ST. VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO.18 OF2005

BETWEEN:

ELWARDO LYNCH

Appellant

and

RALPH GONSALVES

Respondent

Before:

The Hon. Mr. Michael Gordon, QC — Justice of Appeal
The Hon. Mr. Denys Barrow, SC — Justice of Appeal
The Hon. Hugh A. Rawlins — Justice of Appeal

Appearances

Mr. Stanley John and Dr. Linton Lewis for the Appellant
Mr. Anthony Astaphan SC and Mr. Grahame Bollers for the Respondent

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2006: May 22;
September 18.

JUDGMENT

[1] **BARROW, J.A.**: At the commencement of the trial of the claim for damages for slander the respondent asked Thom J to decide as a preliminary issue an application that she should strike out what amounted to substantially the whole of the appellant's defence. The judge later delivered a fully reasoned ruling striking out the defences that the words did not bear the defamatory meanings asserted by the respondent, that the words were fair comment, and that the words were published on an occasion of qualified privilege. The judge also struck out the defence of a 'non-admission' of publication. The appellant applied for leave to appeal against all aspects of the judge's decision. However, this court was satisfied that Thom J had finally decided substantive issues in question, that therefore no leave was needed and so it proceeded to hear the appeal.

[2] The appellant was alleged to have spoken the defamatory words as the host of a political party's radio programme entitled "New Times". The words were as follows:

> "Now sometime ago, I mentioned on this programme that the Prime Minister, with his mother, wife and daughter; they went to Rome to see the Pope. Didn't I tell you they went to Rome to see the Pope and he came back and he put a picture in the Searchlight – his party weekly newspaper. They showed you him kissing the Pope. Well, I don't see anything wrong in kissing the Pope. Personally, I don't see anything wrong. What is wrong with that? The passage! The airline tickets for the Prime Minister and others going to Rome to see the Pope, Lord have mercy! A claim was submitted to the Treasury and the airline has already collected for the tickets. The tickets only; it doesn't include food, it doesn't include hotel bills, it doesn't include internal transportation. The tickets for the family to go to Rome are ladies and gentlemen was not much, $41,000.00. What happen? You stunted? The airline tickets for the Prime Minister and his family to go to Rome, $41,000.00 and the taxpayers of St.Vincent and the Grenadines has to pay that. Now you are going to pay an airline. What you call them people again. Travel Agents. $41,000.00, that bill doesn't include food and hotel bill yet. At a time when teachers, civil servants and Police and Nurses salary, their salaries are frozen. When you put only EC$6,000.00 in the budget for books for school children, but it cost $41,000.00 to go to Rome. You pay $41,000.00 for airline tickets to go to Rome when people here are going to be without food in their stomach. When in the hospital you cannot put drugs in the hospital. What is happening in St. Vincent and the Grenadines? Is Ralph travelling in style, First Class and feeding off the carcass of St. Vincent and the Grenadines when the carcass is already going down in the grave. It is in the coffin, now we gonna put it in the grave. Put it in Ralph, put it fast and at the same time the travel agent that received $41,000.00 for airline tickets to go to Rome is a new travel agent just formed called IRIE Investment Ltd. They have in their possession right now $41,000.00 in one sweep for airline tickets to go to Rome. And just recently, he was telling us about LIAT, how we must travel on LIAT and VINLEC lend LIAT money and LIAT is up in the air because of our money, but noticed where the $41,000.00 is – IRIE Investment Ltd. And IRIE Travel being part of IRIE Investment is situated at Post Office Box 1085, Pembroke, and St. Vincent. The IRIE Travel Agency that Ralph Gonsalves put $41,000.00 in their hands just so to take the family to Rome. Well who owns this IRIE Investments Ltd. of which IRIE travel is a part? (1) Timothy Providence – a doctor, Neadia Providence – a financial consultant, Timorah Providence – a student – you in school but you making big money! Kenneth Bibby – Manager, Lennus Bibby. Those are the persons who own IRIE Investments Ltd of which the Travel Agent IRIE Travel that was paid $41,000.00 for tickets to go to Rome, and Timothy Providence is the

