

Civil Jurisdiction

Action No. 968 of 1982

Between:

GYNENDRA NAVEEN PRAKASH SINGH
s/o Dharmendra

Plaintiff

- and -

1. FIJI TIMES AND HERALD LIMITED
2. GARY BARKER of Suva, Publisher
3. VIJENDRA KUMAR of Suva, Editor
4. SURESH PRASAD of Suva, Reporter

Defendants

JUDGMENT

The Plaintiff was at all material times the personnel manager of Air Pacific Limited, a company which owns and operates this country's national airline.

At all material times the first defendant was the proprietor of "The Fiji Times", a newspaper with a daily circulation of about 25,000 copies, while the second, third and fourth defendants were, respectively, the publisher, the editor and a reporter employed by the first defendant.

On 1st October, 1982, the four defendants, as they admit, published in "The Fiji Times" under the heading "AIR PACIFIC SUSPENDS OFFICERS", a news item which I now set out in full :

"Air Pacific has suspended its community relations officer, Mr. Ramlu Naidu, and its operations manager, Mr. Philip Pandaram, after accusing them of attempting to subvert an agreement.

Mr. Naidu, who is also general secretary of Air Pacific Senior Staff Association and Mr. Pandaram a senior union member, were accused of inviting other staff against an agreement related to staff salaries.

The airline says they were engaged in 'anti company' activities in office hours.

In a letter to both employees, the industrial relations manager, Mr. Delai Sainikinawalu, said they had been subverting 'a decision already reached by the company with the association on rationalisation of salaries.'

He said they had interfered with other staff doing their duties.

Mr. Sainikinawalu said they did this without the approval of their respective divisional managers.

'And their absence from office on this unofficial business resulted in no one carrying out their normal official function,' he said.

Mr. Sainikinawalu said the company viewed these charges seriously. The two were suspended on Monday pending disciplinary action.

The personnel manager, Mr. Gyanendra Singh, refused to comment yesterday.

He said the industrial relations manager had not completed his inquiries.

Mr. Naidu and Mr. Pandaram said they were reluctant to comment as their cases were pending.

Senior staff association members have threatened the company with 'drastic action.'

They said Mr. Gyanendra Singh was creating one dispute after another in a ploy to keep himself and his underlings in job."

The plaintiff takes exception to the last sentence of that news item. It is common ground that it refers to the plaintiff; and the plaintiff contends that it bears the following natural and ordinary meaning :

- a) that the plaintiff was dishonest in his capacity as Manager Personnel of Air Pacific Limited;
- b) that the plaintiff was engaged in and encouraged a scheme of deliberately causing industrial unrest between the Union and Air Pacific Limited;
- c) that the plaintiff was not worthy of being Manager Personnel of Air Pacific Limited;
- d) that the plaintiff's honesty and integrity were questionable.

The defendants plead that the sentence is not capable of bearing any such meaning. So I must decide whether or not it does have that meaning. In order to do so, I must ask myself what was the meaning in which reasonable men of ordinary intelligence, with the ordinary man's general knowledge and experience of worldly affairs, would be likely to have understood that sentence when reading it in the context of the news item as a whole. Applying that objective test, putting aside such irrelevant considerations as the meaning the writer intended to convey and the meaning actually conveyed to those who read the sentence, I find that all of those imputations, (a), (b), (c), and (d), were within the natural and ordinary meaning of the sentence.

I find also that all of those imputations were defamatory of the plaintiff, a defamatory imputation being "one to a man's discredit or which tends to lower him in

in the estimation of others, or to expose him to hatred, contempt or ridicule, or to injure his reputation in his office, trade, or profession or to injure his financial credit" : Gatley on Libel & Slander, 8th Edition, para. 31.

I have borne in mind that, to be defamatory, an imputation need have no actual effect on a person's reputation, for the law looks only at its tendency, and that its tendency must be to lower the plaintiff in the estimation of right thinking society generally as opposed to damaging him in the eyes of a section of the community : Gatley, paras. 31 and 41.

The defendants plead that the words complained of are fair comment on a matter of public interest. That plea, in paragraph 5 of the statement of defence, is in a form known as "the rolled up plea" and it reads as follows :

"In so far as the said news item dated the 1st October 1982 consists of statements of fact they are true in substance and in fact and in so far as the same consist of expressions of opinion they are fair comment made upon the said facts which are a matter of public interest."

That being the defendants' plea, it must be borne in mind that where a defendant has published, or taken part in publishing, the statement of another (which is what has happened in the present case) he may rely on the defence of fair comment at least to the same extent as the person whose statement it was: Gatley, para. 730.

I have no doubt that the statement that the plaintiff, the Personnel Manager of Air Pacific Limited, "was creating one dispute after another in a ploy to keep himself and his underlings in a job" was a statement on a matter of public interest. The questions remain: was that statement comment and, if comment, was it fair comment?

