Privy Council Appeal No. 33 *of* 1962

Edward Campello and others – – – – – – *Appellants*

v.

Julius C. Sene – – – – – – – – – *Respondent*

FROM

THE SUPREME COURT OF GIBRALTAR

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH FEBRUARY 1964

Present at the Hearing:
VISCOUNT RADCLIFFE
LORD EVERSHED
LORD MORRIS OF BORTH-Y-GEST
[*Delivered by* LORD MORRIS OF BORTH-Y-GEST]

On the 7th October 1960 the newspaper " Vox, " which circulates in Gibraltar, published in its correspondence column an article with the heading " On a Local ' Tourist ' Trip ". Its purpose was stated to be to bring to the readers' attention " all the officious gearing of the various war departments ". The letter or article (which its authors requested to have published) was of considerable length. Towards the end of it there appeared certain words the English translation of which runs as follows:— " These are not the only anomalies existing in that R. E. Viney Department. There are more. Mr. Sene, Chief Clerk, threatens workmen and even suspends them simply on any report from the charge-men without bothering to make inquiries as if we still lived in the days of Torquemada and Nero. ". The letter or article had underneath it, at the end, the initials " G.F.W.U. " which are the initials of a Trade Union in Gibraltar known as the Gibraltar Free Workers Union.

The letter or article was in fact written in the Spanish language; for the purposes of the appeal before their Lordships' Board the English translation given above of the words complained of has been accepted as correct.

The reference to " Mr. Sene, Chief Clerk " was to Mr. Julius C. Sene, who is and was at all material times the Departmental Civilian Officer in charge of the administration of the War Department Organisation in Gibraltar. Claiming that the words used in respect of him were defamatory and following upon certain correspondence between his legal advisers and the legal advisers of the three appellants he commenced proceedings against the appellants by writ issued on the 2nd November 1960, and claimed damages for libel. Since, as their Lordships were informed, by the law of Gibraltar a trade union cannot as such be made liable in civil proceedings, the union was not sued. The defendants to the action, who are the appellants before their Lordships' Board, are respectively the Editor, the printers and the publishers of the " Vox " newspaper.

The action was tried in the Supreme Court of Gibraltar before the Chief Justice of Gibraltar and a special jury. The jury found for the respondent. They awarded him £600 damages and judgment was entered for that sum. Against that judgment the appellants now appeal to their Lordships' Board. They submit that the case should have been withdrawn from the jury and they submit that there was both misdirection and non-direction in the summing-up.

The three appellants did not separately plead nor were they separately represented. Paragraph 3 of their joint defence opened with the following

words:— " In so far as the said words consist of allegations of fact they are true in substance and in fact; in so far as they consist of expressions of opinion they are fair comments written and published in good faith and without malice towards the plaintiff or at all upon a matter of public interest and importance namely; the manner in which the employees of the War Department are treated and dealt with ". Particulars pursuant to R.S.C. Order 19 r. 22(A) were then given. It should be stated that the law relating to defamation is mainly the same in Gibraltar as in England. The paragraph, in the form of the rolled-up plea, was a pleading of Fair Comment. (See *Sutherland v. Stopes* [1925] A.C.47.) The particulars proceeded to identify the words which were to be regarded as statements of fact. Both parties have been in agreement in regard to this. They accept that the words " Mr. Sene, Chief Clerk, threatens workmen and even suspends them simply on any report from the charge-men without bothering to make enquiries " were words which purported to record statements of fact. The concluding words " as if we still lived in the days of Torquemada and Nero " were accepted by both parties as being words purporting to contain comment. The defence advanced in paragraph 3 was therefore that the comment was based upon the foundation of facts truly stated and related to a matter of public interest and, as comment, was fairly made in good faith and without malice. The particulars which were given in support of the truth of the statements of fact were as follows:—

> " (b) The defendants will rely on the matters and facts following in support of the allegation that the said words are true, i.e.
>
> (i) The plaintiff Mr. Sene is the Departmental Civilian Officer in charge of administration of the Department Works Organisation and in this capacity has Civilian workmen employed by the War Department under his charge.
>
> (ii) Pursuant to the duties of his office and employment the plaintiff from time to time signs letters addressed to workmen employed by the War Department informing the workman in question of reports made against the workman for a deficiency in his work or misconduct and threatening dismissal or suspending the workman. The said letters are written without first giving the workman a hearing, and simply on the strength of a report against the workman. The defendants will rely on—
>
> (a) a letter dated the 12th July 1960 addressed to a Mr. A. Matos and signed by the plaintiff;
>
> (b) a letter dated the 2nd August 1960 addressed to a Mr. H. Lopez and signed by the plaintiff;
>
> (c) Two letters dated the 15th September 1960, both addressed to the said Mr. A. Matos and signed by the plaintiff;
>
> (d) other letters of similar nature particulars of which are within the knowledge of the plaintiff. ".

