C.I.A. 1/65

LURLINE BODDEN

V.

KARL BRANDON

LEWIS, J.A.:

I agree. Counsel on both sides accepted the principle of immunity of counsel for words spoken in office as firmly established in the case of Munster v. Lamb (1883) 11 Q.B.D. 588. The justification for the wide terms in which the rule of law was laid down in that case was thus put by Brett, M.R., at p.604:

> "The reason of the rule is, that a counsel, who is not malicious and who is acting bona fide, may not be in danger of having actions brought against him. If the rule of law were otherwise, the most innocent of counsel might be unrighteously harassed with suits, and therefore it is better to make the rule of law so large that an innocent counsel shall never be troubled, although by making it so large counsel are included who have been guilty of malice and misconduct."

In Bottomley v. Brougham (1908) 1 K.B. 584, Channel J., at p.587, stressed that -

> " .... it is desirable that persons who occupy certain positions as judges, as advocates, or as litigants should be perfectly free and independent, and to secure their independence, that their acts and words should not be brought before tribunals for inquiry into them merely on the allegation that they are malicious."

The question which was canvassed in this appeal was whether the circumstances that the respondent's observation was made after the appellant had been challenged and had left the jury box and that it was addressed directly to the appellant and not to the Court deprive the respondent of the protection which he would otherwise have had.

//Counsel...

Counsel for the appellant contended that in these circumstances the words were not uttered by the respondent in his capacity as advocate, that in effect he had "stepped aside" from his position of advocate to have a private and personal quarrel with the appellant. This view, he said, found support in the respondent's statement in reply to the learned judge's enquiry that "she insulted me when passing and I said something back to her." The words, he contended, were not spoken with reference to the proceedings, for the challenge had been effectively completed, the appellant had on leaving the jury box become a mere bystander, and it was no part of the function of the respondent as advocate to explain to her the reason why he had challenged her.

Counsel for the respondent submitted that the respondent had spoken in his capacity of advocate for his statement arose directly out of the fact that he had challenged a juror; that the statement had been made in circumstances in which an advocate might honestly feel that it was incumbent upon him to let his client, the remaining jurors and potential jurors know that he had challenged the juror not as a personal favour but on the ground of bias; and that the circumstances were so closely connected and inextricably tied up with the challenge as to form one transaction.

In my opinion the argument of learned counsel for the respondent is to be preferred. The words used by the respondent on the face of them indicate that he was speaking as an advocate with reference to an act done by him as part of the proceedings in the case and for the purpose of explaining his reason for that act. They were uttered in reply to the words of thanks which the appellant had addressed to him as advocate with reference to that act as she passed by him to resume her seat.

It is not necessary, in my view, that the words should be addressed to the court. It is sufficient that they were made by the respondent when speaking as an advocate and with reference to the case then being heard in court. Once this is established the court is not permitted to enquire whether counsel bona fide thought that it was

/necessary ...

necessary in his client's interest to speak the words. That is the very inquiry which the rule prohibits.

I think that the rule in Munster v. Lamb is wide enough to cover the facts of this case and that this appeal should be dismissed.

Judge of Appeal