In Kemsley v. Foot (1952) A.C. 345, at page 356, Lord Porter said that he found his own view well expressed in the following remarks contained in the sixth edition of Odgers on Libel and Slander, at page 166 :

"Sometimes, however, it is difficult to distinguish an allegation of fact from an expression of opinion. It often depends on what is stated in the rest of the article. If the defendant accurately states what some public man has really done, and then asserts that 'such conduct is disgraceful,' this is merely the expression of his opinion, his comment on the plaintiff's conduct. So, also, if without setting it out, he identifies the conduct on which he comments by a clear reference. In either case, the defendant enables his readers to judge for themselves how far his opinion is well founded; and, therefore, what would otherwise have been an allegation of fact becomes merely a comment. But if he asserts that the plaintiff has been guilty of disgraceful conduct, and does not state what that conduct was, this is an allegation of fact for which there is no defence but privilege or truth. The same considerations apply where a defendant has drawn from certain facts an inference derogatory to the plaintiff. If he states the bare inference without the facts on which it is based, such inference will be treated as an allegation of fact. But if he sets out the facts correctly, and then gives his inference, stating it as his inference from those facts, such inference will, as a rule, be deemed a comment. But even in this case the writer must be careful to state the inference as an inference, and not to assert it as a new and independent fact; otherwise his

inference will become something more than a comment, and he may be driven to justify it as an allegation of fact."

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Now, it is my view that the words complained of, being a statement that the plaintiff was creating one dispute after another in a ploy to keep himself and his subordinates in employment, when read in the context of the whole news item, do not appear to be an expression of opinion or comment but an allegation of fact. If a defamatory allegation is to be defended as fair comment it must in the first place be recognisable by the ordinary reasonable man as comment and not as a statement of fact - that, at least, is clearly established by the authorities. See Gatley, para. 701. So I hold that the defence of fair comment fails.

I should add that even if the words complained of were in my view comment, I would consider myself bound to hold that they were not "fair comment".

True it is that, when he comments on matters of public interest, the critical commentator is allowed wide latitude. The defence of "fair comment" is so wide as to have led to a suggestion by the Committee on Defamation in the United Kingdom that it should be renamed simply "comment". See Gatley para. 707.

In Merivale v. Carson (1887) 20 Q.B.D. at page 281 Lord Esher M.R., explaining the meaning of "fair comment", said :

"The question which the jury must consider is this - would any fair man, however prejudiced he may be, however exaggerated

or obstinate his views, have written this criticism?"

In Turner v. M.G.M. Pictures Ltd. (1950) 1 All E.R. at page 461, Lord Porter quoted those words of Lord Esher and added :

"I should adopt them except that I would substitute 'honest' for 'fair' lest some suggestion of reasonableness instead of honesty should be read in."

In Slim v. Daily Telegraph Ltd. (1968) 2 Q.B., at page 170, Lord Denning M.R. said :

"The important thing is to determine whether or not the writer was actuated by malice. If he was an honest man expressing his genuine opinion on a subject of public interest, then no matter that his words conveyed derogatory imputations; no matter that his opinion was wrong or exaggerated or prejudiced; and no matter that it was badly expressed so that other people read all sorts of innuendoes into it; nevertheless, he has a good defence of fair comment. His honesty is the cardinal test. He must honestly express his real view."

True it is that judges of great eminence have said that the citizen's right to express fair comment on matters of public interest must be maintained and not whittled down. Lord Denning went on to say so in Slim v. Daily Telegraph (supra).

However, let it also be said that the right is not a licence for malicious, dishonest or grossly irresponsible comment.

For comment to be fair it must meet the following conditions :

- (a) It must be based on facts contained in or referred to in the publication complained of.
- (b) The facts must be sufficiently true to make the comment fair.
- (c) If the comment contains an imputation of corrupt or dishonest motives, or perhaps any inference of fact, the comment must be shown to be justifiable.
- (d) The comment must be such as fairly to be described as criticism.
- (e) The comment must represent the honest opinion of the commentator, and be published without malice: Gatley, para. 709.

It seems to me that neither condition (a) nor condition (b) was met. If a defamatory allegation is to be defended as fair comment, not only must that allegation be recognisable as comment by the ordinary reasonable man but the publication must bring to his mind the facts on which the comment is based (unless they are so well known and obviously related to the comment as to render it unnecessary to do so) and, furthermore, those facts must be shown by the defendant to be sufficiently true. That seems to be the position as it is affected by section 16 of the Defamation Act which is in the same terms as section 6 of the Defamation Act, 1952, of the United Kingdom. See Gatley, paras. 714 and 715.

In the present case, the words complained of stand naked and alone, so to speak, in the news item. There are plenty of references to fact in the news item

but the words complained of, if comment, do not appear to be based on any of those facts.

