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E.H.2.G.1

24, 1957

Gambia

In the Privy Council.

No. 1 of 1956.

**ON APPEAL FROM THE WEST AFRICAN COURT
OF APPEAL**

UNIVERSITY OF LONDON
25 FEB 1958
INSTITUTE OF ADVANCED
LEGAL STUDIES

BETWEEN

P. S. N'JIE APPELLANT

AND

C. S. T. EDMONDSON RESPONDENT.

49834

CASE FOR THE APPELLANT

RECORD

1.—This is an Appeal from a Judgment, dated the 30th June, 1954, of the West African Court of Appeal (Foster Sutton, P., Smith, C.J. and Coussey, J.A.), setting aside a Judgment, dated the 16th November, 1953, of the Supreme Court of the Gambia (Miles, J.), awarding the Appellant £1000 as damages for libel. pp. 62-66, pp. 27-31

2.—The Appellant, by his amended Statement of Claim, dated the 9th November, 1953, alleged that the Respondent on the 28th April, 1953, falsely and maliciously wrote and forwarded to the Attorney-General of the Gambia a letter to which was annexed a statement by one Sanjali Bojang. This statement was to the following effect : pp. 13-14

Bojang was the owner of No. 7, Denton Street, Bathurst. In December, 1950, he had asked the Appellant for a loan of £100, offering the title deeds to this property as security. The Appellant had drawn up and read to him a document, which he (Bojang) had understood to provide for the sale of the property to the Appellant. He had refused to sign this. The Appellant had then torn it up, and prepared and read out another document, which Bojang, believing it to be a loan agreement, had signed. The Appellant then told him that, whenever he (Bojang) repaid £100, he (the Appellant) would return the title deeds. Bojang had subsequently repaid the loan, and the Appellant had given him a receipt. He could not read or write English, but he had

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been told afterwards that the receipt said he had paid £100 to the Appellant for safe keeping. The Appellant had told him to go back for his title deeds. When he went back, the Appellant had said that he (Bojang) had signed a document selling his property to the Appellant for £1000. He (Bojang) had been upset and had not believed it, so he had waited patiently to see how the Appellant could do that. Some months later a man named Kebba N'Jie had told him that the Appellant had sold him the property, and he would like to come and see it. Bojang had said he might come. Kebba had come the next day, and had said that the Appellant had told him that Bojang was paying him (the Appellant) £15 per month rent for the property. Bojang had never paid a farthing rent to anyone. 10

In his letter, the Respondent stated that Bojang's statement amounted to an allegation of forgery, and his instructions were to take proceedings to cancel the alleged deed of conveyance on the ground that it was not signed by Bojang and was in fact a forgery on the part of the Appellant. By sending the letter and statement to the Attorney-General, the Respondent published the libellous statements of the Appellant, and published them of him as a legal practitioner. At the material time the Appellant was practising as a barrister-at-law of the Supreme Court of the Gambia. 20

pp. 15-16

3.—By his amended Defence, dated the 10th November, 1953, the Respondent admitted that he had written to the Attorney-General the letter mentioned in the Statement of Claim, with a copy of the statement of Bojang, as set out in the Statement of Claim, annexed. He alleged that, in his capacity as Counsel and Solicitor for Bojang, he had an interest and a duty to do so, and the Attorney-General had a corresponding interest and duty to receive the letter and statement; the letter contained fair and impartial statements, and had been written and sent, with a copy of Bojang's statement, in the honest defence of his client's interest and without any malice. The Respondent alleged that Bojang had retained him as Counsel and Solicitor to advise and take such proceedings as were necessary to secure cancellation or revocation of a deed of conveyance of No. 7 Denton Street, Bathurst, to the Appellant, and generally to secure redress against the Appellant in regard to that property. He also alleged that he had sent to the Attorney-General, together with his letter and statement, a copy of a letter, dated the 21st February, 1953, from the Appellant to him (the Respondent), giving the Appellant's version of his transaction with Bojang. 30

4.—The Appellant's Reply, dated the 11th November, 1953, alleged the following matters, *inter alia*, in proof of malice: 40

- (i) in 1949 the Respondent had wrongfully defamed the Appellant, and apologised for his action;

