

## Controversial Criminal Punishment for Victim of the Spread of Immoral Chat



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**ABSTRACT.** The purpose of this research is to (1) analyze the Supreme Court's consideration of victims of the spread of sordid chatter in the Supreme Court's decision Number 574K / PID.SUS / 2018, and (2) analyze the arguments of the Public Prosecutor regarding the offense Article 27 paragraph (1) juncto Article 45 paragraph (1) of the Information and Electronic Transaction Law in decision No. 574K / PID.SUS / 2018. This type of research uses qualitative methods with a normative juridical approach. In this method, secondary data uses the decision of the Mataram District Court Number: 265 / Pid.Sus / 2017 / PN.MTR and the decision of the Supreme Court Number 574 K / Pid.Sus / 2018. Primary data to support this research were obtained from interviews of the Supreme Court of the Republic of Indonesia and the Institute for Criminal Justice Reform. Results and discussion of research (1) The values underlying the Supreme Court in the Supreme Court's decision Number 574K / PID.SUS / 2018 and (2) the Prosecutor's argument The Public Prosecutor related to offense Article 27 paragraph (1) jo Article 45 paragraph (1) of the Information and Electronic Transaction Law in the decision No. 574K / PID.SUS / 2018. Overall it can be concluded that (1) The value underlying the Supreme Court in passing this decision is that the judge tries to apply the benefits of the law. (2) The Public Prosecutor's Arguments in indicting or in prosecution cannot describe the offenses that are charged to the defendant, this is a serious record in the first-level court of the indictment and the demands of the Public Prosecutor are declared unproven on the defendant.

**KEYWORDS.** Punishment, Immoral Chat, Victim of Crime, Victimology

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## Introduction

The case began when Baiq Nuril still the honorary teacher at SMAN 7 Mataram, at that time Baiq Nuril harassed by former Principal via phone. However society assumes that She have an affair, then Baiq Nuril record to prove that the relationship is not as charged. The tapes were distributed to colleagues Baiq when he tells about to make things as evidence. The former principal of SMAN 7 Mataram reported Baiq Nuril because he he did not accept the tape was scattered. At the first trial at the Mataram District Court with case number 265 / Pid.Sus / 2017 / PN. MTR., She was declared not guilty because it did not fulfill the elements of Article 27 paragraph (1) of Law No. 11 of 2008 concerning Electronic Information and Transactions. The prosecutor appealed to the Supreme Court, and different results came out and said She was guilty. Based on the background that has been described, the author is interested in conducting a research concerning Criminal Punishment on Victim of the Spread of Immoral Chat (Study of Supreme Court Decision Number 574 K/Pid.Sus/2018) with the following problem formulations, *first* what value lies behind the Supreme Court of the punishment penalties against the decision No. 574 K / PID.SUS / 2018 and *second* how the argument of prosecutor offense related elements of Article

27 paragraph (1) in conjunction with Article 45 paragraph (1) of the Law on Information and Electronic Transactions against the decision No. 574K / PID.SUS / 2018?

This study aims to: (1) analyze the Supreme Court's consideration of victims of the spread of Immoral Chat in the Supreme Court decision Number 574K / PID.SUS / 2018 and (2) Analyze the Prosecutor's argument regarding the offense of Article 27 paragraph (1) in conjunction with Article 45 paragraph (1) of Information and Electronic Transactions law in decision Number 574 K / PID.SUS / 2018. The theory used in this research is justice, certainty, legal benefit. The three legal values raised by Gustav Radbruch are always echoed in lecture halls which have a strong meaning to create laws that are good for the nation and state. Furthermore, justice and certainty are two values that are interrelated in law. The discussion in the entity space as the syringe law of these two values seems to be a conflict, so that in philosophy it means the search for just certainty or certain justice.<sup>1</sup>

## Method

The research approach used in this research is a qualitative research approach with a normative juridical research type. The focus of research is the analysis of judges' considerations in the Supreme Court Decision No. 574 K / Pid.Sus / 2018 and the arguments of the public prosecutor regarding the articles accused. This research produces a series of descriptions that are descriptive-analysis in nature, where descriptive means describing an object in accordance with reality in detail, systematically and thoroughly regarding the decision of the Supreme Court No. 574 K / Pid.Sus / 2018. While analytical itself means describing or describing the data obtained normatively and empirically with theory and thematic which are then used to thoroughly analyze the problems that occur after the research is carried out.

This research was conducted by examining through library materials, journals, laws and other sources and supported by interviews with Mr. H. Suharto S.H., M.Hum. Junior Registrar for Special Crimes at the Supreme Court of the Republic of Indonesia and Ms. Genoveva A.K. Sheila Maya S.H. Researcher at the Institute for Criminal Justice Reform. The validity of the data from this research was obtained by the writer using one form of

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<sup>1</sup> Sidharta, *Reformasi Peradilan dan Tanggung Jawab Negara, Bunga Rampai Komisi Yudisial, Putusan Hakim: Antara Keadilan, Kepastian Hukum, dan Kemanfaatan*, Jakarta, Komisi Yudisial Republik Indonesia, 2010, pp. 3-5.

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triangulation, including triangulation with sources. In triangulation with this source, the author can meet the predetermined criteria.

## Values underlying the Supreme Court in a Convict

According to Ali Masyhar, crime today is no longer focused on conventional-based crimes such as theft, murder, and so on. This is also in line with the development of increasingly advanced times, crimes in the world of technology cannot be handled only in a conventional way through our current Criminal Code. So that in enforcing the law (especially criminal law) judges are expected to be able to compensate, this certainly requires extraordinary law enforcement efforts.<sup>2</sup> The ability of Indonesian criminal law still has limitations in overcoming crimes, our criminal law also lacks an adaptive attitude in responding to developments that occur in society.

