COMMONWEALTH OF DOMINICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 1 OF 2002

BETWEEN:

GILDON RICHARDS

Appellants

and

DESMOND BLANCHARD

Respondent

Before:

The Hon. Mr. Albert Redhead — Justice of Appeal
The Hon. Ephraim Georges — Justice of Appeal [Ag.]
The Hon. Madame Suzie d'Auvergne — Justice of Appeal [Ag.]

Appearances:

Mr. Alec Lawrence for the Appellant
Mr. Anthony Astaphan S.C. for the Respondent

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2002: September 30;
2003: January 28.

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JUDGMENT

[1] **REDHEAD J.A.**: The Appellant was a Senior Police Officer in the Police Service of the Commonwealth of Dominica. He later read law and obtained qualifications of a Barrister-at-Law. The Respondent was a career policeman. He rose to the rank of Commissioner of Police. On 19th December 1996 the Respondent, as Commissioner of Police, chaired a meeting of his fellow officers at the Police Headquarters. The Appellant, at the meeting made statements that he had reliable information about police officers who are deeply involved in drugs and that there was a police officer "sitting right here now" who was planning to kill him because of the position he had taken on drugs.

[2] On 20th December, 1996 the Respondent wrote to the Appellant. The final paragraph of that letter read as follows:

> "Your remarks in my view contained very serious allegations and demand urgent investigations. You are required to submit a detailed report to my office, under confidential cover, outlining the information available to you which gave rise to your statements you made at the meeting. The report must name the police officers concerned, giving indication who can support the allegations and where evidence can be found. In light of the gravity of this matter, your report should reach my office no later than 31st December, 1996.
>
> J.D. Blanchard
> Commissioner
>
> cc: Secretary to the Cabinet
> Secretary, Police Service Commissioner
> Deputy Commissioner of Police"

[3] The Appellant replied to the Commissioner's letter on 21st December 1996. In that reply he stated that because of "prevailing circumstances" his confidence in the Respondent had been eroded and consequently he the Appellant was unable to submit to the Respondent the report and details which he "demanded".

[4] Thereafter in that letter the Appellant launched into what I could regard as a blistering personal attack upon the Respondent. This attack consisted of a lengthy narrative full of innuendos and hearsay. At about the time the Respondent chaired the meeting of his police officers there was great concern about the illicit drug trade in Dominica. The Appellant at the meeting said that he knew police officers who were deeply involved in drug trafficking. The Respondent quite legitimately and responsibly requested the Appellant to submit a detailed report of the names of the police officers concerned.

[5] He refused to submit that report giving as his reason that his confidence in the Respondent had been eroded and that the Respondent was not working or competent to deal fairly and seriously with his welfare as a police officer, or allegations of drug dealings by Members of the Police Force.

[6] Unfortunately the Appellant was not content to leave it there. He went on throughout his lengthy response to ask the Respondent embarrassing, suggestive and damning questions

which seem to implicate or suggest that the Respondent knew about a police officer who was, sometime in 1993 "allegedly" involved in illegal drugs.

[7] The Appellant asked the question of the Respondent is it true that a police officer who was involved in drug dealing was caught red-handed? He continued by way of questions to suggest that the Respondent as a result transferred the police officer and placed him in charge of a police station.

[8] The Appellant by way of questions asked:

"Am I correct that sometime in 1995 a certain police officer was under surveillance by members of the drug squad for his alleged involvement in illegal drugs?"
The Appellant went on to suggest again by way of question that the Respondent ordered the surveillance parties not to search the police officer.
The Appellant then went on to ask why two of the members of the drug squad were immediately transferred and were constantly harassed by the officer who was under surveillance?
The Appellant then went on to ask the Respondent "Have you not in spite of these questions about that police officer's conduct persistently recommended him for promotion and placed him in charge of sensitive information gathering sections of the police force?"

[9] The Appellant then wrote of the Respondent's son of whom he said that he opposed the Respondent's son entry into the Montserrat Police Force partially because of his firm belief that the Respondent ought not to recommend to another police force, persons whom by his own standard he would not admit into the Commonwealth of Dominica Police Force. The Appellant then went on to ask the Respondent "is it true that as a member of the Montserrat Police Force your son was engaged in some conduct which formed the basis of my opposition regarding vetting him for entitlement there? It's true that your son was eventually dismissed from the Montserrat Police Force when his persistent engagement in that conduct became intolerable? I learned much from friends while studying in Barbados and Trinidad, I hope these were not other pieces of propaganda."

