publicly by the plaintiff and/or Tenaganita of the ill-treatment of illegal immigrants and corruption at the Semenyih Detention Camp, which had subsequently become both a national and international issue, and which had adversely affected the image of Malaysia in F general and the aforesaid public institution in particular, the plaintiff ought to have extended her fullest co-operation to the police in their investigation in all respects in particular by entertaining the request by the police for an interview at the earliest opportunity in preference to her other engagements to enable the police to G investigate the allegations expeditiously.

[9] In the case of *Tun Datuk Patinggi Haji Abdul Ramnan Ya'akub v. Bre Sdn. Bhd.* [1996] 1 MLJ 393 His Lordship Richard Malanjum J (as he then was) at pp. 402 and 403 said:

H > On issue (a), it is one of construction of the words complained of and at the same time to determine if they were capable of and in fact defamatory of the plaintiff. The approach in the construction of the words complained of is to consider the meaning such words would convey to ordinary reasonable persons I using their general knowledge and common sense; it is not confined to strict literal meaning of the words but extends to any reference or implication from which persons can reasonably draw

(see *Jones v. Skelton* [1963] 3 All ER 952; *Kemsley v. Foot* [1952] 1 All ER 501; *Rajagopal v. Rajan* [1972] 1 MLJ 45). It is irrelevant what the publisher intended the words complained of to mean (see *Capital & Counties Bank v. Henty* [1882] 7 App Cas 741; *Grubb v. Bristol United Press Ltd* [1963] 1 QB 309; *AJA Peter v. OG Nio & Ors* [1980] 1 MLJ 226). It is also irrelevant what the readers understood the words complained of to mean for the purpose of deciding their ordinary and natural meaning. (See J*B Jeyaretnam v. Goh Chok Tong* [1985] 1 MLJ 334). There is also no necessity for a plaintiff to prove falsity of the words complained of once they are found to be defamatory of him (see *Abdul Rahman Talib v. Seenivasagam & Anor* [1965] MLJ 142).

[10] The Impugned Article pertained to the circulation of a press release (exh. P2) and a Memorandum entitled "Abuse Torture & Dehumanized Treatment of Migrant Workers at Detention Centres" (exh. P1) both of which were issued by Tenaganita which the plaintiff headed at the material times. Both documents had the effect of revealing gross neglect, mistreatment, abuses and torture by police officers in detention centres, in particular the Semenyih Detention Camp which at the material time was under the supervision of the Royal Malaysian Police.

[11] I agree with the contention of the plaintiff that the Impugned Article and the Impugned Works convey the following to a reasonable reader:

(1) the police was investigating into the matters raised by the plaintiff ie, mistreatment of migrant works and the abuse by the police officer charged with handling the migrant workers;

(2) the matters raised national and international interests and had created a controversy. The plaintiff was responsible for the ensuring controversy;

(3) the police contacted the plaintiff for assistance in the said investigation;

(4) the plaintiff having raised these matters, refused to cooperate with the police. In particular the plaintiff deliberately avoided the police for interview and to that end, lied about her health;

(5) the plaintiff intentionally refused to meet the police and was adamant in her position (the phrase "tetap enggan" was used to describe the plaintiff's refusal to meet the police (statement 3 of the Impugned Article);

(6) the plaintiff had no real or good reason to not meet the police as the plaintiff's reason or excuse in not meeting the police, ie, illness, was not true;

(a) this is borne out from the headline which puts the blame entirely on the plaintiff's conduct – "Sikap Irene lengahkan siasatan";

(b) further, the words "mulanya", "kini" and "pula" were used in statement 2 giving rise to a contradiction between what the plaintiff told the police for not attending the police and what actually took place subsequently. The readers would be left with the impression that:

(i) the plaintiff could not have been ill as she was at all times prepared to travel overseas;

(ii) the plaintiff had actually left for Chiang Mai, Thailand for her own purposes after informing the police that she had been ill. No mention was made in the Impugned Article as to the plaintiff's purpose for leaving for Chiang Mai. This could and would lead the unaware reader to conclude that she was there for holidays;

(iii) the foregoing led to the Inspector General of Police becoming livid and furious ("berasa amat marah") (the foregoing must be true as it involved the highest ranked police officer in the country);

(iv) the Inspector General himself imposed a dateline or ultimatum for the plaintiff to attend upon the police for an interview by 26 September 1995;

(7) the plaintiff must have had no basis in raising allegations of corruption and mistreatment of the migrant works. If it were otherwise she would be co-operating. As such the plaintiff

was to be blamed for raising the same and stalling the police investigation into the same by not co-operating with the police when so requested by the police;

(8) as such it must be that the plaintiff had an ulterior motive in raising the allegations of mistreatment of the migrant workers. The word "helah" was used denoting some trickery or deception on the part of the plaintiff.

In Kamus Perwira Bahasa Melayu the dictionary meaning of the word "helah" is "muslihat, tipu daya" meaning trick or with deceit.

The plaintiff was described as an activist who knew exactly what she was doing (This is clear from statement 31 of the Impugned Article).

(9) despite knowing the gravity of the allegations and having immense experience on these matters, the plaintiff, having made the allegations, avoided the police and did not fully co-operate with the police who had been investigating into the allegations. In this regard:

(a) the Impugned Words asserted that the plaintiff ought take responsibility. In statement 4 it was asserted that the plaintiff "harus bertanggungjawab" while in statement 18 it was alleged that the plaintiff had the responsibility to put an end to the matters "dia yang memulakan maka itu juga dia yang harus menamatkannya".

The reasonable reader would think that the plaintiff was irresponsible and unco-operative.

(10) The plaintiff was conscious and deliberate in her refusal to co-operate with the police with the full knowledge that the image and interests of Malaysia was affected:

(a) the plaintiff was as such painted as a trouble maker who was prepared to recklessly threaten national interests. She was accused of causing damage to Malaysia by consciously allowing and/or contributing to the misleading and perverse reporting by the international media on Malaysia. She disregarded

A national interests and was as such disloyal to Malaysia. She betrayed her allegiance to Malaysia and trust placed on her as an activist, representing Malaysia in international scene and as such acted in a treasonous manner against the Government of Malaysia.

B

[12] The tone of the Impugned Article was cynical throughout. This is illustrated by the way in which the plaintiff's disclosure is described. The words "berjaya dalam usahanya" used in statement 4 to describe her efforts in exposing the mistreatment, and
C "pendedahan kemungkaran pejuang hak asasi manusia dan sebagainya" in inverted commas in statement 30 in describing her experience and work were reasonably read as being sarcastic. What was conveyed was certainly not complimentary or congratulatory.

D

[13] The theme of the Impugned Article and the Impugned Words was that the plaintiff was guilty of wrong doing or unacceptable conduct. Words such as "apakah sebenarnya helah", "lengahkan" bear suggestion of wrong doing or unjustifiable conduct.

