IN THE FEDERAL COURT OF MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO: 02(f)-61-07/2019(W)

BETWEEN

LIM GUAN ENG … APPELLANT

AND

RUSLAN BIN KASSIM … RESPONDENT

[In the matter of the Court of Appeal of Malaysia Civil Appeal No: W-02(NCVC)(A)-695-04/2015

Between

Ruslan bin Kassim … Appellant

And

Lim Guan Eng … Respondent]

IN THE FEDERAL COURT OF MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO: 02(f)-62-07/2019(W)

BETWEEN

LIM GUAN ENG … APPELLANT

AND

1. **DATO' IBRAHIM ALI**
2. **PERTUBUHAN PRIBUMI PERKASA MALAYSIA … RESPONDENTS**

[In the matter of the Court of Appeal Civil Appeal No: W-02(NCVC)(A)-696-04/2015

Between

1. **Dato' Ibrahim Ali**
2. **Pertubuhan Pribumi Perkasa Malaysia … Appellants**

And

Lim Guan Eng … Respondent]

In the matter of the High Court of Malaya at Kuala Lumpur
Civil Suit No: 23NCVC-60-05/2012

Between

Lim Guan Eng … Plaintiff

And

1. **Ruslan bin Kassim**
2. **Dato' Ibrahim Ali**

3. Pertubuhan Pribumi Perkasa Malaysia

4. Syed Nadri Syed Harun

5. The New Straits Times Press (Malaysia) Sdn Bhd

6. Abdul Aziz bin Ishak

7. Utusan Melayu (Malaysia) Berhad … Defendants

CORAM

NALLINI PATHMANATHAN, FCJ

ABDUL RAHMAN SEBLI, FCJ

HARMINDAR SINGH DHALIWAL, FCJ

MINORITY JUDGMENT

[1] The salient facts have been set out by my learned brother Justice Harmindar Singh Dhaliwal in his judgment and I have nothing to add. The sole and only question of law for this court's determination is as follows:

> "Does the decision of the Federal Court in *Chong Chieng Jen v The State Government of Sarawak* [2019] 1 CLJ 329 allow a Government Official to sue for defamation in his or her official capacity bearing in mind the decision in *Derbyshire County Council v Times Newspaper Ltd & Ors* [1993] 1 All ER 1011, not being applicable under Malaysian law?"

[2] Quite clearly the factual premise of the leave question is that the appellant had sued in his official capacity and not in his

personal capacity. It is an implied admission by the appellant that he had sued in his official capacity as the Chief Minister of Penang. What he now wants this court to determine is whether, as a matter of law, he could sue for defamation in that official capacity.

[3] For reasons given by my learned brother Justice Harmindar Singh Dhaliwal in his illuminating judgment, I am in full agreement that a government officer can sue for defamation in his official capacity, except that I am unable to agree, with regret, with paragraphs [86], [116], [117], [118] of the judgment which suggest, albeit by way of *obiter*, that the government cannot in law commence action for damages against its citizens. Apparently this court in *Chong Chieng Jen v The State Government of Sarawak* [2019] 1 CLJ 329 (*Chong Chieng Jen*) had decided otherwise. I have no reason to depart from that decision.

[4] Since the factual premise of the leave question is that the appellant had sued in his official capacity, the question has to be answered in the affirmative, that is to say, the decision of this

court in *Chong Chieng Jen* does allow a government official to sue for defamation in his or her official capacity.

[5] But that is not the end of the matter. Having taken the position that he had sued in his official capacity, the appellant cannot now be heard to say, as he is now saying, that he had sued in his personal capacity as a private citizen and not in his official capacity as the Chief Minister of Penang. With due respect, the appellant cannot approbate and reprobate.

[6] In any event, by pleading and making the point in paragraph 1 of his Statement of Claim that he was the Chief Minister of Penang at the material time, it is obvious that the appellant's primary concern was to protect his reputation as the Chief Minister of Penang and the reputation of the State Government of Penang that he was heading, and not so much his personal reputation as a private citizen.

