ALWIS v. SENEVIRATNE

COURT OF APPEAL
ABDUL CADER J. & RODRIGO, J.
C.A. (S.C.) 225/75(F)
D.C. COLOMBO 77746/M
JULY 24, 1980.

Defamation – Plea of justification and plea of privilege – Are proceedings before the Rent Control Board judicial in nature? – Rent Restriction Act, (Chapter 274) Sections 13(1), 20(12) – Penal Code, Sections 17, 19 and 188.

Words defamatory of the plaintiff were contained in cage 10 of the application form made by the defendant to the Rent Control Board, which required an applicant to state the grounds of dispute and all matters relevant thereto. The plaintiff was occupying a rent controlled premises as tenant of the defendant. The plaintiff sued the defendant for defamation.

Held :

(1) The Rent Control Board holds its proceedings in a manner as nearly as possible similar to that in which a Court of Justice holds its inquiries in respect of any matter before it. What was stated in the application attracted immunity of absolute privilege by reason of the character of the Board.

(2) The defendant's purpose in making the application to the Rent Control Board was the protection of her interests, namely the recovery of her house and the ejectment of her tenant the plaintiff, on the grounds specified. She had an honest belief in the allegation she made and what she stated in the application attracted qualified privilege. She is entitled to claim to be protected by this privilege unless some other dominant and improper motive on her part is proved in rebuttal.

Cases referred to:

(1) *Silva* v. *Balasooriya* (1911) 14 NLR 452
(2) *Royal Aquarium* v. *Parkinson* (1892) 1 QB 431 at 442
(3) *Dawkins* v. *Loard Rokeby* NLR 8 Queen's Bench 255
(4) *Basner* v. *Trigger,* (1946) AD 94
(5) *Horrocks* v. *Lowe* (1974) 1 AER 669
(6) *Adam* v. *Ward* (1917) AC 326.

APPEAL from the order of the District Court of Colombo.

H. W. Jayewardena, QC. with *H. M. P. Herath* and *Lakshman Perera* for the defendant-appellant.

D. R. P. Gunatilake for the plaintiff-respondent.

Cur adv vult.

5th September, 1980

RODRIGO, J.

The appellant is the landlady of a premises that she had let to the plaintiff. She had her own residence next door to the plaintiff's. There was no fence separating the two premises, stout or otherwise, and not surprisingly the two of them fell out before long. The appellant thereafter wanted to get back the premises let to the plaintiff and she made an application to the Rent Control Board. This was on the 3rd February 1972. In that application the relief that she claims was the recovery of the premises. She added that the premises was also required for occupation by her son and also that it had become necessary to ascertain the authorised rent. There is a cage No. 10 in that application form which required the applicant to state the grounds of dispute and matters relevant thereto. In that cage she had stated that "the tenant is a drunkard who often abuses the landlady in abusive words, insulting and humiliating her; keeping other men's wives and indulging in immoral acts – keeping undesirable persons in the premises to conduct Bali ceremonies and so on; making the premises filthy, damaging personal property belonging to me and getting others to do likewise. He does not pay

the house rent on the due date. The Town Council has raised the rent to a higher amount than the present rate".

This application came for consideration before the Rent Control Board. That was at a public sitting of the Rent Control Board. There had been about 15 – 20 members of the public present on this occasion. The contents against cage 10 of the application had been read out aloud by a member of the Board or it had been caused to be read out. The appellant had then been asked whether she could substantiate these allegations. She had answered in the affirmative and thereafter the hearing had been postponed for evidence for the 22nd of June 1972. On that date the appellant appeared with an Attorney-at-Law and the Attorney had moved to withdraw the allegations in cage 10 and that had been allowed. By this date the plaintiff, the tenant, had sent the appellant a letter of demand seeking to recover damages in a sum of Rs. 20,000/- on account of the alleged defamatory statements contained in the application of the appellant to the Rent Control Board against the plaintiff.

The plaintiff instituted action in January 1973 against the appellant, his landlady, for the recovery of damages for having made defamatory statements against him in her application to the Rent Control Board referred to. He has specified the contents against cage 10 of the application as defamatory statements. He had reduced his claim to Rs. 15,000/-.

At the trial the appellant stood by what she had stated in her application and sought to establish the truth of what she has stated. In her answer she denied that the allegations that she has made in the application are defamatory of the plaintiff. She, however, did not say in her answer that the words as such and the allegations are by themselves not defamatory of the plaintiff but by reason of the allegations having being made in the course of a judicial proceeding the allegations are not defamatory. This is how she put it.

