NOR AZIZ MAT ISA

v.

SUN TEOH TIA (SAC) & ORS

Federal Court, Putrajaya
Mohd Zawawi Salleh, Hasnah Mohammed Hashim, Harmindar Singh Dhaliwal FCJJ
[Civil Appeal No: 01(f)-38-11-2019(W)]
8 January 2021

Criminal Procedure: *Police investigations — Police report — Absolute privilege — Circumstances when police report protected by absolute privilege and not actionable in defamation — Public policy grounds behind absolute privilege protection accorded to police reports*

Criminal Procedure: *Police investigations — Police report — Absolute privilege — Expansion in scope of absolute privilege, when justified — Whether absolute privilege would extend to police report for purpose of disciplinary proceedings against maker who lodged such report for purposes other than for police to start investigation into commission of crime —Whether absolute privilege ought not be given any wider meaning than absolutely necessary in administration of justice*

Public Servants: *Disciplinary proceedings — Proceedings under reg 37 Public Officers (Conduct and Discipline) Regulations 1993 — Rank and file policeman making insulting and defamatory statements in police report against Inspector General of Police — Whether policeman lodged such report in furtherance of his public duty to report crime or to provide information to his colleagues in investigating suspected crime — Whether such police report protected by absolute privilege in disciplinary proceedings — Whether such insulting and defamatory statements a serious breach of police standing orders and inconsistent with policeman's professional duties — Whether disciplinary proceedings leading to policeman's dismissal perfectly justified*

Tort: *Defamation — Absolute privilege — Police report — Circumstances when police report protected by absolute privilege and not actionable in defamation — Public policy grounds behind absolute privilege protection accorded to police reports*

Disciplinary proceedings were instituted against the appellant policeman under reg 37 of the Public Officers (Conduct and Discipline) Regulations 1993 ("the Regulations 1993"). The appellant faced 12 charges. After considering the appellant's representations, the 2nd respondent found the appellant not guilty of misconduct in respect of the first to ninth charges. However, the 2nd respondent found the appellant guilty of misconduct in respect of the 10th to 12th charges. In respect of the 11th and 12th charges, the appellant was given a warning, but in respect of the 10th charge, the appellant's service was terminated. The 10th charge arose out of a police report the appellant had

lodged against the Inspector General of Police ("IGP") which had allegedly insulted the IGP. The appellant applied to the High Court for judicial review but his application was refused. His appeal to the Court of Appeal was dismissed. The appellant obtained leave to appeal to the Federal Court on the following question of law: "whether the defence of absolute privilege extended to a police report under s 107 of the Criminal Procedure Code ("CPC") and whether disciplinary action could be based on the police report against the maker of such report". The appellant submitted that absolute privilege extended to protect a statement contained in a police report lodged under s 107 of the CPC based on public policy considerations. As such, no disciplinary action based on such report could be taken against him. Therefore, his dismissal was unlawful.

Held (dismissing the appellant's appeal; and answering the leave question in the negative):

(1) Absolute privilege was founded on policy considerations. A police report lodged would be absolutely privileged if it were the first step in the process of criminal investigation by the police and therefore not actionable for the purpose of the law of defamation. With such a report, the crime would be investigated and the perpetrator be brought to justice. The grounds of public policy which explained the basis for the absolute privilege rule were to encourage honest and well-meaning persons to assist in the process of investigating a crime with a view to prosecution, by relieving the persons who lodged the police report from the fear of being sued for something they said in the report. (para 19)

(2) Any expansion in the ambit of the defence of absolute privilege must relate to the underlying aim of facilitating the effective discharge of the shared public duty in judicial proceedings or events leading to judicial proceedings. A police report lodged would be absolutely privileged if it were the first step in the process of criminal investigation by the police and therefore not actionable for the purpose of the law of defamation. The public policy dictated that citizens must have unfettered access to make police reports. It recognised the importance of ensuring an "open channel of communication" between citizens and the police. (para 21)

(3) There was no compelling justification for extending absolute privilege to a police report for the purpose of disciplinary proceedings against the maker who lodged the report for purposes other than for the police to kick-start an investigation into the commission of a crime. In the instant case, there could be no doubt that the contents of the statements in the police report lodged by the appellant, in their literal and ordinary meaning, were understood to mean that the IGP was incompetent and stupid. It was not a genuine complaint to the authorities. The appellant was venting his frustration publicly. His conduct of lodging the said police report could not be said to be discharging his public duty to report crimes or to provide information to his colleagues in investigating a suspected crime. The impugned statements were made from

ill-will and improper motives, or causelessly and wantonly for the purpose of injuring the IGP. (paras 22 & 25)