[10] These are but a sample of the allegations made by the Appellant against the Respondent. The Appellant ended by writing:

> "I hope Sir that you feel obliged to answer the questions I have asked to the Prime Minister to whom you are accountable or to any other appropriate authority.

Because the person asking these questions (which are by no means exhaustive) I trust that you will make available to me a copy of the answers/account. I promise to keep it in my strictest confidence".

[11] Apart from the legal implications of the Appellant's letter, such arrogance I have never encountered from a subordinate officer to his superior.

[12] The Respondent as a result of the Appellant's letter filed a Writ of Summons on 15th January, 1998 claiming damages and aggravated damages against the Appellant for libel contained in the letter of 21st December 1986.

[13] The Appellant filed a defence to the action on 6th February 1998. In his defence the Appellant admitted writing the letter. In his Particulars of Defence the Appellant said as follows:

[a] "Before publication of the said letter the defendant who is and was at all materials times a Member of the Commonwealth of Dominica Police Force informed the Plaintiff as the Commissioner of Police on more than one occasion that he had reasons to believe that some Members of the said Police Force were involved in illegal drug dealings.

[b] In relation to the above the Defendant informed the Plaintiff that his life had been threatened by one or more of those police officers whom he suspected to be involved in illegal drug dealings and requested the Plaintiff to inquire into the matter, but he failed and/or refused to do so.

[c] By letter dated 20th December 1996 the Plaintiff ordered the Defendant to put into writing the name of the police officers suspected to be involved in illegal drug dealings, the names of persons who could support the allegations and supportive evidence but the Defendant to do so for reasons stated in the letter dated 21st December, 1996 addressed to the Plaintiff.

[d] The said words were written to the Plaintiff and copied to the Prime Minister and other persons having a common interest in the control, administration and management of the Commonwealth of Dominica Police Force and under a sense of duty and without malice believe that the statements therein made were true.

[e] "In the premises the Defendant, the Prime Minister, the Secretary to the Cabinet, the Chairman of the Police Service Commission, the Director of Public Prosecutions, the Deputy Commissioner of Police and the Chairman of the Police Welfare Association had a corresponding interest in the subject matter and publications of the said words to the aforementioned persons had a like duty and/or interest to receive them"

[14] " Further or in the alternative the Defendant states that the contents of the said letter referred to at paragraph 3 of the Statement of Claim were adduced in evidence by the Defendant at a Commission of Inquiry appointed by the President to inquire inter alia, into the administration and management of the Commonwealth of Dominica Police Force and will at the trial rely on the provisions of Section 13 of the Commission of Enquiry Act Cap 19:01.

[15] The Appellant put forward the defences of qualified privilege and Section 13 of the Commission of Inquiry Act Chap 19.01. On preliminary issues tried by the learned Master Pemberton whether the Appellant can rely on the defence of qualified privilege and whether the appellant can rely on Section 13 of the Commissions of Inquiry Act Cap.19.01, the learned Master gave a written decision which is the subject of this appeal.

[16] Two grounds of appeal were argued on behalf of the Appellant. They were:

[1] That the learned Master erred in law in that she wrongly decided that Section 13 of the Commissions of Inquiry Act did not advance Appellant's case and should be struck out

[2] The learned Master erred in law in that (a) By the learned Master's application of an extremely restrictive scope of social or moral duty or interest in respect of the occasion of the publication, she wrongly denied the Appellant the protection of the defence of qualified privilege in respect of the communication of the publication to Director of Public Prosecutions, the Secretary to the Cabinet, the Deputy Commissioner of Police, and the Chairman of the Police Welfare Association

[b] The learned Master failed to give full or sufficient consideration to the special circumstances of the occasion of the publication."

[17] I deal first of all with the second ground of appeal.

[18] It was advanced before us that the purpose of the letter was to initiate a public inquiry. If this was the intent and purpose of the letter there was absolutely no indication of this from the letter written by the Appellant to the Respondent.

