

BARBADOS

[Unreported]

IN THE HIGH COURT OF JUSTICE

CIVIL DIVISION

No. 780 of 2010

BETWEEN:

NYIKA MARSHALL

CLAIMANT

AND

THE NATION PUBLISHING CO. LIMITED

DEFENDANT

Before the Honourable Mr. Justice Randall Worrell, Judge of the High Court

2012: 7th and 8th June

2013: 24th May

Mr. David Comissiong for the Claimant

Mr. Brian Barrow for the Defendant

DECISION

- [1] By claim filed on 23rd June 2010 the Claimant, Mr. Nyika Marshall, claimed damages in defamation against the Defendant, The Nation Publishing Co. Limited, for an article written by an agent of the Defendant, Ms. Heather-Lyn Evanson and published by the Defendant.

BACKGROUND

- [2] On the 5th April 2008, the Saturday Sun, published by the Defendant, published an article with the headline '10 charged in robbery spree'. The article read as follows:

"Eight of ten Christ Church youngsters charged with a series of robberies in the south of the island were remanded when they appeared in the Oistins Magistrates' Court yesterday. Two were granted bail \$5,000 bail each with sureties and all are slated to return to Oistins court on Wednesday. The ten are: Ramon Alphonso Cox, 19, of Kendall Hill; Jamar Leon Ashby, 19, of Montrose; Jason Omar Mason, 17 of Brownes Gap, Sargeants Village; Marvin Martin Victor, 21, of Maxwell Hill; Nyika McCartni Kamar Marshall, 19, of Kingsland Terrace; Jamal St. Clair Ramsay, 19, of Brownes Gap, Sargeants Village; Damien Omar Jones, 19, of Silver Hill, Jemel Martin Polin, 18, of Bartletts Tenantry, Sargeants Village; and Christopher Renaldo Bentham, 19 of Lower Gall Hill.

The accused have a total of 24 charges among them in the Worthing, District "B", District "A" and Oistins jurisdictions.

They include burglary, robbing people of cell phones and personal effects; criminal damage to a laptop; theft of personal effects; inflicting serious bodily harm; assault and assault occasioning actual bodily harm. The offences allegedly occurred between January 4 and March 24, this year. [...]"

- [3] The article was accompanied by the photos of each of the ten men, captioned with their names. The entire article (including the pictures) measured 8.5 inches by 12 inches. The Claimant had in fact been in court that day, charged with criminal damage to a laptop.
- [4] It was the Claimant's contention that the ordinary and natural meaning of the words of the article were understood to mean that the Claimant had been charged with the criminal offence of robbery and that he had been a part of a gang of 10 young men who were implicated in a series of robberies in Barbados or in a robbery spree.
- [5] Whilst the Defendant admitted that the article was published, it denied that the words used in the article were capable of having a meaning defamatory to the Claimant. However, if the words were found to be defamatory, the Defendant relied on the defence of triviality contained in section 6 of the **Defamation Act Chapter 199** of the Laws of Barbados.

ISSUES FOR DETERMINATION

- [6] The following issues must be determined:
- (1) Whether the words in the article were defamatory of the Claimant;
 - (2) If the words were in fact defamatory, whether the Defendant can rely on the defence of triviality;
 - (3) If the defence fails, what damages should be awarded
 - (4) Whether aggravated damages should be awarded

[7] In order to successfully establish a case of defamation, the Claimant must prove the following:-

- (1) That the words complained referred to him;
- (2) That the words were defamatory of him; and
- (3) That the words were published by the Defendant to a third party.

[8] The Defendant did not deny that the 'Nyika McCartni Kamar Marshall, 19, of Kingsland Terrace' referred to in the article referred to the Claimant. The Defendant also admitted that the article, as contended by the Claimant, was published. This leaves only the second issue of whether the words used were capable of being construed in a manner that is defamatory of the Claimant.

[9] In order to decide whether the words bore a meaning or meanings defamatory of the Claimant, I must first determine the meaning of the words used.

Meaning of the words

[10] Mr. Comissiong, Attorney-at-Law for the Claimant, contended that given their ordinary meaning the article was understood to mean that the Claimant was charged with the criminal offence of robbery and that he had been a part of a gang of 10 young men who were implicated in a series of robberies in Barbados or in a "robbery spree".