(4) The suggested extension of the scope of absolute privilege would be wholly disproportionate and unnecessary for the aim of encouraging members of the public to report suspected wrongdoings. The defence of absolute privilege was afforded for sound reasons of policy, but it must not be extended further than was necessary. Absolute privilege should not be given any wider meaning than was absolutely necessary in the administration of justice. (paras 23 & 24)

(5) There was no public policy consideration to recognise that the defence of absolute privilege was automatically invoked when a police report was lodged and there be no action whatsoever taken against its maker, like disciplinary proceedings in the instant case. There was no reason of public policy that made it necessary for a police officer to be immune from disciplinary proceedings when he made statements defamatory of his superior which he knew to be false and scandalous for the purpose of injuring or ruining his reputation. (paras 25 & 26)

(6) The impugned statements in the present case were not a matter of public concern but were designed to tarnish the IGP's image as the head of the Royal Malaysian Police. The appellant's behaviour was a serious breach of the Perintah-perintah Tetap Ketua Polis Negara and inconsistent with his professional duties. As such, the disciplinary action leading to the appellant's dismissal was perfectly justified. (para 27)

Case(s) referred to:

Buckley v. Dalziel And Another [2007] 1 WLR 2933 (refd)

Darker v. Chief Constable of the West Midlands Police [2001] 1 AC 435 (folld)

Dato' Dr Low Bin Tick v. Datuk Chong Tho Chin & Other Cases [2017] 5 MLRA 361 (refd)

Evans v. London Hospital Medical College (University of London) and Others [1981] 1 WLR 184 (refd)

Lee Yoke Yam v. Chin Keat Seng [2013] 1 MLRA 457 (distd)

Mann v. O'Neill [1997] 145 ALR 682 (refd)

Noor Azman Azemi v. Zahida Mohamed Rafik [2019] 2 MLRA 259 (refd)

Taylor and Another v. Director of the Serious Fraud Office and Others [1999] 2 AC 177 (refd)

Westcott v. Westcott [2009] 2 WLR 838 (refd)

Legislation referred to:

Criminal Procedure Code, s 107

Police Act 1967, s 4

Public Officer (Conduct and Discipline) Regulations 1993, reg 37

Counsel:

For the appellant: MM Athimulan (Tinoshiny Arumugam together with him); M/s Athimulan & Co

For the respondents: Shamsul Bolhassan (Mohd Asraf Abdul Hamid together with him); Attorney General's Chambers

[For the Court of Appeal judgment, please refer to Nor Aziz Mat Isa lwn. Sun Teoh Tia (SAC) Pengerusi Lembaga Tatatertib Polis Diraja Malaysia Bukit Aman & Yang Lain [2020] MLRAU 96]

JUDGMENT

Mohd Zawawi Salleh FCJ:

Introduction

[1] The short legal question that arises in this appeal is whether absolute privilege should be extended to the defamatory statements contained in a police report lodged by a police officer under s 107 of the Criminal Procedure Code ("CPC") for the purpose of disciplinary proceedings against him under the Public Officer (Conduct and Discipline) Regulations 1993 ("Regulations 1993").

[2] The courts below opined that the ambit of absolute privilege should not be extended for such purpose. For the reasons set out later in this judgment, we agree with the decisions of the courts below.

The Outline Facts

[3] The appellant was, until his dismissal on 18 August 2015, a police man with the Royal Malaysia Police ("RMP") for 27 years.

[4] A show cause letter dated 12 September 2013 was issued to the appellant informing that the 2nd respondent had decided to pursue disciplinary proceedings against him pursuant to reg 37 of the Regulations 1993, with a view to dismiss or reduce in rank. There were 12 charges preferred against the appellant:

(i) The 1st to 9th charges were in respect of the appellant's failure to report physically to the battalion chief;

(ii) The 10th charge was in respect of the appellant's police report dated 27 August 2012 for which the appellant had insulted the Inspector General of Police ("IGP");

(iii) The 11th charge was in respect of the appellant's statements for which he had insinuated that the IGP was in good terms with the Bridge Commander and any reports made against him would have no effect (tidak akan membawa kesan); and

(iv) The 12th charge was that the appellant's conduct had adversely tarnished the image of the public service.