Paragraph 4 of the defence was as follows:—

> " 4. The said words are no libel upon the plaintiff; they were not written or published of the character of the plaintiff, but merely of the methods employed by him as Civilian Officer pursuant to, in the course of and in the discharge of the duties of his employment. "

In his reply the respondent alleged that the defendants had been actuated by malice. It is manifest that if the words complained of were held by the jury to be defamatory the pleaded defence of fair comment would fail *in limine* if the defendants failed to prove the truth of the facts that they asserted and upon which the comments were based.

Certain interrogatories were ordered and the answers of the respondent were relied upon by the appellants. The respondent gave evidence and called certain witnesses. No evidence was given by or called on behalf of the appellants.

At the end of the summing up five questions, the form of which was accepted by both sides, were put to the jury. The questions and the jury's unanimous answers to them were as follows:—

(1) Are the words complained of statements of facts or expressions of opinion or partly one and partly the other?

Answer: Partly one and partly the other.

(2) In so far that you find that they are statements of facts are such statements of facts true?

Answer: No.

(3) In so far as you find that they are expressions of opinion do such expressions of opinion exceed the limits of fair comment?

Answer: Yes.

(4) Were the defendants actuated by malice?

Answer: Yes.

(5) Damages.

Answer: £600.

The learned Chief Justice had held (and as to this there has been no complaint before their Lordships) that the words complained of were capable of being regarded as defamatory of the respondent: it was left to the jury to find whether they were in fact defamatory or not. The learned Chief Justice had also held that in so far as the words consisted of comment they were comment upon a matter of public interest.

It is to be observed that the finding of the jury that the facts were not truly stated made it strictly speaking unnecessary for the jury to answer the third and fourth questions.

It was essential for the appellants at the trial to discharge the onus of proving the truth of the statements of fact that they had made. At the close of the evidence called by the respondent at the trial a submission was, rather surprisingly, made to the learned Judge that the issues should be withdrawn from the jury. It is difficult to see how that could have been done. Though it was for the learned Judge to rule as to whether the words complained of were capable of being held to be defamatory it was for the jury and for the jury alone to decide whether they were defamatory. On the question whether facts were truly stated, inasmuch as the respondent's case was that they were not and inasmuch as the appellants' case was that they were, it was manifestly for the jury to decide. The respondent had called evidence which, if accepted, went to show that the asserted facts were not true. Even if the facts had been truly stated there would have been the issues whether the comments were fair and were made without malice. It could not be said that it would not be open to the jury to hold that the comments were not fair. The submission that was made was very properly rejected by the learned Judge.

In regard to the issue whether the statements of fact were truly made it was for the jury not only to decide what evidence they accepted but it was also for them to decide as to the meanings of the words which the appellants had employed. The appellants had written that the respondent threatened workmen. What, in its context, was the meaning of the word " threaten "? There was no reference to written threats. The word was used in an unlimited way. Did the word receive colour by reason of the suggested comparison with the days of Torquemada and Nero?

The words which the appellants used and published and which thay asserted (and undertook to prove) to be true contained many constituent statements: accordingly they gave rise to many questions. Was it true that the respondent had threatened workmen? Was it true that he had suspended them? Had he received reports from charge-men? If he had threatened workmen or suspended them had he done so simply on any report from the charge-men? If so, had he threatened or suspended without " bothering " to make enquiries? The mere mention of these questions serves to demonstrate the formidable nature of the burden that the appellants assumed in pleading that their statements of fact were true.

