

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT VINCENT AND THE GRENADINES

SVGMCVAP2021/0006

BETWEEN:

KENTON CHANCE

Appellant

and

ADRIAN DASILVA

Respondent

Before:

The Hon. Mr. Mario Michel

Justice of Appeal

The Hon. Mr. Trevor Ward

Justice of Appeal

The Hon. Mr. Gerard St. C. Farara

Justice of Appeal [Ag.]

Appearances:

Mr. Jomo Sanga Thomas for the Appellant

Ms. Tonya Da Silva holding papers for Mr. Duane Daniel for the Respondent

2023: February 23;
July 26.

Magisterial civil appeal – Defamation – Libel – Defences to defamation – Justification – Fair comment - Absolute privilege – Qualified privilege - Whether learned magistrate failed to properly apply her mind to defences of qualified privilege, fair comment, and justification

On 16th July 2018, the Appellant published an article in his online newspaper, I-Witness News, in which he stated that a woman, Ms. Sherika Chandler (“Ms. Chandler”), who was the former girlfriend of the Respondent, had cut the Respondent on his penis, leaving him with 16 stitches. The Appellant said that this statement came from notes that he made during criminal proceedings before Senior Magistrate Rickie Burnett (“the Senior Magistrate”) on a charge brought by the police against Ms. Chandler. The Respondent denied that he was cut and received stitches on his penis and stated that the cut was in fact on his groin, and that this was said several times during the criminal trial before the Senior Magistrate. In the same article, the Appellant also stated that Ms. Chandler had said during the criminal proceedings that she had miscarried once, because the Respondent had struck her in her belly. The Respondent also denied this allegation and, in particular, denied that Ms. Chandler had linked the striking to the miscarriage.

The Respondent filed two defamation claims in the Magistrate's Court against the Appellant, based on the statements in the article, which claims were heard together by Magistrate Zoila Ellis Browne ("the Learned Magistrate") on 23rd February 2021. The Respondent and Ms. Chandler gave evidence in support of his defamation claims, and the Appellant and a fellow journalist, Mr. Ashford Vincent Peters, gave evidence in opposition to the claims.

In a judgment delivered on 28th April 2021, the Learned Magistrate clearly intimated, though without expressly saying so, that she accepted the evidence of the Respondent and his witness that the cut and stitches were on the Respondent's groin and not on his penis, and that Ms. Chandler never linked the striking on the belly to the miscarriage of the baby. Following the review and analysis of the evidence of all four of the witnesses who gave evidence before her, the Learned Magistrate held that the Respondent had established his claim and was entitled to damages.

Dissatisfied with the decision of the Learned Magistrate, the Appellant appealed on five grounds, including that the Learned Magistrate failed to acquaint herself or refused to refresh her memory or disregarded the evidence offered during trial and that the Learned Magistrate failed to apply her mind to the defences of truth, qualified privilege, fair comment, and justification.

Held: allowing the appeal and setting aside the decision of the Learned Magistrate to award damages and costs to the Respondent, and ordering that the parties shall bear their own costs, that:

1. An appellate court would only disturb a finding of fact by the lower court where there was no or only a scintilla of evidence to support the finding of the lower court. Having regard to the evidence in the court below on the basis of which the Magistrate could and did find that the words published by the Appellant in I-Witness News, about which the Respondent complained, were not an accurate record of the words spoken by Ms. Chandler in the proceedings before the Senior Magistrate; this Court ought not to interfere with the factual findings of the Learned Magistrate. Accordingly, in so far as ground 3 was intended to challenge factual findings by the Learned Magistrate, this ground fails and is accordingly dismissed.

Watt v Thomas [1947] AC 484 applied.

2. The common law defence of justification is established by proving that the statement made by the defendant is true in substance and in fact. This burden of proof rests on the defendant. The Appellant(who was the defendant in the court below) not having disputed that he published the offending statements and that they were defamatory of the Respondent, the burden would have been on him to prove that the offending statements were true. The Learned Magistrate heard the evidence of the Appellant and his witness and the Respondent and his witness, and although she did not expressly state in her judgment that the offending statements were untrue, importantly, and given where the burden of proof lay, she did not make a finding that the statements were true. The entire thrust of the Learned Magistrate's judgment is that the offending statements were untrue. It cannot therefore be said that the Learned Magistrate did not apply her mind to the defence of justification.

