A

FIJI TIMES AND HERALD LIMITED

v.

MARQUARDT-GRAY

B [COURT OF APPEAL, 1968 (Gould V.P., Hutchison J.A., Marsack J.A.), 4th, 18 October]

Civil Jurisdiction

Libel—apology—reference to by judge—no payment into court—whether reference permissible—Libel Act 1845 (8 & 9) Vict., c.75) (Imperial) s.2.

C *Libel—newspaper report—plaintiff's name appearing therein—capable of being understood as referring to him—words in natural sense capable of libellous meaning—innuendo unnecessary.*

The respondent, a legal practitioner, obtained judgment for damages in the Supreme Court, in respect of a report in the appellant company's newspaper of certain judicial proceedings. The respondent was named in the report and no innuendo was pleaded. The newspaper later published an apology and on appeal it was submitted that the trial judge had used the apology to prove the libel of the respondent and that to refer to it at all was contrary to the Libel Act, 1845 (Imperial), because no money had been paid into court by way of amends.

D

Held: 1 (a) The provision in section 2 of the Libel Act, 1845, that "every such plea so filed without payment of money into court shall be E deemed a nullity," does not mean that a judge may not refer to an apology, provided he does not treat it as mitigating damages.

(b) The apology had not in fact affected the judgment of the trial judge.

2. The report named the respondent and could be understood by the F ordinary reader without further evidence to refer to him, and the words in their natural meaning could be held to be libellous; consequently no innuendo was required.

Cases referred to: *Sadgrove v. Hole* [1901] 2 K.B. 1; 84 L.T. 647: *Capital & Counties Bank Ltd. v. Henty* (1882) 7 App. Cas. 741; 47 L.T. 662: *Fournet v. Pearson Ltd.* (1897) 14 T.L.R. 82: *Tolley v. J. S. Fry & Sons Ltd.* [1931] A.C. 333; 145 L.T. 1.

G

Appeal from a judgment of the Supreme Court awarding damages for libel.

R. G. Q. Kermode for the appellant company.

K. C. Ramrakha for the respondent.

H The facts sufficiently appear from the judgment of *Hutchison J.A.*

The following judgments were read:

HUTCHISON J.A.: [18th October, 1968]—

Respondent, a practising barrister, brought his action alleging that he had been libelled by a report in Appellant's newspaper. The facts are fully stated in the judgment of the learned trial Judge and I do not think it necessary to re-state them at this stage, save only that it is important to set out immediately the report, which was as follows :-

A

"

CHANGE OF COUNSEL
SOUGHT BY ACCUSED

The Acting Chief Justice (Mr. Justice Hammett) yesterday adjourned a hearing against a man charged with wounding Fiji's Deputy Controller of Prisons after the accused said he wished to change the counsel assigned to him under the legal aid scheme.

B

Vereniki Vueti Merumeru (about 30), of Suva, pleaded not guilty at a criminal session of the Supreme Court, Suva, to a charge that last July 20 at Suva, he wounded Eric Reginald Smith with intent to do some grievous harm.

C

"Merumeru also pleaded not guilty to an alternative charge that on July 20, at Suva, he assaulted Eric Reginald Smith, occasioning him actual bodily harm.

Merumeru appeared in court yesterday represented by barrister-solicitor Mr. Marquardt-Gray.

D

Mr. Marquardt-Gray told the court he was contacted about 3 p.m. on Friday "at the last minute."

Merumeru told Mr. Justice Hammett that he wished to be represented by Mr. S. M. Koya and indicated that he wanted the Government to meet Mr. Koya's fees under the legal aid scheme.

E

"LET DOWN"

Mr. Justice Hammett said: "This man seems to have been let down by counsel at the last minute if it is true.

"I think he ought to be given reasonable chance to get in touch with Mr. Koya and be given time to brief another counsel."

F

Counsel for the Crown, Mr. Timoci Tuivaga, told Mr. Justice Hammett that the accused was under the impression the Government would be able to finance his choice of counsel in the matter.

Mr. Justice Hammett had told the accused earlier that he would be at liberty to have Mr. Koya if the accused wanted to meet the expense.

