

DEFAMATION LAW

THE PRINCIPLE OF ABSOLUTE PRIVILEGE – TRULY ABSOLUTE?

The Federal Court in the case of *Nor Aziz bin Mat Isa v Sun Teoh Tia (SAC) (Pengerusi Lembaga Tata tertib Polis Diraja Malaysia Bukit Aman) & Ors* [2021] 2 MLJ 142 (the ‘Case’) decided on the extent of the principle of absolute privilege for defamatory statements contained in a police report lodged by a police officer under Section 107 of the Criminal Procedure Code (“CPC”). In this article, we examine the facts, issues and ruling of the case.

BACKGROUND FACTS The Appellant was a policeman before he was dismissed from service after the Royal Malaysian Police (‘RMP’)’s disciplinary board found him guilty of misconduct based on the report that he lodged (‘Report’), which includes insults against the Inspector-General of Police (‘IGP’). In the Report, the Appellant had described the IGP as “stupid” and “incompetent”. The relevant part of the Report is as follows:

“Sepanjang 23 tahun saya bekerja dibawah pucuk pimpinan 7 orang Ketua Polis Negara, dalam 205 sejarah PDRM tidak pernah lagi PDRM diberi penghinaan oleh seorang Ketua Polis Negara yang begitu bodoh dan dayus yang boleh disamakan dengan lawak seperti Mr Bean.

...

Yang anehnya, bagaimana orang yang bodoh boleh menjadi KPN?”

The Appellant, found guilty of misconduct for insulting the IGP, then filed an application for judicial review at the High Court. The High Court refused the application on the basis that the cases cited by the Appellant in establishing absolute privilege were defamation cases and have no bearing in the context of disciplinary proceeding. The Appellant appealed to the Court of Appeal where the application was also dismissed. Hence, the appeal before the Federal Court.

THE ISSUE The issue before the Federal Court in this case is, when the defence of absolute privilege is extended to police reports under Section 107 of the CPC, whether disciplinary action can be taken based on the police report against the maker.

The question posed before the Federal Court were two-tiered. First, whether or not the Court should extend the defence of absolute privilege to the police report lodged, and second, whether such report lodged can form the basis of a disciplinary proceeding against the maker.

DECISION OF THE FEDERAL COURT

The leave to the question of law that was granted is as follows:

“When the defence of absolute privilege is extended to police report under Section 107 of the Criminal Procedure Code, whether the disciplinary action can be based on the police report against the maker, who lodged the police report?”

The Federal Court **answered the question in the negative**. The Federal Court held that it will not extend the principal of absolute privilege to the Report lodged by the Appellant in this circumstance and the analysis were as follows:

a) Policy Considerations

The Federal Court analysed numerous cases regarding the legal position in Malaysia¹ and in the United Kingdom² and concluded that the principle of absolute privilege is founded on policy considerations.

It was held that the privilege is accorded to reports lodged since it is the first step in the process of criminal investigation by the police. The statements contained in the reports cannot form an actionable cause for defamation. This principle is to encourage honest and well-meaning persons to assist in the criminal investigation process and to relieve the person from the fear of being sued over statements they made in the reports lodged.

¹ *Lee Yoke Yam v Chin Keat Seng* [2013] 1 MLJ 145 ; *Noor Azman Azemi v Zahida Mohamed Rafik* [2019] 3 MLJ 141

² *Westcott v Westcott* [2009] 2 WLR 838

The Federal Court further held that any extension of the absolute privilege principle therefore must be constrained to the underlying aim of ‘*facilitating the effective discharge of the shared public duty in judicial proceedings or events leading to judicial proceedings.*’ On this note, the Federal Court came to a conclusion that it has no reason to extend the principle of absolute privilege to a report lodged for purposes other than the one stated above.

b) Necessity

The Federal Court also found that the act of the Appellant in calling the IGP “stupid” and “incompetent” in his report was not a genuine complaint to the authority, but rather a communication made to vent out his frustration publicly and that it was not an act of the Appellant in discharging his public duty to report crimes. Any extension of the absolute privilege principle suggested by the Appellant therefore would be disproportionate and unnecessary.

The Federal Court adopted the findings in the case of **Darker v Chief Constable of the West Midlands Police [2001] 1 AC 435** whereby Lord Cooke opined:

*“Absolute immunity is in principle inconsistent with the rule of law but in a few, strictly limited, categories of cases it has to be granted for practical reasons. It is granted grudgingly, the standard formulation of the test for inclusion of a case in any of the categories being McCarthy P’s proposition in Rees v Sinclair [1974] 1 NZLR 180 at 187: **The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice...**”*

CONCLUSION This decision highlights that the principle of absolute privilege will not be extended on statements made with no genuine intention to discharge the public shared duty in assisting a criminal investigation. It certainly also will not be extended to cover statements made maliciously and will not shield an individual from disciplinary proceedings. However, at the other end of the spectrum of the decision, the Federal Court emphasized on the applicability of the absolute privilege principle for statements in police reports which are made genuinely for the purpose of assisting the police in criminal investigations.

Authors



Idza Hajar Ahmad Idzam
Partner

idza.hajar@zulrafique.com.my



Nur Fatin Hafiza Hasham
Legal Associate

nfhafiza.hasham@zulrafique.com.my

Disclaimer: The contents do not constitute legal advice, are not intended to be a substitute for legal advice and should not be relied upon as such.

Zul Rafique & partners
9 June 2021