3. The position in Saint Vincent and the Grenadines as it relates to the defence of privilege is still the common law position which gives absolute privilege to accurate reports of statements made in judicial proceedings (reproduced verbatim) but gives only qualified privilege to reports which, though fair and honestly believed by the writer, did not simply reproduce statements actually made in court by parties, witnesses, advocates and adjudicators in the judicial proceedings. The publisher of the offending statements (which were not reproduced verbatim) could only escape liability if there was no malice, actual or implied, in his publishing of the statements. In this case, the words published by the Appellant in his online newspaper were not proved by him to have been an accurate report of what was said in the proceedings before the Senior Magistrate; and the burden of proof was his to discharge. His published words will not therefore attract absolute privilege.

Reynolds v Times Newspaper Ltd [2001] 2 AC 127 considered.

4. If the Learned Magistrate had fully and properly addressed her mind to the defence of qualified privilege, she was bound to have frontally addressed the question of whether the Appellant's report was fair and would inevitably have come to the conclusion that the statements made by the Appellant in the article in his online newspaper were made on an occasion of qualified privilege when, as a journalist, he was reporting on what he heard said in court by the prosecutor and/or the defendant in a criminal case before the Senior Magistrate. The evidence is uncontroverted that the Appellant was not actuated or motivated by malice; the onus of proof of which would be on the Respondent, who never even alleged it. The appeal is therefore allowed on the Appellant's fifth ground of appeal that the Learned Magistrate erred when she failed to apply her mind to the defence of qualified privilege.

JUDGMENT

- [1] **MICHEL JA:** This is an appeal against the judgment of a Magistrate on two defamation claims instituted by the Respondent, Adrian DaSilva, against the Appellant, Kenton Chance (Trading as I-Witness News), arising from statements published by the Appellant in his online newspaper.

Background

- [2] On 16th July 2018, the Appellant published an article in his online newspaper, I-Witness News, in which he stated that a woman, who was the former girlfriend of the Respondent, had cut the Respondent on his penis, leaving him with 16 stitches on his penis. The Appellant said that this statement came from the notes that he made during criminal proceedings before Senior Magistrate Rickie Burnett (hereafter "the Senior Magistrate") on a charge brought by the police

against the Respondent's former girlfriend, Ms. Sherika Chandler (hereafter "Ms. Chandler"). The Respondent denied the allegation that he was cut and received stitches on his penis and stated that the cut was in fact on his groin, and that this was said several times during the criminal proceedings before the Senior Magistrate.

- [3] In the same article, the Appellant stated that Ms. Chandler had said during the criminal proceedings that she had miscarried once, because the Respondent had struck her on her belly. The Respondent denied this allegation and, in particular, denied that Ms. Chandler had linked the striking to the miscarriage.
- [4] On 23rd July 2018, the Respondent filed two defamation claims in the Magistrate's Court against the Appellant, based on the statements in the article about which the Respondent complained. The two claims were heard together by Magistrate Zoila Ellis Browne (hereafter "the Learned Magistrate") on 23rd February 2021. The Respondent and Ms. Chandler gave evidence in support of his defamation claims, and the Appellant and a fellow journalist, Mr. Ashford Vincent Peters, gave evidence in opposition to the claims.
- [5] In a judgment delivered by the Learned Magistrate on 28th April 2021, the Learned Magistrate clearly intimated (though without expressly saying so) that she accepted the evidence of the Respondent and his witness that the cut and stitches were on the Respondent's groin and not on his penis, and that Ms. Chandler never linked the striking on the belly to the miscarriage of the baby. The Learned Magistrate's exact words after her review and analysis of the evidence of all four of the witnesses who gave evidence before her were: 'I find that the Claimant has established his Claim and is entitled to damages'.
- [6] On the basis of her findings, the Learned Magistrate concluded that the Appellant had defamed the Respondent and awarded him the sum of \$7,500.00 in respect of each of the two defamation claims, plus costs.
- [7] On 7th May 2021, the Appellant filed a notice of appeal by which he appealed against the decision of the Learned Magistrate on the following 5 grounds:

- (1) The Learned Magistrate erred when she convened the trial without allowing Mr. Chance to obtain the criminal trial transcript out of which the news story emerged.
- (2) The Learned Magistrate erred when she denied Mr. Chance's request to summon the Senior Magistrate as a witness to testify as to the truth of the statements made in the alleged defamatory article printed in I-Witness News.
- (3) The Learned Magistrate failed to acquaint herself or refused to refresh her memory or disregarded the evidence offered during trial.
- (4) The Learned Magistrate erred in law by not offering a reason or reasons for her findings and decision; and
- (5) The Learned Magistrate failed to apply her mind to the defences of truth, qualified privilege, fair comment, and justification.