E

[14] The general tone of the Impugned Article was more accusatory then conciliatory.

[15] In the case of *Abdul Khalid Bakar Shah v. Party Islam Se*
F *Malaysia (PAS) & Ors* [2001] 4 CLJ 15 His Lordship RK Nathan J at p. 24 said:

> Words in themselves apparently innocent may be shown to have a defamatory meaning when they are read with reference to the context in which they appear.

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[16] In the case of *Wong Yoke Kong & Ors v. Azmi M. Anshar & Ors* [2003] 6 CLJ 559 Her Lordship Heliliah Yusuf J (as she then was) at p. 595 said:

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> Here the entire article does not contain glowing tributes but is full of sarcasm. The effect of the irony or sarcasm is to render defamatory an apparently innocent expression.

[17] From the foregoing, the Impugned Words as pleaded in para. 4 of the amended statement of claim when read in their context,
I in their natural and ordinary meanings gave rise to the following imputations and were understood to mean that:

(1) the plaintiff was dishonest, and lacking in integrity; and

(2) the plaintiff was irresponsible and unco-operative; and

(3) the plaintiff was a disloyal citizen and/or treasonous; and

(4) the plaintiff was deliberately avoiding the police for the purposes of delaying the giving of a statement to the authorities; and

(5) the plaintiff had lied about her health in order to avoid the police.

[18] In the case of *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v. Bre Sdn. Bhd.* [1996] 1 MLJ His Lordship Richard Malanjum J (as he then was) at pp. 402 and 403 said:

> As to whether the words complained of in this case were capable of being, and were, in fact, defamatory of the plaintiff, the test to be considered is whether the words complained of were calculated to expose him to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in the estimation of right-thinking members of society generally (see *JB Jeyaretnam*). Mohamed Azmi J (as he then was) in *Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Bhd & Anor* [1973] 2 MLJ 56 at p 58 said:
>
> > Thus the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? The typical type of defamation is an attack upon the moral character of the plaintiff attributing crime, dishonesty, untruthfulness, ingratitude or cruelty.
>
> Words could still be defamatory even if they did not really lower a plaintiff in the estimation of those to whom they were published. The law looks only to its tendency (see *JB Jeyaretnam v. Goh Chok Tong; Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Bhd & Anor*).

[19] The Impugned Words disparage the plaintiff's reputation. Reasonable readers would tend to think less of her as a person and an activist.

[20] I am of the view that the Impugned Words were and are defamatory as they (a) tend to lower the plaintiff in the estimation of right thinking members of society generally; (b) expose the plaintiff to hatred, contempt or ridicule; (c) cause the plaintiff to be shunned or avoided.

[21] The plaintiff has proved that the Impugned Article was published by the defendants.

[22] In the case of *Abdul Rahman Talib v. Seenivasagam & Anor* [1965] 31 MLJ 142 His Lordship Hepworth J at p. 150 said:

> A plaintiff establishes a *prima facie* cause of action as soon as he has proved the publication of defamatory words. It is no part of the plaintiff's case in an action of defamation to prove that the defamatory words are false for the law presumes this in his favour.

[23] As such the burden shifts to the defendants.

[24] In para. 5 of the respective re-amended defence the defendants have pleaded that in view of the gravity of the allegations made publicy by the plaintiff and/or Tenaganita of the ill-treatment of illegal immigrants and corruption at the Semenyih Detention Camp which had subsequently become both a national and international issue, and which had adversely affected the image of Malaysia in general and the aforesaid public institution in particular, the plaintiff ought to have extended her fullest co-operation to the police in their investigation in all respects in particular by entertaining the request by the police for an interview at the earliest opportunity in preference to her other engagements to enable the police to investigate the allegations expeditiously.

[25] "Thus the imputations are those charges or allegations made with respect to the plaintiff that are conveyed by the matter complained of" (Gillooly M, "The Law of Defamation in Australia and New Zealand." At p. 34.

[26] As observed in *Hall-Gibbs Mercantile Agency Ltd v. Dun* [1910] 12 CLR 84 by Griffith CJ at p. 91:

> Impute is an ordinary English word, and, as I understand it, is property used with reference to any act or condition asserted of or attributed to a person.

[27] The defendants' alternative imputation is not an imputation. It is in the nature of a statement and not a charge or allegation.

[28] On the contrary the alternative imputation is akin to an euphemism. In other words, the alternative is a mild, vague and non-offensive of the defamatory meanings which arise from the Impugned Article and the Impugned Words.

[29] Further the alternative meaning does not arise at all from the Impugned Article and the Impugned Words.

[30] In the case of *Hasnul bin Abdul Hadi v. Bulat bin Mohamed & Anor* [1978] 1 MLJ 75 His Lordship Ibrahim J at p. 75 quoted para. 93 of *Gatley on Libel and Slander*, 7th edn, as follows:

> 93. Natural and Ordinary Meaning.
>
> Words are normally construed in their natural and ordinary meaning, ie, in the meaning in which reasonable men of ordinary intelligence, or worldly affairs, would be likely to understand them. The natural and ordinary meaning may also include any implication or inference which a reasonable reader guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction, would draw from the words. The words are not to be construed in a milder sense (*mitiori sensu*) merely because they are capable on some forced construction of being interpreted in an innocent sense.

[31] In *Gatley on Libel and Slander*, 9th edn para. 3.22 p. 88 reads as follows:

> Although the judge does not have to be satisfied that the defamatory meaning contended by the Plaintiff is more probable than an alternative, innocent meaning, yet he should "reject those meanings which can only emerge as the product of some strained or forced or utterly unreasonable interpretation, and it is not enough to say that by some person or another words might be understood in a defamatory sense.

[32] The alternative imputation does not sit with the entire Impugned Article looking at the language, the theme and underlying negative suggestions of the article. The alternative imputation pleaded by the defendants is a contrived and strained meaning. I therefore reject the alternative imputation as been utterly unreasonable interpretation.

[33] In the case of *Slim v. Daily Telegraph Ltd* [1968] 2 QB 157 His Lordship Diplock LJ at p. 172 said:

> What is the natural and ordinary meaning of words for the purpose of the law of libel? One can start by saying that the meaning intended to be conveyed by the publisher of the words is irrelevant.

[34] The 2nd defendant (DW4) in his answer to Question 14 of DW4A said as follows:

> J: Pada pendapat saya, plaintif sepatutnya menggunakan peluang terawal ketika mula-mula sekali diminta oleh polis untuk temuduga. Jika plaintif tampil segera bagi saya plaintif telah beri keutamaan, sesuai dengan keutamaan yang plaintif pilih semasa mengemukakan memorandum layanan buruk terhadap pendatang haram dan rasuah di Kem Tahanan Semenyih ...
>
> ... Bagi saya isu yang dikemukakan oleh plaintif adalah suatu isu kebangsaan dan antarabangsa yang telah menjejaskan imej Malaysia di mata dunia dan institusi awam tersebut.

