ABBAS ALI v EDWARD HENRY THOMPSON, RICHARD JAMES URWIN AND JAI PRASAD (ABU0029 of 2010L)

COURT OF APPEAL — APPELLATE JURISDICTION

CALANCHINI AP, CHITRASIRI and WATI JJA

24 February, 16 March 2012

Defamation — defences — fair comment and qualified privilege — whether law relevant to defences applied correctly — whether law relating to burden of proof in establishing defences properly considered — malice — appeal dismissed.

The appellant claimed that his reputation, character and credit were damaged by a letter sent by the respondents to the Acting Commissioner of Police/Crimes and five others. The appellant appealed against a decision of the High Court which found that while the letter contained defamatory statements, the respondents were covered by the defences of fair comment and qualified privilege.

Held –

(1) To succeed in the defence of fair comment, it is necessary to establish that the words are written for the purpose of comment only and not to state facts about a given situation. The totality of the contents of the letter indicate that the purpose of writing the letter was to comment on the police investigation rather than to give a true statement of the facts.

(2) It is not necessary for the respondents to prove that the matters stated in the letter are in fact true in order to establish the defence of qualified privilege. The respondents wrote the letter in pursuit of an interest they have in the Fantasy Co, with the belief that the matters mentioned therein were true, and so were entitled to claim the defence of qualified privilege.

Horrocks v Lowe [1975] AC 135, followed.

(3) Once the defence of qualified privilege is taken up by the defendant, the onus of proving malice on their part lies on the plaintiff.

Howe & McColough v Lees [1910] 11 CLR 361, followed.

(4) There was no error in the High Court's finding that there was no malice on the part of the respondents by the inclusion of the defamatory words in the letter.

Kine v Sewell [1838] (3) M & W 297, followed.

Appeal dismissed with costs.

Cases referred to

Albert Cheng v Tsey Wai Chun Paul [2000] HKCFA 35; [2000] (3) HKLRD 418; *Hasselblad (GB) Ltd v Orbinson* [1985] QB 475; *Telnikoff v Matusevich* [1992] 2 AC 343, considered.

S Maharaj for the Appellant.

S Nandan for the first and second Respondent.

T Draunidalo for the third Respondent.

[1] Calanchini AP. I agree with the judgment and proposed orders of Kankani Chitrasiri JA.

[2] Chitrasiri JA. This is an appeal filed by the Appellant Abbas Ali, seeking to set aside the judgment of the learned High Court Judge, Justice Inoke. In that judgment, His Lordship dismissed a claim for damages sought by the Appellant

for libellous, slanderous and defamatory statements alleged to have been made in the letter dated 30.01.2003 written by the respondents.

Background

[3] Appellant being the Plaintiff, filed writ of summons dated 1st June 2004 along with the statement of claim alleging that his reputation, character and credit was damaged by having sent the said letter to Acting Commissioner of Police/Crimes with copies to five others by the Respondents. Whilst addressing the letter to the Acting Commissioner of Police/Crime, it was copied to OC Nadi Police Station, Western Divisional Police Chief, G P Shankar – Solicitor, Hari Ram – Solicitor, and CCF Rev Akuila Yabaki. (vide pages 77 to 83 of the record) However no evidence is found to establish that the letter was received by the two Solicitors, G P Shankar and Hari Ram. Therefore, the fact remains that the letter was received only by the Police officials named therein and Rev. Yabaki who is the Chief Executive Officer of Citizen Concession Forum (CCF).

[4] The Respondents whilst admitting the writing of the letter had claimed that its contents do not amount to defamatory character of the Appellant. They also have taken up the position that even if it is of a defamatory character, the Respondents are not liable for the tort of defamation since they are well within the defences of fair comment and of qualified privilege that nullifies the liability for defamation.

[5] As mentioned in the preceding paragraph, the three respondents have admitted placing their signatures in the letter put in suit after writing the same. Other than the 3 Appellants, 4th defendant in the case filed in the High Court and another person by the name of Umendra Jit Chaudhary who was not made a party to the action also have placed their signatures at the right end of the letter.

[6] Interestingly, the appellant with the three respondents and the other two persons mentioned above had been doing business together, having incorporated a company named Fantasy Co of Fiji. Appellant was the managing Director of the company, holding a major stake and the Respondents were minority share holders. Whilst engaged in business, a dispute had arisen amongst them and it had resulted in writing this letter that led to the filing of this action in the High Court at Lautoka.

[7] Having concluded the trial, Learned High Court Judge decided that the aforesaid letter written by the Respondents do contain defamatory statements of the Plaintiff. (vide paragraph 27 of the Judgment/page 15 in the record). However, he has concluded that the Respondents cannot be made liable for defamation since they are covered by the defences of Fair Comment and Qualified Privilege known to the Common law jurisdictions which is applicable in Fiji as well. Accordingly, the case of the Appellant was dismissed by His Lordship but without costs.

