



Disparity of criminal decisions in criminal cases in the ITE law against the defendants

Noer Chalim, Umi Enggarsasi, Titik Suharti

Department of Law, Universitas Wijaya Kusuma Surabaya, Indonesia

Abstract

This research was carried out with the aim of finding out the disparity in criminal decisions regarding criminal cases in the ITE Law against Defendant I and Defendant II, while this research method is a normative juridical research method. The disparity in criminal decisions in criminal cases under the ITE Law against Defendant I and Defendant II occurred because of differences in the defense of their Legal Advisors. Defendant I's legal advisor stated in his defense that the Public Prosecutor's allegations were not proven, because at the time of the examination of the witness at trial there was no match between the statements of the twelfth witness and the statements of the sixth and seventh witnesses. And Defendant I explained in court that he had never asked anyone to upload a video. The defense of Defendant I's legal advisor was considered by the Panel of Judges. Defendant II's legal advisor in his defense did not submit an objection and did not convey that there was no suitability in examining witnesses at trial so that the legal advisor's defense was not considered by the Panel of Judges. The Panel of Judges' consideration was regarding the role of Defendant II in knowing when the sixth witness uploaded a video via the seventh witness' YouTube account, therefore the elements of "person who did it, ordered it to be done, participated in doing it" were declared to have been fulfilled for Defendant II, because the elements alleged against him were Defendant II has fulfilled everything, so according to the Panel of Judges' considerations, the Public Prosecutor's indictment has been proven against Defendant II, so Defendant II is declared proven to have committed a criminal act. According to the Panel of Judges, Defendant II's criminal actions must be accountable as part of a mistake, therefore in accordance with the legal principle "there is no crime without error (gen straaft zonder schuld)".

Keywords: Disparity in criminal decisions, ITE law, defense

Introduction

Technological developments are currently occurring increasingly rapidly, both in Indonesia and in other countries. People, especially those in Indonesia, are finding it easier to get news or information about anything through technology and communication, both people in big cities and small towns and even in villages. The development of technology and communication makes it easier for humans to carry out activities to meet their needs and interact or communicate with other individuals wherever they are, information and communication technology has developed from time to time. The development of technology and communication in the form of telecommunications technology makes it easy for humans to fulfill their needs and interact with other individuals wherever they are without having to leave their place or community and can be done anywhere and at any time.

Along with its development, telecommunications technology has brought humans to a new civilization with a social structure and values. This means that society is developing towards a new society with a global structure where state boundaries are starting to fade. The value system in a society changes, from being local-specific to global-universal (Sodiki, 2005). This will ultimately have an impact on shifting values, norms, decency and can encourage changes in criminal behavior patterns to become more modern by using the features provided by mobile phones, namely services or facilities in the form of cameras and videos.

One form of criminal act is a crime committed in the form of defamation, in the Criminal Code (KUHP) defamation is known as insult. According to R. Soesilo, insulting is attacking someone's honor and good name, those who are

attacked usually feel embarrassed. The meaning of "honor" is a person's good name, not honor in the sexual field (Susilo, 1991). In Indonesian positive law, there are several laws and regulations that regulate defamation, including, in the Criminal Code Chapter imprisonment for 1 month and 2 weeks or a maximum fine of four thousand five hundred rupiah, and the most severe is imprisonment for 4 years. As a result of the development of criminal acts through electronic media, criminal law has also developed.

One of the triggers for changes in criminal law is the progress of information technology which requires all human activities to take place quickly, transparently and without territorial restrictions or borderless. Advances in information technology have resulted in the need to adapt the Criminal Code to regulations development in society. The development of information technology has also resulted in the emergence of new crimes whose perpetrators are difficult to prosecute legally if the provisions of the laws and regulations used are not adapted to developments in information technology (Anwar & Adang, 2008). The government enacted Law of the Republic of Indonesia Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Information and Electronic Transactions (ITE). The Information and Electronic Transactions (ITE) Law aims to guarantee legal certainty in the field of information and electronic transactions, bearing in mind that developments in information technology have resulted in changes in the economic and social fields, resulting in the development of criminal acts through electronic media. The ITE Law also regulates defamation. Defamation through electronic information and/or electronic documents containing insulting and/or defamatory content is regulated in Article 27 Paragraph (3) of Law Number 11 of

2008 concerning Electronic Information and Transactions. The criminal threat for someone who meets the elements in Article 27 Paragraph (3) is regulated in Article 45 of Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Electronic Information and Transactions, namely as follows

- Article 45 paragraph (1) "Any person who intentionally and without right distributes and/or transmits and/or makes accessible Electronic Information and/or Electronic Documents which have content that violates decency as intended in Article 27 paragraph (1) shall be punished with a maximum imprisonment of 6 (six) years and/or a maximum fine of IDR 1,000,000,000.00 (one billion rupiah)."
- Article 45 paragraph (2) "Any person who intentionally and without right distributes and/or transmits and/or makes accessible Electronic Information and/or Electronic Documents which contain gambling content as intended in Article 27 paragraph (2) shall be punished with a crime imprisonment for a maximum of 6 (six) years and/or a fine of a maximum of IDR 1,000,000,000.00 (one billion rupiah)."
- Article 45 paragraph (3) "Any person who intentionally and without right distributes and/or transmits and/or makes accessible Electronic Information and/or Electronic Documents which contain insulting and/or defamatory content as intended in Article 27 paragraph (3) shall be sentenced to imprisonment for a maximum of 4 (four) years and/or a fine of a maximum of IDR 750,000,000.00 (seven hundred and fifty million rupiah)."
- Article 45 paragraph (4) "Any person who intentionally and without right distributes and/or transmits and/or makes accessible Electronic Information and/or Electronic Documents which contain extortion and/or threats as intended in Article 27 paragraph (4) shall be punished with imprisonment for a maximum of 6 (six) years and/or a fine of a maximum of IDR 1,000,000,000.00 (one billion rupiah)."