[5] The appellant had responded to the show-cause letter vide his letter dated 31 December 2013.

[6] After considering the appellant's representation, the 2nd respondent found that the appellant was not guilty of misconduct in respect of the 1st to 9th charges. The 2nd respondent found that the appellant was guilty of misconduct in respect of the 10th to 12th charges. The punishment imposed against the appellant are as follows:

(i) The 10th charge, the appellant's service was terminated; and

(ii) The 11th and 12th charges, the appellant was given a warning.

The 2nd respondent had informed the appellant of its decision vide letter dated 21 August 2015.

[7] Dissatisfied with the decision, the appellant filed an application for judicial review. The High Court refused the application. The appellant's appeal to the Court of Appeal was dismissed.

Police Report No: Sg Siput (U) 002450-12

[8] Central to the present appeal was the police report lodged by the appellant which became the subject matter of the 10th charge and upon which the appellant's service was terminated. The report, with the impugned words appearing in bold, reads as follows:

> "Jutaan terima kasih diucapkan kepada Tan Sri Ismail Haji Omar selaku Ketua Polis Negara kerana menamatkan perkhidmatan saya (di buang kerja) nasib saya baik kerana tidak di buang daerah. Perpatah inggeris berkata kalau ikan busuk di kepala ini bermakna surat yang dibuat oleh pegawai bawahan KPN pun turut sama busuk. 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. Tepatlah kata pepatah orang-orang bodoh sentiasa mencari orang yang boleh untuk ia dikagumi. Yang anehnya, **bagaimana orang yang bodoh boleh menjadi KPN**?".

The High Court's Decision

[9] The main reason of the High Court refusing the appellant's application for judicial review was that the defence of absolute privilege did not apply to disciplinary proceedings under Regulations 1993. The High Court stated:

> viii) Kes-kes yang dirujuk pada pandangan saya adalah tidak relevan dengan tindakan tatatertib yang dijalankan terhadap Pemohon. Kes-kes yang dirujuk adalah saman fitnah di Mahkamah dan laporan polis yang dibuat

itu diputuskan oleh Mahkamah mempunyai elemen kepentingan awam yang perlu dilindungi."

The Court Of Appeal's Decision

[10] The Court of Appeal arrived at the same conclusion. The Court of Appeal stated:

> "[41] Perayu berhujah bahawa laporan polis dan kandungannya adalah dokumen terlindung 'absolute privilege' dan tidak boleh dijadikan asas untuk pertuduhan. Hakim Mahkamah Tinggi mendapati nas-nas yang dirujuk oleh perayu tidak relevan dengan tindakan tatatertib yang dijalankan terhadap perayu kerana kes-kes yang dirujuk adalah saman fitnah di mahkamah di mana laporan polis yang dibuat itu diputuskan oleh mahkamah sebagai mempunyai elemen kepentingan awam yang perlu dilindungi. Kami bersetuju dengan dapatan Hakim Mahkamah Tinggi.
>
> [42] Tindakan terhadap perayu adalah tindakan pentadbiran iaitu tindakan tatatertib di mana perayu sebagai anggota polis terikat dengan PTKPN yang menjadi asas pertuduhan. Mengikut perenggan 8.1.3 PTKPN, mana-mana pegawai polis yang berlakuan mengugut, biadap dalam perkataan atau perbuatan dan tingkahlaku terhadap mana-mana pegawai polis yang berpangkat lebih kanan daripadanya, adalah melakukan kesalahan tatatertib dan boleh dikenakan tindakan tatatertib."

Leave Question

[11] Leave to appeal was granted by this Court on 22 November 2018 on the sole question of law as follows:

> "When the defence of absolute privilege is extended to police report under s 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?"