[19] Learned Counsel, Mr. Lawrence argued strenuously that the issue of qualified privilege was dismissed summarily by the learned Master. In her written judgment the learned Master, in dealing with the issue of qualified privilege, followed the judgment of Adams J. in **Kertist Augustus v Leo Bernard Nicholas** Suit No. 262/1991 (Dominica). At paragraph 7 of the judgment the learned judge said:

> "whether the duty to communicate the matter does or does not exist is a question of law for the Judge. Where the duty of the communicator is a legal one, then no difficulty arises."

[20] The Appellant in his letter to the Respondent had copied it to the following persons:

> The Hon. Prime Minister
>
> The Secretary to the Cabinet
>
> The Chairman, Police Service Commission
>
> The Director of Public Prosecutions
>
> The Chairman of the Police Welfare Association

The learned Master analysed individually the letter to each of the above in order to determine whether the letter of the Appellant copied to the different individuals was on a privileged occasion.

[21] Having undertaken an examination of section 72[2] of the Constitution of the Commonwealth of Dominica Chp 19.01 as it pertains to the powers of the Director of Public Prosecutions, the learned Master concluded that she had not seen anywhere under the provision, the power to investigate allegations of a commission of a crime.

[22] With reference to the publication to the Deputy Commissioner of Police, the learned Master after turning her attention to the dicta of Adams J at paragraph 10 said:

> "I do not think that it can be argued against that the rank of Deputy Commissioner of Police is subordinate to that of Commissioner of Police. The court need not address the issue further save to say that the defendant has not provided proof of the existence of a legal duty to publish the defamatory information about the plaintiff."

[23] The learned Master in analyzing the defamatory effect of the letter copied to the Police Welfare Association said that no submission was made by the Appellant as to the structure

and functions of the Police Welfare Association. The learned Master after looking at the particulars supplied by the Appellant inferred that the Association as a body which looks after the social and other needs of police officers and concluded. "Clearly, no legal duty resided in the communicator to make the defamatory statement known to the Chairman of that Association."

[24] The learned Master referred to section 69 of the Constitution which deals with the responsibility of the Secretary to the Cabinet. She found that no evidence was led by the Appellant that the publication of the defamatory letter was in anyway connected to matters that could have come within the confines of Section 69 so as to make the publication to the Secretary to the Cabinet excusable as an occasion of qualified privilege. The Master therefore concluded:

> "It is the Court's view therefore that to extend that privilege to the Secretary to the Cabinet would be an overgenerous extension. As such the publication on this occasion will offend the legal duty test."

[25] With reference to the Police Service Commission, the learned Master looked at Sections 91 and 92 of the Constitution. The former establishes the Police Service Commission, the latter empowers the President with the advice of the Prime Minister and after consultation with the Leader of the Opposition and Chairman of the Police Service Commission to appoint the Commissioner of Police.

[26] The learned Master opined that the Chairman of the Police Service Commission is part of the appointing machinery of the Commissioner of Police and is in a position analogous to that of Master which accords with the learning as expressed by Adams J. She took judicial notice that the Prime Minister is responsible for national security under whose purview the police service falls.

[27] The learned Master then concluded:

> "Taking the above into consideration, the Court is of the view that there is an existing legal duty, so that the defence of qualified privilege is available to the Defendant with respect to those two offices."

[28] I am of the opinion that the learned Master was too restrictive in her analysis of qualified privilege in relation to the individual persons to whom the letter was copied.

[29] For example the learned Master in analyzing the letter copied to the Deputy Commissioner of Police said:

> " The Deputy Commissioner of Police is subordinate to that of the Commissioner of Police. The Court need not address the issue further save to say that the defendant has not provided any proof of the existence of a legal duty to publish the defamatory information about the plaintiff"

[30] This is too restrictive an approach in my view. The determining factor is not whether the Deputy Commissioner is subordinate to the Commissioner but whether there was a duty, legal, social or moral to make the communication to the deputy Commissioner of Police and whether the Deputy Commissioner of Police had a corresponding duty to receive it. In **Adam v Ward** [1917] A.C. 309 at page 334 Lord Atkinson said:

> "……A privileged occasion is, in reference to qualified priviledge, an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it."

[31] First and foremost I am of the opinion that the purpose the motive of the publication is relevant on the issue of qualified privilege. In the instant case the Appellant was not complaining of any wrong doing. He was not reporting any wrongdoing. He was simply airing his own grievance and in doing so he launched an attack on the Respondent and his family.