[8] At the hearing of the appeal, Counsel for the Appellant, Mr. Jomo Thomas, indicated his intention to argue grounds 1 and 2 together. He did not, however, proceed with these grounds for very long before conceding that there was nothing in the transcript of the proceedings which revealed any complaint by the Appellant about the unavailability of the transcript of the criminal proceedings before the Senior Magistrate or of any request to summon the Senior Magistrate as a witness to testify in the civil proceedings before the Learned Magistrate. These two grounds of appeal will accordingly be dismissed without further ado.

[9] In relation to ground 3 of the Appellant's grounds of appeal, Mr. Thomas did not elaborate on how the Court should treat with the statement of this ground. The Learned Magistrate heard the evidence of the Appellant, the Respondent, and the witness called by each of them. She also had the opportunity to see and observe them as they gave their evidence. In her judgment, she said that she found that the Claimant (the Respondent in this appeal) had established his claim[s], which claims were that Ms. Chandler had cut the Respondent on his

groin and not on his penis, and that her miscarriage was not the result of being struck on her belly by the Respondent.

[10] Having regard to the much-quoted statement of law clearly expressed by Lord Thankerton in the Court of Appeal of England and Wales in the case of **Watt v Thomas**,¹ and followed so consistently by our courts, that an appellate court would only disturb a finding of fact by the lower court where there was no or only a scintilla of evidence to support the finding of the lower court; and having regard to the evidence in the court below recorded in the transcript of the proceedings before the Learned Magistrate, on the basis of which the Magistrate could and did find that the words published by the Appellant in I-Witness News, about which the Respondent complained, were not an accurate record of the words spoken by Ms. Chandler in the proceedings before the Senior Magistrate; this Court ought not to interfere with the factual findings of the Learned Magistrate. Accordingly, in so far as ground 3 was intended to challenge factual findings by the Learned Magistrate, this ground too must fail and will accordingly be dismissed.

[11] The Appellant's fourth ground of appeal was premised on the Magistrate not giving reasons for her findings and decisions. But although the Learned Magistrate did not '[offer] a reason or reasons for her findings and decision' at the conclusion of the trial on 23rd February 2021, she delivered a written judgment on 28th April 2021 in which she gave her reasons for decision. This ground of appeal cannot therefore stand and must also be dismissed.

[12] This leaves only the fifth ground of appeal standing, that the Learned Magistrate failed to apply her mind to the defences of truth, qualified privilege, fair comment, and justification.

[13] I will outline all of the defences to the tort of libel, even though some may not have been specifically mentioned in the Appellant's fifth ground of appeal, but I will address only those relevant to the appeal before this Court.

¹ [1947] AC 484.

[14] Gatley on Libel and Slander², which is recognized in English and other Commonwealth courts, including ours, as the authority on the law of defamation, sets out 12 defences to the tort of defamation, one of which applies only to slander and not libel, while the other 11 apply to all defamation claims. Since the claim in this case is in respect of the publication of statements in writing, then it is a claim in libel and not slander, and so the slander only defence will not be addressed.

[15] The first of the 11 defences to a claim for libel is denial: the defendant never published the words complained of; the words complained of did not refer to the claimant; the words complained of were not defamatory. None of these were alleged by the Appellant in relation to the words complained of by the Respondent and none was mentioned in the fifth ground of appeal, so we need not be troubled further by this defence.

[16] The second of the 11 defences is that the publication of the words complained of was authorized or consented to by the claimant. Here again, this was never alleged by the Appellant or mentioned by him in his fifth ground of appeal.

[17] The third defence is that the words were true in substance and in fact. This defence was advanced by the Appellant and comes within the fifth ground of appeal where the Appellant mentions truth and justification as defences to the claim against him for defamation. I will address this defence in the course of this judgment.