Criminal acts of defamation often occur, and the criminal act itself is an act that is prohibited by legal regulations, a prohibition which is accompanied by threats (sanctions) in the form of certain penalties, for anyone who violates the prohibition (Moeljatno, 2008). The definition of defamation in the Criminal Code is known as insult. In the Big Indonesian Dictionary, insults are defined as insults, insults and insults, and insults themselves are defined as processes, actions, ways of insulting. The meaning of insult is to look down on, humiliate, tarnish another person's good name, defame another person, curse. The Indonesian Dictionary emphasizes that defamation is more limited to a person's personality.^[1] The criminal act of defamation is an act that attacks a good name. Defamation attacks are utterances (words or a series of words/sentences) by accusing them of committing certain acts, and which are aimed at a person's honor and good name which can result in that person's sense of self-worth or dignity being tarnished, humiliated or humiliated (Chazawi, 2009).

The criminal act of insulting/defaming is a complaint offense. The complaint offense itself is a type of offense or criminal act which in the formulation of the offense clearly states that a criminal act can only be prosecuted if there is a complaint from an interested person. As a complaint offense,

prosecution depends on the wishes and will of the person affected by the crime or those concerned, in other words, the person affected by the crime has a role in determining whether the perpetrator of the offense will be prosecuted or not (Chulzum & Novia, 2016). Perpetrators of criminal acts of defamation through social media can be punished if they fulfill the objective elements stipulated in this article. The ITE Law is a regulation or rule that becomes a signpost for society. It is in interacting and expressing opinions through internet-based social media. The implementation of the ITE Law aims to ensure that crimes do not occur again in electronic systems or on social media, however based on the facts that have occurred there are still criminal acts of defamation committed via social media, as happened in criminal case No. 83/Pidsus/2021/PN.Gsk. namely a criminal case that tried two defendants, namely Defendant I and Defendant II.

Defendant I and Defendant II in criminal case no. 83/Pidsus/2021/PN.Gsk was charged with the same article, namely Article 27 Paragraph (3) of Law Number 11 of 2008 concerning Information and Electronic Transactions, as referred to in Article 45 paragraph (3) of Law No. 19 of 2016 concerning amendments to Law no. 11 of 2008 concerning Electronic Information and Transactions in conjunction with article 27 paragraph (3) of Law no. 11 of 2008 concerning Electronic Information and Transactions in conjunction with Article 55 paragraph (1) 1 of the Criminal Code as charged by the Public Prosecutor. These charges were prosecuted by the Public Prosecutor with prison sentences of: 1 (one) year and 10 (ten) months in prison and a fine of Rp. 100,000,000 (one hundred million rupiah), subsidiary 4 (four) months in prison, by ordering the sentences imposed on Defendant I and Defendant II to be reduced by the temporary detention period already served, with an order that the Defendants remain in detention.

Defendant I and Defendant II as Defendants were brought to trial by the Public Prosecutor based on Indictment Number: PDM-32/GRSIK/Euh.2/03/2021 dated 10 March 2021 as follows

Impact: That Defendant I and Defendant II on Monday 9 December 2019 at approximately 20.30 WIB or at least at a certain time in December 2019 or at least still in 2019, took place in the Royal City Housing Block Prague A- 5 No. 14 C Menganti District, Gresik Regency or at least in another place which is still within the jurisdiction of the Gresik District Court which has the authority to examine and try this case, the Defendants "who committed, ordered to commit, or participated in committing the act intentionally and without the right to distribute and/or transmit and/or make accessible electronic information and/or electronic documents which contain insulting and/or defamatory content".

The legal advisors for Defendant I and Defendant II defended the Public Prosecutor's charges at trial through a defense note (pledooi) and after listening to the defense from the Legal Advisor at trial, the Panel of Judges handed down their decision against Defendant I and Defendant II.

Decision against Defendant I and Defendant II in case no. 83/Pidsus/2021/PN.Gsk mentioned above, the results were different, namely that Defendant I in the first instance was acquitted (vrijspraak) while Defendant II was found guilty and sentenced to prison for 3 (three) months. The difference in criminal decisions in the Court at the first instance means that the subsequent legal efforts carried out by the Public

Prosecutor and Legal Counsel are not the same, namely that Defendant I cannot be appealed by the Public Prosecutor because the decision is acquittal (*vrijspraak*), whereas Defendant II can appeal by his Legal Counsel. because the verdict was declared guilty.

The legal remedy taken against Defendant I by the Public Prosecutor in the above case is cassation, while the legal remedy against Defendant II is an appeal and cassation carried out by the Legal Advisor. Due to differences in the verdict and defense in criminal case no. 83/Pidsus/2021/PN.Gsk at the Gresik Court, even though the indictment and demands of the Public Prosecutor against Defendant I and Defendant II were the same, the researcher examined how the defense efforts were carried out by the legal advisor against Defendant I and Defendant II so that the decision of the District Court was made. Gresik in criminal case no. 83/Pidsus/2021/PN.Gsk between Defendant I and Defendant II the results are different.

Based on the background as mentioned above, the problems to be studied are as follows: 1. What is the disparity in criminal cases in the ITE Law against the Defendants 2. What are the different factors in taking legal action against criminal acts in the ITE Law against the Defendants.

Material and Methods

1. Type of Research

This type of research is normative juridical, namely legal research carried out by examining library materials, namely primary and secondary legal materials which are used as basic material for research by conducting searches on regulations related to the issues discussed so as to find legal rules and principles. law, as well as legal doctrines to answer the legal issues faced.

2. Approach Method

The approach method used in this research is: Case Approach, which is carried out by reviewing cases related to the issues at hand which have become Court decisions that have permanent legal force and the Statute Approach.) which is carried out by reviewing all laws and regulations relating to legal issues (Marzuki, 2022). This research uses legal materials obtained through library materials, all the literature materials are then analyzed, reviewed, in order to gain an in-depth understanding and be able to draw conclusions from the problem regarding the differences in criminal decisions against Defendant I and Defendant II in the ITE Law criminal case in the decision. Number: 83/Pid.Sus/2021/PN.Gsk.