[32] In doing so I do not think that the Appellant was under an obligation or duty to make the communication to the many persons. He may have been under an obligation or duty if he was responding to the request of the Respondent but quite clearly he was not. He said clearly in the first paragraph of the letter that he was refusing to comply with the request of the Respondent.

[33] In Gatley on Libel and Slander 8th edition at paragraph 447 the learned authors say:

> "It is for the Judge to determine whether an occasion is privileged and therefore to decide whether the defendant was under a duty to make the communication. The Judge will have no difficulty in determining whether there was a legal duty to make the communication, but there is no sure and unfailing criteria of what does or does not constitute a moral or social duty, indeed, as was pointed out by Erle C.J in **Whiteley v Adams** (1863) 15 CB 392 at p 418:
>
> > "Judges have felt great difficulty in defining what kind of social or moral duty will afford a justification."

[34] In **Pullman and Another v Walter Hill & Co Ltd**. [1891] 1 Q.B. 524 Lord Esner M.R. explained at page 529:

> " An occasion is privileged when the person who makes the communication has a moral duty to make it and the person who receives it has an interest in hearing it. Both these conditions must exist in order that the occasion may be privileged."

[35] The privilege exists as against the person who is libeled, it is not a question of privilege as between the person who makes the communication and the person who receives the communication, the privilege is as against the person who is libeled.

[36] In **Gately on Libel and Slander – 8th Edition** at paragraph 531 the learned authors write:

> " In all cases in which the defendant relies on a plea of qualified privilege, whether on the ground of duty or interest, such duty or interest must exist in fact. It is not sufficient that the defendant honestly and reasonably believed that he was discharging a duty or that he had a legitimate interest in making the communication. That the defendant acted under a sense of duty, though important on the question of malice, is not, I think, relevant to the question whether the occasion was or was not privileged. That question does not depend upon the defendants belief, but on whether he was right or mistaken in that belief…."

[37] In **Adam v Ward** (referred to above) the Plaintiff, who was formerly an officer on a cavalry regiment and was subsequently elected a member of Parliament, in a speech in the House of Commons, falsely charged the General commanding the brigade of which late regiment formed part with sending confidential reports to Headquarters on officers under his command, containing wilful and deliberate misstatements. The General having referred the matter to the Army, the Defendant, as Secretary to the Council and by their direction, wrote a letter to the General vindicating him against the charge made by the Plaintiff, and containing defamatory statements about the Plaintiff and sent it to the press for publication. The letter was widely published in the British and Colonial Press. In an action for libel by

the Plaintiff against the Defendant, the Defendant pleaded that the letter was published on a privileged occasion. It was held inter alia, that the occasion was privileged and that there was no evidence of malice on the part of either the Council or the Defendant.

[38] Mr. Astaphan, learned Senior Counsel submitted in his skeleton arguments that the critical issue is whether under this plea of qualified privilege there existed a right or duty to publish.

[39] He argued that the publisher must plead and establish that at the time of the publication there existed a duty to make or publish the allegations and that the recipients had a corresponding interest in receiving it. Therefore, if the Appellant failed to properly plead or the undisputed facts and admissions show that there did not exist any right or duty or a corresponding interest in receiving the allegations and charges, the pleaded defence of qualified privilege must fail and ought to be struck out.

[40] As I have said above, the Respondent requested information of the Appellant who indicated that he had confidential information about fellow officers in the Dominica Police Force who were involved in dealing in illicit drugs. If the Appellant had supplied the information to the Respondent then in my view, he could have been said to be acting under, or discharging a duty. Then the Respondent would have had an interest in receiving the communication, but he refused to supply any information. He said he would not supply any information to the Respondent because he had no confidence in the Respondent. The first paragraph of the Appellant's letter dealt with that. Thereafter the Appellant launched into a lengthy discourse which charged the Respondent with, among other things with complicity and cover up with drug dealers in the police force.

[41] The Respondent in my view could not have any interest in receiving that. Neither could any of the recipients of the letter have had a legitimate interest in receiving the letter. I venture to say that in my opinion if the Appellant had provided a genuine report and in doing so contained libelous material the Appellant would have been covered by qualified

privilege. Mr. Astaphan, learned Senior Counsel contended that no one to whom that letter was addressed had any interest in receiving this scurrilous garbage.