[18] The fourth defence is absolute privilege, which was advanced by the Appellant, though not mentioned in the fifth ground of appeal. The appellant's arguments on the defence of qualified privilege did, however, include elements of the

² The material from Gatley which I am using here is from older editions of Gatley (like the Eighth Edition published in 1981) which state the law as it stands in Saint Vincent and the Grenadines now. The most recent editions of Gatley (like the Thirteenth Edition published in 2022) state the law as it stands now in the UK following the passage of the Defamation Acts from 1996 to 2013. These Acts do not apply to Saint Vincent and the Grenadines.

defence of absolute privilege, so absolute privilege will be addressed in this judgment alongside the fifth defence of qualified privilege, which was advanced by the Appellant and was contained within the fifth ground of appeal.

[19] The sixth defence is fair comment, which again was advanced by the Appellant and contained within ground five and will be addressed in this judgment.

[20] The seventh defence is the offer of an apology, along with an offer of a payment into court; the eighth is an offer of amends; the ninth is release and accord; the tenth is limitation; and the last is res judicata. None of these arise on the facts of this case.

[21] This judgment will therefore address the defences of truth/justification, absolute and qualified privilege and fair comment.

Justification

[22] In the Appellant's fifth ground of appeal, it appears that he is treating truth and justification as two different defences. This is not correct. The common law defence is justification,³ which is established by proving that the statement made by the defendant is true in substance and in fact. It is for the claimant to prove that the statement was published by the defendant and that it was defamatory of him. Once the claimant does so, the burden then shifts to the defendant to prove that the defamatory statement published by him was true in substance and in fact. If he so proves, then the defence of justification will avail him.

[23] It is to be noted that if a person (A) publishes an untrue statement, it does not avail him to say that he only repeated what another person (B) had said, even if he specifically says or writes that (B) said so. He must prove not that it is true that (B) told him so, but that what (B) told him was true, otherwise both he (A) and (B) are liable for defamation, even though he honestly believed what (B) had told him.

³ In the UK, the common law defence of justification has been replaced by the statutory defence of truth, as per section 2(4) of the UK Defamation Act 2013.

- [24] The Appellant (as the defendant in the court below) did not dispute that he published the words complained of, or that they were defamatory of the Respondent (as the plaintiff in the court below). In order for the defence of justification to avail the Appellant, therefore, he would have to prove (with respect to the first claim) that Ms. Chandler did cut the Respondent on his penis and that he received 16 stitches on his penis as a result, and (with respect to the second claim) that the Respondent did strike Ms. Chandler on her belly and cause her to miscarry.
- [25] At the trial before the Learned Magistrate, the Respondent testified that he was cut and received stitches on his groin, and not on his penis, and that both he and Ms. Chandler said so during the criminal proceedings before the Senior Magistrate. The Respondent also testified that Ms. Chandler did say that she had miscarried once when she was carrying his child and that he had struck her on her belly. He testified though that she never linked the two things to say that she miscarried because he struck her on her belly.
- [26] Ms. Chandler, in her testimony before the Learned Magistrate, said that she clearly said at the criminal proceedings before the Senior Magistrate that 'the incident didn't occur on his penis, it happened on his groin', meaning thereby that the cutting and stitching took place on the Respondent's groin and not on his penis. She also testified that it was not true that she had a miscarriage because the Respondent struck her on her belly. She said that she made this clear to the court, referring to the criminal proceedings before the Senior Magistrate.
- [27] The Appellant gave evidence in the civil proceedings before the Learned Magistrate and testified that he was in court during the criminal proceedings before the Senior Magistrate when Ms. Chandler pleaded guilty to a charge of wounding the Respondent. He said that, upon entering the guilty plea, the prosecutor read the facts to the court wherein it was stated that Ms. Chandler had cut the Respondent on his penis, as a result of which he got 16 stitches on his penis. The Appellant testified that Ms. Chandler never disputed this statement. He also testified that Ms. Chandler said in court that the Respondent

had struck her on her belly while she was pregnant with his child, causing her to miscarry.

[28] The appellant's witness, Mr. Peters, gave evidence before the Learned Magistrate substantially corroborating the evidence of the Appellant. Indeed, he testified that the story carried by the Appellant in I-Witness News accurately reflected the coverage of what took place in court that day.