> President. How could the Prime Minister be lavishing Government funds on things that are not even bringing back any investment or otherwise to this country? Why should Ralph Gonsalves dip into the Treasury of this county, $41,000.00 to buy airline tickets to go to Rome and the IRIE Travel, they have already collected the claim that was in the Treasury. I think they need some other explanation to do at least. And the other thing is there are other persons in this company whose name is not register. You usually have people in companies, but their names are down and sometimes if their names are down, they only have nominal shares, when in truth and in fact, they are the big boys. Everybody is getting in on the act of getting monies from Government. It rough! All kinds of this and that and Ralph Gonsalves. Well of course, there is no proof of corruption in these tickets."

[3] The respondent claimed that the words meant and were understood to mean that the respondent was corrupt and that in his capacity of prime minister and minister of finance he caused public funds to be used to pay for airline tickets from St. Vincent to Rome for his daughter and mother as well as their hotel accommodation and thereby had committed one or more criminal offences punishable by imprisonment. The offences identified included misconduct in public office and offences under the Criminal Code of obtaining services by deception, contrary to s. 225; obtaining a pecuniary advantage by deception, contrary to s. 226; and false accounting, contrary to s. 228.

[4] At an earlier stage of the claim Alleyne J (as he then was) had ruled, following the respondent's acceptance that he was relying on the natural and ordinary meaning of the words and not upon any innuendo, that the words were capable of bearing the meanings asserted by the respondent.

[5] As stated at the outset, the defence did not admit publication of the words; it denied the words bore the alleged or any defamatory meanings; it stated that the words were fair comment made in good faith upon a matter of public interest; and it stated that, if the words were published by the appellant, the words were published on an occasion of qualified privilege.

The preliminary issues

[6] Although the actual notice of application was not included in the documents before this court it is stated in the judgment that the claimant sought

> "to have the court determine as preliminary issues whether having regard to the Defendants' defences, the documentary evidence and witness statements:
>
> > "(a) The Defendants are capable of establishing the defamatory statements of facts made against the Claimant, namely that the Claimant as Prime Minister and Minister of Finance paid or caused the Government of St. Vincent and the Grenadines to pay for the airfares for his mother and daughter to travel to Italy with him.
> >
> > "(b) The Defendants' defences show properly pleaded defences, particularly in relation to the defences of fair comment and qualified privilege; or
> >
> > "(c) Raise any reasonable grounds for defending the Claimant's claim and/or
> >
> > "(d) Have any reasonable prospect of succeeding at trial and/or taken at their highest whether any Judge properly directing herself or himself on the facts and the law would at a trial make any findings in favour of the Defendants.

[7] Counsel for the appellant accepted that the court has power to strike out a statement of case under rule 26(3) of the **Civil Procedure Rules 2000** (CPR 2000). Rule 26.3(1) provides that:

> "In addition to any other power under these Rules, the Court may strike out a statement of case or part of a statement of case if it appears to the Court that –
>
> (a) …
>
> (b) the statement of case or part to be struck out does not disclose any reasonable ground for bringing or defending a claim;
>
> (c) the statement of case or the part to be struck out is an abuse of the process of the court or likely to obstruct the just disposal of the proceedings"

Mention may also be made of rule 25.1(2) which provides:

> "Except where the rules provide otherwise, the Court may –
>
> > … dismiss or give judgement on a claim after a decision on a preliminary issue:"

[8] As he had done in the court below, counsel for the appellant relied upon the words of Neil LJ in **McDonald Corporation et al v Steel**[1] to identify the proper approach to the exercise of this power. Neil LJ stated:

> "I understand that it has become the practice in actions for defamation to consider at the outset of the trial whether some parts of the defence should be struck out on the basis that it has become apparent that some of the matters pleaded are not going to be supported by evidence. I can understand that in an appropriate case this is a sensible course which is likely to shorten the trial. On the other hand there may be cases where a defendant pleads some matter that he believes to be true but which he may still be unable to prove by admissible evidence otherwise than by eliciting an answer in cross-examination. Each case will have to be considered on its own facts.
>
> I am satisfied that the correct approach is to consider whether or not the defendant's case in relation to a particular passage is incurably bad. The power to strike out is a draconian remedy which is only to be employed in clear and obvious cases. I have already set out the wide variety of the evidence, which a defendant may be able to rely upon at the trial. I anticipate therefore that it will only be in a few cases where it will be possible to say at an interlocutory stage and before full discovery that a particular allegation is incapable of being proved."