Parties' Competing Submissions

The Appellant's Submission

[12] The nub of the appellant's submission is that absolute privilege has been extended to protect statements contained in a police report lodged under s 107 of the CPC based on public policy consideration. As such, no disciplinary action based on such report could be taken against him and his dismissal was unlawful. The appellant placed reliance on cases of *Lee Yoke Yam v. Chin Keat Seng* [2013] 1 MLRA 457 and *Dato' Dr Low Bin Tick v. Datuk Chong Tho Chin & Other Cases* [2017] 5 MLRA 361 in support of his contention. The appellant posited that these cases extended the scope of the defence of absolute privilege beyond its traditional application which confines to statements made in the course of judicial and *quasi*-judicial proceedings to out-of-court statements leading to judicial proceedings, such as statements made in a police report. In doing so, the courts were swayed by an overriding public interest of encouraging members of the public to report alleged criminal conduct to the police without

fear of being embroiled in civil litigation. In other words, absolute privilege is based on a policy that regards the ends to be gained by permitting such statements as outweighing the harm that may be done to the reputation of others. The defamatory statements contained in police report are deemed as privilege so that the individual making the statements will not be deterred by the threat of civil liability.

The Respondents' Submission

[13] Learned Senior Federal Counsel ("SFC") acknowledged that the law recognises that on public policy consideration, absolute privilege is accorded to statements made in a police report irrespective of whether there is element of malice on the part of the complainant, and he should be free from accountability by way of defamation suit. However, the protection should not be extended to disciplinary proceedings. Learned SFC referred us to the case of *Noor Azman Azemi v. Zahida Mohamed Rafik* [2019] 2 MLRA 259 in which the Federal Court stated that the ambit of absolute privilege should not be extended unnecessarily. The underlying purpose of absolute privilege of a police report is to encourage public to give information of a crime. In the case at hand, the police report was used to vent the appellant's anger against the top management or senior officers in the MPF. In such circumstances, to resort to absolute privilege is a clear abuse. On the factual matrix of the present case, it was contended that the calling of names against the IGP in the police report lodged by the appellant does not relate to information of a crime.

Discussion And Analysis

The Malaysian Position

[14] In *Lee Yoke Yam (supra)*, this court held that the defence of absolute privilege should be extended to statements made in a first information report for reasons of public policy. In the court's view, there was an "overriding public interest that a member of the public should be encouraged to make [a] police report with regard to any crime that comes to his or her notice". Such public interest outweighed the countervailing consideration that this could sometimes lead to an abuse by a malicious informant, and in any case, there would be a sufficient safeguard against such malicious report in that informants could be prosecuted for making a false report. This position was subsequently followed by this court in the case of *Dato' Dr Low Bin Tick (supra).*

[15] In *Noor Azman (supra)*, this court set limit to the defence of absolute privilege accorded to a police report. It held that the subsequent publication of the contents of a police report made by the maker of the report was not protected by the defence of absolute privilege except where the contents of the report were made in or in connection with judicial proceedings. There is no valid reason of public policy why the maker of a police report should be free from accountability by way of defamation action to publish the defamatory words contained in the police report to the world at large. The court reasoned,

"the right of the maker of the police report to speak and write freely to the public cannot override an individual's interest in protecting his reputation."

The English Position

[16] In *Buckley v. Dalziel And Another* [2007] 1 WLR 2933, the English High Court held that absolute privilege applied to a statement made to the police. It reasoned that the need to protect those who provided evidence to police officers, or other investigatory agencies, in the course of an inquiry into possible illegality or wrongdoing had to take priority over any competing public policy consideration regardless of whether the informant was a mere witness or the initial complainant. Significantly, the statement in question had been recorded in the course of investigations which commenced after a complaint was made.

[17] Subsequently, in *Westcott v. Westcott* [2009] 2 WLR 838, the English Court of Appeal extended the scope of absolute privilege further to cover the initial complaint to the police. Ward LJ took the view that the necessity of allowing informants to speak freely overrides the sanctity of a good reputation in such cases. Ward LJ stated that:

> "The police cannot investigate a possible crime without the alleged criminal activity coming to their notice. Making an oral complaint is the first step in that process of investigation. In order to have confidence that protection will be afforded, the potential complainant must know in advance of making an approach to the police that her complaint will be immune from a direct or a flank attack. There is no logic in conferring immunity at the end of the process but not from the very beginning of the process. Mr Craig's distinction between instigation and investigation is flawed accordingly. In my judgment, any inhibition on the freedom to complain will seriously erode the rigours of the criminal justice system and will be contrary to the public interest. In my judgment immunity must be given from the earliest moment that the criminal justice system becomes involved. It follows that the occasion of the making of both the oral complaint and the subsequent written complaint must be absolutely privileged."