Grounds of Appeal

[8] Being aggrieved by the aforesaid decision of the learned High Court Judge, the appellant filed Notice of Appeal dated 12th August 2010 seeking to set aside the said decision of the Trial Judge. In that Notice, 3 grounds of appeal had been advanced by the appellant. Those are;

- That the learned judge erred in law and in fact in concluding that the defence of **fair comment** was available to the Defendants having held that the letter dated 30th January, 2003 was defamatory of the Plaintiff.

• That the learned judge erred in holding that the publication of the letter dated 30th January, 2003 was on an occasion of qualified privilege and which conclusion was wrong in law and in fact.

• That the learned judge erred in holding that it was for the Plaintiff to affirmatively prove that the Defendants did not believe the matters stated to be true or that they were indifferent to their truth or falsify and which finding was wrong in fact and in law resulting in miscarriage of justice.

[9] Upon a careful consideration of the three grounds of appeal, it is clear that the decision of the original Court is being challenged to ascertain whether or not the learned High Court Judge has applied the law relevant to the two defences namely, the defence of **fair comment** and the defence of **qualified privilege**, correctly; and also to find out whether the High Court Judge has properly considered the law relating to the burden of proof, in establishing such defences.

[10] It is evident that the learned High Court Judge has come to the conclusion that the contents of the letter are of defamatory character of the Appellant. (para 27 of the judgment) It reads thus:

"[27] Applying this test, I find that the words particularised in the statement of claim and in the letter as a whole, in their natural and ordinary meaning, are capable of having the meanings complained of and are therefore defamatory of the plaintiff."

Accordingly, in keeping with the grounds of appeal advanced by the Appellant in this instance, I will consider the applicable law relevant to the said two Defences and the issue of discharging the burden, in proving those defences.

Defence of Fair Comment

[11] Learned High Court Judge in his judgment has referred to many authorities in connection with the defence of fair comment. In that judgment, he, having quoted number of passages which run into 9 pages from the decision in *Albert Cheng v Tsey Wai Chun Paul,* [2000 HKCFA 35]; [2000 (3) HKLRD 418] has basically, depended upon the law discussed therein. Counsel for both parties also have referred to the law discussed therein. There is no doubt that this decision in Albert Cheng helps to a greater extent in deciding the issue at hand.

[12] In addition to the lengthy references made by the learned Judge as to the requisites that are necessary to establish the defence of fair comment, learned Counsel for the appellant too has reproduced those 5 requisites mentioned in the case of Albert Cheng in his submissions. Those are namely:

1. *The comment must be on a matter of public interest;*
2. *The comment must be recognizable as comment as distinct from an imputation of fact*
3. *The comment must be based on facts which are true or protected by privilege.*
4. *The comment must be explicitly indicated at least in general terms, what are the facts of which the comments are being made.*
5. *The comment must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views. It must be germane to the subject matter criticized.*

[13] I would like to refer to a few of other authorities as well which may help to have a clear understanding of the law relating to the defence of fair comment.

In *Telnikoff v Matusevitch* [1992] 2 AC 343 at 351, it is stated:

"*the question whether words are facts or comment, is in the first instance for the judge: if he is satisfied that they must fall into one of the categories he should so rule. If a defamatory allegation is to be defended as fair comment it must be recognisable by*

the ordinary, reasonable reader as comment and the key to this is whether it is supported by facts, stated or indicated, upon which, as comment, it may be based."

In *Hasselblad (GB) Ltd v Orbinson* [1985] QB 475, an observation had been made to state;

"Where an inquiry is made of a person with a view to the detection of a criminal offence, it is his duty in the sense here used to give such information as he may possess, and such information, if given bona fide and without malice, will be privileged. "I cannot doubt, said Parke B. in Kine v Sewell, that is a perfectly privileged communication, if a party who is interested in discovering a wrongdoer, comes, and makes inquiries, and a person in answer makes a discovery, or a bona fide communication, which he knows, or believes, to be true, although it may possibly affect the character of a third person" However, answers to inquiries by the police may now be protected by absolute privilege even though no proceedings have been started".

[14] In the textbook of "Gatley on Libel and Slander" It is stated:

"To succeed in the defence of fair comment, defendant must show that the words are comment and not a statement of fact. *[Campbell v Spottiswoode* (1863) 3 B 7 S 769; *Minister of Justice v S A Associated Newspapers* 1979 (3) SA 466. However, an inference of fact from other facts referred to, may amount to a comment. [*Kemsley v Foot* [1952] AC 345 *Jeyaretnam v Goh Chok Tong* [1989] 1 WLR 1109; *London Artists Ltd v Littler* [1968] 1 WLR 607. He must also show that there is a basis for the comment, contained in the matter complained of. Finally, he must show that the comment is on a matter of public interest or is otherwise a matter with which the public has a legitimate concern." [p 288 in Cap 12]

[15] As stated by Gatley, to succeed in the defence of fair comment, it is necessary to establish that the words are written for the purpose of comment only and not to state facts at a given situation. This is the law found in all the authorities including in Albert Cheng, referred to by the learned Trial Judge as well as both the Counsel.