- (ii) in communicating with the Attorney-General, the Respondent had acted solely on an unsigned and undated statement, allegedly made by Bojang and reduced to writing ;
- (iii) the Respondent had intentionally omitted to send to the Attorney-General a copy of a tenancy agreement between one Macoumba N'Jie and the Respondent relating to the Respondent's occupation of No. 7 Denton Street ;
- (iv) the Respondent did not take proceedings to set aside the conveyance, instead of writing to the Attorney-General ;
- 10 (v) the Responent told the Apellant that he did not believe Bojang's statement ;
- (vi) the Respondent's failure to mark his letter to the Attorney-General " Private " ;
- (vii) the Respondent's subsequent abandonment of the charge of forgery ;
- (viii) the statement by the Respondent's Counsel that he would not give evidence ;
- (ix) the language used by the Respondent in the letter.

5.—The action was tried by Miles, J. on the 11th and 12th November, p. 30, ll. 36-40
20 1953. On the first day of the trial the Respondent applied for his evidence to be taken in Sierra Leone, on the ground that he was unfit to travel. He withdrew this application, however, before the learned Judge had an opportunity of ruling on it.

6.—The Appellant put in the following material documents :

- (i) the statement of Bojang and the Respondent's letter to the Attorney-General, summarised in the Statement of Claim ; pp. 35-36, 48
- (ii) a letter from the Respondent dated the 10th February, 1953, p. 37 summarising Bojang's story and asking the Appellant to explain his side of the matter ;
- 30 (iii) the Appellant's answer to this letter, dated the 21st February, 1953, pp. 38-39 explaining that :
 - (a) Bojang had sold No. 7 Denton Street to him in January, 1951, saying (untruly) that he was leaving Bathurst ;
 - (b) the Appellant had allowed Bojang to stay in the house, and in August, 1952, had begun to charge £12 10s. per month rent ;

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- (c) in December, 1952, the Appellant had sold the house to one MacCoumba N'Jie; he had previously told Bojang of his intention to do so, and Bojang had offered to buy the house back;
- (d) MacCoumba N'Jie had continued Bojang's tenancy, but at £15 per month (a copy of the tenancy agreement between them was enclosed with the Appellant's letter).
- pp. 42-43 (iv) an Indenture dated the 24th November, 1952, executed by the Appellant, conveying No. 7 Denton Street, Bathurst, to MacCoumba N'Jie; 10
- p. 44 (v) a Lease dated the 26th November, 1952, executed by MacCoumba N'Jie as landlord and Bojang as tenant, letting No. 7 Denton Street to Bojang;
- p. 47 (vi) a letter from the Appellant to the Respondent dated the 30th June, 1956, saying that the Appellant and Respondent had a meeting at Bathurst, and at this meeting the Respondent told the Appellant that he had not advised his client, Bojang, to take a civil action to set aside the deed of conveyance to the Appellant, because he (the Respondent) did not believe his client. In this letter the Appellant also said that at the meeting the Respondent had produced the original of Bojang's statement, saying he had just had it signed by Bojang; and he (the Appellant) had said he would consider withdrawing his action against the Respondent if the Respondent sent a written apology or explanation; 20
- p. 45 (vii) a letter from the Respondent to the Appellant dated the 6th July, 1953, admitting that at this meeting the Respondent had produced Bojang's statement, but denying the rest of the Appellant's account of the meeting.
- 7.—The following other evidence was given for the Appellant:
- p. 18, ll. 42-45 (i) the Appellant himself produced the documents described in the foregoing paragraph. He had sent to the Respondent the tenancy agreement between MacCoumba N'Jie and Bojang, but the Respondent had not sent this to the Attorney-General. He said the Respondent had done nothing about civil proceedings until August, 1953, when acting for Bojang, he had started an action against the Appellant to have the conveyance set aside. That action had failed. Bojang's statement and the Respondent's letter to the Attorney-General charged him (the Appellant) with forgery, and with obtaining execution of a legal document by fraud. In 1950 the Respondent had written to the Attorney-General of the Gambia, alleging that he was unable to get money due to a client from a certain estate, for which (he had said) the Appellant was acting. He (the Appellant) had explained to the 40
- pp. 54-55