[18] The Court in *Westcott (supra)* adopted the test laid down in *Evans v. London Hospital Medical College (University of London) and others* [1981] 1 WLR 184 that was endorsed by the House of Lords in *Taylor and another v. Director of the Serious Fraud Office and Others* [1999] 2 AC 177: can the offending statement fairly be said to be part of the process of investigating a crime or a possible crime with a view to a prosecution or possible prosecution in respect of the matter being investigated? The Court in *Westcott (supra)* held that the making of an oral complaint and a subsequent written complaint to the police could, since "immunity must be given from the earliest moment that the criminal justice system becomes involved".

[19] It can be seen from the decisions of the cases referred to above, absolute privilege is founded on policy consideration. A police report lodged would be absolutely privileged if it is the first step in the process of criminal

investigation by the police and therefore not actionable for the purpose of the law of defamation. With such a report, the crime will be investigated and the perpetrator be brought to justice. In our opinion, the grounds of public policy which explain the basis for the absolute privilege rule are to encourage honest and well-meaning persons to assist in the process of investigating a crime with a view to prosecution by relieving the persons who lodged the police report from the fear of being sued for something they say in the reports (see *Noor Azman (supra)*).

[20] Learned counsel for the appellant vehemently argued that cases of *Lee Yoke Yam (supra)*, *Dato' Dr Low Bin Tick (supra)* and *Noor Azman (supra)* bind us to find otherwise. Learned counsel submitted that in order to achieve the objective of administration of criminal, it is essential that the immunity given to the maker of police report should be extended to protect a policeman against any disciplinary proceedings. To decide otherwise would render the defence of absolute privilege illusory.

[21] With respect, we disagree. In our judgment, any expansion in the ambit of the defence of absolute privilege must relate to this underlying aim of facilitating the effective discharge of the shared public duty in judicial proceedings or events leading to judicial proceedings. As we have alluded to earlier, a police report lodged would be absolutely privileged if it is the first step in the process of criminal investigation by the police and therefore not actionable for the purpose of the law of defamation. The public policy would dictate that citizens must have unfettered access to make police reports. It recognises the importance of ensuring an "open channel of communication" between citizens and the police.

[22] As we examine the policy consideration, however, we see no compelling justification for extending an absolute privilege to a police report for the purpose of disciplinary proceedings against the maker who lodged the report for the purposes other than for the police to kick-start the investigation on the course of the commission of a crime. In the instant case, there can be no doubt that the contents of the statements in the police report lodged by the appellant in their literal and ordinary meaning were understood to mean that the IGP was incompetent and stupid. It was not a genuine complaint to the authorities. The appellant was venting his frustration publicly. His conduct of lodging the said police report could not be said to be discharging his public duty to report crimes or provide information to his colleagues in investigating a suspected crime. That is the crucial difference between the present case and the case of *Lee Yoke Yam (supra)*.

[23] In our judgment, the suggested extension of the scope of absolute privilege would be wholly disproportionate and unnecessary for the aim of encouraging members of the public to report suspected wrongdoings. The defence of absolute privilege is afforded for sound reasons of policy, but it must not be extended further than is necessary. Thus, in *Darker v. Chief Constable of the West Midlands Police* [2001] 1 AC 435, Lord Cooke said at p 453:

> "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] INZLR 180 at 187: The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice..."

[24] We respectfully adopt Lord Cooke's speech. Absolute privilege should not be given any wider meaning than is absolutely necessary in the administration of justice. Any extension of absolute privilege must be "viewed with the most jealous suspicion and resisted unless its necessity is demonstrated". In the Australian case of *Mann v. O'Neill* [1997] 145 ALR 682, Brennan CJ, Dawson, Toohey and Gaudron J had considered the policy considerations for the extension of absolute privilege to such complaints and concluded in their joint judgment that:

> "It may be that the various categories of absolute privilege are all properly to be seen as grounded in necessity, and not on broader grounds of public policy. Whether or not that is so, the general rule is that the extension of absolute privilege is "viewed with the most jealous suspicion, and resisted, unless its necessity is demonstrated". Certainly, absolute privilege should not be extended to statements which are said to be analogous to statements in judicial proceedings unless there is demonstrated some necessity of the kind that dictates that judicial proceedings are absolutely privileged."