Masyhar then explained that the law exists to regulate human life, including human interaction. The history of human life was originally the creature "*homo homini lupus*" which is a reflection of uncivilized humans. A cultured nation will have an attitude of respect for each other, because that is called respecting differences. A person or group of people who cannot accept pluralism, respect others, affirm their own desires, are reflections of uncivilization and deserve criticism for endangering the concept of peace which is then called crime.<sup>3</sup>

### 1. Background of the Case

Baiq Nuril received a phone call from the former principal of SMAN 7 Mataram Haji Muslim in August 2012, during which Haji Muslim shared his personal secret with Mrs. Nuril over the phone. Mrs. Nuril, without the

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<sup>2</sup> Ali Masyhar, "Formulation Model of Retroactive In the World (Comparative Study with Indonesian Penal Code)", *South East Asia Journal of Contemporary Business, Economics and Law*, Vol. 12 No. 4, 2017, pp. 25-26. For further reading concerning to criminal law, human rights, and punishment, please also see Emi Nugraheni Solihah and Ali Masyhar, "The Implementation of Capital Punishment in Indonesia: The Human Rights Discourse", *Journal of Law and Legal Reform* Vol. 2 No. 2, 2021, pp. 321-28; Ridwan Arifin, Ali Masyhar, and Btari Amira, "The Invisible Big Waves: How Indonesia Combat with Radicalism and Terrorism in Global Perspective", *HIKMATUNA* Vol. 6 No.1, 2020, pp. 105-121; Ali Masyhar, "Balancing Principles of Legality in Teaching Legal Studies", *The Indonesian Journal of International Clinical Legal Education*, Vol. 1 No. 3, 2019. <https://doi.org/10.15294/iccle.v1i01.20709>.

<sup>3</sup> Ali Masyhar, "Regeneration modus and Strategy of Terrorism", *South East Asia Journal of Contemporary Business, Economics and Law*, Vol 18 No. 4. 2019, pp. 13-14.

knowledge of Haji Muslim, recorded the conversation. December 2014, Mrs. Nuril was delivered by Husnul Aini to meet Lalu Agus Rofiq to ask for a phone that had been borrowed, a few hours after that came Haji Imam Mudawin and She said that She had something to say. Mrs. Nuril did not give this recording for a moment, this is because Mrs. Nuril is afraid if bad thing happens. Haji Imam Mudawin on every occasion kept asking Nuril to submit the recording on the grounds that the recording was to complete the evidence for the report to be made to the DPRD.

The recording was obtained by Haji Imam Mudawin, after a period of time the recording of the actual report material to the DPRD was scattered in the SMAN 7 Mataram environment. Nuril and Haji Imam Mudawin were contacted by the Head of the Mataram City Education and Youth Office to ask about the scattered recordings, which led to Haji Muslim's dismissal from his position as Principal of the SMAN 7 Mataram School. Haji Muslim who did not accept his recordings was scattered then reported Nuril to the Mataram Police on suspicion of committing a criminal act of Article 27 paragraph (1) of Law No. 11 of 2008 concerning Information and Electronic Transactions (ITE).

## ***2. History of the Case***

Nuril was reported on March 17, 2015 at the Mataram Police, on March 27 2017 Nuril's case was only investigated by investigators. The first trial at the Mataram District Court was held on May 4, 2017 and the case was decided at the first stage on July 19, 2017. Mrs. Nuril was charged by the Prosecutor of violating Article 27 (1) of Law Number 11 of 2008 j.o. Law Number 16 of 2016 concerning Electronic Information and Transactions. At the first level, Baiq Nuril Maknun was released because the panel of judges considered himself not legally and convincingly proven to have violated Article 27 (1) of the ITE Law as charged by the prosecutor.

## ***3. The Charges Applied***

The criminal indictment letter dated June 14 2017 by the public prosecutor explains that the defendant's actions have been legally and convincingly proven to have violated Article 27 paragraph (1) jo. Article 45 paragraph (1) of Law Number 11 Year 2008 concerning Electronic Information and Transactions. In the same indictment, the public prosecutor charged Nuril with a sentence of 6 (six) months and a fine of Rp.

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500,000,000.00 (five hundred million rupiah) a subsidiary of 3 (three) months in prison.

Analyzing the charges applied in this case, it is very clear that the Public Prosecutor in this case is using a subsidiary type of indictment. This is because there is no specificity in the indictment which is only one article which was imposed on Mrs. Nuril. A single indictment itself is sufficient to formulate an indictment in the form of a single letter, namely a clear description that fulfills the formal and material requirements stipulated in Article 143 paragraph (2) of the Criminal Procedure Code.<sup>4</sup>

## 4. Supreme Court Decision

The legal education system has been designed in such a way as to strengthen the legal system of continental Europe which is clearly not the original legal system of the Indonesian nation. Finally, it is appropriate if there is a conflict between the laws carried out by the state and the existing laws and living for a long time in the community. So a big question arises whether law enforcement officials read the law more in the arena of black over white, rigid, rigid and prioritize the principle of legal certainty while justice is ignored<sup>5</sup>. The author will analyze the values contained in this decision along with the juridical and non-juridical aspects.

### A. Juridical Aspect

The existence of a juridical aspect is intended so that the Judge in saying his consideration that observes the facts of the trial and the applicable provisions must be included in the decision so that the decision is not null and void by law.<sup>6</sup>

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<sup>4</sup> M. Yahya Harahap, *Pembahasan Permasalahan dan Penerapan KUHAP*, Jakarta: Sinar Grafika, 2013, p. 399.