[42] As I said in my judgment the letter was not written on a privileged occasion. Even if I am wrong and the letter was written on a privileged occasion.

[43] I now turn to the issue of malice.

[44] In **Adam v Ward** (supra) at page 326 Lord Dunedin says:

> " What then is the situation? You have a letter written on a privileged occasion, and that communication and used words which are in themselves defamatory. What test is to be applied? On the one hand, it is said that, the occasion being privilege, but that if in the document you find parts which are not really necessary to the fulfillment of the particular duty or right which is the foundation of the privilege on the occasion then these parts may be used as evidence of express malice. In other words it stands thus malice which is the essence of libel, is presumed from defamatory words……. "There are two questions. The first is whether the occasion was a privileged occasion and if it was, then secondly whether there was evidence of malice."

[45] I have no doubt that in the case at Bar there was evidence of malice. The Respondent in my opinion, having legitimately requested the Appellant to supply him confidentially with the names of police officers of the Police Force of Dominica whom he claimed he knew were involved in illicit drug trade refused to name the officers. But went on to attack the Respondent's son who was a Member of the Montserrat Police force under a different command, by writing:

> "Will you please inform the Commonwealth of Dominica Police Force and the relevant authorities whether your son was involved in the same activities after he left Montserrat Police Force? He was (sic) what happened to him?"

[46] To my mind this has absolutely no relevance to what was happening in Dominica and that was not really necessary for any particular duty or right, the Appellant may have perceived or that he had. But what is startling to my mind is the appellant went on to say-

[47] I learnt much from my friends while studying in Barbados and Trinidad, I hope these were not just other pieces of propaganda." One gets the distinct impression that what the

Appellant said was as a result of what he heard about the Respondent's son while he was at college in Barbados and Trinidad. The Appellant is a qualified lawyer and an experienced police officer. He could not therefore use hearsay evidence as the basis of his genuine belief. It is significant in **Reynolds v Times Newspaper** Ltd [1999] 3 WLR at page 1057 Lord Hope of Craighead said:

> "The test of Malice in the words of …L.J. in **Clarke v Molyneaux** [1877] 3 Q.B. at 237 is: has it been proved that the defendant did not honestly believe that what he said was true, that is, was he either aware that it was not true or indifferent to its truth or falsity…"

[48] I address one further question which was raised by Mr. Lawrence. He argued that the learned Master was wrong in striking out the Appellant's plea of qualified privilege without first hearing evidence. Mr. Astaphan drew attention to the pleadings. The Appellant in his reply to notice to admit some of his answers were no response."

[49] The Appellant as a senior police officer, if he was aware that any police officer was involved in illicit drug dealing, had a duty to investigate or report the matter. I do not agree with learned Counsel having regard to the state of the pleading and the issues of fair comment. The learned Master was justified in ruling as she did.

[50] It was contended on behalf of the Appellant that his motive for publishing the letter to the different persons, was to initiate a public inquiry. There is not a hint of this by reading the letter. Moreover persons he published the letter to have no authority under the Constitution of the Commonwealth of Dominica set up an inquiry.

[51] I therefore dismiss any such suggestion.

[52] Finally, I turn to the Appellant's defence under the Commission of Inquiry Act Chapter 19.01. The Appellant relied on Section 13 of the Act which provides:

> "No statement made by any person who is called as a witness before any Commission of Inquiry, or any Commissioners appointed in pursuance of this Act in answers to any question put by or before the Commission or Commissioners shall, except in cases of indictment for perjury be admissible as evidence in any proceeding civil or criminal."

[53] The language of the section is pellucid and I simply say that this has absolutely no merit to the instant case. In my judgment the Appellant cannot rely on the defence of qualified privilege in respect to any of the recipient of the letter he wrote to the Respondent dated 21st December 1996 there being evidence of malice.

[54] In this regard the directions given by the learned Master with- reference to C-G 1 are hereby set aside. The matter is set down for assessment of damages.

[55] Prescribed costs to the respondent in the sum of $9333.33.

Albert Redhead
Justice of Appeal

I concur

Suzie d'Auvergne
Justice of Appeal [Ag.]