- Attorney-General that he had never acted for that estate, which in fact owed him money. The Respondent had acted on that occasion simply on what he had been told by somebody else ; he had not written to the Appellant before complaining to the Attorney-General. On the 21st May, 1953 (after the institution of the present proceedings), he had met the Respondent at Bathurst, and had told him that his right course would have been to start proceedings to have the conveyance cancelled. The Respondent had answered : " How can I do that when I don't believe the man ? Look ; the statement is not signed, but I am going to get it signed to-day." He (the Appellant) had seen that the statement was unsigned. He had asked the Respondent for an explanation of his conduct, but had had none. The Respondent had done nothing to have the deed cancelled until two days before the libel action was fixed for hearing. The Attorney-General had sent the statement and the letters to the Superintendent of Police. He had given them for investigation to the Assistant Superintendent, who had called at the Appellant's chambers and discussed it. The matter had been known to the clerks in the Attorney-General's office.
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- (ii) the Attorney-General of the Gambia, Mr. A. C. Spurling, said he had received the letter written by the Respondent in 1950. He had also received the Respondent's letter of the 28th April, 1953. He had not seen the envelope ; he thought that, if it had been marked " confidential," the envelope would have reached him unopened, which was the normal practice. One of the clerks in the office had most probably opened the envelope. He had sent the letter to the Superintendent of Police, making it " confidential " when he wrote his minute. The Attorney-General in that territory carried out the duty of Director of Public Prosecution ;
- (iii) A. D. Baker, Chief Clerk to the Attorney-General, said that he had received, opened and read the Respondent's letter dated the 28th April, 1953. He did not remember the envelope was in another envelope marked " confidential." He did not deal with confidential matters, as there were confidential clerks at the Secretariat who did this. If there had been an envelope marked " confidential " he would not have opened it. No other clerk had read the letter to his knowledge ;
- (iv) G. St. C. Joof said that he had been legal assistant and lands officer until the 8th July, 1953. He had seen the Respondent's letter dated the 28th April, 1953. It had been shown to him by Baker on the 2nd May ;
- (v) a customs officer named Grant said he had been the witness to Bojang's mark on his statement. He had done this at the
- p. 19, ll. 14-24
- p. 19, ll. 40-43
- p. 19, ll. 44-45
- p. 20, ll. 8-14
- p. 23, ll. 1-34
- p. 24, ll. 5-28
- p. 24, l. 29—
p. 25, l. 3
- p. 25, ll. 4-22

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Respondent's request on the 19th May, 1953. The Respondent had said to him: "This letter was written, and there was no signature of Bojang neither a witness. Whether he understands it I don't know. Yet still you could read it and explain it to him." Bojang had signed the statement (sc. put his mark to it) on the 19th May. Bojang could not read English.

p. 25, l. 31

8.—The Respondent did not give evidence, nor did he call any witnesses; in spite of the fact that Counsel for him had challenged in cross-examination, and denied in his closing address to the learned Judge, the truth of the Appellant's account of his conversation with the Respondent 10 on the 21st May 1953.

pp. 27-31

p. 27, ll. 31-35

9.—Miles, J. delivered a reserved judgment on the 16th November, 1953. He first stated the facts, and said it was not disputed that the Respondent's letter and Bojang's statement were defamatory of the Appellant. Justification was not pleaded; the only defence was that the publication was on a privileged occasion, and without malice. The learned Judge then considered the claim of privilege, and held that the letter and the statement were published to the Attorney-General on an occasion of qualified privilege. He went on to consider the plea of malice set up by the Appellant. He accepted the Appellant's account of the conversation of the 20 21st May, 1953, and held that the fact that the Respondent did not honestly believe the information on which he acted was of itself strong evidence of malice. There were, however, other matters which showed a malicious intention to injure the Appellant. These were:—

p. 27, l. 41—
p. 28, l. 15p. 28, l. 16—
p. 29, l. 17

p. 29, ll. 17-19

p. 29, ll. 20-32

1. The recklessness with which the charge had been made. On the 28th April, 1953, the Respondent had had before him a typewritten, unsigned statement in English, the Appellant's letter of explanation and the tenancy agreement made between Bojang and Macoumba N'Jie, to whom the premises had been sold by the Appellant. He had not seen Bojang at that time, and 30 it was clear from Grant's evidence of what happened on the 19th May that up to then the Respondent did not know whether the statement was a genuine statement of Bojang or not.

p. 30, ll. 1-13

2. The excessive publication of the libel. It was clear from the evidence of the Attorney-General and Baker that the envelope in which the letter was contained had not been marked private or confidential, and the learned Judge accepted the evidence that Baker had shewn it to Joof.

p. 30, ll. 14-20

3. The allegation in the Respondent's letter of the 28th April, 1953, that the conveyance was not signed by Bojang and was in 40 fact a forgery by the Appellant was not borne out by Bojang's statement. Bojang had at no time suggested that his signature had been forged by the Appellant.