G

To benefit under the legal aid scheme "it must be counsel in Suva because of the expense," Mr. Justice Hammett said . . . . . "

The learned trial Judge dealt fully with the issue in the action and held that the report was defamatory of respondent and awarded him £500 damages.

H

Upon the appeal, appellant advanced three grounds :-

"1. That the learned trial Judge erred in holding on the evidence before him that the report was defamatory of the respondent.

2. That the learned trial Judge erred in using the apology published by the appellant and holding it substantiated the alleged defamatory nature of the published report.

3. The learned trial Judge erred in not holding that the report was not clearly defamatory of the respondent and that if the statements complained about were defamatory and referred to the respondent by innuendo the respondent had failed to call any evidence to establish that anyone had read the report and understood it to refer to the respondent in a defamatory sense."

These are closely related and it is, I think convenient to discuss them all shortly before coming to a conclusion on the case.

Upon the first ground, Counsel contended that no ordinary reader would take it from this report that it was respondent who had let Merumeru down, if indeed such a reader would accept the statement of an alleged criminal that some barrister had let him down. The observation of the learned Judge then presiding clearly did not assume his statement necessarily to be true. When, however, it was set out in the report in appellant's newspaper, it was given the weight of that publication, and I think that the ordinary reader would be likely to take it to be true. That, however, does no more than deal with a lesser aspect of this submission. The more important branch of it was that the ordinary reader would not apply this to respondent. In fact it seems now to be clear that the practitioner of whose action Merumeru rightly or wrongly complained was Mr. Koya. But would the ordinary reader apply this to respondent? One statement of Merumeru's that was not picked up by the reporter and does not appear in the report was —

"There is colour in this case and I want a black man to appear for me. Mr. Koya was going to appear for me."

If this had appeared in the report, it would, as it seems to me, have indicated, respondent then being present with Merumeru, that the particular Counsel referred to was not he but was a non-European. However, it did not appear, and we have to deal with the report as it was.

The learned trial Judge said :

"I turn therefore to the issue as to whether the report is defamatory of the plaintiff. I find that it must be held to be defamatory. Indeed the defendant Company's apology itself refers specifically (a) to the omission from the report of Merumeru's reason for not wanting to be represented by the plaintiff and for wanting to change his counsel and (b) to the Judge's comment, which does appear in the report, that Merumeru, if the story were true, appeared to have been let down by his counsel. The apology proceeds "The Fiji Times wishes to make it quite clear that (the) counsel referred to was not Mr. Marquardt-Gray." The reason why the defendant Company, had come to appreciate the necessity for making this "quite clear" was precisely because the report is incorrect; and without such vital correction it is defamatory of the plaintiff. The report is so put together, titled and subtitled, that an ordinary reader would understand from it that the reported comment by the Judge was directed against the plaintiff and this "letting down" by counsel would be associated in the reader's mind with Merumeru's wish to change his counsel, a request which was acceded to in that Merumeru was granted an adjournment to enable him to do so."

It is convenient, following on that quotation, to turn to ground 2 advanced for appellant. The report, the subject of the action, was published on the 7th November, 1967; the Writ was issued on the 22nd November, 1967; on the 9th January 1968 appellant published the apology referred to as follows :-

> "Suva barrister and solicitor Mr. H.A.L. Marquardt-Gray has complained of a report which appeared in the Fiji Times of November 7 regarding the case of Vereniki Vueti Merumeru, which was charged before the Supreme Court with wounding Eric Reginald Smith with intent to do some grievous harm.
>
> Mr. Marquardt-Gray has complained that the report was not an accurate one in that it omitted a statement made by Merumeru, stating his reason for not wanting to be represented by Mr. Marquardt-Gray, and for wanting a change of counsel.
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> The Fiji Times has had the opportunity of consulting the court record and has found that a statement made by Merumeru was omitted from the Fiji Times report.
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> "This statement was : 'There is colour in this case and I want a black man to appear for me. Mr. Koya was going to appear for me.'
>
> The reporter who supplied the report states that he did not hear the translation of the statement made by Merumeru. The accoustics of the Supreme Courtroom are not good and the interpreter spoke in a low voice.
>
> The report contained a reference to a comment by the Judge that Merumeru, if his story were true, appeared to have been let down by counsel. The Fiji Times wishes to make it quite clear that counsel referred to was not Mr. Marquardt-Gray.
>
> The Fiji Times apologises to Mr. Marquardt-Gray for the omission of the statement by Merumeru from the report and for any embarrassment which the report may have caused him.
>
> The report was published in good faith as an accurate, though necessarily abbreviated, record of the court proceedings, and at no time was there any intention to reflect on Mr. Marquardt-Gray's ability or reputation as a barrister and solicitor."