3. Sources of Legal Materials

The sources of legal materials used consist of 3 (three) sources of legal materials, namely

- a. Primary Legal Materials. Legal materials that have binding force such as statutory regulations related to this research, namely: - The 1945 Constitution of the Republic of Indonesia, the IVth amendment; - Criminal Code (LN No. 23 of 1847); - Law no. 11 of 2008 concerning Information D an Electronic Transaction (ITE) (LN No. 39 of 2008, TLN No. 4279); - Law no. 19 of 2016 concerning Amendments to Law no. 11 of 2008 concerning Information and Electronic Transactions (ITE) (LN No. 251 of 2016, TLN No. 5296); - Gresik District Court Decision Number: 83/Pid-Sus/2021/PN.Gsk; - Surabaya High Court

Appeal Decision Number: 26/PID.SUS/2022/PT.SBY; - Cassation Decision Number: 5499 K/Pid/2022

- b. Secondary Legal Materials. Legal materials that provide explanations of primary legal materials. The legal materials referred to here are non-binding, consisting of books, various magazines and newspaper papers, legal journals containing theories and principles and related research results, so that they can be used for this research.
- c. Tertiary Legal Materials. This legal material is complementary to the two legal materials above, consisting of a legal dictionary, a large Indonesian dictionary, and an English dictionary as well as primary, secondary and tertiary materials outside of law that are relevant and can be used to complete this research.

4. Legal Material Collection Techniques

Collecting Legal Materials is a process of procuring Legal Materials for research purposes. The technique for collecting Legal Materials used in this research is Document Study, which is a tool for collecting legal materials, which is used through written legal materials.

Researchers conduct research on documents that are closely related to the research object to obtain a theoretical basis, and to obtain information in the form of formal provisions and official data regarding the problem to be researched. This research is limited to only using document or library material study techniques, namely a tool for collecting legal materials carried out through written data. The tools used to collect legal materials are notebooks, stationery and flash disks. Legal material collection tools are used to inventory legal materials, in the form of notes about materials relevant to the research topic. Library legal materials, namely research carried out by studying reading materials in the form of literature, scientific books, notes on the results of an inventory of legal materials, applicable legislation and other materials in this research.

5. Analysis of Legal Materials

Analysis of the selected legal materials is primary and secondary legal materials that have been selected through literature study as mentioned above, then arranged systematically, so that a comprehensive picture of legal principles, legal rules and provisions related to the differences in criminal decisions against Defendant I and the Defendant are obtained. II in the case of criminal acts under the ITE Law in decision Number: 83/Pid.Sus/2021/PN.Gsk. Furthermore, the research obtained was analyzed qualitatively juridically. The legal material obtained in the research will be studied juridically and in depth because the basis for the analysis is the applicable laws and regulations.

Discussion

1. Disparity of criminal decisions against defendant i and defendant ii in the ite law criminal case in decision number: 83/pid.sus/2021/pn.gsk.

a. Indictments and demands between Defendant I and Defendant II in the ITE Law criminal case in decision Number: 83/Pid.Sus/2021/PN.Gsk.

Indictments and demands between Defendant I and Defendant II in the ITE Law criminal case in decision Number: 83/Pid.Sus/2021/PN.Gsk. are the same, namely: Defendant I and Defendant II were charged by the Public

Prosecutor with indictment number: PDM-32/GRSIK/Euh.2/03/2021 dated 10 March 2021 for the criminal case referred to in article 27 paragraph (3) concerning defamation well as intended in article 45 paragraph (3) of Law number: 19 of 2016 concerning amendments to Law number: 11 of 2008 concerning Electronic Transaction Information (ITE), in conjunction with article 27 paragraph (3) of Law number: 11 of 2008 concerning Electronic Transaction Information (ITE), in conjunction with article 55 paragraph (1) 1 of the Criminal Code as charged by the Public Prosecutor.

The Public Prosecutor's indictment, namely, Defendant I and Defendant II were charged with: "who committed, ordered to do, or participated in carrying out acts that intentionally and without authorization distributed and/or transmitted and/or made accessible electronic information and/or electronic documents containing content insult and/or defamation".

The Public Prosecutor's demands which were read before the court were basically as follows:

1. Declare that Defendant I and Defendant II have been legally and convincingly proven guilty of committing a criminal act of "committing, ordering to commit, or participating in carrying out acts that intentionally and without authorization distribute and/or transmit and/or make electronic information and/or accessible or electronic documents containing insulting and/or defamatory content as intended in Article 27 paragraph (3)" as intended in Article 45 paragraph (3) of the Law. Law number: 19 of 2016 concerning amendments to Law number: 11 of 2008 concerning Electronic Transaction Information (ITE), in conjunction with article 27 paragraph (3) Law number: 11 of 2008 concerning Electronic Transaction Information (ITE) in conjunction with article 55 paragraph (1) 1 of the Criminal Code;
2. Sentenced Defendant I and Defendant II to prison for: 1 (one) year and 10 (ten) months in prison respectively and a fine of Rp. 100,000,000,- (one hundred million rupiah), subsidiary 4 (four) months in prison;
3. Order the sentences imposed on Defendant I and Defendant II to be reduced by the temporary detention period already served, with an order that the Defendants remain in detention;
4. State evidence in the form of: - Activation letter for 1 (one) Vivo Y1915 brand cellphone in spring white with IMEI number: 867966044204190 and IMEI2: 867966044204182; - A receipt for the purchase of a Vivo Y1915 brand cellphone at the MURAKI CELL counter on March 16 2020; - A GAMER AK47 (Mr. Joker) youtube account; - An email and complete with password; - Several screenshots of the homepage of the GAMER AK47 YouTube account and videos posted by the account; - One I phone 6 brand cellphone, 12 GB memory, silver color; - Screenshots of conversations and photos of the cellphone purchased by the Defendant which has been confiscated by investigators;
5. Charge the defendants each with court costs of Rp. 5,000,- (five thousand rupiah).

b. Criminal Elements in ITE Law Criminal Cases in Decision Number: 83/Pid.Sus/2021/PN.Gsk.