[11] Mr. Barrow for the Defendant contended, on the other hand, that although the article was entitled '10 charged in robbery spree', it went on to explain that 8 of the 10 persons were charged with robbery and that all 10 persons had cumulative charges that included robbery as well as assault and criminal damage of a laptop. He further contended that there was nothing in the article which stated that any particular person was charged with any particular offence. Mr. Barrow in his arguments states, in my opinion rightly so, that the article must be read as a whole in order to determine its meaning.

[12] 'Natural and ordinary meaning' is what the ordinary man would infer without special knowledge. When examined as a whole and looking at the natural and ordinary meanings of the words used, the article had the meanings which the Claimant attributed to it. I am inclined to agree with him that the article is understood to mean that:

- a. The Claimant had been charged with robbery;
- b. The Claimant was one of 10 young men who were all together charged with robbery;
- c. The ten young men, the Claimant included, were implicated in several robberies or a series of robberies
- d. The 10 men were some sort of "gang" or worked together in these robberies.

[13] In my opinion the 'reasonable man' would not attribute to the article the meaning which the Defendant contended. The meaning attributed to the article by the Defendant was false and strained. The words used in the article and its meanings were clear. It meant that whilst there were other charges among the men, there was a common charge of robbery among them all and that eight of the ten had been remanded to prison while the other two had been granted bail ("**Eight of ten Christ Church youngsters charged with a series of robberies in the south of the island were remanded when they appeared in the Oistins Magistrates' Court yesterday**"). In fact, this is the meaning that the journalist who wrote the article also attributed to it under cross examination by Mr. Comissiong.

[14] Further, the fact that all the accused persons listed in the article resided in the parish of Christ Church, and the fact that the article stated that the young men were charged with "a series of robberies in the south of the island" seemed to suggest some common enterprise among the men or that they were all a part of some gang that took part in robberies.

Whether the words are defamatory

[15] Words are defamatory if they would tend to lower the Claimant in the estimation of right thinking members of society generally, would tend to cause others to shun or avoid the claimant or would tend to expose the Claimant to hatred, contempt or ridicule.

[16] Mr. Barrow contended that it was not defamatory to state that a person had been charged with an offence and that, contrary to the view of Bridges J in the case of **LeBlanc v L'Imprimerie Acadienne Ltee [1955] 5 DLR 91**, it "would be erroneous to say that in 2011 to say that someone has been 'charged' with an offence would lower that person in the estimation of right thinking people". Mr. Barrow stated that "to be charged with an offence simply means that the person charged has been the subject of an investigation" and that "the right thinking persons in society will not say that a person who has been charged with an offence has been injured in relation to his reputation by virtue of simply being charged with an offence".

[17] In the case of **LeBlanc** the Defendant published an article erroneously identifying the Plaintiff as being charged with an offence. This was found to be libellous on the grounds that it would lower the Plaintiff in the estimation of right thinking members of society. In the case of **Lewis v Daily Telegraph Ltd (1964) A.C. 234**, the Defendant printed an article stating that the Plaintiff was the subject of a fraud investigation. This article was found, and indeed admitted by the Defendant, to be defamatory. Lord Devlin in his decision stated, "I dare say that it [the Plaintiff's reputation] would

not be injured if everybody bore in mind, as they ought to, that no man is guilty until he is proved so, but unfortunately they do not [...] Just a bare statement of suspicion may convey the impression that there are grounds for belief in guilt [...]”.

- [18] Although decided in 1955 and 1964 respectively, I am of the opinion that the reasoning behind these cases is still very much relevant today. Such a statement would not be defamatory if persons bore in mind the ‘golden rule’ of law, that a person is innocent until proven guilty. However, the reality, as pointed out in these two cases, is that among right thinking persons of society such a statement will probably and, I accept, did in fact, lower the Claimant in their estimation. Further, I am also of the view that the article would also have caused others to shun and avoid the Claimant.
- [19] I also agree with the position of Lord Devlin that “a statement of suspicion may convey the impression that there are grounds for belief in guilt”. Mr. Barrow himself stated, “to be charged with an offence simply means that the individual charged was the subject of an investigation”. Right thinking members of society know this and will, as Lord Devlin stated, believe that since there was such an investigation and a person was ultimately charged that there are grounds to believe that he must be guilty. Lord Devlin reminds us that “logic is not the test”. The test is whether the statement would lower the Claimant in the estimation of right thinking members of society. I so find that the article published by the Defendant would so lower the Claimant in the estimation of right thinking members of society.
- [20] Mr. Marshall’s evidence-in-chief was that persons were calling him and his other family members expressing their disappointment in him, having been charged with robbery. I accept that persons reading the newspaper would have accepted the article as fact and believed its contents to be true.
- [21] The allegations contained in the article are serious. Mr. Marshall is accused of having committed more than one robbery with a group of nine other men. I simply cannot accept the Defendant’s contention that the article was incapable of being defamatory.
- [22] I find from the evidence of Ms. Heather-Lyn Evanson, that there was no malice and that she honestly relied on incorrect information given to her. However, the motive or intention of the Defendant is irrelevant to whether a statement is defamatory (except in the case of qualified privilege which is not an issue here). It was said in the case of **Abrath v N.E Ry (1886) 11 App. Cas. 247**, “A man may be the publisher of a libel without a particle of malice or improper motive”.
- [23] Having found that the article was in fact defamatory I must now turn to the Defendant’s defence of triviality.