[29] The Appellant, not having disputed that he published the offending statements and that they were defamatory of the Respondent, the burden would have been on him to prove that the offending statements were true. The Learned Magistrate heard the evidence of the Appellant and his witness and the Respondent and his witness, and although she did not expressly state in her judgment that the offending statements were untrue, importantly, and given where the burden of proof lay, she did not make a finding that the statements were true. Indeed, the entire thrust of her judgment pointed to a finding that the offending statements – that the Respondent had struck Ms. Chandler on her belly whilst she was pregnant with his child, causing her to miscarry, and that Ms. Chandler had cut the Respondent on his penis causing him to get 16 stitches on his penis – were untrue.

[30] It cannot therefore be said that the Learned Magistrate did not apply her mind to the defence of justification. In any event, once she applied her mind to it, she would inevitably have come to the conclusion that this defence would not have availed the Appellant.

[31] The question of whether the Appellant had satisfied the Learned Magistrate that his article was an accurate report of what was said in court before the Senior Magistrate will be addressed shortly in dealing with the defences of absolute and qualified privilege.

Privilege

- [32] The Appellant ran the defence of privilege, arising from the fact that the statements published by him were part of a report by him of criminal proceedings in the Magistrate's Court in which the Respondent was the virtual complainant and Ms. Chandler was the defendant. Although the Appellant's challenge in his notice of appeal was that the Learned Magistrate failed to apply her mind to the defence of qualified privilege, I propose to deal with both qualified and absolute privilege, which both arose on the applicable facts and relevant law.
- [33] There are occasions of privilege relating to the publication of defamatory statements for which the publisher of the statements cannot be found liable. Indeed, a statement of claim which alleges publication of a defamatory statement on any such occasion will be struck out as disclosing no cause of action. The most significant occasions attracting absolute privilege are statements made in the course of judicial and quasi-judicial proceedings and statements made in the course of parliamentary proceedings and in reports published by order of Parliament. But while statements made in the course of judicial or quasi-judicial proceedings by the parties to and witnesses at the proceedings (along with the statements of the lawyers and the judges) attract absolute privilege, reports of the proceedings by journalists and others only attract absolute privilege if they accurately reproduce the exact statements made during the proceedings.
- [34] The reference in *Gatley* to 'fair and accurate reports in a newspaper of proceedings publicly heard by a court exercising judicial authority within the United Kingdom' speak to the position in the United Kingdom by virtue of the Defamation Act 2013 of the United Kingdom and similar legislation preceding the 2013 Act. The position in Saint Vincent and the Grenadines is still the common law position which would give absolute privilege to accurate reports of statements made in judicial proceedings (reproduced verbatim) but would give only qualified privilege to reports which, though fair and honestly believed by the writer, did not simply reproduce statements actually made in court by parties, witnesses, advocates and adjudicators in the judicial proceedings. The publisher of the offending statements could only escape liability if there was no malice, actual or implied, in his publishing of the statements. Applied to the present case, if the

Appellant reported as he did that the Respondent had struck Ms. Chandler on her belly and caused her to miscarry, and that she had cut his penis leaving him with 16 stitches there, his words would attract absolute privilege if that was what was in fact said in the proceedings before the Senior Magistrate. The Appellant will not however be able to rely on absolute privilege, because the Learned Magistrate did not find that he – upon whom the burden lay – had established that the statements published by him in his article were a reproduction of what was said in the proceedings before the Senior Magistrate. Indeed, as I said earlier,⁴ the entire thrust of the judgment of the Learned Magistrate pointed to her finding that neither the Respondent nor Ms. Chandler said what the Appellant reported them as saying.

[35] If the Appellant did not accurately report exactly what the Respondent and Ms. Chandler had said in the proceedings before the Senior Magistrate, but he did report, without malice, what he honestly believed was said (based probably on what the prosecutor had said to the Senior Magistrate before he invited Ms. Chandler to speak), then the defence of qualified privilege would avail him. There was no finding by the Learned Magistrate of unfairness by the Appellant in his publication of the offending words in his online newspaper. He admitted that he had published them; he did not deny that they were defamatory of the Respondent; he insisted though that he published what he heard in the proceedings before the Senior Magistrate; and he asserted that he had no malice towards anyone in his publication of the offending words; indeed, he said that he had not previously known either the Respondent or Ms. Chandler

[36] Based on the statement of principles in *Gatley*, and in numerous cases which have addressed these principles, it would appear that the Appellant would not be liable if Ms. Chandler had said in the criminal proceedings what was reported by him, even if what Ms. Chandler said was untrue. His accurate report would entitle him to absolute privilege. If, however, he did not accurately report what Ms. Chandler had said, but wrote a report on the proceedings before the Senior

⁴ See para. 29.