[35] So such intended meaning of the 2nd defendant is irrelevant.

[36] In para. 5(b) of the respective reamended statement of defence the defendants have averred that the aforesaid alternative meaning is not defamatory of the plaintiff. Alternatively if the aforesaid meaning is found to be defamatory of the plaintiff, which is denied, the defendants avers that the said meaning is in substance and in fact true. Here the defendants are raising the plea of justification.

[37] As stated earlier I have held that the alternative imputation is not an imputation in law. I have also held that the alternative imputation does not arise from the Impugned Article and the Impugned Words. Therefore there is no basis for the plea of justification. In any event I shall also deal with the plea of justification.

[38] In the case of *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v. Bre Sdn. Bhd. & Ors* [1996] 1 MLJ 393 His Lordship Richard Malanjum J (as he then was) on the issue of the defence of justification at p. 404 said:

In a defamation action, the defence of justification is a complete defence if it succeeds. And the question of malice or bad faith does not arise. But in order to succeed in the defence of justification a defendant must establish the truth of all the material statements in the words complained of which may include defamatory comments made therein. And in order to justify such comments, it is necessary to show that the comments are the correct imputations or conclusions to be drawn from the proved facts. However, the plea of justification does not fail 'by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to be truth of the remaining charges' (see s. 8 of the Defamation Act 1957 and *Abdul Rahman Talib v. Seenivasagam & Anor* [1966] 2 MLJ 66). It is also to be noted that partial justification may be useful in the mitigation of damages.

Of course, the standard of proof required is on the balance of probabilities, and the burden of establishing the defence of justification is on a defendant.

There is no burden on a plaintiff to prove that a defamatory statement is false. The law presumes that the defamatory words are false.

[39] So there is no burden for the plaintiff to prove that the alternative imputation is false. Falsity is presumed. The defendants must rebut the presumption by proving the particulars in support of the pleas of justification.

[40] In a defence of justification on the alternative imputation the defendants must show the following:

(1) that the police investigation was into the matters raised in a press release (P2) and a memorandum entitled "Abuse, Torture & Dehumanized Treatment of Migrant Workers at Detention Centres" (P1) by Tenaganita and/or the plaintiff and not the plaintiff herself;

(2) the plaintiff did not make herself available for the police interview at the earliest opportunity in preference to her other engagements;

(3) the plaintiff did not surrender all the relevant documents and materials in support of Tenaganita and/or the plaintiff's allegation to the police voluntarily at the earliest opportunity;

(4) that police investigation into the matters was hampered by the refusal of the plaintiff to surrender documents and material.

[41] The defendants have failed to establish the foregoing. Instead the police investigation was into the plaintiff and not into the matters raised by Tenaganita and the plaintiff.

[42] Abu Bakar bin Mustafa (DW1) has stated in his witness statement (DW1A) that on 1 September 1995 at 2.30pm ASP Wan Ahmad b. Wan Abas referred him a police report Dang Wangi Report No. 16396/95 dated 1 September 1995 (P29). The report (P29) was lodged by Supt. Abdul Malik b. Jano, Pegawai Pemerintah Batalian 4, Pasukan Gerak Am, Kuala Lumpur: He was directed by the Pengarah Jabatan Siasatan Jenayah to carry out the investigation under s. 500 of the Penal Code. DW1 directed ASP Wan Ahmad b. Wan Abas to obtain an order to investigate from the Attorney General. At 4pm DW1 received the order to investigate from ASP Wan Ahmad b. Wan Abas. The relevant parts of P29 reads as follows:

> Saya percaya bahawa pihak Tenaganita telah memfitnahkan saya dan pegawai/anggota polis Kem Tahanan Semenyih. Saya percaya pihak Tenaganita telah melakukan satu kesalahan di bawah Seksyen 500 Kanun Keseksaan.

[43] P29 was against the plaintiff.

[44] PW1 has stated that the press release was issued on 25 July 1995 and the memorandum entitled "Abuse Torture and Dehumanized Treatment of Migrant Workers in Detention Centres" was issued on 16 August 1995. PW1 also stated that on 15 August 1995 she gave a copy of the Memorandum to ASP Ahmad Shukor from the IGP's Secretariat who came to discuss with Tenaganita the reports in the media arising from their press conference on 27 July 1995. At the meeting with ASP Ahmad Shukor at Tenaganita's office in No. 6, Lorong Bunus, Off Jalan Bunus, Kuala Lumpur. ASP Ahmad Shukor said that he was directed by the then IGP to investigate into the issue they had raised ie, the condition in the camps. So he had come for that particular meeting to ask for more information as part of the investigation conducted by the IGP's Secretariat, Bukit Aman.

[45] At the meeting on 15 August 1995 PW1 personally handed over the memorandum to ASP Ahmad Shukor. This was in the spirit of co-operation with the police in the light of the stated objectives of the police at that time ie, to look into the issues which had arisen out of Tenaganita's HIV/AIDs research. At the meeting ASP Ahmad Shukor explained that he was directed by the then IGP to seek clarification of the matters stated in the press release. They had a discussion on how Tenaganita had come to know of the occurrences in the detention camps. She told him that they had prepared a memorandum which had more details and he requested for a copy of the memorandum. As stated earlier she gave him a copy of the memorandum (P1) and he assured her that the findings would be thoroughly investigated. He further stated that should he require any further assistance of documents he would come back. He never made any further requests thereafter. He never came back or called them. She found this curious and later reflected this in a press release (P4).

[46] In cross-examination PW1 agreed that on 15 August 1995 she said earlier that there was a dialogue with ASP Ahmad Shukor at Tenaganita's office. It lasted for almost an hour. So it is the stand of the defendants that the police did not take any investigative steps at that as the meeting between the plaintiff and ASP Ahmad Shukor on 15 August 1995 was a mere dialogue.

[47] So it is clear that the police investigation was not triggered by Tenaganita issuing press release in relation to the mistreatment and abuse of power in Semenyih Detention Camp.

[48] Instead the police investigation by Abu Bakar bin Mustapha (DW1) was triggered by a police report (P29) lodged by Supt. Abdul Malik b. Jano on 1 September 1995.

[49] DW1 admitted that the order to investigate relate to a s. 500 Panel Code offence.

[50] In question and answer to Question 51 of DW1A, DW1 stated as follows:

> 51. S: Sila rujuk kepada muka surat CABD1 (exhibit D16) khususnya perenggan terakhir laporan tersebut. Adakah penyiasatan tuan didalam kes ini merangkumi dua aspek seperti yang dikatakan oleh Tan Sri Rahim Noor, Ketua Polis Negara pada masa itu, iaitu pihak polis akan

menyiasat kebenaran dakwaan plaintif didalam memorandum yang dikeluarkan oleh plaintif dan menyiasat laporan polis yang dibuat oleh Supt. Abdul Malek Jano pada 1.9.95?