4. The Respondent on a previous occasion in 1950 had libelled the Appellant in a letter to the then Attorney-General. He had subsequently apologised for that libel, so no proceedings had been taken. p. 30, ll. 21-25

5. The failure of the Respondent, when sending the statement of Bojang to the Attorney-General, to enclose the copy of the tenancy agreement between Bojang and Macoumba N'Jie which had been sent to him by the Appellant. This agreement was entirely inconsistent with the allegation made by Bojang. p. 30, ll. 26-33

10 6. The conduct of the Respondent in not appearing in Court or calling any evidence, but nevertheless instructing his Advocate to impute to the Appellant the deliberate fabrication of evidence. p. 30, ll. 34-40

For these reasons, the learned Judge held that the privilege was destroyed by malice on the part of the Respondent. He gave judgment for the Appellant for £1000 and costs. p. 31, ll. 6-21

10.—The Respondent appealed to the West African Court of Appeal. In his notice of appeal, dated the 25th November, 1956, he complained that there was no evidence of malice, and Miles, J. had misdirected himself in relying on the various matters which he regarded as evidence of malice. pp. 32-34

20 11.—The appeal was argued at Freetown, in Sierra Leone, before Foster Sutton, P., Smith, C.J. and Coussey, J.A. on the 7th and 9th April, 1954, in the absence of the Appellant. pp. 60-61

12.—Judgment was delivered on the 30th June, 1954. Foster Sutton, P. (in whose judgment the other learned Judges concurred) summarised the facts, and agreed with Miles, J. that the Respondent's letter and Bojang's statement were published to the Attorney-General on an occasion of qualified privilege. The learned President said that the finding that lack of honest belief in Bojang's statement was strong evidence of malice in the Respondent was fundamental to the judgment of Miles, J. pp. 62-66
 30 In his (the learned President's) view, whether the Respondent believed that statement was irrelevant. He did not agree that it was a solicitor's duty to satisfy himself of a client's veracity before acting for him, and it seemed to him that in referring the matter to the Attorney-General the Respondent had been performing the ordinary duty of a solicitor. As regards the Respondent's failure to send to the Attorney-General a copy of the tenancy agreement between Bojang and Macoumba N'Jie, Foster Sutton, P. said the existence of this agreement was explained in the Appellant's letter, of which the Respondent did send a copy to the Attorney-General, and there had been no attempt at concealment... The learned President recalled p. 62, ll. 11-30
 40 that Bojan's statement had been unsigned when the Respondent sent it p. 63, ll. 1-26
 p. 63, ll. 27-39
 p. 63, l. 40—
 p. 64, l. 22

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to the Attorney-General, and the Respondent had told Grant on the 19th May, 1953, that he did not know whether Bojang understood it. He thought too much significance should not be attached to the fact that the Respondent had not seen Bojang before writing to the Attorney-General. The Respondent might have acted more cautiously, but his conduct, the learned President thought, did not show malicious intention. He felt that Miles, J. would not have found that it did, but for his conclusion that it was the Respondent's duty to satisfy himself that Bojang's instructions were true before acting on them. The Respondent's failure to mark his letter to the Attorney-General "Private" or "Confidential" was not, in the opinion of Foster Sutton, P., so outside usual procedure as to justify an inference of malice. There was no doubt that the Respondent had erred in describing Bojang's complaint as an allegation of forgery, but here again the learned President was unable to agree that an inference of malice was justified, because there could hardly, he said, have been an intention to deceive or mislead the Attorney-General. He could find nothing in the incident of 1950 to justify the statement that the Respondent had libelled the Appellant then. The Respondent would undoubtedly have been better advised to attend the trial and give evidence, but the learned President did not think it would be right to infer malice from the Respondent's instructions to his advocate to contest the Appellant's version of the conversation of the 21st May, 1953. The appeal should therefore be allowed, and judgment entered for the Respondent with costs.