<sup>5</sup> Ali Masyhar, *Pergulatan Kebijakan Hukum Pidana dalam Ranah Tatahan Sosial*, 2008, Semarang, Unnes Press, p. 20.

<sup>6</sup> M. Yahya Harahap, *Op.cit*, p. 360. For further reading please also see Ni Luh Ariningsih Sari, "Analisis Putusan Mahkamah Agung No. 574. K/Pid. Sus/2018 Pada Kasus Baiq Nuril Maknun (Ditinjau dari Konsep Keadilan)", *Media Keadilan: Jurnal Ilmu Hukum* Vol. 10 No.1, 2019), pp. 1-16; Rahmat Nopriadi, "Analisis Putusan MA No. 574. K/PID. SUS/2018. pada Kasus Baiq Nuril Maknun Ditinjau dari Sosiologi Hukum (Amnesti Presiden)", *Jurnal Sagacious* Vol. 4 No. 2, 2018, pp.73-80; Aditya Yuli Sulistyawan, "Berhukum Secara Objektif Pada Kasus Baiq Nuril: Suatu Telaah Filsafat Hukum Melalui Kajian Paradigmatik", *Humani (Hukum dan Masyarakat Madani)* Vol. 8 No. 2, 2018, pp. 187-200; Reda Manthovani, and Kukuh Tejomurti, "A Holistic Approach of Amnesty Application for Baiq Nuril Maknun in The Framework of Constitutional Law of Indonesia", *Yustisia Jurnal Hukum* Vol. 8 No. 2, 2019, pp. 277-291; Hanif Fudin Azhar, "Menakar Keadilan Putusan Hakim Terhadap

The identity of the defendant is written in full in the decision of the Mataram District Court as well as in the decision of the Supreme Court of the Republic of Indonesia. History of Nuril's detention, she was detained at the State Detention Center and was subsequently detained in city custody from 31 May 2017 to 26 July 2017. The charges applied were a single indictment with one article, namely Article 27 paragraph (1) of Law of the Republic of Indonesia Number 11 Year 2008 concerning Electronic Information and Transactions. The verdict of the Public Prosecutor stated that Nuril was found guilty according to the prosecutor's indictment, sentenced him to a 6 (six) month imprisonment reduced while he was in detention and paid a fine of five hundred million rupiah in addition to three months in prison. The District Court's decision stated that Nuril was not proven to have been charged by the prosecutor of restoring the defendant's rights in his capacity, position, dignity and dignity. There is no decision of the High Court, this is because this case did not go through the High Court stage, this is in accordance with the provisions of Article 244 of the Criminal Procedure Code which reads "against decisions of criminal cases given at the last level by other courts, apart from filing a request for cassation to the Supreme Court except for decisions. free". However, with the Constitutional Court decision No. 114 / PUU-X / 2012 in 2013 which states the phrase "except for acquittal" in Article 244 of Law Number 8 of 1981 concerning Criminal Procedure Law does not have binding legal force, so the authority to examine cassation requests against free decisions is owned. The reason for the appeal for cassation is that the Public Prosecutor has the reason that the Mataram District Court is considered incorrect and wrong in implementing legal regulations or does not apply the law that should have been issued an acquittal and declared not legally proven and convincingly guilty of the indictment the public prosecutor made The decision was made based on inaccurate legal conclusions and considerations because the decision did not see the legal facts that were legally relevant properly, and did not see the legal facts revealed in the trial.

In this decision, all the juridical aspects contained in the Supreme Court Decision No. 574 K / Pid.Sus / 2018 is in accordance with what is required in KUHAP in Article 197 paragraph (1) KUHAP and in accordance with Article 51 paragraph (2) of Law No. 14 of 1985 concerning the Supreme Court.

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Kasus Baiq Nuril Perspektif Maqāṣid Asy-Syari'ah", *Jurnal Ilmiah Mahasiswa Raushan Fikr* Vol. 9 No.1, 2020, pp. 38-56.

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## **B. Non Juridical Aspect**

Apart from the juridical aspect, the judge also considers non-juridical aspects in the basis of imposing a sentence. The first aspect is Baiq Nuril's background, he was an honorary employee of SMAN 7 Matararam before being fired. She lives her life accompanied by her husband and two children. This changed when the Principal of SMAN 7 Mataram continued to say immoral things. Then the issue arose that Nuril had a special relationship with the school principal. The second aspect is the impact of the defendant's actions, the most obvious impact of the defendant's actions is that the Witness Haji Muslim felt ashamed and was dismissed from his position as school principal. However, for the wider community it does not really have any impact on social order. The third aspect is the condition experienced by Nuril who was dismissed from his job by witness Haji Muslim before being detained by the police. Nuril is traumatized because this condition should not make Nuril the guilty person.

This case becomes interesting when the judges make interpretations that should not have been carried out by the Supreme Court, so that the Supreme Court is considered to have overstepped the powers that should only have come to the *judex juris*. In the author's evidence that the Supreme Court Judge overstepped his authority so that he carried out an interpretation that led to *judex facti* contained in the judges' legal considerations which read:

*“Although at first the Defendant was not willing to hand over the conversation to witness Haji Imam Mudawin, but in the end the Defendant was willing to hand over the recorded conversation on the Defendant's cellphone because the Defendant was fully aware that by sending and transferring or transferring the contents of the recorded conversation on his cellphone It is most likely that the defendant on the Defendant's laptop and / or it can be ascertained that or at least the witness Haji Imam Mudawin will be able to distribute and / or transmit and / or make Electronic Information and / or Electronic Documents accessible in the form of the contents of the recorded conversations which contain immorality violations.”*

This is where there is an interpretation made by the Supreme Court which if it is concluded:

*“Nuril had previously fully realized that the deeds he had committed were likely or at least certain that Haji Imam Mudawin could spread them too.”*

Seeing the fact in the Mataram District Court that Nuril did not immediately give the cellphone containing the recording, Nuril gave his cellphone because it had been repeatedly asked by Witnesses Haji Imam Mudawin and Nuril advised that the cellphone containing the recording was used as a report to the DPRD.