[7] The clear representation that he made was that he was suing as the Chief Minister of Penang and not in his personal capacity as a private citizen. This can be seen first of all from

paragraph 20 under the heading “Particulars of Malice” of his Statement of Claim where he pleaded as follows:

> “III. Bearing in mind the fact that the Plaintiff, **as the Chief Minister of Penang, commands a high degree of respect due to his governments performance during his term as Chief Minister**, it has become imperative for the Barisan Nasional coalition to do all it can to tarnish the Plaintiff’s good name in the hope this will entice voters to vote for the Plaintiff out of office in the next General Election.”

[8] In his Witness Statement dated 17th February 2014, the appellant gave his address as *“Chief Minister’s Office, Level 28, KOMTAR, 10502 Penang.”* Obviously that was his official address as the Chief Minister of Penang and not his personal address.

[9] Paragraph 1 of the Statement of Agreed Facts is further proof that the appellant had sued in his official capacity as the Chief Minister of Penang. This is what the parties had agreed to:

> “**The Plaintiff is the Chief Minister of the State of Penang**, the elected Member of Parliament for Bagan, the State Assemblyman for

Air Puteh and the Secretary General of the Democratic Action Party, Malaysia."

[10] In any case, whether the appellant had sued in his official capacity or in his personal capacity is a question of fact. In this regard, the Court of Appeal was unanimous in finding that the appellant had sued in his official capacity. The appellant did not appeal against this finding. He must therefore be taken to accept the finding as the truth and is estopped from saying otherwise.

[11] It is important to bear in mind that the appellant's appeal before this court is only against that part of the Court of Appeal's decision that decided that he had no *locus standi* to bring a claim for defamation, being the Chief Minister of Penang, in his official capacity. This is clear from the appellant's Notice of Appeal dated 17th February 2019, which reads:

"**AMBIL PERHATIAN** bahawa Lim Guan Eng, Perayu yang dinamakan di atas yang tidak berpuas hati dengan keputusan yang diberikan oleh Mahkamah Rayuan pada 21 haribulan Disember 2016, merayu kepada Mahkamah Persekutuan terhadap sebahagian daripada keputusan yang mendapati bahawa Perayu tidak mempunyai locus standi untuk membawa tindakan asal **dalam kapasiti rasminya.**"

[12] This is repeated in the appellant's Amended Memorandum of Appeal dated 3rd February 2020 where the opening paragraph reads as follows:

> "**Lim Guan Eng**, the Appellant abovenamed having obtained leave to appeal on the 11th day of July 2009, appeals to the Federal Court against that part of the decision of the Court of Appeal given at Putrajaya on the 21st day of December 2016 which held that the Appellant had no locus standi to bring a claim for defamation, being the Chief Minister of the State of Penang, **in his official capacity**…"

[13] Both the Notice of Appeal and the Amended Memorandum of Appeal were filed post-*Chong Chieng Jen*. It is therefore reasonable to assume that by then the solicitor who filed the two documents on behalf of the appellant would have been aware of the decision in that case (hence the leave question), including in particular the following *obiter* observation by this court:

> "[32] Although in Derbyshire no individual was a party to the claim and thus, the right of individual officers or employees of the organs of Government to sue for defamation was not directly in issue in the case, in the aforesaid speech Lord Keith acknowledged the fact that an individual can sue for defamation:
>
> > Reputation in the eyes of the public is more likely to attach itself to the controlling party, and with a change in that party the reputation itself will change. A publication attacking the activities of the authority will necessarily be an attack on the body of councilors

> which represents the controlling party, or on the executives who carry on the day to day management of its affairs. If the individual reputation of any of these is wrongly impaired by the publication any of these can himself bring proceedings for defamation. Further, it is open to the controlling body to defend itself by public utterances and in debate in the council chamber."

[14] Thus, at the time the appellant filed the leave application, he must have reasonably expected the leave question to be answered in his favour by this court. That is probably the reason why no attempt was made to amend the leave question or to substitute it with another question at the hearing before us. It was to use *Chong Chieng Jen* to the appellant's advantage as the decision in that case readily provides an affirmative answer to the question.