[56] **GEORGES J.A. [AG.]:** I have been afforded the opportunity of reading the draft judgment of my learned brother Redhead J.A. but regret that I am unable to agree with some of his findings and his conclusions for reasons that I shall shortly state.

[57] The facts from which this libel action stems are not in dispute and are summarised at paragraphs 1 to 10 of his judgment.

[58] Following response to a request for further and better particulars of defence the plaintiff filed a notice to admit which the Master by order dated 17th July, 2001 required the defendant to file an answer on or before 31st July, 2001.

[59] The selfsame order directed that the following issues be set down for hearing as preliminary issues on 4th October, 2001:

[i] whether or not the defendant can in the circumstances of this case rely on the defence of qualified privilege;

[ii] whether or not the defendant can rely on the provisions of section 13 of the Commission of Inquiry Act Cap 19:01 of the Laws of the Commonwealth of Dominica ("the Act").

[60] In a decision dated 7th December, 2001 written with remarkable clarity and cogency the learned Master held that:

[a] "Section 13 of the Commission of Inquiry Act does not advance the Defendant's case so that paragraph 3 of the Defence filed herein cannot be relied on by the defendant and is hereby struck out;

[b] The defence of qualified privilege fails in relation to the Director of Public Prosecutions, the Secretary to the Cabinet, the Deputy Commissioner of Police and the Chairman of the Police Welfare Association. Evidence in defence on this issue in relation to these four persons cannot be led at trial;

[c] The defence of qualified privilege may be relied upon in relation to the Prime Minister and the Chairman of the Police Service Commission;

[d] The sole issue to be tried is what was the state of mind of the defendant at the time of the publication of the defamatory statements."

[61] The appellant/defendant filed three grounds of appeal namely:

Ground 1:

2.1. The learned Master erred in law in that she wrongly decided, that section 13 of the Commissions of Inquiries Act did not advance the Appellant's case so that paragraph 3 of the Appellant's Defence should be struck out. By her use as the major determining factor, the time of publication of the alleged defamatory statements in relation to the date on which the commission of inquiry was appointed, she asked herself the wrong question and misdirected herself as to the true legal effect of section 13 of the said Act on the proceedings.

Ground 2

2.2 The learned Master erred in law in that:

(1) By the learned Master's application of an extremely restrictive scope of **social or moral duty or interest** in respect of the occasion of the publication, she wrongly denied the Appellant the protection of the defence of qualified privilege in respect of the communication of the publication, to the Director of Public Prosecutions, the Secretary to the

Cabinet, the Deputy Commissioner of Police and the Chairman of the Police Welfare Association.

(2) The learned Master failed to give full or sufficient consideration to the special **circumstances** of the occasion of the publication.

Ground 3:

3. The Learned Master erred in law and/or misdirected herself by holding, without any evidential basis, that the defence of qualified privilege failed in relation to the Director of Public Prosecution, Cabinet Secretary, Deputy Commissioner of Police and Chairman of the Police Welfare Association.

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[62] With regard to section 13 of the Act it is patently clear that these provisions do not and cannot avail the defendant in the circumstances as **publication** of the alleged defamatory letter first occurred prior to the Commission of Inquiry at which it was subsequently adduced in evidence. In other words the Commission of Inquiry was ex post facto the first publication of the letter. As Redhead J.A. succinctly put it:

> "The language of the section is pellucid and [that defence] has absolutely no merit.'

Ground 1 of the appeal consequently fails.

[63] As regards Ground 2 I fully agree with Redhead J.A. paragraph 29 of his judgment) that with reference to the Deputy Commissioner of Police the learned Master adopted too restrictive an approach in deciding that the defence of qualified privilege as known to law does not assist the appellant in his quest of qualified privilege. And indeed in my view this holds true in respect of her treatment of the publication of the said letter to the Director of Public Prosecutions, the Secretary to the Cabinet and the Chairman of the Police Welfare Association. This is where I find myself compelled to differ with respect with the learned President and partly with the Master herself.