The fact that the Supreme Court then concluded was that the recordings owned by Nuril in his cellphone were transferred to Nuril's laptop. Whereas in the legal facts in the trial of the Mataram District Court the laptop belonged to witness Haji Imam Mudawin, this fact has been mentioned in the consideration of the Mataram District Court decision No. 265 / Pid.Sus / 2017PN. MTR. on page 16. The judge at the Mataram District Court explained that it was proven that the witness Imam Mudawin plugged the data cable from Nuril's cellphone into a laptop device belonging to the Toshiba brand belonging to Haji Imam Mudawin.

## ***5. Underlying Value***

The decision issued by the judge is the result of a trial process in court. Whereas the court is the place for people who seek justice, so that the judge's decision should fulfill the expectations of justice seekers. In relation to this, three elements must be reflected, namely justice, legal certainty, benefit in deciding the case<sup>7</sup>. Regarding 3 legal values, the value of justice is the value that is most often debated. A person feels his sense of justice has been fulfilled for a court decision, but sometimes not for the other party. Equality before the law is part of a sense of justice, but for some people it is even considered unfair<sup>8</sup>. During World War II, Nazi-controlled Germany used the certainty value theory to legalize inhuman practices by making rules that

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<sup>7</sup> Margono, *Asas Keadilan, Kemanfaatan dan Kepastian Hukum dalam Putusan Hakim*, Jakarta, Sinar Grafika, 2012, pp. 37-38.

<sup>8</sup> Ali Masyhar, *Op.cit.* p. 15.

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justified cruel acts. Radbruch finally fixed his theoretical position above by placing the value of justice in a position above other legal values.<sup>9</sup>

Judges should include several aspects in the decision. Some of these aspects are a description of the process of social life which is part of social control, an embodiment of applicable law and essentially useful for every person or group as well as the state, a balanced manifestation of legal provisions (*das Sollen*) and reality on the ground *Sein*), a picture of the ideal awareness between law and social change, has a benefit for those who litigate, and in the future it should not cause a new conflict for the litigants and society.<sup>10</sup>

The law is harsh, but as it sounds, this is an expression of the adage "*Lex Dura, sed tamen scripta*". This adagium is very often heard for adherents of legal certainty. The public really hopes that legal certainty is because with legal certainty, the community will be more orderly. The task of the law itself is to create legal certainty because it aims at public order<sup>11</sup>. The public will feel the benefit of the judge's own decision when the judge is not only the mouthpiece of the law alone (*La bouche da la loi*), the judge is required to be able to decide something by not applying the law textually but only pursuing justice. Considering that the judge's decision will later become a law, the judge should maintain a balance in society by restoring the social order to its original state. The community really hopes that the settlement of cases through the court will bring benefits or benefits to life together in society. The hope is that at least the judge's decision can restore the balance of the social order, meaning that the guilty party is sanctioned, while the injured party will receive compensation or get what is due to him.<sup>12</sup>

Suharto S.H., M.Hum. (Junior Registrar for Special Crimes at the Supreme Court of the Republic of Indonesia) said that in making a decision, the judge prioritizes the values of justice. This also applies if there is a

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<sup>9</sup> Hardi Munte, *Model Penyelesaian Sengketa Administrasi Pilkada*. Medan, Puspantara, 2017, p. 26.

<sup>10</sup> Rommy Haryono Djojarahardjo, "Mewujudkan Aspek Keadilan Dalam Putusan Hakim Di Peradilan Perdata". *Jurnal Media Hukum dan Peradilan* Vol. 5 No. 1, 2019, p. 95.

<sup>11</sup> Sudikno Mertokusumo, *Mengenal Hukum Suatu Pengantar*. Yogyakarta, Liberty, 2005, p. 160.

<sup>12</sup> Fence M Wantu, "Mewujudkan Kepastian Hukum, Keadilan dan Kemanfaatan dalam Putusan Hakim di Peradilan Perdata", *Jurnal Dinamika Hukum* Vol 12 No. 3, 2012, p. 486.

conflict between the three values described by Radbruch, the Judge is obliged to prioritize the value of justice.<sup>13</sup>

The value that is the reason for the imposition of crimes carried out by the Supreme Court based on the Electronic Transaction Information Law is to be in line with what the government aims at developing technology using legal means and a set of rules, so that technology and information can be utilized and carried out safely so that misuse does not occur. Keeping in mind the cultural and religious values in society, this is based on the fact that today's technology in addition to presenting information for the good of humans is also a tool that can be said to be the most frequent means of committing acts against the law. The Supreme Court hopes that this criminalization can be used as an education for the public in Indonesia, especially for Nuril to be more vigilant when using electronic media, especially when it comes to a person's personal data or interpersonal conversations, where the use of that data should have the consent of the person concerned.