[15] The appellant would also have been aware that this court in *Chong Chieng Jen* did not disapprove of the following observations by the Court of Appeal (*Government of the State of Sarawak & Anor v Chong Chieng Jen* [2016] 5 CLJ 169), from which the appeal emanated:

> "[100] The statutory right of the State Government to sue for defamation is independent of the right of any member of the administration, including the Chief Minister to sue in his own name and in his personal capacity.

[101] If any of them were to sue in that capacity, it will then be an action between private citizens and not between government and citizen. Such action does not involve the affairs of the State. It is purely a private and personal matter. An example would be where a member of the State administration is wrongly accused of being a thief, and it does not matter if he is accused of stealing government money or money belonging to a private citizen. It is still a private and personal matter between the accuser and the accused."

[16] Since the appellant had chosen to pursue his appeal on the premise that he had sued in his official capacity by retaining the leave question despite having the opportunity to amend it, I do not think it is permissible for this court to travel outside the perimeters of the question. That will defeat the whole purpose of section 96 of the Courts of Judicature Act 1964, which requires for leave to be obtained first. The section provides as follows:

"**Conditions of appeal**

96. Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court –

(a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general importance upon which further argument and a

decision of the Federal Court would be to the public advantage; or

(b) from any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision."

[17] The judgment of the Court of Appeal from which the present appeal emanates was to set aside the decision of the High Court on the ground that the appellant had no *locus standi* to sue the respondents in his official capacity as the Chief Minister of Penang. What the appellant is now doing is to abandon the leave question altogether, which relates to that part of the judgment, and instead to ask this court to decide the appeal on an entirely different question for which no leave had been granted to him.

[18] It is true that this court being the court of last resort has a discretion to permit the appellant to argue a ground which falls outside the scope of the leave question in order to avoid a miscarriage of justice but the discretion must be exercised judiciously and sparingly and not capriciously. What needs to be appreciated is that it is not a right for the appellant to pursue his appeal on a question for which no leave had been granted to him.

[19] In the absence of any application by the appellant to amend or to modify the leave question at any time before or at the commencement of the hearing before us, there is no justification for this court to exercise its discretion in favour of allowing the appellant to pursue his appeal on an entirely new ground. The appellant did not even consider it necessary make an oral application to argue on the new point, which is completely outside the purview of the leave question.

[20] What the appellant is now doing is to argue the appeal on an entirely different factual premise, i.e. that he had sued in his personal capacity as a private citizen, which is a complete deviation from the leave question which is premised on the fact that he had sued in his official capacity as the Chief Minister of Penang.

[21] This must not be countenanced by this court as it will set a dangerous precedent. In *Melawangi Sdn Bhd v Tiow Weng Theong* [2020] 3 MLJ 677, this is what this court had to say on the matter:

> "As we said in the recent case of *Noor Azman Azami v Zahida bt Mohamed Rafik* [2019] 3 CLJ 295 as a matter of broad general principle, a party is not precluded from raising a ***new issue*** in an ***appeal*** because this court has the power and discretion to permit a party to argue a ground which falls outside the scope of the question regarding which leave to appeal had been granted in order to avoid a miscarriage of justice (see: *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337; [1999] 2 CLJ 471 and *Datuk Harris Mohd Salleh v Datuk Yong Teck Lee (sued in his personal capacity and as an officer of the second respondent) & Anor* [2017] 6 MLJ 133; [2018] 1 CLJ 145. We must add here that the discretion must, however, be exercised judiciously and sparingly, and only in very limited circumstances in order to achieve the ends of justice. It has to be performed with care after giving serious considerations to the interests of all parties concerned."

[22] This appeal must therefore be decided strictly on the basis that the appellant had sued in his official capacity as the Chief Minister of Penang and not in his personal capacity as a private citizen.

[23] Even if the leave question cannot be taken as an implied admission by the appellant that he had sued in his official capacity, the Court of Appeal was not plainly wrong in my view in finding that the appellant had sued in his official capacity.

[24] Putting aside the fact that the appellant did not appeal against this finding, the evidence taken in its entirety shows

beyond any doubt that the defamatory statements were directed at the appellant in his official capacity as the Chief Minister of Penang and not in his personal capacity as a private citizen.