[25] In our considered opinion, there is no public policy consideration to recognise that the defence of absolute privilege is automatically invoked when a police report is lodged and there could be no action whatsoever be taken against the maker, like a disciplinary proceedings in the instant case. Furthermore, it has not been demonstrated in the present case of the necessity for the appellant to make the impugned statements in the said police report. The impugned statements were made from ill will and improper motives, or causelessly and wantonly for the purpose of injuring the IGP. In fact, the police report lodged by the appellant is not for the purpose of actually reporting crime, or to enforce obedience to the law, or to see that guilty people are punished but for the purpose of tarnishing the image of another individual.

[26] What reason is there of public policy that makes it necessary that a police officer should be immune from disciplinary proceedings when he makes statements defamatory of his superior which he knows to be false and scandalous for the purpose of injuring or ruining his reputation? The IGP sits atop hierarchical structure of the RMP that spans multiple policing competencies across the country. Section 4 of the Police Act 1967 states:

> "The force shall be under the command of an Inspector General who shall be a police officer and shall be responsible to the Minister for the control and direction of the force ....".

[27] The impugned statements in the present case are not a matter of public concern but are designed to tarnish the IGP's image as the head of the RMP. The appellant's behaviour was a serious breach of para 8.1.3 (now para 33.1.4) Perintah-perintah Tetap Ketua Polis Negara (PTKPN A110) (menggunakan bahasa mengugut, biadap dalam perkataan atau perbuatan dan tingkah laku terhadap mana-mana pegawai polis yang berpangkat lebih kanan daripadanya) and inconsistent with his professional duties. As such, the disciplinary action leading to the appellant's dismissal is perfectly justified.

Conclusion

[28] For all the above reasons, the leave question is answered in the negative. Consequently, the appeal is dismissed and we make no order as to costs.

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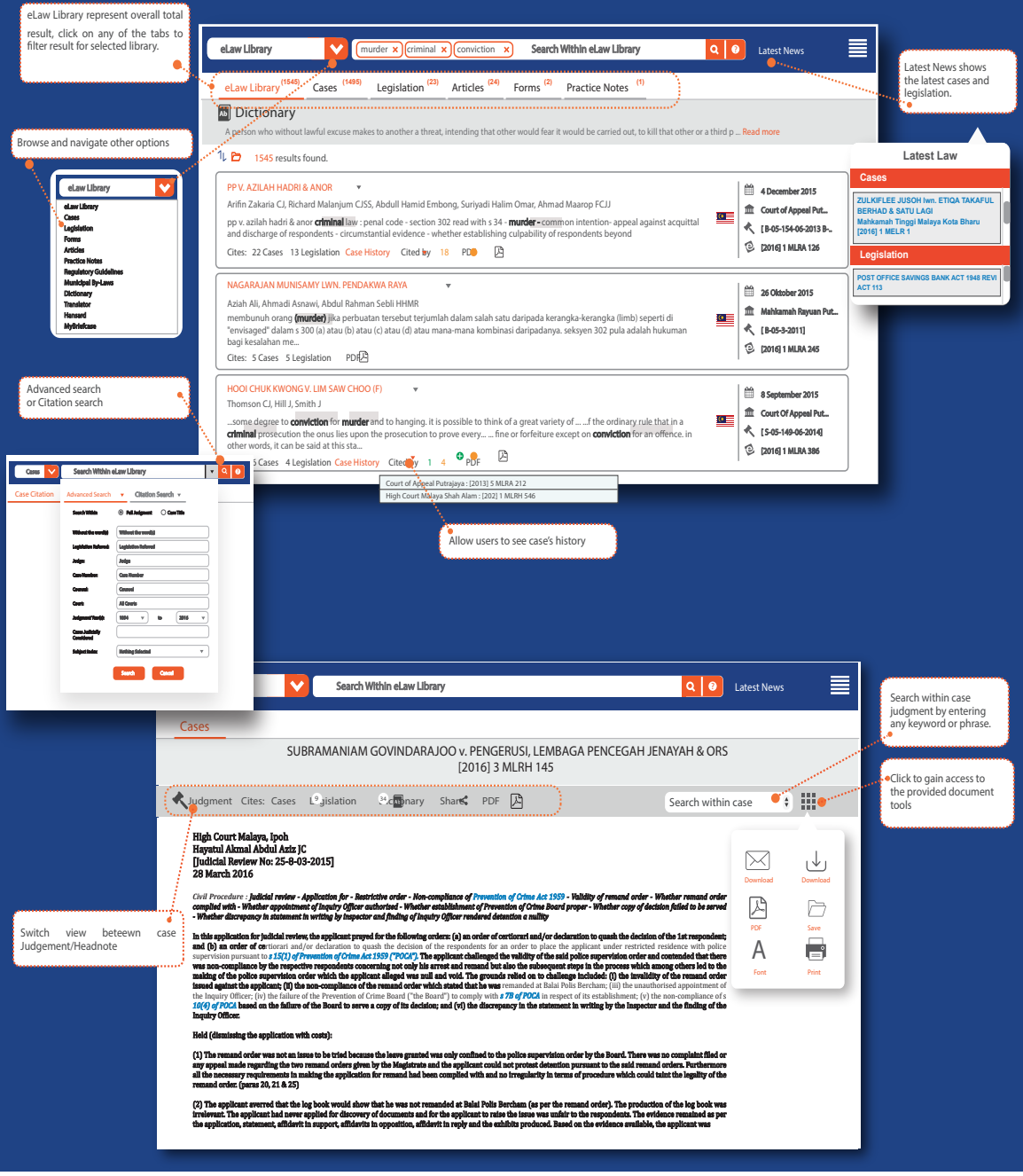