12.—The Appellant respectfully submits that the evidence showed clearly that the Respondent was activated by malice in sending his letter and Bohang's statement to the Attorney-General, and the Court of Appeal's view of the evidence is wrong. The Appellant also submits that the evidence, even if a different finding could have been made upon it, was abundantly capable of supporting Miles, J.'s finding of malice. Consequently the learned Judges of the Court of Appeal departed from their proper functions in interfering with that finding.

13.—The Appellant respectfully submits that Foster Sutton, P. was wrong in regarding the finding of Miles, J., that the Respondent's lack of belief in Bojang's statement was strong evidence of malice, as fundamental to the judgment. This finding was only one among a number of grounds upon which the learned Judge concluded that the Respondent had been activated by malice. Even if this were a false ground, the validity of the other grounds on which Miles, J. relied would be unaffected. Unfortunately, it is clear that the learned President misunderstood this part of the judgment, for he referred to Miles, J. as having "come to the conclusion that before acting on (Bojang's) instructions it was the (Respondent's) duty to satisfy himself that they were true." Miles, J. in fact said nothing of any such duty, nor did he base any finding on the absence of proof of the truth of Bojang's statement. He held only that the action of the Respondent in sending that statement to the Attorney-General while not himself believing in it was evidence of malice.

14.—The Appellant respectfully submits that the learned Judge was right in treating this action of the Respondent as evidence of malice. Foster Sutton, P. appears to have held that the question whether the Respondent believed the statement was irrelevant, because in sending it to the Attorney-General “ he was performing the ordinary duty of a solicitor.” It is not, in the Appellant’s submission, part of the ordinary duty of a solicitor to communicate to a third party (even a law officer or public prosecutor), without express instructions from his client, serious charges in which he does not himself believe. The Respondent did not believe Bojang’s statement. When he sent it to the Attorney-General, he did not even know whether Bojang understood the charges he was making. It has never been suggested that Bojang instructed the Respondent to send the statement to the Attorney-General. The inference, in the Appellant’s submission, is inevitable, that the Respondent was activated by something other than professional zeal or sense of duty.

15.—The Appellant respectfully submits that each of the other matters upon which Miles, J. relied (set out in paragraph 9 of this Case) constituted evidence of malice, and the learned Judges of the Court of Appeal were wrong in explaining them otherwise. The Appellant draws attention, by way of example, to the treatment by Foster Sutton, P. of certain of these matters, viz. :

1. The recklessness with which the charge had been made. The learned President apparently regarded this finding as based entirely on the fact that when the Respondent wrote to the Attorney-General he had not seen Bojang; whereas Miles, J. relied chiefly on the fact that the Respondent acted in reliance simply upon a type-written and unsigned statement, at a time when he did not know, and had no means of knowing, whether the statement was genuine or not.
3. The reference in the Respondent’s letter to an allegation of forgery. Foster Sutton, P. thought no inference of malice could be drawn from this, because the Respondent could hardly have intended to deceive the Attorney-General. He thus overlooked what, in the Appellant’s submission, is the vital consideration; that the Respondent’s use of exaggerated and unjustified language indicates what was his state of mind.
5. The Respondent’s failure to send to the Attorney-General a copy of the tenancy agreement between Bojang and Macoumba N’Jie. the learned President thought that, because this agreement was mentioned in the Appellant’s letter, of which the Respondent did send a copy to the Attorney-General, and the Respondent said he had told Bojang to produce “ other papers ” if the Attorney-General asked for them, there had been no attempt at concealment.

He again overlooked, in the Appellant's submission, the *vita*ⁱ consideration; that the Respondent's failure to send to the Attorney-General one of the relevant documents in his hands, and that a document inconsistent with Bojang's allegations and supporting the Appellant's explanation, indicates the Respondent's state of mind.

16.—The Appellant respectfully submits that the judgment of the Supreme Court of the Gambia was right, and that of the West African Court of Appeal was wrong and ought to be reversed, for the following (amongst other) 10

REASONS

1. BECAUSE the evidence and the circumstances showed that the Respondent was activated by malice :
2. BECAUSE there was evidence to support Miles, J.'s finding of malice, and the West African Court of Appeal should not have disturbed that finding :
3. BECAUSE the learned Judges of the West African Court of Appeal misunderstood the evidence, and the reasoning of Miles, J.

J. G. LE QUESNE. 20

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