[64] For whilst it is recognised that for a plea of qualified privilege to succeed there must exist at the time of the publication a duty on the part of the publisher to make or publish the allegation(s) and a corresponding interest by the recipients in receiving it the learned Master in my view was too restrictive in her analysis of these criteria in relation to the

individual recipients to whom the letter was copied by referring in the main to their constitutional status function and powers and in so doing found that a **legal** duty existed in relation to the Chairman of the Police Service Commission and the Prime Minister but that the test had not been satisfied in relation to the Secretary to the Cabinet, the Deputy Commissioner of Police and the Chairman of the Police Welfare Association.

[65] The rank of Deputy Commissioner of Police she further declared was subordinate to that of Commissioner of Police and no proof had been provided of the existence of a **legal** duty to publish the defamatory information about the plaintiff to him. And whilst she also recognised that the Police Welfare Association "sees to the welfare of police officers in the sense that their social and other needs can be addressed collectively" she concluded that no **legal** duty resided in the communicator to make the defamatory statement known to the Chairman of that Association.

[66] The point I wish to make is that the learned Master appears to have largely confirmed her analysis of qualified privilege to the necessity for the publisher to demonstrate the existence of a **legal** duty and paid little or no heed to the social or moral aspect of the matter.

[67] Experience shows that whether a publication is protected by qualified privilege is a decision which may after be difficult where the privilege depends not on a legal duty but on a legal duty but on a social or moral duty.

[68] In **Watt v Longsdon** [1930] 1KB 130 AT 144 Scrutton LJ described the problem as follows:

> "As to legal duty, the judge should have no difficulty; the judge should know the law; but as to moral or social duties of imperfect obligation, the task is far more troublesome. The judge has no evidence as to the view the community takes of moral or social duties. All the help the Court of Appeal can give him is contained in the judgment of Lindley LJ in Stuart v Bell: "The question of moral or social duty being for the judge, each judge must decide it as best he can for himself. I take moral or social duty to mean a duty recognised by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal. My own conviction is that all or, at all

> events, a great mass or right-minded men in the position of the defendant would have considered it their duty, under the circumstances, to inform Stanley of the suspicion which had fallen on the plaintiff." Is the judge merely to give his own view of moral and social duty, though he thinks a considerable portion of the community hold a different opinion? Or is he to endeavour to ascertain what view "the great mass of right-minded men" would take? It is not surprising that with such a standard both judges and text-writers that the matter as one of great difficulty in which no definite line can be drawn.'

[69] Further light is thrown on the subject by the judgment of Greer LJ in **Watt v Lonsgdon** (ap cit) where he said:

> "The only guide one can get from previous decisions is to be obtained from the judgments of the Court of Appeal in Stuart v Bell. There Lindley LJ says: "I take moral or social duty to mean a duty recognised by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal." Would the great mass of right-minded men in the position of the defendant have considered it their duty, under the circumstances, to make the communication? Kay LJ says: "The true mode of judging upon the question is to put one's self as much as possible in the position of the defendant." I think these tests are as near as one can reasonably get to the tests to be applied in forming an opinion on the question whether a privileged occasion arising out of a moral or social duty has or has not arisen.'

And in **Beach v Freeson** [1972] 1 QB14 at 24 Lane J referred to the judgment of Scrutton LJ in **Watt v Longsdon** (cited supra) and continued:

> 'The judge must, accordingly, do his best in the light of such evidence as he has, coupled with his own views as to what the defendant's duties, moral or social, were in the circumstances.'

Further guidance is afforded by the learned authors of GATLEY ON LIBEL AND SLANDER 8th Edition at paragraphs 447 and 531 which are referred to by Redhead J.A. at paragraphs 32 and 35 of his judgment.

The effect of the authorities would seem to indicate that the standard to be applied by the judge is an objective standard-what would people of ordinary intelligence and moral principle have done in the circumstances.

[70] As I see it and as Mr Lawrence learned Counsel for the Appellant submitted by reference to his skeleton arguments the Appellant by his letter dated 21st December, 1996 informed

the Respondent that he could not produce the information in the manner in which the Respondent had demanded since because of prevailing circumstances the Appellant's confidence that the Respondent was either willing or competent to deal fairly and seriously with any matter concerning his welfare as a police officer or with the allegations of drug dealings by members of the police force had rapidly eroded. The Appellant therefore felt that he could not in good conscience submit to the Respondent the report and details demanded.