J: Saya melakukan two-pronged investigation. Two-pronged investigation adalah untuk menyiasat kesahihan oleh plaintif didalam memorandumnya dan satu lagi adalah sekiranya adakah kebenaran salah guna kuasa oleh pihak yang ditohmahkan oleh Irene, maka tindakan akan diambil terhadap mereka yang bertanggungjawab.

[51] In cross-examination DW1 was cross-examined as follow:

S: Saya merujuk kamu kepada jawapan kamu kepada soalan 51 DW1A. Saya cadangkan yang jawapan yang diberi kurang tepat kerana kamu telah menjelaskan bahawa kamu telah diberi arahan hanya untuk menyiasat kesalahan seksyen 500 Kanun Keseksaan, bersetuju?

J: Saya tidak bersetuju.

S: Lihat jawapan kamu di mana kamu menyatakan yang kamu melakukan two-prong investigation. Kami bersetuju yang kamu tidak diarahkan menyiasat samada pihak berkenaan telah salah guna kuasa dengan tujuan mengambil tindakan terhadap pihak tersebut, bersetuju?

J: Saya tidak bersetuju sebab asas penyiasatan ialah dibawah seksyen 500 Kanun Keseksaan dan tujuan "Order to investigate" dari Timbalan Pendakwa Raya ("TPR") ialah bagi membantu satu penyiasatan. Dan Penyiasatan walaupun kearah fakta memfitnah namun ia wajar disiasat keseluruhan dan itu tidak tertakluk kepada arahan specifik mengikut "order to investigate" sahaja.

S: Kamu bersetuju tiada ada arahan-arahan specifik berkenaan dengan penyiasatan salah guna kuasa oleh pihak berkenaan?

J: Specifically tiada ada.

S: Saya juga cadangkan yang tiada penyiasatan secara formal yang ditumpukan kepada isu salah guna kuasa?

J: Saya tidak bersetuju.

[52] DW1 has stated in cross-examination that the investigation ultimately ended with the plaintiff being charged for false publication.

[53] DW1 also stated in cross-examination that there was no police report on the abuse of power lodged. A

[54] DW1 in his witness statement in answer to question 69 of DW1A said "J: Di akhir rakaman percakapan plaintif saya mendapat tidak ada kenyataan untuk substantiate dakwaan plaintif mengenai tomahan melibatkan salah laku kuasa. Dan ekoran hasil siasatan itu saya telah memajukan kertas siasatan kepada pihak Peguam Negara." B

[55] So it can be seen that DW1 only focused on the plaintiff's s. 112 CPC statement which shows that the investigation was singularly into the plaintiff's conduct. If there was indeed a two pronged investigation DW1 would not have ended his investigation at the end of the recording of the plaintiff's statement. C

[56] There was no evidence of any investigation in the intervening period after the press conference and release on 27 July 1995 at the first request for an interview by the police on 6 September 1995 which was more than a month. D

[57] So the conduct of the police does not lend support to the conclusion that there was an investigation into the mistreatment of the migrant workers and abuse of power. E

[58] The defendants have not shown that the police could not have had carried on with its investigation into matters of mistreatment and abuse of power without first interviewing the plaintiff. Neither did the defendants show that there were steps taken to investigate into the matters raised in the press release and the memorandum other than interviewing the plaintiff. F

[59] According to the plaintiff in her answer to question 66 of SP1 during the course of investigation the police never complained or informed the plaintiff that the police were unable to investigate the matters raised in the memorandum fully because of insufficient information. G

[60] DW1 the investigating officer agreed that the focus of the investigation was on whether the plaintiff had committed a criminal defamation. DW1 agreed in cross-examination that Tenaganita was informed of the police report (P29) prior to the police investigation. DW1 agreed in cross-examination that it would be reasonable that the plaintiff be afforded the opportunity to seek legal advice and act in accordance with the advice. H I

[61] As such I agree with the contention of the plaintiff that the plaintiff was entitled to as the person being accused as having committed criminal defamation to take steps to protect herself interest as is permitted within the law.

[62] The learned counsel for the defendants submitted that the plaintiff knew that she would be called for an interview by the police sometime late August and early September 1995 and should have stayed back in Kuala Lumpur and wait to be called instead of making the trip to Beijing to attend the 4th World Conference on Women. Counsel for the defendants submitted that the plaintiff had been well anticipating that she would be called for interview upon the press conference on 27 July 1995.

[63] Preparations for the plaintiff to attend the 4th Women World conference began as early as March 1995. The plaintiff obtained her letter of invitation on or about 1995 (see pp. 82 to 84 and 86 of CABD1).

[64] The plaintiff left Malaysia for Beijing to attend the conference on 29 August 1995. There was an intervening period of more than a month before the plaintiff left for Beijing. The police could have interviewed the plaintiff in the intervening period before she left for Beijing. In fact the police through ASP Ahmad Shukor did in fact interview the plaintiff at Tenaganita's office for almost an hour on 15 August 1995. If indeed the matter was of a crisis, it would be incumbent on the police to act with the appropriate swiftness. I agree with the contention of the plaintiff that it is unfair and unrealistic to expect citizens to anticipate and wait for the police to call for interview where no such request has been made.

[65] I thus reject the defendants submission that the plaintiff should have stayed back in Kuala Lumpur and wait to be called by the police instead of making the trip to Beijing to attend the 4th World Conference of Women.

[66] The police only notified the plaintiff *vide* P6 dated 6 September 1995 that she was required for interview. This was in relation to an allegation of criminal defamation. On 6 September 1995 the plaintiff was already in Beijing, China. There was no attempt made by the police to request for an interview prior to the plaintiff leaving for Beijing, China.

[67] Also the police never attempted to contact the plaintiff directly while she was in Beijing.

[68] PW1 in her witness statement has stated that her participation in the 4th Women's World Conference in Beijing was confined approximately one year before the conference and reconfirmed six months before. In her answer to question 74 of SP1, PW1 stated that she was a presenter at the Beijing Conference. The papers presented were Impact of Food Security on Women, Migrant Rights and Violence Against Women.

[69] In re-examination, PW1 stated that the conference in China was the 4th World Conference on Women. And she was recourse person for 3 major meetings at the conference namely (1) on violence against women (2) Women, Poverty and Agriculture and (3) Feminization of Migration. These 3 were very important meetings for decisions on the next plan of agenda for action.

[70] As such I am of the view that it was a matter of importance and priority for the plaintiff to attend the 4th World Conference on Women in Beijing and not stay back in Kuala Lumpur to wait for the police to call her for an interview. The plaintiff could not have known that the police would request for an interview while she was in Beijing.

[71] The learned counsel for the defendants has submitted that the plaintiff ought to have stayed in Malaysia and cancelled her planned attendance of the international conference in Chiang Mai.

[72] The plaintiff was not informed of the police request for an interview on 13 September 1995 while she was still in Beijing.

