JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 38 OF 1979

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE WHITE, J.A.

BETWEEN	NEVILLE ATKINSON	PLAINTIFF/APPELLANT
AND	KEITH HOWELL	DEFENDANT/RESPONDENT

R.N.A. Henriques, Q.C., and W.K. Chin-See for plaintiff/appellant.

C.M.M. Daley for defendant/respondent

April 4, June 22, 1983
& June 13, 1985

WHITE, J.A.

After hearing arguments in this appeal, brought by plaintiff, Neville Atkinson against the judgment of Parnell, J., in favour of Keith Howell, the defendant, we dismissed the appeal with costs. The following are the reasons for our judgment.

The learned trial judge had heard evidence by and for both parties in the action by the appellant claiming damages for slander in respect of words uttered by the respondent on or about Friday the 25th day of April, 1975. This complaint arose out of the appellant removing from the sidewalk in front of his premises a number of building blocks and a quantity of marl which the respondent admittedly had caused to be deposited there. This removal was subsequent to an oral, as well as a written request to the respondent to remove them, so as to facilitate the taking over of the roads in the New Green subdivision by the Manchester Parish Council. The appellant was developing this subdivision and the respondent had bought a lot in the subdivision. It was the common understanding that a stipulated condition to the assumption of responsibility for the roads by the Parish Council was that the roadway and the carriageway had to be free from all obstacles.

When the respondent learned of the removal of the blocks and marl, he made a report to the Mandeville Police. Accompanied by the respondent, Sergeant Lattie Brown went to the appellant's home, on enquiries. There the respondent repeated to the sergeant in the presence of the appellant, the report which he had made at the police station. It was alleged in the statement of claim, and supported by the evidence that the respondent used the following words of and concerning the plaintiff:

"You stole my blocks. You are a thief".

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The further allegation was that even after the sergeant had heard both sides, and advised the respondent that he had formed the view that it was not a case of larceny of the building material, the respondent continued to call the appellant a thief. According to the sergeant, this accusation was repeated even after the appellant had advised where the blocks and marl were.

It is a matter of interest that the defence originally pleaded justification -

> "That the said words were true in substance and in fact inasmuch as the plaintiff subsequently admitted to the defendant that he (the plaintiff) was the one who had unlawfully taken away the defendant's block and marl".

However, this defence dated 30th September, 1975, was amended by leave of the court granted on the 27th day of February 1973. By the amended defence the defendant admitted using the words and that he published them to Sergeant Brown, at the same time claiming that the circumstances of publication was privileged. It was hereby admitted also that the defendant reported the loss of the marl and bricks at the Mandeville Police Station, whereupon accompanied by Sergeant Brown, the defendant went to the home of the plaintiff, where and when at the request of the sergeant the defendant reported the unlawful removal of his blocks and marl by the plaintiff. Additionally, it was pleaded that by "a letter dated May 1, 1975, the plaintiff impliedly admitted to the defendant that the plaintiff was the person responsible for removing the defendant's blocks and marl and advised the defendant of the location of the said blocks and marl".

"In the premises, the defendant was under a legal and/or public and/or moral duty to publish the said words to Sergeant Brown who had the duty and/or interest to receive them".

Parnell, J., gave judgment for the respondent. Although the learned trial judge concluded that the respondent was naturally annoyed at finding that his blocks and marl had been moved by the appellant without the respondent's knowledge, he decided that when the latter made his report to the police, he did so with the aim of securing the aid of the police, so that the blocks could be returned to him. The judgment stated further that the investigation at the home of the appellant was part of the policeman's investigation into the report by the respondent, and the sergeant did, in fact, form the view that it was not a case of larceny. The learned trial judge also found that the words complained of were used on an occasion of qualified privilege. In respect of this, Parnell, J., noted the failure of the plaintiff to prove (a) that in the circumstances in which the words were used, an absolute affirmation of guilt in the commission of larceny was made; (b) that the meaning conveyed to Sergeant Brown - the only hearer - was that larceny had been committed; and (c) that the words conveyed at the time and were understood by the hearer to mean that the plaintiff had stolen blocks and marl. Even if the Sergeant did understand the words to mean that larceny had been committed the learned trial judge found that the appellant had not proven malice.

Before this court, this judgment was vigorously questioned on the ground firstly, that the words complained of were defamatory if one gives due weight to the context in which the statement was made, that being the criterion of whether a statement is defamatory. However, it was conceded that if the respondent honestly believed that larceny had been committed, then certainly his report would be entitled to qualified privilege if all the material facts were disclosed.