The plaintiff admitted in evidence that he was keeping somebody else's wife while his own wife and children are living, though elsewhere. The learned trial Judge gives the plaintiff a good character certificate because he was candid in the witness box about it and also because he was looking after his own wife and children as well. The learned trial Judge has come to a finding that the allegations in the application to the Rent Control Board are false and malicious *per se*. In respect of some allegations of the appellant, the learned trial Judge had stated that the appellant's imagination was running riot.

The learned trial Judge had found the allegations to be defamatory of the plaintiff. The appellant put in two pleas as a defence namely, the plea of justification and the plea of privilege. The learned trial Judge had found against the appellant on both these pleas.

One of the questions for consideration in this appeal is whether the proceedings before the Rent Control Board are judicial in nature. If the proceedings are judicial then, on both principle and authority the allegations would appear to be protected. That is in the sense of absolute privilege attaching to proceedings before a judicial body. The question, also arises in the alternative, as to whether the occasion attracts only qualified privilege. I shall consider the position on both these footings.

On the question whether an action can be maintained for libellous matter contained in the pleadings of a case or for words used in *viva voce* pleadings in the course of a judicial proceeding, the "local authorities speak with no uncertain voice. They are in fact unanimous." Over a period of years it has been said over and over again that absolute privilege attaches to libellous matter contained in pleadings or uttered by witnesses in judicial proceedings. The subject had been dealt with at length by Lascelles, C.J., in *Silva v. Balasooriya*[1] and it is redundant for me to write an exposition on the topic all over again. It has, therefore, become necessary to examine if the proceedings before the Rent Control Board are in their nature judicial. If the proceedings are in their nature judicial then absolute privilege will attach to the allegations. See *Royal Aquarium v. Parkinson*[2]. If they are not, then it remains to be decided whether the proceedings before the Rent Control Board attract qualified privilege and if so whether qualified privilege attaches to the allegations. It is of importance therefore to examine the Rent Acts and particularly the Rent Restriction Act (Chapter 274 as amended from time to time) since at the date of the consideration of the application what was in operation was that Act.

The character in which the Rent Control Board acted turns, in the first place, on the language of the Act. Was the Rent Control Board holding its proceedings in a manner as nearly as possible similar to that in which a Court of Justice holds its inquiries in respect of any matter before it? The Act itself describes the proceedings before the Board as judicial proceedings within the meaning and for the purposes of Chapter XI of the Penal Code and the members of the Board are deemed to be public servants within the meaning of the Act – Section 20(12) of the Rent Act. Chapter XI is titled "False evidence and offences against public justice". "A public servant" within the meaning of this Chapter includes every Judge – Section 19 of the Penal Code. Then the word "Judge" not only denotes every person who is officially designated as a judge, but also every person

who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, or who is one of a body of persons, which body of persons is empowered by law to give such a judgment. – Section 17 of the Penal Code. Then again the words "Courts of Justice" denote a judge who is empowered by law to act judicially alone, or a body of judges which is empowered by law to act judicially as a body, when such judge or body of judges is acting judicially – Section 18 of the Penal Code. Among the illustrations to Section 17 of the Penal Code are instances of a President of a Village Tribunal and each Councillor of such Tribunal exercising jurisdiction under the Village Communities Ordinance and a Provincial Registrar exercising jurisdiction under Section 20 of the Kandyan Marriage Ordinance. The said Chapter also enacts that "Whoever, being legally bound by an oath or affirmation, or by any express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true, is said to give "false evidence" – Section 188. In explanation (1) thereto it is enacted that a statement is within the meaning of this Section whether it is made verbally or otherwise. The application of the aforesaid provisions of the Penal Code to proceedings before a Rent Control Board is enacted, in my view, to make the proceedings before the Board as near as possible similar to the proceedings before a Court of Justice strictly so called. Every order made by the Board is required to be reduced to writing and signed by the chairman. Its proceedings shall be open to public and minutes of such proceedings including the summary of oral evidence given before the Board are required to be kept; parties may be represented before the Board by an attorney-at-law; witnesses may be examined on oath. Any person could be summoned to appear before it or to produce a document and any order made by the Board is subject to an appeal to the Board of Review. All these matters are provided for by the provisions of the Act.

It is said in the judgment of Ex. Cheq. Chamber in *Dawkins v. Lord Rokeby*[3] that:

> "The authorities are clear, uniform and conclusive that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognised by law."