The Supreme Court is of the view that in this case we have to look at a broader aspect. Suharto emphasized that this case must be seen in a series of events, in seeing these events must be linked to the theory of causality. Simply put, when a teacher punishes a student for standing in a room then an earthquake occurs so that the child dies from being crushed by rubble, is the teacher responsible. According to Suharto, the theory of causality itself is useful for assessing who is responsible to find and determine whether or not there is a causal relationship between actions and consequences that arise in this case. The author in this analysis uses the theory of cause and effect, then the most likely thing is that the Supreme Court uses the theory of causality. In this theory itself, in this theory, every condition or factor that comes together to cause an effect and cannot be eliminated from a series of factors that give rise to an effect must be considered an effect, this teaching has an impact on the expansion of accountability in actions<sup>14</sup>. This theory is very easy to apply because it will not cause problems and attract widely the factors that influence it.

Preamble to Law Number 19 of 2016 which is an amendment to Law Number 11 of 2008, it explains that the law was amended on the basis that at that time many people were detained for committing a defamation. Articles related to defamation were amended so that the public would not easily fall

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<sup>13</sup> Personal Interview with Panmud PidSus MA RI 14 November 2019.

<sup>14</sup> Sudarto, *Hukum Pidana I*. Semarang, Yayasan Sudarto, 2013, pp. 113-114.

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into the offense of the law, however, there is one article regarding this decency which (can be considered) escaped the change. According to the author's analysis, if at that time the article on decency was also changed by explaining the meaning of decency which the author felt was too broad and ambiguous then it was not impossible that Nuril could escape from criminal conviction by the Supreme Court.

Suharto explained that he saw this case with criminal responsibility. Even though Nuril did not give it through an electronic system and it was not him who distributed it, did his criminal responsibility just disappear. In seeing this, we have to look once again at criminal responsibility, Van Hamel explained that criminal responsibility is a normal condition and psychological maturity which brings 3 forms of ability to understand the meaning and consequences of his actions, understand that his actions cannot be justified or prohibited by society, and determined by the ability to act.<sup>15</sup>

Seeing the perpetrator's mistake, the judge must ascertain whether he is able to take responsibility for his actions. If the judge makes a decision not seeing whether he is an adult or not, of course this is a problem. The ability to take responsibility itself is not clearly explained in the Criminal Code. However, in Article 44, Article 48, Article 49, Article 50, and Article 51 it describes someone who is unable to take responsibility (negative criminal responsibility). The ability to take responsibility alone is not an absolute element in every criminal act, it is only prejudiced against each suspect. If the results of the examination (mental disorders or imperfect growth) cannot be accounted for, then it is clear that he should not be convicted.<sup>16</sup>

The legal analysis of this decision is that the panel of judges does not accommodate the values of justice, certainty, although they still try to accommodate the value of legal benefits. In the verdict pronounced by the Panel of Judges of the Supreme Court No: 574K / Pid.Sus / 2018, it is very unfortunate that the judge later stated himself that Nuril was deemed aware that the cellphone containing the recording could be distributed to the public. The role of the Supreme Court judge as the *judex juris* in adjudicating the Nuril case aims to correct errors in the application of the law that are alleged to have been committed by the Mataram District Court, considering that his

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<sup>15</sup> Dwidja Priyatno, *Pertanggungjawaban Pidana Korporasi dalam Peraturan Perundang-Undangan Khusus di Luar KUHP di Indonesia*, Jakarta, Sinar Grafika, 2017, pp. 15-16.

<sup>16</sup> Martiman Prodjohamidjojo, *Memahami Dasar-Dasar Hukum Pidana*, Jakarta, Pradnya Paramita, 1997, pp. 36-37.

main role in the context of examining and deciding the appeal for cassation is as a *judex juris*.

Judging from the attitude of the Supreme Court by issuing decisions that can create unity in the application of law, as is the obligation of the Supreme Court under Article 253 paragraph (1) of the Criminal Procedure Code, cassation legal measures have the aim of creating a unity in the application of law by means of decisions that are contrary to law are annulled or if the *judex factie* has wrongly applied the law, while the decision of the Supreme Court in the case is to grant the appeal of the public prosecutor on the basis that the appeal for cassation is not based on the provisions in Article 248 paragraph (3) of the Criminal Procedure Code, but rather bases the cassation memory which focuses on the facts of the trial which in this case the validity has been checked and as a basis in deciding Nuril to be free in decision No. 265 / Pid.Sus / 2017 / PN.MTR by the Mataram District Court.

Seeing the legal certainty based on the law, then referring to the elements of Article 27 paragraph (1) of the Electronic and Transaction Information Law, Nuril did not fulfill all the elements of offense in that article. Legal certainty should be carried out with legal facts at the trial of the Mataram District Court explaining that the recording originates from electronic digital evidence which cannot be guaranteed its integrity and cannot be accounted for as valid evidence. Putting the evidence aside from the decision in the legal logic of the consideration of the Supreme Court Judges should guarantee legal certainty.

The next element is justice. Justice is indeed subjective, conditional and bound by time and space. It is possible that people who steal 3 eggs are not punished and are judged to be fair. Public opinion itself sometimes creates justice that can form a measure of justice so that it views court decisions as unfair. For judges, justice does not have to be favored by the crowd or the majority, sometimes it even seems to contradict public opinion but that does not mean it is unfair. Even though justice is considered subjective, justice here must contain aspects of stability which means order and peace for the community. In this consideration, it appears that the Judge does not see this aspect. That the judge said Nuril was guilty because he was deemed to know that the recording could be distributed by the witness Haji Imam Mudawin, even though Nuril had advised that this recording was only for material to report to DRPD and not to be disseminated. If you look at it from another point of view, Nuril is in fact a victim whose chatter spreads by other people.