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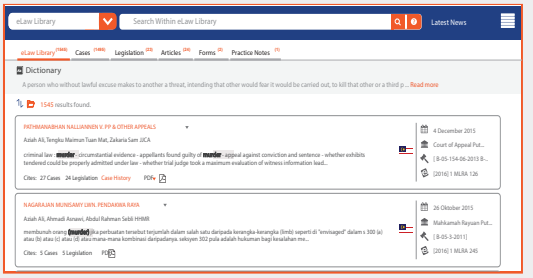

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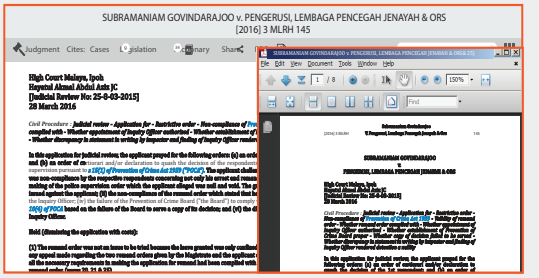

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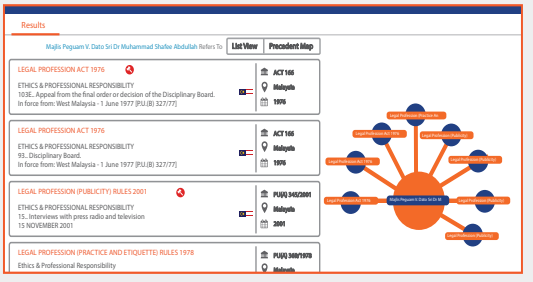

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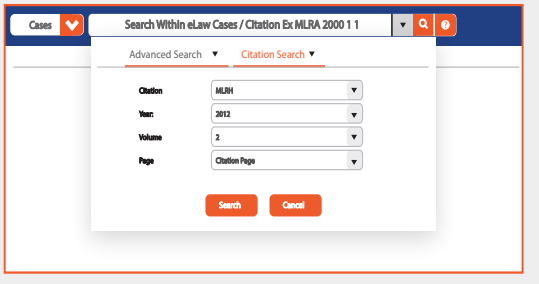

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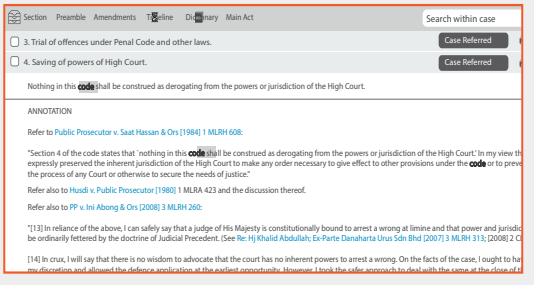

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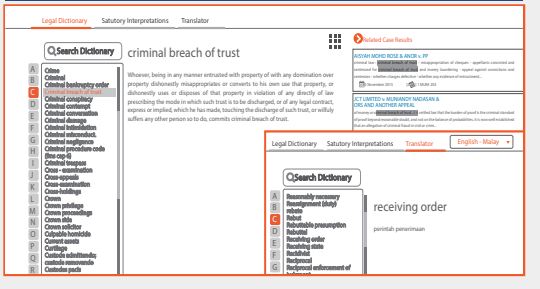

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