[25] As noted by the Court of Appeal, the High Court in finding that defamation had been proved against the respondents, had proceeded on the basis that the appellant was the Chief Minister of Penang. The question of the appellant suing in his personal capacity as a private citizen did not arise.

[26] By way of comparison, the appellants in the Singapore case of *Tang Liang Hong v Lee Kuan Yew & Anor and other appeals* [1998] 1 SLR 97 sued in their personal capacities as private citizens. None of them brought the actions in their official capacities. It was therefore perfectly in order for them to be represented by private law practitioners of their choice.

[27] For the record, the first respondent Lee Kuan Yew in that case was a Senior Minister in the Prime Minister's Office whilst the second respondent BG Lee Hsien Loong was the Deputy Prime Minister of Singapore at the material time.

[28] Given the fact that the appellant was a serving Chief Minister at the material time, the suit does not turn into a private suit between private individuals just because the appellant says so, unless he had pleaded and had proceeded with the trial on the basis that he was suing in his personal capacity as a private citizen. By not making his position clear, the appellant cannot now be heard to say that he was suing in both official and personal capacities, whichever suits him.

[29] The question whether the appellant had sued in his personal capacity or in his official capacity is important because under the Government Proceedings Act 1956 ("the GPA"), a government officer who sues or is sued in his official capacity can only be represented by a government legal officer, unless the subject matter of the suit concerns a personal matter in which case the officer can be represented by a private law practitioner of his choice.

[30] In the present case, what was of concern to the appellant was the fact that the defamatory statements had damaged his reputation as the Chief Minister of Penang, the official position that he was holding at the material time and not his personal

reputation as a private citizen. This is expressed in his answer to Question 19 of his Witness Statement dated 17th February 2014 where he said:

> "A: It has consistently been the strategy of the Barisan Nasional and its connected media to discredit me and **damage my reputation as the Chief Minister of Penang** and Secretary General of the DAP with lies and insinuations in order to advance their political interests in the 13th General Elections to the Federal Parliament and the Penang State Assembly.".

[31] In other words, the suit was to vindicate his reputation as the Chief Minister of Penang and not to vindicate his personal reputation as a private citizen. Then in answer to Question 21 of the same Witness Statement, this is what the appellant said:

> "A: Yes. I believe the allegations which I have made of malice are the basis upon which the Defendants propagated the disparaging and untrue remarks first published by Ruslan Kassim on the PERKASA website.
>
> I wish to emphasise that none of the Defendants made any attempt to contact me to verify the allegations made by Ruslan Kassim and this can only be regarded as totally irresponsible gutter journalism, **the effects of which would have had far reaching consequences as far as my integrity as a loyal Malaysian citizen and Chief Minister is concerned**."

[32] It is also important to remember that the appellant's action was triggered by the respondents' accusation that he had disclosed official government secrets while on official visit to Singapore in his official capacity as the Chief Minister of Penang and not in his personal capacity as a private citizen on a holiday in the Republic.

[33] To accuse a Chief Minister of disclosing official government secrets while he is on official duty is not accusation of a personal and private nature. It concerns not only the holder of the office but also the office itself. On the facts, it is futile to separate the two entities.

[34] The appellant does not in fact deny that his visit to Singapore was an official visit and that the purpose of the visit was to develop investment potential in Penang and to promote tourism. It was certainly not a private visit. It was on government business. This is confirmed in no uncertain terms by the appellant himself in his Witness Statement dated 17th February 2014 where he said in answer to Question 9 as a follow up to his answer to Question 8:

"Q8. Have Datuk Azman, Datuk Seri Kalimullah and yourself ever had dinner with any senior PAP leader in Singapore?

A. No. There has never been any such dinner.

Q9. Not even on the 11-12 August 2011?

A. Definitely not. **On 11-12 August 2011 I was in Singapore on an official programme to promote investment in Penang**. I refer to a press statement issued by my press secretary, at page of the Plaintiffs Further Bundle of Documents [Exhibit]."

[35] Having regard to the factual matrix of the case, it is clear that in so far as the appellant's capacity is concerned, the official element is more predominant than the personal element, and there is no dispute that he had all along been represented by a private law practitioner and not by a government legal officer.