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Legal benefit is the last aspect, because this benefit can have an impact on the wider community. The analysis that the author states here is that the aspect of legal benefit is attempted to be fulfilled by the Supreme Court Judge, by means of the Judge giving considerations to the public to be more careful in using technology.<sup>17</sup>

Seeing the legal considerations described above, the author sees that the Supreme Court is trying to create legal benefits. In addition to creating legal benefits, the Supreme Court strives to curb the existing legal culture in society related to technological advances. It should be noted that in the facts the trial explained that Nuril was not the one who carried out the act of transmitting or distributing, but someone else. Furthermore, if the Supreme Court is of the opinion that the act committed by Nuril, namely handing over a cellphone to witness Haji Imam Mudawin, is an act of making it accessible, the author assumes that this is not true, because it refers to the offense element in Article 27 paragraph (1) of the Information and Electronic Transactions law must be carried out in an electronic system. What was done by Mrs. Nuril, namely handing over the cellphone, was not included in the actions carried out in the electronic system. The active actions of moving, transferring, sending and distributing which were carried out by Haji Imam Mudawin, Mulhakim, and Muhajidin were then given to Hj. Indah Deporwati, Muhalim, Lalu Wirebakti, Hanafi, Sukrian, and H. Isin could be classified as "*distributing*" and "*transmitting*" and "*making accessible*" Electronic Information".

Evidence of electronic documents through validation of electronic digital evidence, does not find data related to the alleged criminal act in accordance with the elements of offense in Article 27 paragraph (1). This statement was proven by the Digital Forensic Examination Team for the IT and Cybercrime Sub-Directorate for Economic Crime and Special Criminal Investigation at the National Police Criminal Investigation Unit with General

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<sup>17</sup> Please also see Aris Hardinanto, and Zumrotul Jannah, "The Usage of Forensic Computer Report on The Case of Baiq Nuril Maknun", *International Conference on Social Science 2019 (ICSS 2019)*. Atlantis Press, 2019; Faidlur Rohmah, and Natangsa Surbakti, *Analisis Tindak Pidana ITE Berdasarkan Perkara Baiq Nuril*. Diss. Universitas Muhammadiyah Surakarta, 2020; Soraya Ramli, Faiz Afio Dhiarafah, and Diah Merrita, "A Case of Baiq Nuril in Media: Sara Mills' Critical Discourse Analysis", *Lingua: Jurnal Ilmiah* Vol. 15 No. 2, 2019, pp. 101-115; Febriana, Asyri, Muhammad Rif'an, and Tria Vista Maghfira, "Baiq Nuril's Amnesty Impacts on Legal Certainty in Indonesia", *Unram Law Review* Vol. 4 No.1, 2020, pp. 40-46.

Data Records on the Results of Examinations related to Digital Evidence Number 220-XII-2016-CYBER on 5 (five) sub-digital evidences.

## **Argument from the prosecutor regarding the element of offense in Article 27 paragraph (1) jo Article 45 paragraph (1) of the Electronic and Transaction Information Law**

The letter of prosecution made by the Public Prosecutor states that Mrs. Nuril is legally and convincingly proven guilty of committing a criminal act "intentionally and without the right to distribute and / or transmit and / or make Electronic Information and / or Electronic Documents accessible with contents that violate decency. "As the indictment of the public prosecutor violates Article 27 paragraph (1) jo. Article 45 paragraph (1) of Law Number 11 of 2008 concerning Electronic Information and Transactions with the argument that the act of handing over a cellphone owned to Haji Imam Mudawin is an act that fulfills the element of offense making accessible content that violates decency.

The public prosecutor charged Nuril with a single indictment, the prosecutor also did not explain in more detail why and why Nuril was charged with this article. In this case the author wants to analyze the elements of the offense in the article. Examining the elements of the offense in Article 27 paragraph (1) of Law No. 11 of 2008 concerning Electronic Information and Transactions, it will be divided into Intentionally and without Rights, Distributing and / or transmitting and / or making Electronic information and / or Electronic Documents accessible, as well as Content that violates decency.

In essence, in Criminal Law, the law must be interpreted in accordance with the law itself and because Law Number 11 of 2008 concerning Electronic Information and Transactions does not provide an official explanation of the meaning of "on purpose", then looking at the good interpretation of the doctrine of Criminal Law and according to the needs of criminal justice practice in Indonesia. Every element of deliberation in the formulation of a criminal act according to MvT is always aimed at all the elements that are behind the words `` intentionally " always suffers from that deliberate element. According to the doctrine of Criminal Law, if a formulation of a criminal act is used the term "deliberately", it will be divided into 2 (two) forms, namely *Dolus Malus* and *Dolus Eventualis*. *Dolus Malus*

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is in the case of a person committing a criminal act not only does he want that action, but also understands if his act is prohibited by law and is punishable by punishment<sup>18</sup>. Meanwhile, Dolus Eventualis is intentional as a form of possibility, namely an understanding to do an act which is known to result from another action that he does not want from his action, but the maker continues to do the action.<sup>19</sup>

Deliberate itself has 3 features, namely intentionally with the intention that this means that the perpetrator knows and wants the consequences of the crime. Deliberately Deliberate as a possibility when the consequences of the criminal act of the perpetrator are certain to occur, but also not certain. While deliberate as certainty is when the perpetrator has guessed and understood the consequences of his actions and even the effects of his actions.<sup>20</sup>

Proof of whether Nuril carried out an act "intentionally and without rights" must consider the element of the offense "distributing and / or transmitting and / or making Electronic Information and / or Electronic Documents accessible". This is because in a statutory formula, if the offense is behind the element "intentionally", then all the elements of the offense are covered by opzets from the offender. The analysis that the author conveyed Nuril did not know that the recording would be widespread, this was because Nuril told the recording to Haji Mudawin to be used as evidence for reports to the DPRD. Then the recording of the chat by Haji Mudawin was transferred to his laptop and distributed to other people who were not in his interest. Looking at the construction of criminal law that sees the core element is "on purpose", in this case, whether Nuril's actions of "distributing and / or transmitting and / or making Electronic information and / or Electronic Documents accessible" are indeed done on purpose, as well as the act of "distributing and / or transmitting and / or making accessible Electronic information and / or Electronic Documents" which Nuril wants and knows is prohibited, but is still being done.