Nevertheless, it was contended that all the material facts had not been disclosed. The respondent did not make a truthful and honest report to the police, and therefore he could not have believed that the plaintiff had committed larceny.

This stricture was made because of the evidence of Sergeant Brown, that when the respondent repeated his report which he had made at the police station the appellant said "Sergeant tell Mr. Howell to show you the notice I served on him". This was a notice which the learned trial judge found the appellant had served on the respondent and which called upon the respondent to remove the blocks and marl on or before the 21st April, 1975. The appellant in fact removed the materials on the 25th April, 1975, without informing the defendant that he was doing so, or where he had deposited them.

The sergeant asked the respondent if he had received a letter from the appellant, and the respondent admitted this but said he had torn up the note. The learned trial judge did not accept the argument that this tearing up of the note showed malice in the respondent when he asseverated his alleged defamatory statement.

It is clear that because of the previous relationship between the parties, when the respondent resorted to the police he acted reasonably. The respondent described the appellant as a litigious person. The judge described the appellant as a didactic octogenarian, who incidentally told the court, he was concerned about his good name and reputation which had been destroyed by the accusation that he was a thief. He had brought the action to clear his unblemished reputation; had the respondent withdrawn the accusations and apologised, the appellant might have given thought to a withdrawal of the action.

Mr. Daley for the respondent argued before this court that in so far as Sergeant Brown was the only hearer of what the respondent said, the enquiry must have resulted in the

finding that the report attracted qualified privilege. Apart from that he framed his main submission in this way: when the plaintiff was called a thief Sergeant Brown knew that it was not a case of larceny, and the plaintiff therefore had to prove special damage. The findings of Parnell, J., were in effect, that the words used were not defamatory per se having regard to the fact that the hearer to whom the allegations were published did not believe that the plaintiff was a thief. This factual finding undermines the serious contention for the appellant that the words were actionable per se.

It is well to be reminded that words which prima facie impute a crime are not actionable per se without proof of special damage if it is clear from their context, or from facts stated by the speaker or known to the hearers, that they were in fact neither used nor understood to convey a criminal imputation. The finding of fact by the trial judge underlines his acceptance that the respondent had discharged the burden of proof in this regard; or at any rate, that from the appellant's own witness there was adequate basis for saying that the facts showed the effect of the alleged defamation was not to prove a criminal offence. See Gatley, Libel and Slander (7th ed.) para. 160.

This principle is further illustrated by the case of Thompson v. Bernard [1807], Camp. 47 in which the words used were "Thompson is a damned thief; and so was his father before him; and I can prove it". He added "Thompson received the earnings of the ship and ought to pay the wages". Lord Ellenborough directed a non-suit, observing that the word "thief" was used without any intention in the defendant to impute felony to the plaintiff.

Mr. Chin-See argued for the appellant that the insistence with which the respondent asserted his accusation even

after the sergeant had stated his view that it was not a case of larceny, is emphatic and conclusive of the appellant's complaint that he was defamed. He pointed out that the imputation of a criminal offence is in no way affected by subsequent discovery after investigation. It is clear, however, that the sergeant had gone with the respondent to carry out investigations into a case of larceny. He did not go to the appellant with the settled notion that an offence had been committed.

We were of the view that the learned trial judge was quite correct in finding that, in the circumstances as related by the record of the evidence, the alleged defamatory words were not actionable per se.

The appeal itself was based on the question of qualified privilege to the extent that it was destroyed by malice. There is no gainsaying that the law is that a complaint to a police officer in the performance of his duties is privileged. And as pointed out earlier, it was conceded in argument that if the respondent honestly believed that he was making a factual report, he could not be condemned in damages for the defamatory statement. "If the defendant honestly believed his statement to be true, he is not to be held malicious merely because such belief was not based on reasonable grounds, or because he was hasty, credulous or foolish in jumping to a conclusion, or was irrational, indiscreet, stupid or pigheaded or obstinate in his belief". This statement of the Law by Gatley on Libel & Slander (7th ed.) para. 774 finds further exposition in the language of Lord Diplock when he delivered the judgment of the House of Lords in Horrocks v. Lowe [1972] A.C. 135. That case was about defamatory words used by one local authority councillor of another, which words the trial judge found to

have been spoken in honest belief of their truth, but with gross and unreasoning prejudice. The question was whether such a finding constituted malice. Lord Diplock discussed the meaning of "honest belief". At page 150 A-E he opined:

> "....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 thought tautologously termed, 'honest belief'. If he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true. The freedom of speech protected by the law of qualified privilege may be availed of by all sorts and conditions of men. In affording to them immunity from suit if they have acted in good faith in compliance with a legal or moral duty or in protection of a legitimate interest the law must take them as it finds them. In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value.
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> In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognise the cogency of material which might cast doubt on the validity of the conclusions they reach. But despite the imperfection of the mental process by which the belief is arrived at it may still be 'honest', that is, a positive belief that the conclusions they have reached are true. The law demands no more".