[36] Since the appellant had sued in his official capacity as the Chief Minister of Penang as found by the Court of Appeal, as evidenced by his Statement of Claim, by his own admission in the leave question, by his Witness Statement, by his Notice of Appeal and Memorandum of Appeal, the law required him to be represented by a government legal officer and not by a private law practitioner of his choice.

[37] It is not so much a question of whether a government legal officer is compelled to represent him. It is a requirement of section 24(2)(a) of the GPA, which provides as follows:

> "(2) **Notwithstanding any written law** in civil proceedings to which a public officer is a party –
>
> (a) by virtue of his office; or
>
> (b) …….
>
> **a legal officer may appear as advocate on behalf of such officer** and shall be deemed to be the recognized agent of such officer by whom all appearances, acts and applications in respect of such proceedings may be made or done on behalf of such officer."
> (emphasis added).

[38] The language used in the opening sentence of the subsection is *"Notwithstanding any written law in civil proceedings to which a public officer is a party"*. The significance of the choice of words is that being a special provision that deals specifically with proceedings by or against government officers, the provision must prevail over any other written law relating to legal representation in civil proceedings that involve government officers.

[39] The appellant cannot be heard to argue that the provision has no application in the situation that obtains in the present appeal. To accede to the argument would be to render section 24(2)(a) of the GPA completely redundant and denuded of all meaning.

[40] It is trite principle that Parliament does not legislate in vain. The fact that section 24(2)(a) of the GPA uses the word “may" instead of the word “shall" does not mean that a government officer is free to engage a private law practitioner of his choice to represent him in any civil proceedings unless it concerns a private and personal matter between him and the defendant or the plaintiff as the case may be.

[41] Section 17A of the Interpretation Acts 1948 and 1967 is relevant and it provides:

> “17A. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.”

[42] Having regard to the object underlying the GPA and reading section 24(2)(a) harmoniously with section 24(3), the word “may”

in section 24(2)(a) must be construed to mean that other than a legal officer, a private law practitioner may not act as advocate on behalf of a government officer unless he is authorised by law to do so, in this case by section 24(3) which provides as follows:

> "(3) An advocate and solicitor of the High Court **duly retained by the Attorney General** in the case of civil proceedings by or against the Federal Government or a Federal officer, **or by the Legal Adviser**, or, in the case of the States of Sabah and Sarawak, by the State Attorney General in the case of civil proceedings by or against the government of a State **or a State officer**, may appear as advocate on behalf of such government or officer in such proceedings."
> (emphasis added)

[43] Applying the maxim *generalia specialibus non derogant,* the Legal Profession Act 1976 ("the LPA") must give way to the GPA. The provision of the LPA that must give way to section 24(2)(a) of the GPA is section 35(1), which reads:

> "35. Right of Advocate and Solicitor.
>
> (1) Any advocate and solicitor shall, **subject to this Act and any other written law**, have the exclusive right to appear and plead in all Courts of Justice in Malaysia according to the law in force in those Courts; and as between themselves shall have the same rights and privileges without differentiation."

[44] Clearly therefore, the exclusive right of a private law practitioner to appear and plead in any Malaysian court is "subject to" section 24(2)(a) of the GPA, which is a special law relating to legal representation involving government officers.

[45] In *Perbadanan Kemajuan Kraftangan Malaysia v DW Margaret David Wilson* [2010] 5 CLJ 899, a case that involved a body corporate (as opposed to a public officer) suing a private individual, this court touched on section 35(2) of the LPA and observed as follows at page 912:

> "Section 35(2) LPA 1976 is also in consonance with the provision of s. 24 of the Government Proceedings Act 1956 which prior to the LPA 1976 has also enabled certain categories of officers of the Attorney General's Chambers to appear on behalf of the Government. In addition, in civil proceedings **when duly retained by the Attorney General** it is permissible for an advocate and solicitor to appear on behalf of the Government of Malaysia."
>
> (emphasis added)

[46] It is to be noted however that this court in that case was not asked to determine the question whether a *fiat* by the Attorney General or the State Legal Advisor, as the case may be, is a requirement for legal representation by a private law practitioner. The case is therefore not authority for the proposition that no *fiat*

is necessary where a public officer wishes to be represented by a private law practitioner of his choice.