[9] In the court below Thom J stated that she fully accepted that approach. She also noted that in the instant case there had been discovery of documents and that witness statements and documentary evidence had been filed. The point that the judge was making, I gather, was that in the instant case she knew what evidence the defendant would be able to lead in support of his case. In this regard, without wishing to open any flood gate, it is pertinent to observe that these days a judge will more often find herself in this vantage than would have a judge in 1953 when Neil LJ spoke, which was long before the introduction of witness statements, which are a main feature of the radical restructuring of the approach to trial wrought by CPR 2000. Instead of "trial by ambush", which describes the former practice whereby litigants concealed until the last moment the evidence they would present, the rules now require parties to fully disclose, well in advance of the trial, the evidence and the case they will be presenting . The present rules of court will make an application such as was made in the instant case more readily possible.

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[1] [1953] 3 All ER 615 at 622, 623

Publication

[10] Rightly, I think, the appellant spent no effort seeking to support his assertion that the defence as to publication complied with the requirements of CPR 2000 that a defendant who does not admit or deny an allegation in the statement of claim is only permitted to "not admit" if he does not know the truth. The relevant provision is rule 10.5(3) which states:

> "(3) In the defence the defendant must say which (if any) allegations in the claim form or statement of claim –
> (a) are admitted
> (b) are denied
> (c) are neither admitted nor denied because the defendant does not know whether they are true;
> (d) …

What the defence stated, in response to the allegation in the statement of claim that the defendant published the defamatory words, was:

> "No admission is made to paragraph 4 of the Statement of Claim."

Unsurprisingly, the judge held that that defence was a violation of the rule because the defendant could not claim that he did not know whether it was true that he had published the words alleged.

[11] Instead of arguing against that conclusion the defendant argues that before the court can find that there was publication the claimant must first call, at the trial, the witnesses who allegedly heard the words spoken to testify as to the fact and content of publication. The appellant advanced a number of arguments in this connection including arguments as to hearsay and credibility. With respect, I do not see the need to address these arguments because, as I understand it, the consequence of failing to defend against an allegation is the same as it was under the old rules of court. In the old rules it was explicitly stated in RSC order 18, rule 3 that if there is no defence to a material allegation in the statement of claim that allegation must be treated as admitted. Where an allegation was admitted RSC order 27 rule 3 entitled a plaintiff to apply for judgment on admissions.

[12] In CPR 2000 the same purport is contained in rule 12.5, which states that the consequence of failure to file a defence to the claim or any part of it is that the court office, at the request of the claimant, must enter judgment for failure to defend. Rule 12.5(c)(i) makes clear that a defendant is in the same position if his defence has been struck out as if he simply had not filed a defence or a defence to a part of a claim. When there is a failure to defend the rule does not require the claimant to prove his case; the claimant is at once entitled, at the stage of the failure to defend, to apply for judgment. The submission on behalf of the appellant that the respondent still needed to prove the fact and the contents of the publication, even after the defence to publication had been struck out, with respect, is misconceived. I would accordingly dismiss the appeal against the judge's decision as to publication.

Meaning of the words

[13] In considering the meaning of the words the judge applied the guidance given by Lord Nichols in **Charleston v News Group Newspaper**[2] that the law adopts a single standard for determining whether statements are defamatory and that is the response of the ordinary listener to the publication. The judge then stated:

> "…I find that an ordinary reasonable listener who heard the first Defendant speak the words complained of would understand the first Defendant to mean that the Claimant as prime Minister and Minister of Finance caused the Treasury of St. Vincent and the grenadines to pay for the tickets for his mother and daughter, that the costs of the tickets for the Claimant's mother and daughter was included in the $41,000.00 paid by the Treasury to IRIE Investments Ltd. The conduct of the Claimant in causing the Treasury to pay for the airline tickets for his mother and daughter to accompany him to Rome was misconduct in public office and that the Claimant was corrupt.
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> "The offence of misconduct in public office is an offence punishable by imprisonment and actionable per se. The Claimant was therefore not required to plead and adduce evidence of special damage."