Mr. Kermode said that the learned trial Judge had used the apology to prove the libel of respondent. I do not think that the apology does that at all, and I do not think that the trial Judge used it for that purpose. His conclusion "without such vital correction it is defamatory of the plaintiff" was not based on the apology, but on the grounds which he stated following that. That is all, I think, that need be said on that point. However, it is as well for me to make some reference to Counsel's submission that it was wrong to refer to the apology at all. He based that on the Libel Act 1845 :-

> "It shall not be competent to any defendant in such action whether in England or Ireland, to file any such plea, without at the same time making a payment of money into court by way of amends . . . . but every such plea so filed without payment of money into court shall be deemed a nullity, and may be treated as such by the plaintiff in the action."

[The more recent statutes in the United Kingdom and in New Zealand have no counterpart in the Laws of Fiji.] Counsel's contention was that because a plea of an apology, without a payment into Court, "shall be deemed a nullity" it might not be referred to at all by the judge. With all respect I do not agree with this. It "may be treated as such by the plaintiff in the action," but I do not think that its being deemed a nullity means that the judge may not refer to it, provided that he does not treat it as mitigating damages. However, I need say no more about this, for, even if I am wrong in this view, I do not think that the apology affected the decision of the learned trial judge.

On the third ground, Mr. Kermode's submission was that, if the report should be libellous, it could be so only by virtue of an innuendo. He said that there was no evidence to link the Counsel referred to with the respondent. He referred to a number of cases, *Sadgrove v. Hole* [1901] 2 K.B. 1, *The Capital and Counties Bank Ltd. v. George Henty & Son* (1882) 7 App. Cas. 741, and *Fournet v. Pearson Ltd.* (1897) 14 T.L.R. 82. *Sadgrove v. Hole* was a case where there was nothing in the written statement referring to the plaintiff and no evidence to show that the Statement referred to him and *Capital and Counties Bank v. Henty* was a normal case of an innuendo's being required, the words complained of not being libellous in their natural meaning, as also was *Tolley v. Fry* [1931] A.C. 333 cited by Mr. Ramrakha. The case that warranted most consideration was *Fournet v. Pearson Ltd.* where Lord Justice A.L. Smith, in a judgment concurred in by Rigby and Collins L.JJ. said —

> "The libel, on the face of it, did not expressly refer to the plaintiff. It referred to a dead man, whereas the plaintiff was alive. It therefore required some outside evidence in order to connect it with the plaintiff. No such evidence was given, and it followed that the plaintiff had failed to prove the innuendo."

In this case, however, the report itself named respondent and could be understood by the ordinary reader without further evidence to refer to him as the counsel concerned and this distinguishes *Fournet v. Pearson Ltd.* Further, the words of the report in their natural meaning could be held to be libellous and consequently no innuendo was required.

In this Court, it was not seriously contended that the report should not be held libellous (of someone who did not "let down" Merumeru) and the substantial question was whether it was libellous of Respondent. On this question, while I do not think that the case is altogether a clear one, I think, on the whole, that the report was libellous of Respondent, and that for the reasons given by the learned trial Judge in the passage above quoted from his judgment.

I would therefore dismiss the appeal with costs.

GOULD V.P.:
I have had the advantage of reading the judgment of my learned brother Hutchison J.A. and agree with his reasoning and conclusions. There will be orders as proposed in his judgment.

MARSACK J.A.:
I concur.

Appeal dismissed.