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Just Clowning Around or Cyberharassment?

As the COVID-19 pandemic continues to rage worldwide, members of the public ought to be wary of escalating threats not only to their health, but also to cyber security and aspects thereof. With millions confined to their homes following nationwide movement restrictions, the surge in online activity has inadvertently created the ideal environment for cybercrimes, including some of an unexpected variety. In fact, depending on the circumstances, seemingly innocuous actions, such as posting content on personal social media platforms, may amount to an offence.

During the subsistence of the Movement Control Order, cyberharassment, which would include cyberstalking, ranked among the most common issues reported to CyberSecurity Malaysia. Given this state of affairs, it is worth exploring how cases of this nature are dealt with under existing law.

Generally, s 233(1)(a) of the Communications and Multimedia Act 1998 (**CMA 1998**) appears to be the "go-to" provision in so far as allegations of cyberharassment are concerned. By virtue of this section, a person commits an offence if they, among others, by means of any applications service, knowingly make, create or solicit and initiate the transmission of any comment, request, suggestion or other communication which is obscene, indecent, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass another person.

Harassment vs Satire

Following the recently reported decision in *Mohd Fahmi Reza*,[1] the lines between cyberharassment and satirical expression seem to have been blurred even further. The facts of the case are of some notoriety. A freelance graphic artist (**MF**) was charged in the Sessions Court and eventually convicted, under s 233(1)(a) of the CMA 1998, for uploading onto his Facebook page a poster which featured, among other things, an image

[1] *Mohd Fahmi Reza bin Mohd Zarin lwn Pendakwa Raya* [2020] 7 MLJ 399

depicting a certain former Prime Minister as a clown. Aggrieved by the decision, MF appealed on the primary basis that the upload amounted to parody or political satire.

On appeal to the High Court, MF's conviction was upheld but his sentence reduced to a fine of RM10,000, or imprisonment for one month in default of payment of such fine. As regards the arguments as to parody and satire, the court pronounced that while MF could not be barred from harbouring his own political views, as these views were however embodied in a communication, he could not maintain that the communication he had produced did not conflict with the law. More to the point, the court applied the principle established in *Ong Eng Guan*,[2] i.e. that "*[t]he point is not whether he annoyed the complainant, but whether he intended to annoy him*", and determined that in the circumstances, the prosecution had succeeded in proving beyond reasonable doubt all three ingredients of the s 233(1)(a) offence:

(a) MF had used his Facebook page, an applications service, to upload the communication;
(b) the communication was false in nature; and
(c) the communication was uploaded with intent on MF's part to injure another person.

Overall, while the above decision exemplifies the readiness of the courts to enforce the provisions of the CMA 1998 and to afford cyberharassment the importance this issue warrants, it concurrently serves as a timely reminder to exercise caution whenever posting or sharing online. Further, the case also invites debate as to the limits of a potential defence of parody or political satire, and the extent to which reliance may be placed on the same in the face of allegations of wrongdoing.

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[2] *Ong Eng Guan v PP* [1956] 1 MLJ 44