DEFENCE OF TRIVIALITY

- [24] The **Defamation Act Chapter 199** of the Laws of Barbados came into force in 1997 and it “radically transformed the law of defamation in Barbados” (**Sealy v First Caribbean International Bank (Barbados) Limited** (unreported) Civil Appeal No. 10 of 2008 at paragraph 50). One of the reforms was the creation of the defence of triviality at **section 6** of the Act. **Section 6 of the Defamation Act** provides:

It is a defence in an action for defamation that the circumstances of the publication of the matter complained of were such that the person defamed was not likely to suffer harm to his reputation.

- [25] This defence was not provided for at common law and further it seems that only the jurisdiction of Australia has such a defence contained in its defamation legislations. My research has not thrown up any instances where the operation and application of section 6 has been decided in these Courts. In such a situation it is helpful to look at the decisions of the Australian Courts where such a provision has been in force since the 1970s.
- [26] The Defendant relied on this defence to say that the Claimant “had been charged in a court of competent jurisdiction in this island and the circumstances of the publication of the words [...] are such that the Claimant is not likely to suffer harm to his reputation”. The Defendant further stated that for the Claimant to complain is to say that to be charged with criminal damage is better than to be charged with theft.
- [27] One of the leading cases in Australia on the operation of the defence of triviality is the New South Wales Court of Appeal decision of **Jones v Sutton [2004] NSWCA 439** (26 November 2004). In this case the Defendant relied on the defence of triviality to escape liability for defamation. The case concerned two occasions of defamation and one occasion of republication of a defamatory statement. The Court of Appeal had to decide the correct test for the application of section 33 of the Defamation Act 2005 of New South Wales which provides as follows:

It is a defence to the publication of defamatory matter if the Defendant proves that the circumstances of the publication were such that the person defamed was not likely to suffer harm.

- [28] This defence was contained in similar terms in the earlier 1974 Act, section 13:

It is a defence that the circumstances of the publication of the matter complained of were such that the person defamed was not likely to suffer harm.

- [29] Beazley JA in **Jones v Sutton** quoted Mahoney JA in the case of **King and Mergen Holding Property Limited v McKenzie (1991) 24 NSWLR 305**:

“Section 13 might have provided that there was a defence if ‘in all the circumstances’ the person defamed was not likely to suffer harm from the publication. In such a case, his prior bad reputation would be proved to show that he was not likely to suffer harm from the instant imputation. But, as Moffitt P pointed out in his judgment [in **Chappell v Mirror Newspapers (1984) Aust Tort Reports 80-691**] the section did not so provide. It provided a defence only where, by reason of more restricted matters, viz the circumstances **of the publication**, the plaintiff was not likely to suffer harm.” (My emphasis)

[30] It was further stated in **Chappell** that:

“the quality of the circumstances *of the publication* must be the factor which renders it unlikely that the person defamed will suffer harm [...] the defence under section 13 is directed entirely to the circumstances of the publication [...] There should not be substituted a mere inquiry whether “in all the circumstances” the plaintiff will probably not suffer harm”.

[31] A similar position was also stated in the case of **Holmes v Fraser [2008] NSWSC 570**, “S 33 focuses upon the circumstances of the publication and not events and circumstances that postdate publications” (at paragraph 77). In my opinion, nor can the defence focus on events and circumstances which predate the publication.

[32] I agree with the Australian authorities that what is relevant for the application and operation of section 6 is the circumstances of the **publication**. Publication was defined in **Chappell** as the act of communication to some other person. Section 6 is, therefore, an inquiry into the circumstances surrounding the act of communication and whether the circumstances were such that the Claimant was unlikely to suffer harm. Section 6 does not allow this Court to inquire into the circumstances of the defamed person to decide whether his reputation or character was such that it was unlikely he would not be defamed. This is not the test.