Regarding evidence in criminal cases, the negative evidence system (negative wettelijk) is adopted, so that to determine

whether a Defendant has fulfilled all the elements of the article charged by the Public Prosecutor, it must be proven by two valid pieces of evidence presented by the Public Prosecutor at the trial and added the judge's confidence in the proven actions of the Defendants.

The Defendants were brought to trial by the Public Prosecutor with a single indictment, namely the actions of the Defendants as regulated and punishable by crime in article 45 paragraph (3) of Law number: 19 of 2016 concerning amendments to Law number: 11 of 2008 concerning Electronic Transaction Information (ITE), in conjunction with article 27 paragraph (3) of Law number: 11 of 2008 concerning Electronic Transaction Information (ITE), in conjunction with article 55 paragraph (1) 1 of the Criminal Code. The Public Prosecutor's indictment consists of the following elements: 1. Everyone; 2. Who deliberately and without right distributes and/or transmits and/or makes accessible Electronic Information which contains insulting and/or defamatory content; 3. The person who does it, orders it to do it or participates in doing it.

These elements must be proven first to state whether the defendants can be blamed, and the considerations of the panel of judges are as follows:

1. The "everyone" element. "In the opinion of the Judicial Council, every person is an element of the article and not an offense, therefore, because it is only an element of the article, the element "every person" is only related to the legal subject (bearer of rights and obligations) proposed by the Public Prosecutor at the trial, p. which is relevant to whether or not there is an error in person in the Public Prosecutor's indictment, whereas to determine whether the Defendants presented at trial by the Public Prosecutor are guilty, the other elements (elements of offense) contained in the Public Prosecutor's indictment must be considered. The identity of the case filed by the Public Prosecutor against Defendant I and Defendant II has been stated in full in the indictment, whereas to prove whether the Defendant I and Defendant II presented are the real people and match their identities, the Panel of Judges considered the juridical facts revealed at the trial which were obtained. from valid evidence. Based on the testimony of witnesses and the statements of Defendant I and Defendant II, it is true that the person referred to in the identity description in the indictment submitted by the Public Prosecutor, therefore, the Panel of Judges is of the opinion that there is no mistake regarding the person (error in persona) and therefore the element "everyone" has been fulfilled.
2. The element "Who intentionally and without right distributes and/or transmits and/or makes accessible electronic information which contains insulting and/or defamatory content." According to the Panel of Judges' consideration, the a quo element consists of several acts, including: Deliberately and without right distributing and/or transmitting and/or making accessible electronic information which contains insulting and/or defamatory content, of which these three acts are elements. is alternative in nature so that if one of the elements is tel If it is fulfilled then all of these two elements legally must be considered to have been fulfilled as well. Based on the relevant juridical facts at the trial, the Panel of Judges considered the following elements: intentionally and without authority

making accessible electronic information containing insulting and/or defamatory content, which is related to these elements because the basis for Defendant I and Defendant II's submission at the trial was the Public Prosecutor's indictment, then what must be proven is whether Defendant I through Defendant II ever ordered the witness to upload a video containing the incident as charged. Based on the information from the witnesses and in relation to the video that was spread via YouTube and also in accordance with screenshots from parts of YouTube that were spread via YouTube, the Panel of Judges considered whether there was an order from Defendant I through Defendant II for the witness to make the video viral, and Defendant II and the witnesses explained that the video uploaded via YouTube was not on the initiative and orders of Defendant I and Defendant I also stated that he was not aware of the upload of the video and never discouraged Defendant II or the other witnesses from uploading the video via YouTube. The Panel of Judges is of the opinion that regarding defamation, it can be proven based on the victim's witness statement material and the element of "deliberately and without right making electronic information containing insulting and/or defamatory content accessible" has been fulfilled for Defendant II and for Defendant I it must be declared unfulfilled because there were no two valid pieces of evidence to prove the existence of an order from Defendant I to Defendant II or to the Witnesses.

3. The element "person who commits, orders to commit, participates in committing" this element relates to the role of each perpetrator in carrying out a criminal act, in this case Defendant I was declared not fulfilled, while the role of Defendant II was knowing when the witness uploaded the video via the YouTube account belongs to another witness, therefore Defendant II has fulfilled the elements of a person who did it, ordered it to do it, participated in it and must be found guilty. Because the first element, the second element, and the third element as stated in the Public Prosecutor's indictment mentioned above have been proven against Defendant II, Defendant II is declared proven to have committed a criminal act, while for Defendant I, because it has not been proven as alleged by the Public Prosecutor, he must be acquitted. of the indictment. In criminal law, there are two main related matters that must be considered by the Panel of Judges, namely the first relates to acts that are unlawful as part of the criminal act (delict) which have been considered and proven by the elements of the article charged, while the second is the act What was done by Defendant II must be accountable as a part of the fault, therefore in accordance with the legal principle "there is no crime without fault (gen straaft zonder schuld), then the Panel of Judges also considered whether or not there was a mistake on the part of Defendant II which is relevant to whether or not there was any justification or excuse for Defendant II at the time of committing the criminal act, whereas because Defendant I was declared not proven to have committed the criminal act as charged by the Public Prosecutor, Defendant I was acquitted of the Prosecutor's indictment. Therefore, the Panel of Judges restored Defendant I's rights to his abilities, position, honor and dignity. Assessing that Defendant II was able

to take legal responsibility for his actions after the Panel of Judges had considered what was found during the trial, as well as taking into account Defendant II's personal condition, there were no things that could exclude Defendant II (both justification reasons and excuse reasons) from responsibility. the law regarding criminal acts that have been committed so that the Panel of Judges is of the opinion that the element of guilt can be proven against Defendant II. Apart from that, during the Panel of Judges observing the trial, it turns out that Defendant II is someone who is physically and mentally healthy so that according to the law Defendant II is considered competent and able to take responsibility for all his actions. Therefore, the actions carried out by Defendant II must also be held accountable to him.

c. Statements from witnesses during the police investigation and during the trial.