In the *Royal Aquarium case (supra)* Fry L.J. accepted this proposition with this qualification namely that he doubted whether the

word "tribunal" does not really rather embarrass the matter; because that word has not, like the word "court", an ascertainable meaning in English Law. He observed that the judgment of the Ex. Chequer Chamber appeared to him to proceed upon the hypothesis that the word is really equivalent to the word "Court", because it proceeded to inquire into the nature of the particular court there in question and came to the conclusion that a military court of inquiry "though not a court of record, nor a court of law, nor coming within the ordinary definition of a court of justice, is nevertheless a court duly and legally constituted". The Penal Code to which reference is made by the Rent Restriction Act has defined a "court of justice"(supra). So that "Wherever you find a court of justice, to that the law attaches certain privileges, among which is the immunity in question". "This immunity or absolute privilege has been constituted on the grounds of public policy to ensure freedom of speech where it is essential that freedom of speech should exist and with the knowledge that courts of justice are presided over by those who from their high character are not likely to abuse the privilege and who have the power and ought to have the will to check any abuse of it by those who appear before them".

The Rent Restriction Act by section 13(1) enacts "notwithstanding anything in any other law, no action or proceeding for the ejectment of a tenant of any premises to which this Act applies shall be instituted in or entertained by any court, unless the Board, on the application of the landlord, has in writing authorised the institution of such action or proceedings". This carries a proviso which dispenses with the authority of the Board in specified circumstances. The appellant's application apparently does not come within the proviso; or so she thought. Her application was in fact entertained by the Board and was fixed for inquiry and evidence. What she had stated in the application attracted the immunity of absolute privilege by reason of the character of the Board as I indicated earlier even though "the words written or spoken were written or spoken maliciously without any justification or excuse and from personal ill-will and anger against the person defamed". See the *Royal Aquarium Case (supra).*

Coming to the next question as to whether, in the alternative, the appellant's allegations in her application to the Board attracted, in any event, qualified privilege, I must mention that the appellant was the landlady of a premises admittedly governed by the Rent Restriction Act and that the appellant could seek the ejectment of her tenant only within the provisions of the Rent Restriction Act. She cannot therefore be faulted for making an attempt to invoke the provisions of the Rent Act to have the tenant ejected. The allegations

were stated in a cage provided for that purpose. The law governing qualified privilege unlike absolute privilege in our courts is the Roman Dutch Law. The allegations are undoubtedly defamatory of the plaintiff. The appellant, however, denies this. What then is the definition of defamation ?

> "Historically, there is no doubt that *animus injuriandi,* or intention to injure, was the gist of our action for defamation, where words were used which in their natural sense conveyed a defamatory meaning, i.e., a meaning calculated to injure the plaintiff, the defendant, in order to succeed had to rebut the inference of *animus injuriandi* that arose from their use. He was at large to try to do this in any way that he could-it was a matter of evidence. But in course of time there have become crystallised in our legal system certain set or stereotyped defences whereby the law recognises that the inference of *animus injuriandi* following from the use of defamatory words can be rebutted and the plaintiff's claim, provisionally, be met. The most firmly established and clearly defined are privilege and fair comment."

> "The growth of legal conceptions and rules in the way that I have mentioned is a common and often useful feature in the development of law; groups of similar cases come to be dealt with similarly and what was at one time an inference of fact in each case hardens into a rule of law covering all the cases. Some beneficial elasticity is lost, but there is a gain in certainty".[4]

What has a defendant to prove to establish qualified privilege provisionally? To restrict the question to this case, the appellant had to establish that she communicated with the Board in the form of sending an application in the protection of an interest of her own which she was entitled to protect by doing so, namely, the recovery of her house and ejectment of the tenant on the grounds specified in her application. Provision has been made by the Act for communicating the grounds of dispute or the grounds upon which the relief is sought. The appellant then has to establish that she used this occasion or the machinery provided to protect her interests. There was no burden on her to prove in addition that she was actuated solely by her sense of desire to protect her interests in this property. If it were otherwise, the burden of qualified privilege might turn out to be illusory. She is entitled to claim to be protected by this privilege unless some other dominant and improper motive on her part is proved. Whereas in this case, the plea of qualified privilege is challenged "what is required on the part of the defamor to entitle him to the protection of the privilege is positive belief in the truth of what

he published or as it is generally though tautologously termed, 'honest belief'. Though the appellant withdrew the allegations when the matter came up for inquiry before the Board and, as it turned out for tactical reasons, she stood by what she said in her application, at the trial of the action by the plaintiff for defamation against him. It is my view therefore that provisionally she had established that the occasion was privileged and that the allegations attracted qualified privilege. As I said this was only provisional for, it was open to the plaintiff to rebut the claim of qualified privilege by establishing on his part that the appellant had not used the occasion in accordance with the purpose for which the occasion arose. This he can establish by showing that the appellant had used the occasion for some indirect or wrong motive. The plaintiff can show "that the defendant had published untrue defamatory matter recklessly without considering or caring whether it be true or not, in which event, the defendant will be treated as if she 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. 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', i.e., a positive belief that the conclusions they have reached are true. The law demands no more'. See *Horrocks v. Lowe.*[5]