[47] The word “legal officer” is defined by section 2(2) of the GPA as follows:

> “legal officer” includes a law officer, the Parliamentary Draftsman and a Federal Counsel, and, in the case of the States of Sabah and Sarawak, a law officer and a legally qualified member of the Federal or State Attorney General’s Chambers, authorised by a law officer in accordance with section 24.”

[48] A private law practitioner is not included in the above definition of “legal officer”, and the word “officer” has the following meaning:

> “Officer”, in relation to a Government, includes a person in the permanent or temporary employment of such government and accordingly (but without prejudice to the generality of the foregoing) includes a Minister of such Government.”

[49] By virtue of section 24(3) of the GPA, the appellant could of course be represented by a private law practitioner of his choice, but the private law practitioner must first obtain a *fiat* from the State Legal Adviser before he could act for the appellant, being a government officer.

[50] The appellant as the Chief Minister of Penang was at all material times a "State officer" within the meaning of section 24(3) of the GPA. No *fiat* by the State Legal Adviser of Penang was ever produced by the law firm representing him in the present action. No explanation was given as to why this was not done. It would have been easy for the appellant to obtain the *fiat* from the State Legal Advisor of Penang given his position as the Chief Minister of the State.

[51] In *Kerajaan Negeri Terengganu & Ors v Dr Syed Azman Syed Ahmad Nawawi & Ors* [2013] 1 CLJ 107; [2012] MLRHU 1003, the issue before the High Court was whether the State Government of Terengganu could be represented by a firm of advocates and solicitors in private practice. Yeoh Wee Siam J (as she then was) held, correctly in my view, that a private law firm could only be allowed to represent the State Government upon proof that the firm had been duly retained or had been given a *fiat* by the State Legal Adviser of Terengganu.

[52] I am mindful of the fact that the case was decided in the context of a State Government suing as the plaintiff, but there is

no reason why in my view the *ratio* cannot be applied to a case where a State Government officer sues in his official capacity as the plaintiff, like the appellant in the present case.

[53] There was therefore a failure by the appellant to fulfill the requirements of section 24(2)(a) and section 24(3) of the GPA when he appointed a private law practitioner to represent him in the action instead of being represented by a government legal officer as required by law.

[54] Clearly, the private law practitioner who represented the appellant at all three levels of the court was not *"the recognized agent of such officer by whom all appearances, acts and applications in respect of such proceedings may be made or done on behalf of such officer"* within the meaning of section 24(2)(a) of the GPA. This is the point of law raised by learned counsel for the respondents which I think has merit and must be decided in favour of the respondents.

[55] As the appellant was not properly represented, it follows that the Writ and Statement of Claim including all cause papers

filed on his behalf by his advocate were illegal and ought to be disregarded by the court, including this court.

[56] It is true that the issue was not raised before the High Court but the issue of the appellant's capacity to sue was raised and fully argued before the Court of Appeal and was decided against the appellant when the Court of Appeal found that he had sued in his official capacity and not in his personal capacity. As I mentioned earlier in this judgment, the appellant must be taken to accept this finding as the truth as he did not appeal against the finding, which was adverse to him as far as it concerns the issue that he is now raising in this appeal.

[57] This court being the apex court cannot turn a blind eye on the breach of the law by the appellant. Nor can the breach be trivialised as a mere technicality not affecting the justice of the case on the ground that liability had been proved against the respondents. It is a serious transgression of the law that has the effect of nullifying the whole action filed by the appellant.

[58] For the reasons aforesaid, the appellant's appeal is dismissed and the decision of the Court of Appeal is affirmed.

There shall be no order as to costs as this case is of public interest.

-Signed-

ABDUL RAHMAN SEBLI
Judge
Federal Court Malaysia
Dated: 26 February 2021.

For the Appellant:	Americk Sidhu of Messrs Americk Sidhu.
For the Respondents:	Adnan bin Saman @ Abdullah of Messrs Adnan Sharida & Associates.