Witnesses examined in case number: 83/Pid.Sus/2021/PN.Gsk. both in the police and at the trial there were 13 (thirteen) people. These witnesses were presented by Ol eh Public Prosecutor to prove his charges. The first witness is a victim witness, both during the police investigation and at trial, basically explaining: - Whereas according to the witness, those who defamed both the witness and the witness' institution were Defendant I and Defendant II; - Whereas according to the witness, this act was carried out by distributing a video whose contents discredited the witness's name; - That the witness initially did not know who uploaded the video via the YouTube account, what the witness knew was that the YouTube account used to upload the video was called MR. JOKER; - What can be seen in the video is that the witness is angry; - That the witness finally found out who uploaded the video from the second witness; - Whereas as a result of the circulation of this video, the witness feels very embarrassed as a member of the police who is supposed to protect the public, because the existence of this video could result in public hatred towards police officers; - That it is the witness who feels very disadvantaged by this incident; - That the witness objected to the title written on YouTube.

The second witness, both during the police investigation and at trial, basically explained: - That the witness explained that what the witness knew about the report was that the video of the first witness had been distributed on YouTube;- That the witness watched the video directly using his cellphone with the YouTube application; - That the witness explained that he first became aware of the video around December 2019, at that time the witness was at Darmo Hill Surabaya; - That the witness explained that he knew Defendant I and Defendant II, while MR. JOKER is the YouTube account that uploaded the video but the witness does not know who the owner of the account is; - That the witness explained that the person who was harmed in this case was the first witness whose reputation was defamed, and who also brought the institution into disrepute.

The third witness, both during the police investigation and at trial, basically explained: - That the witness has been questioned by the East Java Regional Police and what the witness explained in the Investigation Report is true; - That the person who took the photos and videos was the fourth witness; - That the witness initially learned about the circulation of the video from the witness's wife who

accidentally watched YouTube; - That the contents of some of these uploads use Mr. Joker; - That the witness does not know the owner of Mr. The Joker; - Whereas according to the witness who was harmed by the circulation of the video, it was the first witness because it defamed his good name; The fourth witness, both during the police investigation and at trial, basically explained: - That the witness has been questioned by investigators regarding the incident where the video of the first witness was circulated; - That the witness at that time took photos and videos using the witness's cellphone; - That the person who took the initiative to record the video was the witness himself and the witness often records videos when there are important meetings and is used for office purposes when there are meetings with the regional government; - That until now the witness did not know and did not open the video circulating on YouTube; - That the witness does not know who is the most disadvantaged in this matter because all the witness information was obtained from the fifth witness; The fifth witness, both during the police investigation and at the trial, basically explained: - That the witness has been questioned by the East Java Regional Police and what the witness explained in the Investigation Report is true; - That the person who recorded the video was the fourth witness; - Whereas the witness had received a video from the fourth witness, the purpose of which was to confirm the truth of the first witness as a member of the police; - That what is harmed is the good name and institution of the first witness; The sixth witness during the examination at trial basically explained: - That the witness understands that he is being presented because the witness was the one who uploaded the photos and videos to his YouTube account because the witness felt hurt because his father (Defendant II) had been bad-mouthed by the first witness; - That the witness was not the one who recorded it, but the witness who uploaded the video via the seventh witness's YouTube account with a duration of 10 minutes to 20 minutes; - That the witness uploaded the video with the knowledge of the witness's father (Defendant II); - That the witness received the video from a member of the police; - That the witness uploaded the video by first making a statement and uploading it using Mr. Joker; - That the witness received the video from a member of the police who then said the witness would upload the video using Mr. Joker belongs to the seventh witness; - That the seventh witness knew when the video was uploaded by witness Deng and used the seventh witness' cell phone; - That the witness does not know the contents of the conversation in the video; - That when the witness uploaded the video it had not been given a title; - That the witness was never asked by Defendant I to upload the video; - That when the witness is questioned by the investigator, the witness is accompanied by the first witness, the second witness and a member of the police and is directed to provide information; - That when questioned by the Investigator there was no official call, only by telephone and before being questioned he was directed by the Investigator while the witness was questioned in the CYBER room of the East Java Regional Police; - That the witness explained that the witness's statement during the examination by the Investigator was incorrect and that the correct statement was the witness's statement at the trial; - That the witness has made an official statement retracting the witness statement; - That the witness statement in the Investigative Investigation Report which stated that the

video was sent from Defendant I is not true because the video was sent by a member of the police; The seventh witness during the examination at trial basically explained: - What the witness knows is that the sixth witness had borrowed the witness's cell phone which was used to upload videos via the witness's YouTube account, but the witness did not know what video the sixth witness had uploaded; - That the sixth witness borrowed the witness's cellphone when he was at the coffee shop where the witness worked in December 2019; - That the witness was questioned by an investigator, but at that time the witness was asked to sign the investigator's report and put initials, which at that time the witness did not read and was only asked to sign; - Regarding Mr. YouTube account. Joker, according to the witness who gave his name, is the sixth witness, whose previous name was not that; - That the witness bought the cellphone for Rp. 3,000,000 (three million rupiah) but the witness forgot the name of the cellphone shop; - That the witness stated that he withdrew the witness statement material in the Investigation Report; - That the witness was never lured by Defendant I in the amount of Rp. 5,000,000 (five million rupiah) and the witness has never worked with Defendant I; - That the witness does not know the first witness and the second witness; - Apart from being borrowed by the witness, the six witnesses' cellphones have never been borrowed by anyone else, but the cellphones have been taken by investigators; The eighth witness during the examination at trial basically explained: - That the witness has been questioned by the investigator, but many of the witness statements as in the investigator's report are incorrect; - That the witness before signing the Minutes of Investigation, the witness only read part of it before signing; - That the witness knows the sixth witness, namely the son of Defendant II; - That the witness received the video from the East Java Regional Police Investigator; - That when the witness received the video, there was no title yet; - That when questioned by the investigator the witness felt depressed; The ninth witness during the examination in court basically explained: - Whereas the witness was questioned by the East Java Regional Police regarding the video circulating on YouTube involving Defendant I and Defendant II, however, some of the material in the witness's statement as in the Investigation Report was incorrect; - That the witness did not see the complete video, all the witness knows is that in the video the first witness was angry; - That the witness often saw Defendant II at Defendant I's house just chatting and the witness was once sent the video by Defendant II via WhatsApp but at that time there was no title; - That the witness does not know about information technology; The tenth witness during the examination in court basically explained: - That the witness received the video from the police via WhatsApp; - That the witness's purpose in getting the video was because the witness was curious about the contents of the video, which at that time did not have a title and the witness immediately deleted it; - That the witness does not know Defendant II but the witness knows Defendant I; - That the witness never met Defendant I in the East Java Regional Police canteen and the witness stated that what was stated in the public prosecutor's indictment was not true; The eleventh witness during the examination at trial basically explained: - That the witness knows the sixth witness and the seventh witness as well as Defendant I and