What the respondent was seeking in the circumstances of the present case was to cause an enquiry to be made, and the fact that he did not make enquiries before going to the police cannot by itself be regarded as evidence of malice. See Beach v. Freeson [1972] 1 Q.B. 14. What the appellant had to show at the trial was that the respondent not only spoke maliciously, but did not make a bona fide use of the occasion. The repetitious allegations by the respondent did not ipso facto amount to unnecessarily exaggerated or violent

language.

Mr. Daley drew our attention to the case of Sookhoo v. Mitchell R.M.C.A. 32/78, the judgment in which was delivered by Henry, J.A., on behalf of the Court of Appeal on December 8, 1978. In that case the learned Resident Magistrate had found that the defendant, when he uttered the defamatory words complained of, "was acting maliciously and that consequently the defence of qualified privilege could not avail him". The judgment of the Court of Appeal was that the finding of malice could not be justified and the judgment indicated what factors are relevant to any such proper decision:

> "The learned Resident Magistrate appears to have based his finding of malice largely on the fact that the Defendant made no inquiry from the Plaintiff (who was his neighbour) about the matter. He did so notwithstanding the case of Beach v. Freeson [1972] 1 QB. 14 which he himself referred to in his judgment and which indicates that mere failure to make enquiries which might verify or falsify a defamatory statement is not necessarily evidence of malice on the part of a defendant. It may be that he also took into account the fact that the Defendant subsequent to the alleged slander instituted private criminal proceedings against the Plaintiff in respect of the theft of his mule, proceedings which ended in the acquittal of the Plaintiff. We do not however consider that even taking into account this subsequent private prosecution (if it was admissible) the learned Resident Magistrate was justified in finding malice on the basis that the Defendant was 'totally reckless as to the truth or falsity of the statement' which he made to the policeman.
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> The Defendant's evidence which was accepted was that he had gone to the Plaintiff's home with the police and on their instructions. It may well be as the learned Resident Magistrate found that he was angry at what appeared to him to be the inaction of the police but this would not necessarily indicate malice. The learned Resident Magistrate has not found that the publication was excessive either on the basis that it was to persons in the police vehicle who had no interest to receive it or on the basis that it was as the Plaintiff said 'loudly on the top of his voice'. The persons

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> "in the police vehicle apart from the police officer and the Defendant were the Defendant's son and two members of the Home Guard who were on patrol with the policeman. Presumably, the learned Resident Magistrate took the view that the mere fact that these persons happened to be present would not render the occasion 'not one of qualified privilege'. The plaintiff's father merely said that the Defendant 'spoke loudly' and there is no evidence other than that this publication was excessively loud or was heard by persons other than the plaintiff, his father and the police party. It does not therefore appear that the finding of malice can be justified".

In the instant case there was no evidence given that a person other than Sergeant Brown was present, even though it was pleaded that the respondent communicated the defamatory words to the plaintiff's household helper. She did not give evidence. There is no evidence that the respondent spoke loudly or in such other ways as would indicate that he was abusing the privileged occasion.

Mr. Chin-See distinguished Sookhoo v. Mitchell on the grounds that in that case the defendant's mule was found in the possession of the plaintiff, who said it was given to him by one Bolton and that it was a clear case of a proper report of larceny, considering that Bolton had no dealings with the defendant. There was no reason why the plaintiff should have had the Defendant's mule in his possession. This required an explanation. On the other hand, in the instant case the previous relationship between the parties gave the appellant the power to remove the bricks and the marl. Accordingly, said Mr. Chin-See, the respondent here cannot invoke the thrust of Sookhoo v. Mitchell in his favour and thus the defence of privilege and lack of malice could not be upheld unlike in Sookhoo v. Mitchell where the judgment was that there was a lack of malice, and the defence of privilege succeeded.

Looking at the picture as it is delineated by the evidence, we were of the view that the finding of the judge that the respondent honestly believed that the appellant had no right to remove the blocks and the marl, and so he sought the assistance of the police to recover them, was eminently correct. The learned trial judge took all the relevant facts and factors into account.

Therefore, we dismissed the appeal with costs to be agreed or taxed in favour of the respondent.