[2] (1965) 2 All ER 313 at 319

[14] The appellant argues that the judge was wrong to decide the meaning of the words as a preliminary point; that she should have determined the meaning only after all evidence had been given upon a trial. In my view, while it will not always be appropriate to determine the factual meaning of allegedly defamatory words in advance of trial, it was appropriate in the circumstances of this case to do so. Among the circumstances that made it appropriate to do so was that there was no outstanding issue of fact to be determined at the point when the judge considered the strike out application, so there was nothing to await to be done or to emerge during the course of trial.

[15] The appellant also argued that in coming to her decision on the meaning of the words the judge misled herself by relying on two authorities of this court, namely, **France and Bryant v Simmonds**[3] and **Learie Carasco (aka) Rick Wayne v Neville Cenac**[4], because those two cases dealt not with the issue of fact, what was the meaning of words, but with the issue of law, whether or not the words were capable of bearing the alleged meaning. In my view it is a complaint without merit because the judge cited the first of those two cases precisely to draw the distinction between the legal and the factual questions[5] and she cited the second case for the proposition that in determining the issue of fact, whether the words in their natural and ordinary meaning do bear the defamatory meaning alleged, the court may not consider extrinsic evidence.[6]

[16] In a related argument counsel for the appellant repeated in his written submissions the argument made in the court below that the words complained of were part of a 4-hour-long broadcast and that to enable a jury to determine the context in which the words were spoken, and thereafter the meaning of the words, the jury needed to have placed before them the entirety of what the defendant is alleged to have said in the course of his commentaries. In repeating this argument counsel has

[3] St. Christopher and Nevis Civil Appeal No. 2 0f 1985
[4] St. Lucia Civil Appeal No 6 of 1994
[5] At paragraph 28 of the Ruling
[6] At paragraph 29 of the Ruling

advanced no basis to show that the judge was wrong in her decision, assisted by the decision in **Bookbinder v Tebbit**[7], that a defendant who seeks to rely on other words spoken by him, to show the context in which he spoke the words in issue, bears the burden of stating those other words in his statement of case and of stating his reliance on them. In the language of the judge, paraphrasing the words of Gilson LJ in Bookbinder[8],

> "The onus was on the Defendants to plead the relevant context and adduce evidence of that context. They have not done so in their pleadings, witness statements or documentary evidence. The court therefore cannot speculate as to what was said before or after the words complained of."[9]

In my view the judge was fully entitled to reach the decision that she did and I find no basis for the contention that she reached her decision in a flawed manner.

Fair comment

[17] The principal basis upon which the judge struck out the defence of fair comment was that the words complained of were statements of fact and not comment. In summary, the judge found that the statements that the Treasury, and hence the taxpayers of St. Vincent and the Grenadines, paid $41,000.00 for the airline tickets for the Prime Minister and his wife, and his mother and daughter to go to Rome was a bare statement of fact and was not capable of being considered as comment.[10] The judge arrived at this conclusion after due consideration of the rival positions of the litigants and a consideration of cases both from this jurisdiction[11]

[7] [1989] 1 WLR 640
[8] At 647
[9] At paragraph 35 of the Ruling
[10] At paragraph 46 of the Ruling
[11] Learie Carasco v Neville Cenac, at page 19 and Kenny Anthony v Peter Josie St. Lucia HC No. 144 of 1997

and from England[12] and of relevant passages from **Gatley on Libel and Slander**.[13]

[18] The appellant challenges the judge's finding on the bases that the "judge selected only from a small portion of the passage containing the words complained of" to support her finding and that the judge "further truncated" and took out of context even the brief portions she selected. In the written submissions counsel for the appellant sets out the passages that the judge had selected with all the words that accompanied them. The appellant also set out certain admissions that he said the respondent had made. Further, the appellant conducted an analysis of substantially the entire passage that appeared in the statement of claim and identified what were facts, what were comments, what were "comments as facts deduced or inferred from facts stated" and what were "comments as fact based on facts stated and also facts in the common knowledge of the speaker and the listener".