[33] The Australian cases have made it clear that only the reputation or character of the recipient of the defamatory statement is relevant to this defence (if at all). It was stated in **Chappell** that “It is arguable that any special characteristics of him or her as recipient such as personal knowledge of the person defamed may be caught up in the circumstances of the publication”. To my mind, the reputation of the injured party can only be relevant to the issue of damages.

[34] I will at this time examine the circumstances of the publication in the instant case. The offending article was published in the Saturday Sun edition of the Nation Newspaper. The Claimant pleaded, and the Defendant admitted, that this edition of the newspaper is offered for sale among Barbadian emigrant communities in various parts of the world. The Defendant’s website states that in 2005, their local readership for the Saturday Sun newspaper was 158,700. It also states that the newspaper is also distributed in South America, Africa, Europe and the Caribbean. Further, the newspaper is also offered online (and was so offered at the time of this article). It is clear then that the publication had a very wide audience of thousands around the globe.

[35] It is, therefore, my opinion that the circumstances were such that the Claimant was likely to suffer harm to his reputation. The defence of triviality must therefore fail.

[36] I must now turn to the issue of damages.

DAMAGES

[37] When a person is defamed, they do not have to establish any special damage. Instead, the law presumes that a person who has been defamed will suffer some damage to their reputation (**Amory v Daniel Suit No. 19 of 1999**, St. Christopher and Nevis High Court).

[38] Damages for defamation serves three purposes: (1) to act as a consolation to the claimant for the distress he suffered from the publication, (2) to repair harm to his reputation and (3) as a vindication of his reputation (Gatley 11th Edition, paragraph 9.2).

[39] Lord Hailsham said in **Broome v Cassell & Co [1972] A.C. 1027**, “The damages must be sufficient to demonstrate to the public that the plaintiff’s reputation has been vindicated. Particularly where the Defendant has not apologised and withdrawn the defamatory allegations”.

[40] In assessing the quantum of damages the Court considers factors such as: the position and standing of the claimant, the mode and extent of the publication, the presence or absence of an apology, the conduct of the defendant before, during and after commencement of the action, and the claimant’s injured feelings, distress, embarrassment and humiliation (**Sealy v First Caribbean International Bank** at paragraph 60). Mr. Barrow’s submission that the law does not compensate a defamed person for hurt feelings is, therefore, not tenable.

[41] The Claimant in his evidence-in-chief gave evidence as to his standing in his community. He stated that he was heavily involved in football and was a youth leader. He was well known and respected in his community, and the football and athletics community. He was a supervisor at his job. This evidence was not challenged and I accept it as correct. I find that the Claimant was a person of good reputation, notwithstanding that he had been charged with the offence of criminal damage (which I might add was later dismissed).

[42] In an action for defamation, there is a distinction between a claimant’s actual reputation and specific incidences of misconduct (Clerk & Lindsell paragraph 23-242; McGregor on Damages, 18th Edition, paragraph 39-059 to 39-61). An

exception to this rule is criminal convictions. However, Mr. Marshall was not convicted of the offence of criminal damage and, therefore, this exception is not applicable to the instant case. It is my opinion that there has been no evidence adduced to suggest that Mr. Marshall was generally a man of ill repute.

Aggravated Damages

[43] In some cases, general damages may be aggravated by evidence of the circumstances of the publication, of the motives and conduct of the defendant and of the effect which it has actually produced (Clerk & Lindsell on Torts, 19th Edition, paragraph 23-228). It should be stated at this time that aggravated damages are not punitive; they are compensatory. Aggravated damages simply uplift an award for compensation to take into account certain aggravating factors.

[44] The Claimant in this case has also asked for aggravated damages because of the Defendant's refusal to apologise. Pursuant to CPR Part 69.9(2) the Claimant included in his claim a prayer for aggravated damages and stated the grounds for making such a claim.

[45] Counsel for the Defendant submitted that aggravated damages are no longer allowed under the Defamation Act. Section 23 of the Act states that:

Damages recoverable in actions for defamation shall be by way of compensation and may include exemplary damages where the court considers that such an award is appropriate in the circumstances.

[46] As stated above, aggravated damages are compensatory damages and the Act clearly provides that damages for defamation "shall be by way of compensation". I, therefore, reject Mr. Barrow's submission on that point.