It is important to remember that a positive belief in the truth of what is published on a privileged occasion is presumed until the contrary is proved. But this may not be sufficient to negative express malice if it can be proved that the defendant misused the occasion for some purpose other than that for which the privilege is accorded by the law, such as personal spite or ill-will towards the person he defamed. What is stated above is the English law view of principles governing

qualified privilege and its rebuttal. This, however, is in accord with the Roman Dutch Law view of the subject. In *Basner v. Trigger*[4] it is said that malice so understood accurately states what is necessary to defeat qualified privilege in Roman Dutch Law as in the English law. When in that case reference was made to malice so understood it has been said that malice is not confined to spite or ill-will but means any improper or indirect motive. Privileged occasions are recognized, it is said therein, in order to enable persons to achieve certain purposes and when they use the occasion not for those purposes they are actuated by improper or indirect motives. It might have been an indirect motive in the present case on the part of the appellant if her dominant motive was to obtain some private advantage unconnected with the protection of her interests which constitutes the reasons for the privilege. If so, she would have lost the benefit of the privilege despite her positive belief, which is presumed, that what she said or wrote was true.

In the instant case it transpires from the evidence that the appellant's purpose in making the application to the Rent Control Board was to recover her premises and that she had an honest belief in the allegations that she made against the plaintiff if regard is had to the fact at the trial she stood by what she said in her application and also to her condition as an ordinary woman without any claim to being an intellectual. It is significant in considering whether the appellant had an honest belief in what she had stated or whether the appellant was actuated by an improper motive that the plaintiff himself unashamedly admitted in the course of his evidence that he was keeping as his mistress in the premises in suit somebody else's wife when his own marriage was subsisting. Among the allegations made by the defendant there is nothing more damaging to the plaintiff's reputation than this particular statement. Rest of the allegations by comparison in the circumstances cannot hurt him more. It cannot be said that the appellant had no ground at all for making these allegations since, apart from the fact that the most substantial allegation that she has made has been admitted to be true by the plaintiff, the appellant was the plaintiff's next door neighbour and had every opportunity to see what was happening in the plaintiff's house. The plaintiff had further admitted that he was engaged in doing Bali ceremonies and such ceremonies involved certain activities. The appellant cannot be blamed if she found such activities to be offensive to her sensibilities being the kind of woman that the appellant is. I do not agree with the learned trial Judge's observation that the appellant's imagination was running riot when she described what she purported to have seen in the manner that she had so described.

It was observed by Lord Diplock in the case Horrocks *(supra)* that:

> "Judges and juries should, however, be very slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of the privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsity. The motives with which human beings act are mixed. They find it difficult to hate the sin but love the sinner. Qualified privilege would be illusory, and the public interest that it is meant to serve defeated, if the protection which it affords were lost merely because a person, although acting in compliance with a duty or in protection of a legitimate interest, disliked the person whom he defamed or was indignant at what he believed to be that person's conduct and welcomed the opportunity of exposing it. It is only where his desire to comply with the relevant duty or to protect the relevant interest plays no significant part in his motives for publishing what he believes to be true that 'express malice' can properly be found."

It is not the case here that the appellant's allegations are not really necessary for her to maintain her application before the Board. Logically perhaps it might be said that one or two matters among her allegations are irrelevant to her application, but it had been pointed out in *Adam v. Ward*[6] the proper rule as respects irrelevant defamatory matter incorporated in a statement made on a privileged occasion is not to see whether it is logically relevant but whether in all the circumstances it can be inferred that it was so irrelevant that the only inference is that the defendant has seized the opportunity to drag irrelevant defamtory matter to vent his or her personal spite or for some other improper motive. Here too, it has been said judges and juries should be slow to draw this inference. It seems to me, therefore, that what the appellant had stated in her application to the Rent Board attracts, in any event, qualified privilege.

For the above reasons I am of the view that the plaintiff's action must fail and accordingly I dismiss the action of the plaintiff and allow this appeal with costs.

ABDUL CADER, J. – I agree.

Appeal allowed.