The respondent in his evidence explained what his duty was in regard to certain minor offences. The general procedure was that for minor offences the officer immediately in charge of a worker would, for a first offence, give an oral reprimand or warning. In the case of a second offence the officer immediately in charge of a workman would report the matter to the respondent. The respondent would then discuss the matter fully with the officer and if " satisfied of contravention and of prima facie case " he would then send a warning letter to the offender and would sign it " For Command Works Officer ". The respondent did not send warnings on the strength of reports from gangers or charge-men: he did not get direct reports from them. In the case of a third minor offence the same procedure applied and the respondent would send out a final warning letter. A workman had a right, after any warning letter, to be heard by the Area Works Officer and he could be represented by a friend (usually a Trades Union official). If after a final warning letter a period of six months passed without any further minor offence the final warning was treated as lapsed. If within that period there was a further minor offence it was treated as a serious offence but as one upon which only the Command Works Officer could adjudicate. The procedure in that event was that the respondent notified the Command Works Officer and also gave a statement to the workman concerned. The statement would set out the charge: the workman had 48 hours in which to reply and he could take the advice of his Trade Union official: thereafter there would be a hearing before the Command Works Officer: at the hearing the workman could, if he wished, have a friend or a colleague to help him or to speak for him. The evidence of the respondent was therefore that he took no action unless and until some officer had seen and heard an accused workman and that he (the respondent) had a discussion with the officer before he sent any warning letter. The respondent further said that he did not order suspensions. Suspensions were only ordered by the Command Works Officer and then only when criminal proceedings were pending against the workman. Any letter of suspension which the respondent signed was only sent if the Command Works Officer, after discussion, decided that one should be sent. In regard to particular cases referred to at the trial, the letter to Moreno which the respondent signed (for Command Works Officer) was a warning letter in relation to low output. There was a warning letter to Matos relating to poor output and insolence to a superior officer. In relation to persistent lateness for work there was a final warning letter to Lopez. There was a letter (signed as in other cases For Command Works Officer) informing Matos that in consequence of a report received from the Gibraltar Security Police he was suspended from duty.

When the evidence given by the respondent and his witnesses is considered (and their Lordships do not find it necessary to refer more fully to the evidence) it is difficult to suppose how any reasonable jury properly directed could, if they accepted the evidence, have reached any other conclusion than that which the jury recorded in answer to the second question. There was evidence which, if accepted, amply warranted the view that it would be quite untrue to say that the respondent threatened workmen or that he suspended them simply on any report from the charge-men without bothering to make enquiries. The jury found that the purported statements of fact were not true.

Complaint was made because the learned Judge made several references in his summing-up to the fact that the appellants had called no evidence. In their Lordships' view there is no substance in the complaint. Furthermore the summing-up dealt fairly and adequately with all the questions of fact with which the jury were concerned. It is probable that reference to the absence of any witnesses called by the appellants was made during arguments or speeches: whether it was or not their Lordships see no unfairness in any of the comments made by the learned Judge. Had the comments not been made it is more than likely that members of the jury would have entertained some surprise in finding that the appellants called no witnesses although their case was that they had merely in good faith and without malice expressed opinions in regard to certain recorded allegations which they asserted were true in substance and in fact.

A large measure of the criticism which was directed to the summing-up related to those parts of it which dealt with the elements of the plea of Fair Comment and with the issue of malice. As the appellants failed to prove that their assertions of fact were true the whole basis of their defence of Fair Comment collapsed. It is therefore not necessary for their Lordships to deal with the contentions that were urged in regard to certain words and passages which are contained in that part of the summing-up of the learned Judge which explained the law concerning the defence of Fair Comment. If in the careful and detailed summing-up of the learned Judge it were thought that there were one or two phrases which were either erroneous or which could taken by themselves have been erroneously interpreted it is sufficient to say that they were followed by citations from authority and that if the summing-up is considered as a whole the jury had a painstaking and thorough exposition and should have had an adequate appreciation of the legal aspects of the defence of Fair Comment.

Their Lordships find it unnecessary in the circumstances to deal with any questions in regard to malice or to express any opinion in regard to the questions discussed in *Lyon v. The Daily Telegraph* [1943] K.B. 746. As to the damages their Lordships do not consider that their amount can be attacked as being unjustifiable and do not consider that it is shown that the jury were in any way misled in the summing-up or that they made an erroneous approach in their assessment of the damages.

Their Lordships will therefore humbly advise Her Majesty that the appeal be dismissed. The appellants must pay the costs of the respondent.

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In the Privy Council

EDWARD CAMPELLO AND OTHERS

v.

JULIUS C. SENE

DELIVERED BY
LORD MORRIS OF BORTH-Y-GEST

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