[73] The plaintiff returned from Beijing on 12 September 1995 and left for Chiang Mai on 17 September 1995. On 12 September 1995 she returned later that day from Beijing but was very ill. She was suffering from a bad bout of influenza and had lost her voice. She then asked Catherine Inbam (PW2) to inform Superintendent Abu Bakar of this and suggested that the appointment be fixed on 26 September 1995 at 10am instead of on 13 September 1995. She could not fix any earlier date as she had previously committed herself to attend the Asia-Pacific International AIDS Conference in Chiang Mai.

[74] Catherine Inbam (PW2) in her witness statement (PW2A) has stated in answer 12 of PW2A that when the plaintiff returned home from Beijing on 12 September 1995 she was very ill. PW2 called Superintendent Abu Bakar at Bukit Aman to inform him that the plaintiff would not be able to attend in person at Bukit Aman on 13 September 1995, being the next day. PW2 later confirmed this telephone conversation by way of a letter dated 14 September 1995 (P7). In that letter she enclosed the relevant medical certificate and at the same time notified Superintendent Abu Bakar that the plaintiff would be away from 17 September 1995 to 21 September 1995 to attend and participate in the Third International Conference on Aids in Asia and Pacific to be held in Chiang Mai, Thailand. She then suggested an alternative appointment on 26 September 1995 at 10am as the next available date for the plaintiff to be present at Bukit Aman.

[75] According to PW2 when she postponed the meeting on 13 September 1995 there was no unpleasantness. In fact Superintendent Abu Bakar was pleasant and was not upset at all. So it is evident that DW1 was at all times aware that the plaintiff was to attend the Chiang Mai Conference.

[76] According to the plaintiff in Chiang Mai, the Conference focused especially on specific target communities which were very vulnerable to HIV/AIDS and Tenaganita was involved with three of these key target groups, namely women, sex and migrant workers. Therefore because of their experiences with these groups, their work was very crucial for the development of strategies with other organizations in the region in the topics of the conference. She was asked to present at this conference. The paper presented was Empowerment of Sex Worker to Reduce HIV/AIDS vulnerability. She could not have nominated anyone else to present the papers in her place.

[77] It is not just a matter of presentation but of interaction with the other participants of the conferences, convincing them to set up interventions to reduce the risks faced by migrant workers. She also stated that the absence of a guest speaker creates a gap in the whole session and impacts on future collaborative action which Tenaganita may want to undertake with other organizations in the region. It would also jeopardize the confidence which the community at large has in Tenaganita as the voice of the target groups with which Tenaganita is involved.

[78] In re-examination PW1 stated that it was a matter of importance and priority that the plaintiff attend the Chiang Mai Conference on HIV-AIDS in Asia Pacific and she was a speaker for 2 meetings (1) on migration and HIV-AIDS and (2) on trafficking in Women and HIV-AIDS. These 2 issues were new areas in the conference and therefore her impute was very important because Malaysia is a receiving country of more than 2 million migrant workers. These was a need to develop a strategy of interventions in the region.

[79] Her participation in the Chiang Mai Conference was confirmed six months before her departure to Chiang Mai.

[80] DW1 in answer to question 17 of DW1A has stated that on 15 September 1995 he met Aegile Fernandez at Tenaganita's office. He also stated "Pada mulanya saya mencadangkan supaya Irene dapatkan gantian wakilnya ke Chiang Mai tetapi Aegile memberitahu saya bahawa plaintif telah memberikan pengesahan untuk hadir sendiri dan persediaan ke Conference itu diaturkan dan plaintif sendiri perlu hadir. Saya mencadangkan supaya plaintif mempercepatkan tarikh itu sebelum 26 September 1995 memandangkan tarikh dia di Chiang Mai ialah dari 17 September 1995 ke 21 September 1995 tetapi Aegile menyatakan tidak dapat memutuskan sebab plaintif tentu perlu bersedia dan consult para peguamnya untuk nasihat. Atas alasan itu saya bersetuju."

[81] In view of the aforesaid I dismiss the submission of the defendants that the plaintiff ought to have stayed in Malaysia and cancelled her planned attendance to the international conference in Chiang Mai.

[82] The learned counsel for the defendants submitted that the plaintiff should have had withheld the press conference and the release of exhs. P1 and P2 pending her return from Chiang Mai. I reject this submission as misconceived.

[83] The learned counsel for the defendants has submitted that there was no intention on the part of the plaintiff to give the relevant information and documents in respect of her allegations to the police.

[84] I reject this submission as these matters were not in any event part of the Impugned Article or the Impugned Words.

[85] In any event the plaintiff had maintained that it would be more appropriate that the matters raised in the press release and the memorandum be dealt with by an independent board of inquiry. The plaintiff maintained her position *vide* a press release dated 26 September 1995 (P4). The plaintiff further maintained her position throughout the interview with the police. The memorandum pertains to mistreatment of migrant workers in detention centres camps. The police were the authority charged with control, care and administration of the detention centres. The memorandum has alleged mistreatment and abuse of power by the police: As such it is reasonable for the plaintiff to take the stand to have a body independent of the police investigate into the mistreatment and abuse of power by police officers.

[86] The interview dates and times were always fixed with the agreement of the police. The plaintiff was never imposed any conditions or given any deadline or ultimatum by the police. Neither did the police question the plaintiff's requests during the interviews.

[87] The plaintiff had at all times explained to the police her availability and unavailability and requested indulgence trom the police which was accommodated to by the police officers concerned. At all times the police invariably accepted the plaintiff's explanation and did not push her.

[88] The plaintiff did oblige to an interview on 26 September 1995 which was the date earliest possible for the plaintiff. The Impugned Article did not disclose this fact but only alluding to the date of 26 September 1995 as if the same was an ultimatum or deadline imposed by the police when there was none.

[89] The plaintiff has at all times co-operated with the police. The defendants have failed to sufficiently show that the plaintiff did not have any acceptable excuse to not attend the interview at various times. The defendants have not shown that the plaintiff deliberately avoided the police.

[90] The plaintiff has given her statement to the police on 26 September 1995, 27 September 1995, 28 September 1995, 29 September 1995, 3 October 1995, 4 October 1995, 12 October 1995, 13 October 1995 and 14 March 1996.

[91] The defendants have not shown that the police investigation would had been expedited or had any real tangible progress had the interview been conducted in early September 1995 when the police fixed the date of appointment as 13 September 1995 and not on 26 September 1995.

[92] Further, even if the alternative imputation is treated as a comment:

(a) the facts upon which the comment is based were not true or substantially true;

(b) some were not in existence at the time of publication of the Impugned Article.

[93] *Halsbury's Laws of Malaysia*, vol. 2: Defamation, para. 30.089 at p. 437 reads "where a defendant seeks to justify a comment that he has made, he must prove the facts and the inferences from both fact and comment to be true."