I turn now to condition (c). Undoubtedly the words complained of contained imputations of motives on the part of the plaintiff that were corrupt or, to say the least, dishonest. It follows that, if the words complained of are to be defended as fair comment, the comment must be well founded. Usually, when fair comment is pleaded, all that is necessary to sustain that plea is that the comment be honest, but when a man expresses an opinion that another is corruptly or dishonestly motivated he must do more than shew that his opinion is honest - he must show that it is well founded. Gatley, in para. 720, reports Lord Cockburn C.J. as having said in Campbell v. Spottiswoode (1863) 3 B & S at pp 776, 777 :

"A line must be drawn between criticism upon public conduct and the imputation of motives by which that conduct may be supposed to be actuated; one man has no right to impute to another, whose conduct may be fairly open to ridicule or disapprobation, base, sordid and wicked motives unless there is so much ground for the imputation that a jury shall find, not only that he had an honest belief in the truth of his statements, but that his belief was not without foundation It is said that it is for the interests of society that the public conduct of public men should be criticised without any other limit than that the writer should have an honest belief that what he writes is true. But it seems to me that the public have an equal interest in the maintenance of the public character of public men; and public affairs could not be conducted by men of honour, with a view to the welfare of the country, if we were to sanction attacks upon them, destructive of their honour and character and made without any foundation. I think the fair position in which the law may be settled is this: that where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes

imputations on his motives which arise fairly and legitimately out of his conduct so that a jury shall say that the criticism was not only honest, but also well founded, an action is not maintainable." The underlining is mine.

It must, according to Gatley - see para. 720 - appear from the facts stated or referred to in the publication itself that the comment is one which a fair minded man might reasonably draw from those facts.

There is nothing in the facts stated or referred to in the news item which justifies imputations of corrupt or dishonest motives on the plaintiff's part. I go further and say that nothing was disclosed even in the sworn testimony I heard in the course of the trial which came anywhere near justifying the imputations of corrupt and dishonest motives to which the plaintiff has taken exception.

Even if the correct view were that the defamatory sentence consisted of an allegation of fact that the plaintiff was creating dispute after dispute and an expression of opinion that his motive was to keep himself and his subordinates in employment, the plea of fair comment would fail. The defendant would not have shown that the alleged fact was sufficiently true or that the comment was well founded.

I would remark, incidentally, that the defendant, having pleaded in the form of "the rolled up plea", has failed to comply with R.S.C. 0.82, r.3(2) which reads as follows :

"Where in an action for libel or slander the defendant alleges that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect,

he must give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true."

Although the defendant has not given particulars of the facts and matters he relies on I have looked for such facts and matters and, as I have said, I have failed to find any which could reasonably be relied on.

The view that "the rolled up plea" raises one defence only, i.e. the defence of fair comment, was confirmed by the House of Lords in Sutherland v. Stopes (1925) A.C.47. Gatley, para. 1131. However, even if the defendants had pleaded justification, that is to say even if they had separately pleaded that the words complained of were a true statement of fact, I would have considered myself bound to find that that plea was not sustained by the evidence. The defendants would have failed to discharge the onus of proof they assumed by so pleading.

Mr. Vijendra Kumar, the editor of "The Fiji Times" appeared to me to be a fair and honest witness. Nevertheless, his evidence to the effect that, following the publication of the news item, he made enquiries which satisfied him that the defamatory sentence was correct and accurate, was not really evidence of the truth of the imputations in that sentence.

When a defendant pleads justification, it is the Court's function to decide the issue of whether or not the defamatory imputations are true. The most a witness can do is to prove facts bearing on that issue. Evidence of how the witness himself has decided the issue is not relevant.

The same applies to the evidence of the other witness called by the defence, Mr. Veer Singh, that he agreed with what was stated in that sentence.

To my mind, the evidence did not prove that the plaintiff created disputes at all, let alone that he created disputes in order to keep himself and his subordinates in employment.

To establish a plea of justification, the defendant must prove that the defamatory imputation is true. It is not enough for him to prove that he believed that the imputation was true. So, for example, if a defendant writes "Brown said that Jones (the plaintiff) had been convicted of theft" it is no defence for the defendant to prove that Brown had told him so, that he honestly believed what Brown said, and only repeated it. He must prove as a fact that Jones was convicted of theft. "If you repeat a rumour you cannot say it is true by proving that the rumour in fact existed; you have to prove that the subject matter of the rumour is true" - per Lord Grier L.J. in Cookson v. Harrywood (1932) 2 K.B. at p. 485, approved by Lord Devlin in Louis v. Daily Telegraph (1964) A.C. at pp. 283, 284.

I hold that the defendants are jointly and severally liable to compensate the plaintiff.

The allegation that the plaintiff, the Personnel Manager of Air Pacific Limited, was deliberately creating disputes between the company and its personnel in order to keep himself and his subordinates in employment was very defamatory indeed.

I have borne in mind that, on the day following the publication of the news item containing the defamatory sentence, there was published, with about equal prominence in the same newspaper, a second news item containing a statement by the Vice President of Air Pacific Senior Staff Association which directly and expressly contradicted the defamatory statement.

I have also borne in mind that the circulation of the newspaper in question is about 25,000 copies.

In all the circumstances I do not think that aggravated or exemplary damages should be awarded and I assess damages at \$2,000.

I accordingly give judgment for the plaintiff against the defendants and I also order that the defendants pay the plaintiff's costs, to be taxed if not agreed upon.

R. A. Kearsley

(R.A. Kearsley)
JUDGE

Suva,

11th May, 1984