The author argues that what Nuril did was actually not intentional, but committed "unconscious negligence". Nuril could indeed imagine Imam Mudawin spreading it for the sake of his complaint to the DPRD, but Nuril did not imagine if it turned out that Haji Imam Mudawin had spread it to

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<sup>18</sup> S.R. Sianturi, *Asas-Asas Hukum Pidana di Indonesia dan Penerapannya*, Jakarta, Alumni Ahaem-Petehaem, 1996, p. 163.

<sup>19</sup> P.A.F. Lamintang, *Dasar-Dasar Hukum Pidana Indonesia*, Bandung, Sinar Baru, 1984, p. 186.

<sup>20</sup> Sudarto. *Op.cit.* p. 237.

other people. If the case of Mrs. Nuril continues to be constructed as part of the elements on purpose, Nuril still has the rights to the recording.

Phrases in and / or at any material action in Article 27 paragraph (1) of the Law on Electronic Information and Transactions results in the nature of the elements in this article being an alternative - cumulative. The meaning of this alternative - cumulative nature is that if all material actions are fulfilled (cumulative) or only one material action is fulfilled (alternative), then according to the law it is considered proven. The element of distribution in the explanation of the Transaction and Electronic Information Law is sending and / or distributing Electronic Information and / or Electronic Documents intended for the public using Electronic Systems. In the world of Information Technology, explaining what is meant by distributing is sharing copies, copies that are shared can be received at the same time or different times. Furthermore, the element of transmitting in the explanation of the Transaction and Electronic Information Law is an act of sending Electronic Information and / or Electronic Documents which is addressed to one other party using an Electronic System. Transmission is part of the distribution of information in which there must be a receiver and a sender through the information transmission channel.

The explanation in the Transaction and Electronic Information Law regarding making accessible is an act other than distributing and transmitting using an electronic system means that results in electronic information or electronic documents being known to the public or other parties. In the explanation from the point of view of Information Technology, the phrase make accessible involves many parties. These parties can make publishing, intermediary, and so on. Article 1 point 4 explains that what is meant by "Electronic Documents" is all Electronic Information that is created, forwarded, sent, received, or stored in analog, digital, electromagnetic, optical, or the like, which can be seen, displayed, and / or heard. through a computer or electronic system, including but not limited to writing, sound, pictures, maps, designs, photographs or the like, letters, signs, numbers, access codes, symbols or perforations that have meaning or meaning or can be understood by someone who is able to understand them . The last element is the element. The key difference between this verse and other verses is the element of "content that violates morality". This is because all material actions contained in this article must have content elements that violate decency. The fundamental weakness in this element is that there is no explanation regarding content that violates decency in the Transaction and

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Electronic Information Law. Actions that violate decency are actually actions that destroy the sense of morality in society. The sense of decency that is attacked is actually what is considered as courtesy or a sense of courtesy by a group of people in society which injures the sense of immorality in all people in a society.

The elements described in the article clearly show that Nuril did not violate the act, this is evidenced by the fact that the trial at the first level was based on the testimony of Husnul Aini and Lalu Agus Rofiq who were present when Haji Imam Mudawin and Mrs. Nuril met at the office, it was clear that the distribution / transmission process in the indictment described by the public prosecutor it was carried out using the method of "inserting a data cable into Mrs. Nuril's cellphone, then the data cable was connected to the notebook belonging to the witness Haji Imam Mudawin" it was proven if Haji Imam Mudawin did this. Regarding Mrs. Nuril handing over a cellphone to Haji Imam Mudawin, it cannot be said that an activity as it is accused of distributing and / or transmitting and / or making it accessible, so that in the view of the author of the Supreme Court it is not correct to interpret Article 27 paragraph (1) and misunderstand that the actions which what Nuril did was not carried out through an electronic system like what the elements of this article should say. In terms of quality and validation of electronic digital evidence, it must meet the qualification requirements that all cumulative criteria must be met, namely accessible, can be displayed again, can be guaranteed its integrity, and can be accounted for as determined in Article 6 j.o. Article 5 Law Number 11 Year 2008 concerning Electronic Information and Transactions.

The key to distinguishing this verse from other verses is the element of "content that violates decency". This is because all material actions contained in this article must have content elements that violate decency. The fundamental weakness in this element is the absence of an explanation regarding content that violates decency in the Transaction and Electronic Information Law.

Actions that violate decency are actually actions that destroy the sense of morality in society. The sense of decency that is attacked is actually what is considered as courtesy or a sense of courtesy by a group of people in society which injures the sense of immorality in all people in a society. The author is of the opinion that if in the Transaction and Electronic Information Law if there is no explanation, then Article 103 of the Criminal Code applies which has an explanation "if the criminal law outside of the Criminal Code

does not specify otherwise, then Chapter I-VIII Book I of the Criminal Code applies to law the law." Article 281, Article 282 paragraph (1), and Article 283 paragraph (2) of the Criminal Code explain that what is meant by an offense of decency must be carried out in public or at least openly is the key in this analysis.