[94] The defendants are not entitled to rely on the following for they were not in existence at the time of the publication of the Impugned Article:

(1) the plaintiff did not surrender all the relevant documents and materials in support of Tenaganita and/or the plaintiff's allegation to the police voluntarily at the earliest opportunity;

(2) the police investigation into the matters was hampered by the refusal of the plaintiff to surrender documents and material.

I therefore reject the defence of justification.

[95] In para. 6 of the respective reamended statement of defence the defendant have pleaded fair comment.

[96] In the case of *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v. Bre Sdn. Bhd & Ors.* [1996] 1 MLJ 393 His Lordship Richard Malanjum J (as he then was) on the issue of the defence of fair comment at p. 408 said:

> For the defence of fair comment, in order to succeed the following basic elements must be established by the defendants, namely:
>
> (i) that the words complained of are comments, though they may consist of or include inference of facts;

A (ii) that the comments are on a matter of public interest; and

(iii) that the comments are based on facts, truly stated. They must also be fair and which a fair-minded person can honestly make on the facts proved (see *JB Jeyaretnam*).

B On element (i), it is settled law that a comment is a statement of opinion on facts truly stated. A libellous statement of fact is not a comment or criticism on anything (see *Lee Kuan Yew v. JB Jeyaretnam* [1979] 1 MLJ 281). In order to decide whether a statement is capable of being a comment or a statement of fact, should be gathered from the document wherein the words C complained of are found. There is no necessity to look at other documents, though relevant, to come to such determination (see *Telnikoff v. Matusevitch* [1991] 4 All ER 817).

It has also been stated in our court in the case of *Abdul Rahman* D *Talib v. Seenivasagam & Anor* [1965] MLJ 142, and which I have no reason to differ, that a person cannot avail himself of any fact as justifying his comment of which he was ignorant at the time when he published the words complained of. It is the state of mind of a defendant when he published the defamatory words that is most material.

E

[97] I find that the Impugned Words are manifest statement of fact in both form and substance and not comments. The Impugned Words contained many factual assertions and conclusions which were stated as factually rather than as being F derived or based on other facts.

[98] I am of the view that the Impugned Words and the imputations as pleaded in the statement of claim were defamatory of the plaintiff.

G **[99]** The following facts which were within the knowledge of the 2nd defendant had been intentionally omitted, amounting to mistatements of facts:

(1) that the plaintiff was already away in Beijing when the police H first contacted the plaintiff for an interview;

(2) that the appointment for an interview on 13 September 1995 is only fixed on 6 September 1995 and not any earlier;

(3) that the plaintiff was subsequently away in Chiang Mai for I an international conference which she had committed earlier in time;

(4) that the plaintiff was committed to attend the international conferences which were important and of priority to her as an activist.

[100] *Gatley on Libel and Slander*, 9th edn, para. 12.14, p. 257 reads as follows:

> In order to give room for the plea of fair comment the facts must be truly stated. If the facts upon which the comment purports to be made do not exist the foundation of the plea fails. The comment must not mistake facts, because a comment cannot be fair which is built upon facts which are not truly stated. If the Defendant makes a misstatement of any of the facts upon which he comments, he at once negatives the possibility of his comment being fair. The omission of a highly relevant fact may amount to such a misstatement.

[101] The factual assertions that the plaintiff deliberately avoided the police in the Impugned Article is not true.

[102] It is also not true that the ultimatum or deadline of 26 September 1995 was imposed for the plaintiff to attend before the police because the date of 26 September 1995 was an interview date agreed by both the plaintiff and the police. It is not an ultimatum or deadline.

[103] In pleading fair comment the defendants have set out *inter alia* particulars going to the purported refusal by the plaintiff to provide relevant documents and materials to the police. The Impugned Article made no reference to the purported refusal. It only complained of the plaintiff avoiding an interview with the police. The plaintiff never said that she would refuse handing over document and materials to the police at any time prior to publication of the Impugned Article on 20 September 1995. The interview only commenced on 26 September 1995 while the Impugned Article was published on 20 September 1995. The police did not, prior to the interview, request for documents or material pertaining to the matters raised by Tenaganita in the press release and the memorandum. All evidence referred to by the defendants showing a refusal of the plaintiff to hand over the relevant documents and materials was post-publication, namely:

(i) Press Release dated 26 September 1995 (P4);

(ii) Newspaper Report dated 19 December 1995 (D17);

A (iii) Newspaper Report dated 23 December 1995 (D18);

(iv) the s. 51 CPC Order to produce the relevant documents and materials was only issued on 13 October 1995 (D19).

B **[104]** In *Defamation Law, Procedure and Practice,* 3rd edn by David Price and Korieh Duodu para. 9-043 reads as follows:

> Unlike justification, the Defendant cannot rely on facts or matters taking place after the date of publication on which to base the comment. Furthermore there is some authority that the facts on
C which the Defendant relies must also be known to him at the time.

[105] As such the defendants cannot rely on the refusal by the plaintiff to provide relevant documents and materials to the police. Also words such as "helah" were used. According to Kamus
D Perwira Bahasa Melayu the word "helah" is "muslihat, tipu daya" meaning trick or with deceit. The Impugned Article and the Impugned Words also contain sarcasm with expressions such as "berjaya dalam usaha" in sentence 4 to describe her efforts in exposing the ill-treatment, and "pendedah kemungkaran, pejuang
E hak asasi manusia dan sebagainya" in inverted commas in sentence 30 in describing her experience and work. Words such as "apakah sebenarnya helah" and "lengahkan" suggested wrong doing or unjustificable conduct on the part of the plaintiff. The heading reads "Sikap Irene lengahkan siasatan". The general tone of the
F Impugned Article was more accusatory than concilatory.

[106] So the comment was not fair and honestly made.

[107] In the case of *Abdul Rahman Talib v. Seenivasagam & Anor* [1965] 1 MLJ 142 His Lordship Hepworth J at p. 157 said:
G

> But malice is not only provable by extrinsic evidence it may be intrinsic, that is, to be inferred from the terms of the alleged libel itself. It may be that the language used in a libel though under other circumstances justifiable may be so much violent for the
H occasion and circumstances as to form strong evidence of malice and that an inference of actual malice may be drawn from its use.

[108] Excessive language was used in the Impugned Article including such words as "apakah sebenarnya helah", "lengahkan", "Irene harus bertanggungjawab".
I

[109] As such there is sufficient evidence of malice on the part of the defendants. So the defence of fair comment is not available to the defendants on account of malice.

[110] In para. 7 of the respective re amended statement of defence the defendants have pleaded qualified privilege.

[111] The learned counsel for the defendants has submitted that the thrust of the publication in the Impugned Article was truly one of public interest. It was on the serious public allegations by the plaintiff of ill-treatment of illegal immigrants and corruption in detention camps in particular the Semenyih Detention Camp which subsequently became both a national and international issue. By the time the Impugned Article was published on 20 September 1995, the issues raised by the plaintiff during the press conference on 27 July 1995 were already in the public knowledge. The plaintiff's conduct in dealing with the police was pertaining to the aforesaid serious allegations and was therefore part and parcel of the subject matter of public interest.