Defendant II but the witness has no family relationship; - That the witnesses were gathered by Defendant I with the sixth witness and seventh witness, as well as with Defendant II at Defendant I's house; - Whereas when the witness was gathered by Defendant I, the witness was ordered by Defendant I to upload the video of the first witness on YouTube so that it would go viral, but the witness refused because he was afraid of the ITE Law; - Then the video was sent by Defendant I to Defendant II and sent to the sixth witness, then sent by the seventh witness; - That the witness confirmed that he had seen the video when Defendant I showed it using his cellphone; - When the witness met on the street with the seventh witness, they told him that Defendant I had asked for his cellphone and replaced it with money with a nominal value that the witness did not know; The twelfth witness during the examination at trial basically explained: - That the witness knows the sixth witness and the seventh witness as well as Defendant I and Defendant II but the witness has no family relationship;- Whereas on December 9 2019, the witness together with the seventh witness, sixth witness, Defendant II were gathered by Defendant I at his house; - Whereas when the witnesses were gathered by Defendant I, the witness was ordered by Defendant I to upload the video of the first witness on his YouTube account so that it would go viral, but the witness did not want to because he was afraid of the ITE Law; - Whereas then Defendant I ordered the sixth witness and the seventh witness to upload the video of the first witness on YouTube; - That Defendant I assured the sixth and seventh witnesses that if there was a problem with the law, Defendant I would be responsible; - Then the video was sent by Defendant I to Defendant II and sent to the sixth witness, then sent to the seventh witness; - Then the seventh witness uploaded the video on his YouTube account called Mr. Joker at Defendant I's house; - That the person responsible for this matter is Defendant I because he was the one who ordered the seventh witness;

The thirteenth witness during the examination at trial basically explained: - That the witness knows Defendant I and Defendant II; - That the witness does not know for certain about the problems relating to Defendant I and Defendant II; - That the witness is a neighbor of Defendant I; - That the witness heard from the witness' friends that Defendant I was involved in a video upload problem, but the witness did not know what video was uploaded by Defendant I; - As far as the witness knows, Defendant II never asked his son, namely the sixth witness, to upload a video, but only talked about it; - Whereas the witness was questioned by the investigator and the witness explained that many of the statements in the investigator's BAP were not true, whereas what the witness explained at trial was true;

The statements of these witnesses are taken into consideration by the Panel of Judges in deciding the case. In criminal cases, witness statements are needed to provide certainty and confidence for the Panel of Judges with the aim of finding the real facts. Article 1 paragraph (27) of the Civil Procedure Code (KUHAP) states that a witness statement is a person who can provide information for the purposes of investigation, prosecution and justice regarding a criminal case that he himself heard, saw for himself and experienced for himself. Witnesses may not provide information based on their own opinions or conjectures, then this information cannot be accepted as a judge's

consideration or in other words the information is not included as evidence.

Article 185 paragraph (6) of the Civil Procedure Code of the Criminal Procedure Code states, in assessing the truth of a witness' statement, the judge must seriously pay attention to the following:

1. Correspondence between the statements of one witness and another.
2. Correspondence of witness statements with other evidence.
3. The reason the witness gave certain information.
4. Way of life and morality and other things that can generally influence whether the information can be trusted or not.
5. A witness's statement can be said to be valid if they have sworn an oath, the witness's statement must be given in court and the witness's statement is corroborated by other witnesses.

2. Discussion regarding the ratio of criminal disparity fines against the defendants in ite law criminal cases in ruling number: 83/pid.sus/2021/pn.gsk.

a. Examination of Defendant I's Witnesses during the Police Interrogation and During the Trial as well as the Defense Conducted by Defendant I's Legal Counsel.

To prove his charges, the Public Prosecutor presented witnesses, 13 (thirteen) witnesses were presented both during the investigation and at trial. The witnesses presented by the Public Prosecutor during the examination of Defendant I and Defendant II were the same. During the examination of witnesses at the trial, the sixth witness, seventh witness, eighth witness, ninth witness, tenth witness and thirteenth witness all said that the witness had been questioned by the Investigator and these witnesses explained that many of the statements in the Investigator's BAP were not true. true, whereas what is true is what the witness explained in court, even the sixth witness and seventh witness stated that they withdrew their testimony. g is in the Investigator's BAP.

During the examination at trial, the sixth witness stated that Defendant I had never been asked to upload the video and stated that it was not true that it was Defendant I who sent the video to the sixth witness. The seventh witness explained that the witness was never lured by Defendant I in the amount of Rp. 5,000,000 (five million rupiah) and the witness never worked with Defendant I. The eleventh witness explained that the video was sent by Defendant I to Defendant II and sent to the sixth witness, then sent by the seventh witness, but the sixth witness and seventh witness provided different information, the video was sent by a member of the police, not sent by Defendant I. In fact, another witness also stated that the video was sent by a member of the police. Apart from that, according to the twelfth witness' statement, on December 9 2019, the witness was together with the seventh witness, the sixth witness., Defendant II was gathered by Defendant I at his house.