[16] I will now refer to the matters contained in the impugned judgment to ascertain whether the learned High Court Judge has misdirected himself in applying the law referred to above to the facts in this case. In that judgment, it is stated that the letter in question was written out of frustration of the respondents to get someone to do something about the complaints against the plaintiff. He also has said that the comments made in the letter were directed at inaction of the police rather than at the plaintiff and the sole purpose of writing the letter is to compel the Police to investigate the matters mentioned therein.

[17] It should not be forgotten that the learned High Court Judge had come to the above conclusions, only after having addressed his mind to the specific defamatory words found in the letter. He was fully aware of the said words such as:

- *"felonious actions of Abbas Ali";*
- *"Abbas Ali and a number of his fellow conspirators continue to rob and defraud the company and each of us individually unabated- until this day" etc:*

found in the letter when he decided that the contents of the same would amount to comment. Only thereafter he concluded that the defence of fair comment has been made out in so far as it applies to defamatory comments about the Plaintiff.

[18] Having commented on the impugned judgment, I will examine whether the words found in the letter written by the Respondents could lead to an inference rather than coming to a conclusion on facts. Upon a perusal of the

totality of the contents of the letter without interpreting the words in isolation, it seems to me that the purpose of writing this letter to the Police had been to compel the authorities to commence and complete their investigations as to the matters mentioned therein. Letter indicates 32 instances of unlawful acts, in which the Respondents were interested in having a proper investigation by the police. Such a backdrop would lead a reasonable and an ordinary person to infer that the letter is written, not to give a true statement of facts of the situations mentioned therein but to make comments as to the investigation of the police though a few words found are of a defamatory character of the Appellant. In the circumstances, it is clear that the law referred to herein before, permits the respondents to claim the defence of fair comment in this instance.

[19] Moreover, the learned High Court Judge having heard the evidence of the Plaintiff and the police officers has come to the conclusion that most of the opinions and comments made in the letter were directed at inaction of the police rather than the Plaintiff. Therefore, it is clear that the matter complained of has a legitimate concern of the Respondents and it is written on public interest as well. It shows that the learned High Court Judge was aware of the legal principles governing the defence of fair comment when he made such a finding.

[20] In the circumstances, it is my opinion that the totality of the words in the letter indicates comment rather than a statement of facts. Accordingly, the findings of the learned Judge as to defence of fair comment taken up by the Respondents, is correct and should not be interfered with.

Defence of Qualified Privilege

[21] I will now turn to examine the matters relating to the defence of qualified privilege taken up by the Respondents. Learned High Court Judge in para. 38 of his judgment has stated that;

> *"The defendants had interests in the Fantasy Co to protect and the Police and Reverend Yabaki, to a limited extent, had duties to perform in keeping law and order. That was the dominant purpose and possibly the only purpose for which the letter was sent."*

Having said so, he had decided that the defence of qualified privilege is available to the Respondents in this instance. In coming to this conclusion, learned High Court Judge has heavily relied on the celebrated majority decision of Lord Diplock in *Horrocks v Lowe* [1975] AC 135.

[22] The occasions of qualified privilege could broadly be classified into two. First is where the maker of the statement has a duty (whether legal, social or moral) to make the statement and the recipient has a corresponding interest to receive it. Second is where the maker of the statement is acting in pursuance of an interest of his and the recipient has such a corresponding interest or duty in relation to the statement. The facts of this case fall into the second category.

[23] This proposition of law is reiterated by the learned Counsel for the Appellant in his submissions referring to Halsbury's Laws of England (4th Edition). He elaborating this position has referred further to para 145 of the same text and has quoted thus:

> *"...what must alternatively be decided is the Defendant's honesty in publishing the words complained of. Where the defence is qualified privilege, the words complained of are assumed to be untrue and the burden is on the plaintiff to prove express malice and so rebut the privilege on which the defendant seeks to rely."*

[24] As mentioned by the learned Judge, facts of this case indicate that the letter had been written to have the rights of the Respondents in the Fantasy Co protected through the authorities concern. Therefore, it is clear that the Respondents were acting in pursuance of an interest that they have in the Fantasy Co. Simultaneously, the Police and the witness Yabaki had a corresponding interest or duty to inquire into the matter upon receiving the letter which duty had been carried out by them after receiving the same.