[112] The learned counsel for the defendant also submitted that on 11 October 2006 the House of Lords delivered an important decision in *Jameel and Others (Respondents) v. Wall Street Journal Europe Sprl (Appellants)* [2006] UKHL 44. There were two issues before the House of Lords. First the entitlement of a trading corporation to sue for libel and recover damages without pleading or proving special damages. Second, the scope and application of the *Reynold*s defence. Only the second issue is relevant for the present case.

[113] It was also submitted that the Impugned Article was a piece of responsible journalism and the defendants had acted reasonably and fairly in publishing the Impugned Article. It was thus submitted that the defendants have succeeded in the *Reynold*'s defence and/or qualified privilege.

[114] In *Reynolds v. Times Newspapers Ltd and Others* [2001] 2 AC 127 Lord Nicholls at p. 205 stated a non-exhaustic list of 10 factors which would be relevant to the issue of media qualified privilege and that his Lordship also said that the weight to be given to these and any other relevant factors will vary (from one case to another) The 10 factors are as follows:

A 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harm, if the allegation is not true.

2. The nature of the information, and the extent to which the
B subject matter is a matter of public concern.

3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.

C 4. The steps taken to verify the information.

5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.

D 6. The urgency of the matter. News is often a perishable commodity.

7. Whether comment was sought from the plaintiff. He may have information others do not posses or have not disclosed.
E An approach to the plaintiff will not always be necessary.

8. Whether the article contained the gist of the plaintiff's side of the story.

F 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statement of fact.

10. The circumstances of the publication including the timing.

G **[115]** I shall deal with the lst factor. The Impugned Article and the Impugned Words leveled serious allegations of dishonesty and lack of integrity against the plaintiff.

[116] I shall deal with the 2nd factor. The imputations were
H conveyed to the readers of Utusan Malaysia as a fact rather than an allegation or comment.

[117] I next deal with the 3rd factor.

[118] The 2nd defendant stated in his answer to question 15 of
I DW4A the sources that he used in writing the impugned article. These were exh. P3A (p. 187 of CABD1), his own first

commentary in exh. P3B (p. 188 of CABD1), exh. P3C (p. 189 of CABD1), exh. P3D (p. 190 of CABD1) exh. P3E (p. 191 of CABD1), exh. D16 (p. 192 of CABD1), p. 193 of CABD1, p. 68 of CABD1 and p. 69 of CABD1. In addition during the period of approximately 1 August 1995 to 19 September 1995 he had interviewed several officers of the Ministry of Home Affairs who refused publication of their names. He also stated "Saya yakin secara ikhlas dan jujur bahawa sumber-sumber yang digunakan oleh saya untuk menulis artikel tersebut adalah tepat, benar dan memadai."

[119] The objectivity of the Home Affairs Ministry officers is questionable as they were employed by the Ministry in charge of the police and detention camps. The Ministry would be directly affected by the Press Release and the Memorandum by Tenaganita. In fact the then Deputy Home Affairs Minister spoke extensively to the press in defence of the treatment of migrant works in detention camps (see exhs. P3D and P3C). Further it is questionable whether officers from the Home Affairs Ministry would know anything about the investigation into the plaintiff. This places a greater obligation on the 2nd defendant to verify the allegations raised in the Impugned Article by contacting the plaintiff to offer an opportunity to respond to the allegation.

[120] I next deal with the 4th factor.

[121] The defendants did not verify or attempt to verify the contents of the Impugned Article with the plaintiff prior to the publication.

[122] I then deal with the 5th factor. The police investigation was underway at the time of the publication. It was a matter to be handled by the police. The defendants played no role in the investigation other than to report the fact objectively and fairly.

[123] I then deal with the 6th factor. There was no urgency for the public to know of the matters raised in the Impugned Article at all. What urgency could there be in the investigation into the plaintiff personally. According to the 2nd defendant, he had also looked at p. 69 of CABD1 when writing the Impugned Article. In p. 69 of CABD1 which is dated 19 September 1995 of the Sun it was stated "An appointment was subsequently fixed for 10am on September 26 at Bukit Aman, he told reporters ..." So the

2nd defendant knew that the plaintiff would give a statement to the police on 26 September 1995 which is about a week from 19 September 1995.

[124] I then deal with the 7th factor.

[125] No comment was sought from the plaintiff as she may have information others do not posses or have not disclosed.

[126] I then deal with the 8th factor. The Impugned Article made no reference to the plaintiff's side of the story at all. Further that the plaintiff was under investigation for criminal defamation was not disclosed.

[127] Neither was other relevant facts including that the plaintiff was already in Beijing when the police first contacted the plaintiff for interview. The Impugned Article did not contain the fact that the plaintiff left for Chiang Mai to attend an international conference ie, Asia Pacific Conference on HIV/AIDS.

[128] I now deal with the 9th factor. The tone of the Impugned Article clearly suggest that the plaintiff had committed a wrong and that the plaintiff was dishonest, lacking in integrity and irresponsible. There is a tone of sensationalism in the Impugned Article by the use of the words such as "apakah sebenarnya helah", "lengahkan", "Irene harus bertanggungjawab."

[129] I now deal with the 10th factor.

[130] The police had agreed with the plaintiff to a date of 26 September 1995 for interview. There was no real and urgent need to publish the Impugned Article to the public.

[131] The Impugned Article read in its entirety clearly put the blame entirely on the plaintiff, taking sides with the police. The plaintiff was never interviewed prior to the Impugned Article being published. There was never any attempt to verify the truth of the defamatory imputations with the plaintiff. There was no urgency to have published the Impugned Article. The defendant also did not give the plaintiff any opportunity to comment before the publication of the Impugned Article. The defendant clearly ignored to seek the plaintiff's comments as the plaintiff would be in the best position to comment on the accusation leveled against her in the Impugned Article. Unlike in *Jameel*'s case where the plaintiff

therein would not know that he was being monitored and as such unable to deny. However the plaintiff in the matter at hand could easily provide her comments and explanation. Therefore I am of the view that the Impugned Article was not a piece of responsible journalism. Thus I reject the *Reynold*s defence and the defence of qualified privilege.

[132] I therefore hold that the Impugned Words in the Impugned Article are capable of and are defamatory of the plaintiff. I reject all the defences pleaded by the defendants. I therefore hold that the defendants in this action are liable.

[133] I shall then deal with the issue of damages. The learned counsel for the plaintiff has informed the court that the plaintiff is making no claim for aggravated and exemplary damages.

