CAYMAN ISLANDS

IN THE COURT OF APPEAL

CAYMAN ISLANDS CIVIL APPEAL NO. 14/71

BEFORE: The Hon. Mr. Justice Smith - Presiding
The Hon. Mr. Justice Edun
The Hon. Mr. Justice Graham-Perkins

IVA. A. POWERY v. MARIE BUSH

W.K. Chin-See and
Miss Annie Bodden for the Plaintiff/Appellant
Ian Boxhall for the Defendant/Respondent

MARCH 16, 1973

GRAHAM-PERKINS, J.A.:

The plaintiff, a married woman, took proceedings against the defendant for slander, alleging that some time in May, 1970, the defendant said of her the following words (and these words were said to the plaintiff's son):

> "Go home and watch your mother, Iva Powery, because she has Barrick for her work man, and Osbourne Barrett for her fuck man."

In answer to this claim the defendant by way of defence, denied using the words of which the plaintiff complained and went on to deny all the other allegations in the Statement of Claim.

Having heard the evidence adduced by the plaintiff and defendant, the learned trial judge came to the conclusion that the words of which the plaintiff complained were words of heat or vulgar abuse and were not, therefore, actionable.

This appeal turns on the very simple question whether that conclusion was justified in the state of the evidence adduced and the incidence of the burden of proof in such a case as this. It

is clear that words which are prima facie defamatory cannot ordinarily be vulgar abuse. When the plaintiff proved publication of these words she proved exactly what she had alleged in the innuendo as stated in the statement of Claim, namely that the defamatory words meant:-

> "that the plaintiff ~~whose~~ lawful husband, Barrick Powery, was only a workman for the plaintiff, and behaviour with Osbourne Barnett, having that she was guilty of immoral/sexual intercourse in the absence of her husband, who is a seaman being away to sea, and off the Island."

For myself, I find it extremely difficult to contemplate anything more greatly defamatory of a married woman than to ~~allege of her having~~ accuse her of having sexual intercourse with another man in her husband's absence. As soon as the plaintiff proved the publication of these words, which were quite obviously defamatory ~~of herself~~, the burden of proof shifted to the defendant to show, if she could, that those words were indeed merely abuse. There can be no doubt in my view, that the test by which this issue was to be resolved was, would a reasonable person in the circumstances as described by this evidence, have understood the words to convey a charge of immoral conduct instead of a mere vituperation. The defendant having denied the use of the offending words did not and could not attempt to discharge this burden. In those circumstances it seems perfectly clear to me that it was not open to the learned trial judge to find that these words were not defamatory.

In those circumstances I would allow this appeal and remit the matter to the Grand Court for such damages as the learned trial judge thinks appropriate to be awarded the plaintiff.

SMITH, J.A.:

I agree with the result proposed. I would like, however, to deal with a point raised by Mr. Chin See regarding the question of the failure of the defendant to expressly state as a defence

that the words were mere vulgar abuse and the answer to his contention by Mr. Boxhall for the defendant. Mr. Chin See contended that the learned judge was wrong in stating the issue of vulgar abuse as one of the issues to be resolved in the case as there was no express statement of this defence by the defendant before the trial proceeded. Mr. Boxhall referred to s. 150 of the Judicature (Administration of Justice) Law, Chapter 74, and submitted that in the terms of that section there was no obligation on the defendant to state any specific defence. That section reads as follows:

> "On the day in that behalf named in the summons the plaintiff shall appear, and thereupon the defendant shall be required to answer his statement of claim; and an answer being made in Court, the Court shall proceed in a summary way to try the cause and shall give judgment without further pleading or formal joinder of issue."

Mr. Boxhall submitted that the word 'answer' there simply means to appear and to physically defend, and places no burden on the defendant to state a defence. I would simply say, with all due respect, that I do not agree with that interpretation and that it is clear, in view especially of the latter words in the section, the words 'pleading or formal joinder of issue', that the only way in which a defendant can properly answer a statement of claim is to state what is the defence he relies on in answer to that claim. It is my view, however, that in the circumstances of this case the failure of the defendant to state the defence of vulgar abuse is not fatal. I agree with the learned judge that the question of vulgar abuse, or not, was an issue. He had to decide as a question of mixed fact and law, whether the words were defamatory of the plaintiff. If the words were used in a context which might suggest that they were mere words of vulgar abuse the plaintiff is not entitled to succeed, in my opinion, unless there is a finding that they were not.

On the other aspects of the case, I agree that although the

learned judge could properly find that the words were perhaps, on the face of it, abusive, this was not sufficient to discharge the burden on the defendant. The defendant had to go further to show that the words were not intended to be understood in a defamatory sense and that no reasonable person would understand them in that sense. On the latter aspect of this defence there is a complete lack of evidence to support the judgment of the learned judge. It is for these reasons that I agree that the appeal should be allowed and the other proposed by my brother Graham-Perkins, J.A., should be made.

EDUN, J.A.:

In my view, the learned judge of the Grand Court was wrong in holding that the defendant had discharged the burden of proving that the words complained of were mere vulgar abuse. I agree that the appeal be allowed and with the order proposed.

SMITH, J.A.:

The order of the Court is that the appeal is allowed; the judgment in favour of the defendant is set aside and judgment entered for the plaintiff with costs to be taxed or agreed. The matter is to be remitted to the Grand Court for damages to be assessed. The plaintiff/appellant is to have the costs of this appeal to be taxed or agreed.

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