[19] Having considered in depth the very full submissions of the appellant that I have taken the liberty of condensing in the preceding paragraph I find that these submissions make not the slightest impact upon the decision that the judge reached. After all that the appellant argued it remains the case that in the words complained of the appellant made the statement of fact that the respondent caused the treasury to pay for airline tickets for his mother and daughter to travel to Rome. In the language of Price, **Defamation Practice and Procedure**[14] this was one of those cases where the defendant had no realistic prospect of success and the issue was so clear cut that the judge could be satisfied that no reasonable jury could disagree with her finding of fact that the words were statements of fact and could not be comment. It was entirely proper in the circumstances for the judge to have followed the examples to which she pointed, both local and foreign,

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[12] Tse Wai Chun Paul v Albert Cheng [2001] EMLR 777, O'Brien v Salisbury (1889) 54 JP 215 at 216, London Artist v Littler [1969] 2 QB 375, Branson v Bower [2001] EMLR 800, United States Tobacco International Inc v BBC [1998] EMLR 816 and Cruise v Express Newspapers [1992] 2 WLR 327.

[13] 10th edition, at paragraphs 12.1, 12.6, and 12.10

[14] 2nd edition, paragraph 9-07 cited at paragraph 58 of the Ruling

where the issue, whether fact or comment, was determined before the court received evidence at trial.[15] Accordingly, I would also dismiss this aspect of the appeal.

Qualified privilege

[20] The essence of the judge's decision to strike out the defence of qualified privilege as hopeless is found in the following passage of her Ruling[16]:

> "The Defendants must satisfy the duty interest test, they must establish that they acted in accordance with the tenets of responsible journalism. Undoubtedly information on how public finances are spent is a matter of public interest. However the serious allegation that the Treasury paid for the airline tickets for the Claimant's mother and daughter to accompany the Claimant to Rome to see the Pope was presented as a statement of fact when the First Defendant did not seek to verify the information with the Director General of Finance or the accountant General both of whom are public officers nor did he seek a comment from the Claimant, the Minister of Finance. As stated earlier the Defendants have no prospect of establishing this statement to be true. The information was not information the public had a right to know."

[21] The judge concluded her decision on the central aspect of the defence of privilege by citing the following passage from the judgment of Lord Hobhouse in **Reynolds v Time Newspapers Ltd**[17]:

> "The liberty to communicate (and receive) information has a similar place in a free society but it is important always to remember that it is the communication of information not misinformation which is the subject of this liberty. There is no human right to disseminate information that is not true. No public interest is served by publishing or communicating misinformation. The working of a democratic society depends on the members of that society being informed not misinformed. Misleading people and purveying as facts statements which are not true is destructive of the democratic society and should form no part of such a society. There is no duty to publish what is not true: there is no interest in being misinformed."

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[15] See paragraphs 57 to 63 of the Ruling
[16] At paragraph 75 of the Ruling
[17] [2000] EMLR 1 at 63

[22] There is no suggestion in the appellant's arguments that the judge failed to identify the true principles of law relating to the defence of qualified privilege or that she failed to properly apply them. The appellant relied again on the argument that the respondent needed to prove publication and also relied on the argument that the respondent had admitted the truth of some of the things that the respondent alleged the appellant had said. For the reasons already given the argument as to publication cannot avail the appellant. As to the 'admissions' that the respondent made (that he and his wife, mother and daughter visited the Pope and that the Treasury paid the fare for his travel and that of his wife) these are completely immaterial to the defamatory allegation and do not assist the appellant in the slightest. Nothing in the appellant's arguments takes away from the force of the judge's pronouncement that the defence was incapable of succeeding. I would therefore dismiss the appeal against this aspect of the judge's decision, as well.

Conclusion

[23] In my view this appeal fails on all grounds. I would dismiss the appeal with prescribed costs (which will need to await the assessment of damages to be quantified).

Denys Barrow, SC
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal

I concur.

Hugh A. Rawlins
Justice of Appeal