[134] In the case of *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v. Bre Sdn. Bhd. & Ors* [1996] 1 MLJ 393 His Lordship Richard Malanjum J (as he then was) at p. 416 said:

> It is a settled law that in a libel action, the general rule is that damages are assessed on a compensatory basis. However, in certain circumstances, exemplary damages, or punitive damages as they are otherwise described may be awarded.
>
> Compensatory damages may include not only actual pecuniary loss and anticipated pecuniary loss or any social disadvantage which result, or may be thought likely to result, from the wrong which has been done. They may also include the natural injury to his feelings – the natural grief and distress which he may have felt at having been spoken of in defamatory terms, and if there has been any kind of high-handed, oppressive, insulting or contumelious behaviour by the defendant which increases the mental pain and suffering caused by the defamation and may constitute injury to the plaintiff's pride and self-confidence, these are proper elements to be taken into account in a case where the damages are at large.

[135] In assessing damages I took into consideration the following.

(1) The plaintiff (PW1) has in her witness statement stated that she joined the Consumers Association of Penang as its education director from 1975 to 1980. Then in 1982 she became the executive director of the Selangor and Federal Territory Consumer Association ("SCA"). In 1986 she

resigned from SCA and became director of a newly formed group, the Womens Development Collective. In late 1990 together with Jeyamany Anthony they formed Tenaganita of which she is now a director. She was also involved with other organizations. Amongst others in 1989 she was a founder member of All Womens Action Society (AWAM) and Suara Rakyat Malaysia (SUARAM). She was also a founding member of the Malaysian AIDS Council in 1994 of which Datin Paduka Marina Mahathir is the current president and an executive member from 1994 to 1997. Tenaganita is an affiliate member of the Malaysian AIDS Council and they are active in the programmes especially dealing on women and AIDS, Positive Women and on Migrant Worker's concerns.

[136] PW1 in her witness statement (SP1) has stated that she acted as a consultant in developing programmes and strategies for Asia in preparation for the 4th World Women's Conference in Beijing in 1995. She was a participant in this conference wherein she presented 3 papers in 3 forums namely Food Security & Women, The Impact of Migration on Women and Violence Against Women. She was a member of the UN AIDS task force on mobility and HIV/AIDS which was involved in developing training seminars, consultations and strategies to reduce HIV vulnerability among mobile population. She also acted as a representative for the Women's movement as well as for human rights groups in various international meetings and forum. This would mean preparing working papers, research and documentation on various issues. She has presented papers at world AIDS Conferences in Geneva in 1998 and recently in July 2000 in Durban, South Africa.

[137] In 1996 she was awarded the Human Rights Monitor Award for Asia from Human Rights Watch in New York. She has also bee recognized by Amnesty International.

[138] She has also contributed to the development of policies or the law in this country. In the 1970s, she was in the Malaysian Youth Council and helped develop the National Youth Policy. They also organized State and District level committees or councils where she brought in for the first time full participation of women into these committees. They also developed the National Youth Parliament at that time with the Ministry of Youth to develop

programmes, strategy and training centres particularly for skills development by the Government. While in the consumer associations she was instrumental in developing the campaign on breast feeding where they got the Malaysian Government to adopt the international code on breast feeding for infant formula companies. This was the World Health Organization (WHO) Code on Breast Feeding. In the Women's movement she was the chairperson for the joint action group in JAG against violence against women where they brought various legal reforms especially in amendments to the laws relating to rape like the Evidence Act. They initiated the enactment of the Domestic Violence Act and amendments to the Guardianship Act. She was one of the core members of the task force set up by the Ministry of National Unity, Social Development and Women's Affairs to develop a national policy on women which has already been adopted by the Government.

[139] Government organizations are active partners in her activities. In developing the national policy on women she worked closely with the Ministry of National Unity Social Development and Women's Affairs. In the area of HIV/AIDS she worked and is still working with the Ministry of Health to develop a programme on migration and HIV/AIDS vulnerability. She has also been called for dialogue sessions by the Ministry of Health to develop their programmes on health in relation to various groups. She has been the secretary to the One-Stop-Centre for women in crisis at the Kuala Lumpur General Hospital where they developed the protocol for investigation into violence against women and training of medical personal. Today, this has become a national programme implemented in major hospitals.

[140] She has given training to the police to handle cases of domestic violence and rape survivors. This involved gender sensitization programmes counseling skills and methods of probing during crisis intervention. Further to this she trained members of KEMAS (Kemajuan Masyarakat) and officers of Pembangunan Keluarga Tani under the Ministry of Agriculture on issues relating to women and the development of the gender perspective, skills in counseling, mobilization and interventions for women's development.

A **[141]** The main beneficiaries of the programmes in which she were or are involved were or are rural women, women in the plantations, women affected by violence and poor health, women and children who are HIV positive, set works and migrant workers. Also, indigenous communities, people whose livelihood are
B affected and fundamental liberties are taken away, for example, through the Internal Security Act and their families and people who are infected and affected by HIV/AIDS.

[142] Tenaganita stands for Tenaga and Wanita and means
C Women's Force. The objective of Tenaganita are firstly to promote and protect the right of women workers and workers in general. In Tenaganita they have identified four major target community of works:

D (1) plantation workers;

(2) factory workers;

(3) sex workers; and

E (4) migrant works.

[143] Secondly to help women to achieve their full potential in society and thirdly to develop various programmes and interventions for the achievement of the 2 objectives.

F **[144]** So the plaintiff was and is a person of public standing and well known as an activist having represented Malaysia and spoken and presented papers at various international conferences.

(2) Utusan Malaysia is one of the largest Malay Language daily
G newspaper in Malaysia having a nation wide circulation.

(3) The Impugned Article and the Impugned Words leveled serious allegations of dishonesty and lack of integrity.

(4) In answer to question 88 of SP1 the plaintiff said she
H suffered adverse consequences because of the publication of the Impugned Article.

(5) The conduct of the defendants from the time of the libel down to the very moment of the verdict:

I

(a) The defendants never made any attempt to retract the libel or to verify the facts, truth or otherwise of the Impugned Words before publishing them or after the publication.

(b) The absence or refusal of correction, retraction or apology despite a demand for an apology.

[145] I therefore award the plaintiff the sum of RM200,000 as general damages for libel.

[146] I therefore give judgment to the plaintiff as follows:

(1) the defendants to pay the plaintiff the sum of RM200,000 as general damages together with interest at 4% per annum from the date of filing of the writ to the date of judgment and thereafter interest at the rate of 8% per annum from the date of judgment to the date of realization.

(2) an injunction to restrain the 1st defendant by itself, its agents officers or employees from publishing or causing to be published the same or any similar libel of and concerning the plaintiff.

(3) the defendants to pay the plaintiff the costs of this action.

[147] The learned counsel for the defendants has submitted for a certificate of 2 counsel.

[148] I agree with the contention of the learned counsel for the plaintiff that the factual and legal issues involved in this case do not warrant a certificate of 2 counsel. So I order a certificate for 1 counsel.