That when the witnesses were gathered by Defendant I, the witness was ordered by Defendant I to upload the video of the first witness on his YouTube account so that it would go viral, but the witness did not want to because he was afraid of the ITE Law, but the testimony of the twelfth witness did not match the statements of the sixth witness and the seventh witness. which stated that the sixth witness had borrowed the witness's cellphone which was used to upload

videos via the seventh witness's YouTube account, that the sixth witness had borrowed the witness's cellphone when he was at the coffee shop where the witness worked in December 2019, this proves that it is not true that Defendant I gathered at his house and told him to upload the video of the first witness on YouTube so that it would go viral.

Defendant I's legal advisor defended that what the Public Prosecutor alleged against Defendant I was not proven, because at the time of the witness examination at trial there was no match between the statements of the twelfth witness and the statements of the sixth and seventh witnesses, apart from that, in the trial of Defendant I too explained that he did not know about uploading videos and had never asked anyone to upload videos. The legal advisor's argument in his defense stated that because the Public Prosecutor's accusations were not proven, Defendant I must be declared not guilty and released. The defense of Defendant I's legal advisor was considered by the Panel of Judges, after examining the witnesses presented by the Public Prosecutor, so that in the decision in case number: 83/Pid-Sus/2021/PN.Gsk, for Defendant I it was stated as follows:

- Judge:
1. Declare that Defendant I has not been legally and convincingly proven guilty of committing the criminal act as charged;
 2. Acquit Defendant I therefore from the Public Prosecutor's Indictment;
 3. Restoring the rights of Defendant I in terms of his abilities, position, and honor and dignity;
 4. Charge the case costs for Defendant I to the State.

b. Examination of Defendant II's witnesses during the police investigation and at trial as well as the defense carried out by Defendant II's legal advisor.

The witnesses presented by the Public Prosecutor during the examination of Defendant II were the same as the witnesses presented during the examination of Defendant I, namely there were 13 (thirteen) witnesses. The witnesses who were examined in giving statements both at the BAP and at the trial against Defendant II all agreed with each other and according to Defendant II's statement at the trial, it was stated that the motive of the sixth witness in uploading the video was because he was hurt, which was also confirmed and known by Defendant II, there was no denial by the Defendant. II regarding what is alleged.

Defendant II's legal advisor in his defense did not submit an objection and did not convey that there was no suitability in examining witnesses at trial so that the legal advisor's defense was not considered by the Panel of Judges. The Panel of Judges' consideration was regarding the role of Defendant II in knowing when the sixth witness uploaded a video via the seventh witness' YouTube account, therefore the elements of "person who did it, ordered it to be done, participated in doing it" were declared to have been fulfilled for Defendant II, because the elements alleged against him were Defendant II has fulfilled everything, so according to the Panel of Judges' considerations, the Public Prosecutor's indictment has been proven against Defendant II, so Defendant II is declared proven to have committed a criminal act.

According to the Panel of Judges, Defendant II's criminal actions must be accountable as part of a mistake, therefore in accordance with the legal principle "there is no crime without error (gen straaft zonder schuld)". The

considerations of the Panel of Judges are stated in the decision on case number: 83/Pid-Sus/2021/PN.Gsk, and in their decision for Defendant II it is stated as follows:

Judge:

1. Declare that Defendant II was guilty h is legally and convincingly proven guilty of committing the criminal act as charged, namely: "Deliberately Without Right to Make Access to Electronic Information which Contains Defamation and/or Defamation";
2. Sentenced Defendant II to prison for: 3 (three) months;
3. Determine evidence in the form of:
 - a. 1 (one) *Vivo* Y1915 Brand Mobile Phone in spring white with IMEI1 Number: 867966044204190 and IMEI2: 867966044204182;
 - b. A receipt for the purchase of a *Vivo* Y1915 Brand HP at the MURAKI CELL Counter on March 16 2020;
 - c. 1 (one) Youtube Gamer AKA47 (MR.JOKER) account with email x1y4n77@gmail.com with password forgot my password;
 - d. One iPhone 6 mobile phone, 128 Gb memory, silver color;
 - e. Screenshots of conversations and photos of the cell phone purchased by the Defendant;
4. Charge a court fee of Rp. 5,000,- (five thousand rupiah) to Defendant II;

c. Differences in Defense Efforts for Defendant I and Defendant II (the Defendants).

In the defense efforts by the Legal Counsel between Defendant I and Defendant II there is a difference, namely that the Legal Counsel for Defendant I tried to convey to the Witnesses that at the trial the Witnesses must provide true information and if the information submitted in the BAP is not true must also be conveyed to the Panel of Judges. during the examination at trial, because all information is given at trial, there will be legal accountability.

Several witnesses, namely the sixth witness, the seventh witness, the eighth witness, the ninth witness, the tenth witness and the thirteenth witness, finally said at the trial that many of the statements in the Investigating BAP were not true, whereas what was true was what the witnesses explained at the trial, even the sixth witness and The seventh witness stated that he withdrew the information contained in the Investigator's BAP and stated that the correct information was that which was presented at the trial.

Based on the discrepancy in the statements of the Witnesses presented to Defendant I between those in the Investigating BAP and the statements submitted at the trial, the discrepancy was conveyed by the Legal Counsel in his defense argument, on the basis of this defense it became a consideration for the Panel of Judges examining case number: 83 /Pid-Sus/2021/PN.Gsk was decided by the Panel of Judges with a decision stating that Defendant I had not been legally and convincingly proven guilty of committing the criminal act as charged, as well as acquitting Defendant I from the Public Prosecutor's indictment. The legal remedy taken by the Public Prosecutor is Cassation, and cannot submit an appeal or Judicial Review/PK because Defendant I's decision is acquittal.

Defendant II's legal advisor in his defense did not argue and did not deny the statements of the witnesses, both those presented in the Investigating BAP and those presented by the witnesses at the trial. The differences in defense between

Defendant I and Defendant II meant that the final legal decision was different. Defendant II was declared to have been legally and convincingly proven guilty of committing the criminal act as charged, namely: "intentionally without the right to make accessible electronic information containing insulting and/or defamatory content", and sentenced Defendant II to imprisonment for: 3 (three) months. The legal remedies undertaken by the Legal Advisor are Appeal and Cassation because they are found guilty.