[47] I find that there are three aggravating circumstances existing in the instant case which will affect my award for damages. Firstly, the Defendant's refusal to issue a correction and apology. In response to its lack of an apology, Mr. Barrow for the Defendant stated in his closing arguments that there was no need for an apology as "the Claimant exercised his right to sue". The article was printed on the 5th April 2008. A letter dated the 7th May 2008 was sent by Mr. Comissiong on behalf of Mr. Marshall to the Defendant informing them of the error in the article and the fact that it was defamatory of the Claimant. Proceedings were instituted in this case on 23rd July 2010 or some **840 days later**. I cannot see how Mr. Barrow's explanation can stand.

[48] The Defendant simply refused to publish an apology or correction. In my opinion, this shows a lack of remorse and a blatant disregard for Mr. Marshall's feelings and reputation. In the case of **Amory v Daniel**, the Court noted that "the injury to Mr. Amory's reputation and feelings might have been diminished if Mr. Daniel had expressed regret. This lack of apology is a factor to be taken into account when measuring the degree on injury to Mr. Amory's feelings."

[49] In my opinion a similar situation exists here. I am sure that an apology and a correction to the article would have significantly diminished the injury to Mr. Marshall's feelings and reputation.

[50] Secondly, the extent of publication is also an aggravating factor. As stated above, this article was contained in the Saturday Sun edition of the Nation newspaper which is available both locally and internationally to an audience of thousands. Also, the article was published online, making it available to an even wider audience.

[51] Thirdly, the crime and its circumstances of which the Claimant was accused is also an aggravating factor. Robbery is an offence of dishonesty where force is used in the commission of a theft. It is a serious offence. Besides this fact what I also consider to be an aggravating factor is the alleged circumstances of commission of the alleged offence. As stated above, the article seems to suggest that the Claimant was not involved in one robbery, but in several and further, that these robberies were committed with others in a joint enterprise.

QUANTUM

[52] Ms. Jennifer Marshall, sister of the Claimant, gave evidence that after publication of the article the Claimant was "feeling down and depressed" and that he was hurt by the situation. Mr. Marshall himself spoke about his extreme embarrassment by the article and his concern over what persons to whom he could not explain the error would think about him. He said that persons that he met expressed their disappointment in him because of the defamatory article.

[53] In the case of **Philips et al v Boyce and P.S.M.T (Barbados) Inc. (2006) 71 W.I.R. 14**, this Court awarded damages of \$10,000.00 where the defamatory statement stated in a staff meeting implied that the plaintiffs were dismissed for stealing.

[54] In **Rawlins v Harper, High Court Suit No. 479 of 1986** the Plaintiff, an attorney-at-law, was awarded \$20,000.00 when the Defendant called him a rip-off and a thief.

[55] In **Sealy v First Caribbean International Bank** the Claimant was awarded \$15,500.00 when two cheques she wrote were declined and marked 'return to drawer'.

[56] In the case of **Adale Greenidge v The Advocate Company Ltd** Suit No. 1145 of 1993, there was an award of \$25,000.00 where an article and accompanying picture (which blocked out her eyes) suggested that the Plaintiff, a professional masseuse, offered sexual services.

[57] In the case of **Scantlebury v The Advocate Company Ltd** Suit No. 2017 of 1993 an award of \$40,000.00 was made where the Defendant published an article imputing that the Claimant was a drug trafficker.

[58] I consulted the Central Bank of Barbados on inflation rates to calculate how much these awards would be worth in 2012. These awards would in today's money range from \$21,245.00 in the case of **Philips et al** to \$91,444.00 in the case of **Rawlins**.

[59] In light of the aggravating factors, the awards in the above cases and inflation, the large size of the publication and the extreme distress, humiliation and embarrassment caused to Mr. Marshall, I am of the opinion that an award of \$50,000.00 is appropriate. Such an award will compensate Mr. Marshall for the damage to his reputation, for his hurt feelings and vindicate his reputation.

EXEMPLARY DAMAGES

[60] Mr. Comissiong in his closing arguments asked this Court to consider an award for exemplary damages. I refer to the Supreme Court (Civil Procedure) Rules 2008 Part 69.9(2) which states that "where a claimant seeks aggravated or exemplary damages the claimant must include in his statement of claim, a prayer for such damages and the grounds for making such a claim".

[61] The Claimant did not have a claim for exemplary damages in his claim and, therefore, I will not now make an award for exemplary damages.

DISPOSAL

[62] The Claimant is hereby awarded the sum of \$50,000.00 damages.

[63] Costs awarded to the Plaintiff. Counsel for the Claimant and Defendant to provide written submissions as to costs by 4th June 2013.

Mr. Justice Randall Worrell

Judge of the High Court