[25] At this stage, it is pertinent to quote some of the important aspects of the law mentioned by Lord Diplock in *Horrocks v Lowe* (supra) which the learned High Court Judge also has mentioned in his judgment. In that speech, Lord Diplock has said;

> *"The motive with which a person published defamatory matter can only be inferred from what he did or said or knew."*
>
> *"What is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologously termed, "honest belief".* [p 27 of the record]

The above mentioned authorities show that it is not necessary for the Respondents to prove that the matters stated in the letter are in fact true in order to establish the defence of qualified privilege. In this instance, it is crystal clear that the Respondents were making an effort believing that the authorities would investigate on their complaint though the investigations made by the police did not end up in filing any action against the Respondents. The evidence also reveal that the Respondents, in this instance had written this letter with the firm belief that the matters mentioned therein are truth and nothing but the truth though the police were unable to prosecute for the reasons best known to them.

[26] In the circumstances, I am of the view that the learned High Court Judge is correct when he decided that the Respondents are entitled to claim the defence of qualified privilege in this instance.

Burden of Proof

[27] I will now consider the issue of burden of proof which is the third ground of appeal advanced by the Appellant. In the submissions of the learned Counsel for the Appellant once again referring to Halsbury's Laws of England [para145 in the 4th Edition] has stated that it is the duty of the Defendant to prove that the occasion of publication of the letter was one of qualified privilege. It further goes on to state that to defeat the defence, the Plaintiff should prove that the writing of the letter was actuated by express malice of the Respondents.

[28] To the contrary, following passage from Justice O'Connor's judgment, in *Howe & McColough v Lees* (1910) 11 CLR 361 at 373 has been cited by the 3rd Respondent in support of his contention as to the burden of proof when the defence of qualified privilege has been claimed by a Defendant.

> *"Once there is proof that, that the defendant published the defamatory matter on a privilege occasion, it will be assumed he did so honestly believing his statement to be true, unless there is some evidence, the onus of giving which lies on the Plaintiff, from which a contrary inference may be drawn."*

[29] Learned High Court Judge, on this point had to say:

> *"(40) In my view, applying the Lord Diplock test in the above passage, the letter contained no irrelevant matters. Therefore, the onus of proof lies on the Plaintiff to*

affirmatively prove that the Defendants did not believe the matters stated to be true or that they were indifferent to their truth or falsity. I do not think that the plaintiff has done that in this case."

[30] Admittedly, the Respondents have pleaded the defence of qualified privilege in answer to the statement of claim of the Appellant. The authorities mentioned above clearly show that once the defence of qualified privilege is taken up by the Defendant, the onus of proving malice on their part lies on the Appellant. Merely because no witnesses were called by the Respondents to prove the defence of qualified privilege, it will not take away the responsibility of the Appellant of proving malice of the Respondent since the Respondents have already taken up such a defence in their pleadings. Hence, it is my considered view that the onus of proving malicious mind of the Respondents lies on the Appellant. I therefore conclude that the decision of the learned High Court Judge as to the burden of proof of malice of the authors to the letter should not be disturbed.

[31] At this stage, it is also necessary to refer to the matters in connection with the malicious mind of the Respondents in order to ascertain whether the Appellant has discharged the onus of proving malice on the part of the respondents. Having considered the evidence of the Appellant; the police officers; and of Yabaki, the learned High Court judge was of the view that the allegations levelled against the Appellant have not been proven to be true neither have they proven to be false. Moreover, as described herein before, the obvious purpose of sending this letter to the authorities is to have a proper and fair investigation in respect of the incidents referred to therein.

[32] In addition to the authorities cited by the parties and the High Court Judge on the issue of malice, I also wish to refer to one other decision which seems to me is direct on the point. In *Kine v Sewell* [1838 (3) M & W 297 at 302] Parke B. Said:

"That it is perfectly privileged communication, if a party who is interested in discovering a wrongdoer, comes and makes inquiries, and a person in answer makes a discovery, or a bona fide communication, which he knows, or believes, to be true, although it may possibly affect the character of a third person."

[33] In the light of the above, I do not see any error on the part of the learned High Court Judge when he decided that there was no malice on the part of the Respondents by the inclusion of the defamatory words in the letter written by them. Also, it is my view that the learned High Court Judge has correctly addressed his mind to the onus of proving malice on their part.

[34] In the circumstances, I am of the view that there is no merit in the grounds of appeal advanced by the Appellant in this case. Accordingly, this appeal should be dismissed with costs.

[35] **Wati JA.** I agree with the judgment and proposed orders of Kankani Chitrasiri JA.

Orders of the Court

[36] The orders of the Court are:

A. Appeal dismissed.

B. The Appellant is to pay the costs of the appeal fixed summarily in the sum of $3000.00.

Appeal dismissed.