STATE OF SAINT CHRISTOPHER NEVIS ANGUILLA:

(15)

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 7 of 1977

BETWEEN: MICHAEL O. POWELL - Defendant/Appellant

AND

ESMOND ST. JOHN PAYNE - Plaintiff/Respondent

Before: The Hon. Sir Maurice Davis, Q.C. - Chief Justice
The Honourable Mr. Justice Peterkin
The Honourable Mr. Justice Hewlett (Acting)

Appearances: Dr. W. Herbert for Appellant
T. Byron with him

F. Bryant for Respondent
C. Wilkin with him

1977, November 29 and 30
1978, March

J U D G M E N T

DAVIS, C.J.:

This is an appeal against the judgment of Glasgow J. awarding to the Plaintiff/Respondent the sum of $8,000 as damages for slander, along with an injunction restraining the Defendant/Appellant from further publishing the said or any similar words defamatory of the Plaintiff/Respondent.

The Plaintiff/Respondent is a minister of Government. The words complained of are at para. 2 of the statement of claim, and read:

> "The Ministers are looking after themselves, lining their pockets and fattening themselves, and not concerned about the people in this country. You all know what happen in Antigua. We been telling you about

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corruption on this platform a long time. Want to know what are these Ministers in Antigua charged with? They are charged with using public funds for their own personal benefit. You understand? Now good God, brothers and sisters, you seen any example in St. Kitts of Government Ministers using public funds for their own personal benefit? I remember Mr. Caines, Richard Caines, stood up on a platform and he mentioned that St. John Payne was building a house at Bird Rock and he mentioned about certain materials and Government truck and all the rest of it. And I said to myself, "Well, boy, I said". I sat there and I was frightened because I say, "Well, boy, St. John Payne goin' tek everything Caines got". But St. John Payne ain't touch that. He ain't touch it with a 10-foot pole. You know why? Because Caines was right! Caines was right! And if Caines hadn't checked his facts he would never have made a broad statement like that. So when he was talking he knew what he was talking about. And they couldn't, they ain't mention nothing about it. But these people in Antigua are charged, again let me remind you, with using public funds for their own private purposes".

At para. 4 of the defence the Defendant/Appellant pleaded as follows:

"4. In so far as the said words consist of statements of fact they are true in substance and in fact and in so far as the said words consist of expressions of opinion they are a fair comment without malice on the said facts which are a matter of Public interest."

Before the first witness was called on behalf of the Plaintiff/Respondent, counsel for the Defendant/Appellant sought and was granted leave to amend the defence by adding the following particulars at the end of para. 4 thereof:-

/"PARTICULARS.....

"PARTICULARS

1. The following words are statement of fact:-

(a) 'Want to know what are these Ministers in Antigua charged with? They are charged with using public funds for their own personal benefit'.

(b) 'I remember Mr. Caines, Richard Caines, stood up on a platform and he mentioned that St. John Payne was building a house at Bird Rock and he mentioned about certain materials and Government trucks and all the rest of it'.

2. The facts and matters relied on in support of the allegation and the words set out in (1) above are true are as follows:

(a) Ministers of Government in Antigua were charged with using public funds for their own benefit.

(b) Mr. Caines did say that St. John Payne was building a house at Bird Rock and Government trucks took materials there".

During the course of the trial application was made by Counsel for the Defendant/Appellant to further amend the pleadings by the addition to the particulars to para. 4 of a sub-para (c) after sub-para (b) of para. 2 thereof to read as follows:

"(c) St. John Payne did build a house at Bird Rock and Government trucks took materials there."

Counsel for the Plaintiff/Respondent objected to the amendment sought and leave to further amend the pleadings was refused by the Court.

Briefly, the facts are that on the night of the 27th February, 1977, P.C. Chapman was on duty at Pall Mall Square, Basseterre,

/having.....

having been specifically sent there by the Commissioner of Police to tape-record speeches made at a political meeting held by the People's Action Movement, a political party in opposition to the Government. Among the speeches tape-recorded by him was that of the Defendant/Appellant. At the trial P.C. Chapman was permitted by the Court to re-play on the same tape-recorder he had used that part of the Defendant/Appellant's speech which relates to the statement of claim. In his judgment the trial judge has recorded as one of his findings the following:

> "I have no hesitation in finding as a fact that the words I heard on the tape-recorder in Court were spoken by the defendant through the medium of a public address system and that the said words are substantially the same as those alleged in paragraph 2 of the Statement of Claim."

The trial judge also held that the words were capable of a meaning defamatory of the Plaintiff/Respondent, and were in fact defamatory of him. He found too that the words complained of were published falsely and maliciously. After dealing with certain aspects of the defence which he rejected he went on to assess damages in the amount stated.

The grounds of appeal are as follows:-

(1) That the learned trial judge erred in hearing the case when the summons for directions was not in order.

(2) That the learned trial Judge erred in refusing the application by the Defence that interrogatories be administered.

(3) That the learned trial Judge erred in admitting evidence of the tape recording.

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(4) That the learned trial Judge erred in refusing to admit evidence to show that the Plaintiff had used Government trucks to take materials to his building Site.

(5) That the findings of the learned trial Judge on the question of malice are contradictory and erroneous.

(6) That the learned trial Judge erred in finding that the action for slander lay without proof of special damage.