Table 1. The key to decency violation analysis

<b>Provision</b>	<b>Notes and explanation</b>
Article 281	By a maximum imprisonment of two years and eight months or a maximum fine of five hundred rupiahs: 1) anyone who intentionally and <b>openly</b> violates decency; 2) whoever deliberately and in front of others who is there is contrary to his will, violates decency.
Article 282 Paragraph (1)	Any person who broadcasts, displays or posts <b>in public</b> the writings, images or objects <b>whose contents are known to violate decency</b> , or who with the intention of broadcasting, showing or posting them <b>in public</b> , makes such writings, images or objects, brings them into the country, forward it, take it out of the country, or have supplies, or any person who publicly or by circulating the letter without being asked, offers it or shows it as obtainable, shall be punished by a maximum imprisonment of one year and six months or a maximum fine of three hundred rupiah.
Article 283 Paragraph (3)	Anyone who broadcasts, displays or posts <b>in public</b> writings, images or objects that violate decency, or who with the intention of broadcasting, showing or posting it <b>in public</b> makes, imports into the country, continues to take it out of the country, or is in stock, or Anyone who openly or by circulating letters without being asked, offers, or designates as obtainable, is threatened, if there is good reason for him to suspect that the writing, image or object violates decency, by a maximum penalty of nine months or a maximum fine of a lot of four thousand five hundred rupiah

Facts in the case of Nuril, what she did was done in a private space, so according to the analysis of the author, Nuril violates this element is considered inappropriate. This is based on the fact that the Electronic Transaction Information Law does not provide a clear picture of violating decency, so the Criminal Code applies because it is general in nature. When the Criminal Code is enacted, it must be understood that violating this decency must be declared publicly or in front of the public.

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In relation to the actions committed by Nuril, it must also be reviewed in the nature of being against the law. The teaching against formal law initially explained that an action is interpreted as unlawful when the action has fulfilled every element in the formulation of an offense according to statutory regulations. Material legal teachings explain that an action can or cannot be said to be against the law, not only seen by statutory regulations or written law, but must also be reviewed by unwritten law.<sup>21</sup>

The nature of violating material law in a negative function which is explained as a public judgment if an action is not wrong even though the formulation of the offense in a written regulation is fulfilled which has an impact on the lawsuits given to the perpetrator is eliminated<sup>22</sup>. Judging from this nature, Nuril's actions cannot be said to be a criminal act. This is in accordance with the Jurisprudence in decision No. 180 K / Pid / 2010 The Supreme Court has the opinion that the Supreme Court expresses its opinion that a series of words which are a warning to the public cannot be considered as an attempt to defame someone's good name. This is because what was conveyed in order to fight for the rights of the Defendant which was taken and the intent and purpose was a warning.

Using the jurisprudential construction above, actually can use the nature of opposing material laws in a negative function. Because in fact Nuril handed over the cellphone as evidence of a report to the DPRD. This also confirms that this act is a guarantee that the sexual harassment act will get justice. The actions that were carried out by Mrs. Nuril were not even appropriate for judicial proceedings. The statement that was conveyed based on the facts at the trial at the Mataram District Court, Nuril did not fulfill all the elements being accused or had reached the stage of the prosecution. Elements without rights, Mrs. Nuril has died in terms of prosecution. This can be understood from an almost similar case, namely the decision of the Supreme Court Number 22 / PK / Pid.Sus / 2011 with the defendant Prita Mulya Sari. In this verdict, Prita was charged with committing a criminal act of Article 27 paragraph (3) of Law No. 11 of 2008 concerning Electronic Information and Transaction, namely deliberately and without the right to distribute and / or transmit and / or make accessible Electronic Information and / or Electronic Documents that contain defamation and / or defamation,

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<sup>21</sup> Shinta Agustin, et.al., *Penjelasan Hukum: Penafsiran Unsur Melawan Hukum Dalam Pasal 2 Undang - Undang Pemberantasan Tindak Pidana Korupsi*, Jakarta, LeIP. 2016, pp. 25-30.

<sup>22</sup> Erdianto Effendi., *Hukum Pidana Indonesia, Suatu Pengantar*, Bandung, Refika Aditama, 2011, p. 118.

the Panel of Judges states that proven. Consideration The panel of judges approved Prita's statement which explained that her act of distributing, transmitting, making accessible electronic information that she did was a form of merely giving an “appeal” to the public, so that the public would not feel the complaints she experienced.

Using the same construction in Nuril's case by changing it to immoral content when it is done to give an appeal to the public so that what Prita feels does not happen to others, Nuril cannot be convicted. The important thing and the key to the case that must be considered is that the real victim is Nuril, who advises others about the occurrence of immoral acts in the form of sexual harassment.

## **Conclusion**

Based on the exposure in the previous chapters and field research, data and information have been obtained that describe the Judicial Analysis of the Imposition of Crime against Victims of the Spread of Nasty Chat (Study of the Supreme Court Decision No. 574K / PID.SUS / 2018), so that the explanation can be drawn The conclusion of the value behind the Supreme Court in passing this decision is that the judge tries to apply legal benefits. It is clear that the Supreme Court of Justice made this decision based on the value of benefit and formal justice for the defendant. The arguments of the public prosecutor in accusing or in the prosecution cannot describe the elements of the offense imposed on the defendant, this is a serious note in the first instance of the indictment court and the prosecutor's demands are declared not proven to be the defendant. In seeing the elements of offense to distribute, transmit, make accessible it must be understood in a system. So that if the act committed is not in the electronic system, it is clear that the law cannot be used.

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