Magistrate which could be considered fair, his report would attract qualified privilege, provided he was not actuated or motivated by malice.

[37] On the facts of the present case, the words published by the Appellant in his online newspaper were not proved by him to have been an accurate report of what was said in the proceedings before the Senior Magistrate; and the burden of proof was his to discharge. His published words will not therefore attract absolute privilege.

[38] I agree with the Appellant's submission that the Learned Magistrate did not apply her mind to the defence of qualified privilege, even though she referred in her judgment to the case of **Reynolds v Times Newspaper Ltd**,⁵ because if she had fully and properly applied her mind to it she was bound to have frontally addressed the question of whether the Appellant's report was fair, even though she appeared to have found it to be inaccurate in identifying the location of the injury inflicted to the body of the Respondent and in linking two statements made by Ms. Chandler about being struck on her belly by the Respondent and her having a miscarriage. The Learned Magistrate's failure to thus apply her mind led her into error, effectively denying the Appellant of the defence of qualified privilege to which he was entitled on the applicable law and facts of this case.

[39] I am of the view that if the Learned Magistrate had properly applied her mind to the defence of qualified privilege, she would inevitably have come to the conclusion that the statements made by the Appellant in the article in his online newspaper were made on an occasion of qualified privilege when, as a journalist, he was reporting on what he heard said in court by the prosecutor and/or the defendant in a criminal case before the Senior Magistrate. The evidence is uncontroverted that the Appellant was not actuated or motivated by malice; the onus of proof of which would be on the Respondent, who never even alleged it.

⁵ [2001] 2 AC 127.

- [40] The appeal must therefore be allowed on the ground that the Learned Magistrate erred when she failed to apply her mind to the defence of qualified privilege, because had she done so she would have found that the publication of the offending words by the Appellant was protected by qualified privilege.

Fair Comment

- [41] The last of the defences I promised to address in this judgment is fair comment. Since I have already determined that the appeal should be allowed because the Learned Magistrate had failed to apply her mind to the defence of qualified privilege and that had she done so she would have found that the Appellant was not liable, because the words published by him were covered by qualified privilege, then I need not go further and address the defence of fair comment, because a decision one way or the other will not change the outcome of the appeal. For the sake of completeness, though, I will very briefly address the defence.
- [42] It is a defence to an action for defamation that the words complained of by the claimant are fair comment on a matter of public interest. To succeed in a defence of fair comment, the defendant must show that the words published were comments and not statements of fact. He must also show that there is a basis of fact for the comment, which must be contained or referred to in the matter complained of. He must show as well that the comment was fair and on a matter of public interest.
- [43] This defence fails at the outset, because the words published by the Appellant and complained of by the Respondent were not comment, but were pure statements of fact – that the respondent had been cut on his penis by his former girlfriend and got 16 stitches on his penis as a result, and that the Respondent had struck his former girlfriend on her belly whilst she was pregnant and caused her to miscarry as a result. The Appellant, therefore, would clearly have failed on the defence of fair comment, whether or not the Learned Magistrate had applied her mind to it.

Conclusion

[44] Based on the foregoing, the Appellant's appeal fails on his first to fourth grounds of appeal but succeeds on the fifth ground in so far as the Learned Magistrate failed to apply her mind to the defence of qualified privilege, because had she done so she would ineluctably have concluded that the appellant was protected by qualified privilege when he published the words complained of.

[45] The appeal is accordingly allowed and the decision of the Learned Magistrate to award damages and costs to the Respondent is set aside. The Appellant having prevailed on only one of his five grounds of appeal and, even then, only partially, the parties shall bear their own costs.

I concur.

Trevor Ward

Justice of Appeal

I concur.

Gerard St.C. Farara

Justice of Appeal [Ag]

By the Court

Chief Registrar