[71] The Appellant then went on to give some of the reasons for his decision by reference to specific allegations/instances of drug dealing by members of the police force of which the Respondent was alleged to have been privy and to have been involved. He further drew attention to the degeneration of discipline in the police force and the shielding of senior police officers accused of criminal and ethical wrongdoing. The letter in short was a denunciation of the mal practices criminal conduct and mal-administration of the police force of which the Respondent was head and perceived to be implicated.

[72] How in the circumstances the Appellant queried could the police fairly investigate themselves. It was his considered view that an impartial inquiry was required to which he was willing to furnish details of the information sought.

[73] It is common ground that the problems of drug dealing by police officers and other serious misconduct had been a matter of main concern in the Commonwealth of Dominica for some time. It is therefore a matter of small wonder that the Respondent saw it fit to copy his letter of 20th December, 1996 to the Appellant to the Secretary to the Cabinet who is Head of the Civil Service and the Permanent Secretary in the Prime Minister's Office who is the Minister of National Security as well as the Secretary of the Police Service Commission and the Deputy Commissioner of Police - all of whom would of necessity by virtue of the offices which they hold have a vital interest in the matters adumbrated in the Appellant's reply of 21st December, 1996.

[74] The self same letter by the Appellant complains of the Respondent's seeming unwillingness or inability to deal fairly and seriously with any matter concerning his welfare

as a police officer and of dismissing a complaint of a threat to his life as 'another piece of propaganda.' Clearly a reciprocal duty and interest would exist in the Appellant and the Chairman of the Police Welfare Association to whom the Appellant also copied his reply. The Chairman of that Association would in my view be implicitly socially and morally bound or interested to receive such communication touching as it does the general welfare and efficiency of members of the police force.

[75] As regards publications of the letter to the Director of Public Prosecution (DPP) I incline to the view expressed by the learned Master that there exists no legal social or moral duty on the part of the Appellant to copy the said letter to the Director of Public Prosecution qua Director Public Prosecutions and learned Counsel's contention that this was justified by reason if a "special relationship" between the two men by reason of the fact that the then holder of the post had been a former police officer "who had worked with him in the Special Branch form where they left to pursue their legal studies" does not and cannot possibly hold.

[76] In my considered judgment save in that single instance the defence of qualified privilege may be relied upon in relation to the small circle of persons to whom the Appellant copied his reply and they themselves had a ligitimate interest in receiving it having regard to all the circumstances. And it is in my view most lamentable to say the least that learned Senior Counsel for the Respondent should have labeled the Appellant's letter as scurrilous garbage" when as Mr. Lawrence pointed out the very terms of reference of a subsequently appointed commission of enquiry touched directly on the self same issues addressed in that letter.

[77] It is trite law that the defence of qualified privilege will be destroyed by evidence of malice. Adopting the dicta of Singh JA in **Leo Bernard Augustus v Kertist Augustus** (unreported) declared at paragraph 28 of her decision that:

> "A Court should be very slow in drawing the inference that a defendant was actuated by improper motives thereby depriving him of the particulars of the protection of the privilege unless it is satisfied that the defendant did not belief that what he said or wrote was true or that he was indifferent to its truth or falsity . A

> defendant is entitled to be protected by the privilege unless some other dominant or improper motive on his part is proved.

And following the dicta of **May LJ G.K.R. Karate (UK) Limited v Yorkshire Post Newspapers Limited et al** (2000) 1WLR 257 the learned Master opined that the issue of notice requires a determination of "the subjective state of mind of the Defendant" at the time of publication.

[78] The learned Master held that there was no evidence per se of the Respondent's state of mind. Senior Counsel for the Respondent had asked her to make inferences from the events as pleaded and from the fact of publication to what he termed ' the many persons' and to decide the entire case summarily. This she declined to do (and rightly so in my view) holding that on the authorities the issue of malice in this case aright to be fully ventilated with that view I fully concur.

[79] In the result I would allow the appeal to the extent that the defence of qualified privilege fails only in relation to the Director of Public Prosecutions and evidence in defence on that issue in relation to him cannot be led at trial. The defence of qualified privilege may be relied upon in relation to the other persons to whom the letter was copied.

[80] Paragraphs (a) and (b) of the learned Masters directions to be varied accordingly.

[81] Costs to abide the outcome of the trial.

Ephraim Georges
Justice of Appeal [Ag.]