(7) That the decision is unreasonable having regard to the evidence.

(8) That the amount of damages awarded is excessive.

(9) That the ruling of the learned trial Judge in awarding costs to the Plaintiff is unreasonable.

At the hearing of the appeal, Counsel for the appellant abandoned grounds one, two and nine. He argued grounds three, four, five, six seven and eight of his Notice of Appeal, but having regard to the view which I take of the matter, I shall deal only with ground four.

On this ground, counsel for the appellant referred to the judgment of Glasgow, J., where the learned judge reproduced section 6 (3) of the West Indies Associated States Supreme Court (St. Christopher, Nevis and Anguilla) Act 1975 (No. 17 of 1975) and held that inasmuch as there is no provision in the 1975 Act or in any other enactment of the Legislature of the State or in the local rules of Court relating to the practice and procedure to be followed in a case where the defence is in the form of a rolled-up plea, therefore Order 82, Rule 3(2) of the English Rules applies. This rule reads as follows:

/"Where.....

> "Where in an action for libel or slander the defenadnt alleges, that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest or pleas to the like effect he must give particulars stating which of the words he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true".

He then submitted that it is a moot point as to whether this rule applies as there are local rules of Court vide Rules of the Supreme Court (Rules) 1970 which came into operation on the 17th April, 1971 and that there has been a deliberate omission of any rules requiring particulars in actions for libel or slander where the defence is in the form of a rolled-up plea. He submitted further that in any event the learned judge was wrong to refuse a further amendment of the defence so as to permit evidence to be given as to the truth of the allegation made by the appellant as to the use by the respondent of Government trucks to take materials to his building site, as this was the main issue in the case, and that the judge's refusal meant that the issue had not been determined; that by granting the amendment, the plaintiff would not have been prejudiced in any way because counsel for the plaintiff closed his case subject to his right of rebuttal.

Counsel for the respondent submitted that an application to amend the defence further came at a time when the plaintiff's case had been closed, and after the defendant had given his evidence; to have granted the amendment at that stage would have seriously

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prejudiced the plaintiff as the trial would have to start all over again; that the learned trial judge properly exercised his discretion in refusing to allow the amendment and that the Court of Appeal should not interfere. Counsel referred to Order 18 Rule 12 of the English Rules where there is a note to the effect that at the trial leave to amend particulars is as a rule refused. In the face of Order 20 Rule 5(1) of our Supreme Court Rules which states that the Court may at any stage of the proceedings allow the plaintiff to amend his writ or any party to amend his pleading on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct, I do not intend to be guided by the note in the English Rules.

Counsel then submitted that the West Indies Associated States Supreme Court (St. Christopher, Nevis and Anguilla) Act 1975 (No.17 of 1975) was enacted in 1975 a date subsequent to the Rules of the Supreme Court and therefore section 6(3) of the Act must be given a meaning and that the meaning is that where the rules are silent on any question pertaining to practice and procedure, one must follow the practice and procedure in the English Rules.

The meaning of section 6(3) is not by any means clear, but I am inclined to accept the submission of counsel for the respondent. The practice of requiring a defendant to give particulars of the statements of facts and matters on which he relies in support of the allegation that the words are true, and which must form the basis for any plea of fair comment, is such a good one that I think it ought to be followed.

/This.....

This brings me to the question as to whether the learned judge ought to have exercised his discretion in favour of the defendant and allow a further amendment of the defence even at that late stage. The issue joined between the plaintiff and the defendant in the case was whether the words spoken and published by the defendant of and concerning the plaintiff were false, and whether even if they were true, the expressions of opinion made thereon went beyond the bounds of fair comment, and this issue could be determined by the Court only from evidence adduced before it. The plaintiff gave no evidence in the case. I am sure that his main interest in bringing the action was to have his character vindicated, and as matters now stand, there is bound to be the feeling among the 3,000 people who were allegedly present at the meeting that they are not sure as to whether there was any shady dealings on the part of the plaintiff. So it was in the interest of both plaintiff and the defendant that the issue should be tried. The plaintiff could not have been prejudiced in any way as his counsel at the close of the case reserved his right of rebuttal. He anticipated that some attempt would be made to adduce evidence of the truth of the statement, and even if he did not reserve his right, the learned judge in granting the amendment would have been obliged to permit the plaintiff to adduce evidence in rebuttal. The position is not cured by the statement in the judgment that "even if the defendant was in a position to prove the said alleged statement a fact to be proved and had proved it to be true, I would have found as a fact that the defendant's comment thereon, in the absence of proof of further facts exceeded the limits of fair comment".

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The learned judge could not know what facts would have been proved. I do not know; and it is idle to speculate as to whether the comments exceeded the limits of fair comment until all the evidence is in. In my view, the learned judge, in the circumstances of this case, ought to have allowed the further amendment to the defence and proceed to hear the evidence of Caines and any other witness who may be called relating to the issue. I would allow the appeal on this ground, set aside the judgment of the Court below, and order a new trial before another judge. In the circumstances of this case where the appellant by his faulty pleading is responsible for the situation which arose, I would make no order as to costs.

(Sir Maurice Davis)
CHIEF JUSTICE

I agree.

(N.A. Peterkin)
JUSTICE OF APPEAL