Discussion

a. Conclusions

The conclusions that researchers can draw are as follows:

1. The criminal disparity between Defendant I and Defendant II in the ITE Law criminal case as in decision number: 83/Pid-Sus/2021/PN.Gsk is that in the decision Defendant I was declared by the Panel of Judges to have not been legally and convincingly proven guilty, committed the criminal act as charged, and acquitted Defendant I from the Public Prosecutor's Indictment, while Defendant II was found guilty, that is, he was declared to have been legally and convincingly proven guilty of committing the criminal act as charged, namely: "intentionally without the right to make accessible electronic information which has contents of insult and/or defamation", and sentenced Defendant II to imprisonment for: 3 (three) months.
2. The difference factor in taking legal action against Defendant I and Defendant II is that Defendant I, because his Legal Counsel's defense was considered by the Panel of Judges, then the decision was acquittal, so for the acquittal, the legal remedy that could be taken by the Public Prosecutor was cassation because no legal remedy could be taken. appeal and Judicial Review/PK. Defendant II was declared guilty because the defense of his Legal Advisor was not considered by the Panel of Judges, so the Public Prosecutor's indictment was dismissed declare it proven and convince the Panel of Judges. The legal efforts undertaken by Defendant II's legal advisor were appeal and cassation.

b. Suggestions

Suggestions are input from various groups, the suggestions conveyed by researchers are as follows:

1. For law enforcement officials, when carrying out an examination, adjust it to the legal facts that occurred based on actual witness statements, do not manipulate them by writing false witness statements so that it results in harm to the public who have the status of the defendant.
2. For people who face criminal problems, try to ask for help from a good lawyer/legal advisor, so that their legal rights can be fought for and defended well by the lawyer/legal advisor.

References

1. Ahmad Sodiki. *Kejahatan Mayantara*, Refika Aditama, Malang, 2005.
2. R Susilo. *Kitab Undang-Undang Hukum Pidana (KUHP) Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal*, Penerbit Politeia, Bogor, 1991.
3. Yesmin Anwar, Adang. *Pembaruan Hukum Pidana Reformasi Hukum Pidana*, Penerbit Grasindo, Jakarta.
4. Moeljatno. *Asas-Asas Hukum Pidana*, Rineka Cipta, Jakarta, 2008.
5. Umi Chulzum, Windy Novia. *Kamus Besar Bahasa Indonesia*, Kashiko, Surabaya, 2016.
6. Adami Chazawi. *Hukum Pidana Positif Penghinaan*, ITS Press, Surabaya, 2009.
7. M Yahya Harahap. *Pembahasan Permasalahan dan Penerapan KUHAP* Cet. I, PT. Sarana Bakti Semesta, Jakarta, 1986.
8. Teguh Prasetyo. *Hukum Pidana*, PT Raja Grafindo Persada, Jakarta, 2012.
9. *Kamus Hukum*, Citra Umbara, Bandung, 2008.
10. Tri Andrisman. *Hukum Pidana*, Universitas Lampung, Bandar Lampung, 2007.
11. Jimly Asshiddiqie, M Ali Safa'at. *Teori Hans Kelsen Tentang Hukum*, Kompas, Jakarta, 2012.
12. Teguh Prastyo. *Hukum Pidana*, PT Raja Grafindo Persada, Jakarta, 2012.
13. Tri Andrisman. *Hukum Pidana*, Universitas Lampung, Bandar Lampung, 2011.
14. Wirjono Prodjodikoro. *Asas-Asas Hukum Pidana di Indonesia*, Refika Aditama, Bandung, 2008.
15. Erdianto Efendi. *Hukum Pidna Indonesia*, PT Refika Aditama, Bandung, 2011.
16. Chairul Huda. *Tiada Pidana Tanpa Kesalahan Menuju Kepada Tiada Pertanggungjawaban Pidana Tanpa Kesalahan*, PT Kencana, Jakarta, 2006.
17. PAF Lamintang. *Dasar-Dasar Hukum Pidana Indonesia*, Cetakan III, PT Citra Aditya Bakti, Bandung, 1997.
18. Adami Chazawi. *Pelajaran Hukum Pidana, Bagian 1*, PT Raja Grapindo Persada, Jakarta, 2007.
19. R Sugandhi. *KUHP dan Penjelasannya*, Usaha Nasional, Surabaya, 1981.
20. Oemar Seno Adji. *Perkembangan Delik Pers di Indonesia*, Jakarta, Erlangga, 1990.
21. Moh. Anwar. *Hukum Pidana Bagian Khusus* Bandung: Citra Aditya Bakti, 1994.
22. Ari Wibowo. *Kebijakan Kriminalisasi Delik Pencemaran Nama Baik Di Indonesia*, Jurnal Pandecta, 2012, 7(1).
23. Adam Chazawi. *Pelajaran Hukum Pidana Bagian 2*, PT. Raja Grafindo Persada, 2007.
24. Muladi-Barda Nawawi Arief. *Teori-Teori dan Kebijakan Pidana*, Alumni, Bandung, 1984.
25. Muladi. *Dampak Disparitas Pidana dan Usaha mengatasinya*, Alumni, Bandung, 1991.
26. Harkristuti Harkrisnowo. "Rekonstruksi Konsep Pidana: Suatu Gugatan Terhadap Proses Legislasi dan Pidana di Indonesia", *Majalah KHN Newsletter*, Edisi, 2003.
27. Oemar Seno Adji. *Hukum-Hukum Pidana*, Erlangga, Jakarta, 1984.
28. Harkristuti Harkrsnowo. "Rekonstruksi Konsep Pidana: Suatu Gugatan terhadap Proses Legislasi dan Pidana di Indonesia", dalam *majalah KHN Newsletter*, Edisi, 2003.
29. Todung Mulya Lubis. *Kontroversi Hukuman Mati*, Kompas Media Nusantara, Jakarta, 2009.
30. Peter Mahmud Marzuki. *Penelitian Hukum*, Kencana, Jakarta, 2022.