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Judgment 6/1964

IN THE PRIVY COUNCIL

Appeal No.33 of 1962

O N A P P E A L

FROM THE SUPREME COURT OF GIBRALTAR

B E T W E E N :

EDWARD CAMPELLO, SIMPRESS  
LIMITED and VOX  
PUBLICATIONS LIMITED  
(Defendants) Appellants

- and -

10 JULIUS C. SENE (Plaintiff) Respondent

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
22 JUN 1965  
25 RUSSELL SQUARE  
LONDON, W.C.1.

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C A S E FOR THE APPELLANTS

RECORD

1. This is an Appeal brought by leave of The Supreme Court of Gibraltar by the Defendants in a libel action from a Judgment of that Court (The Chief Justice of Gibraltar, The Honourable Mr. Justice Hubert J.M. Flaxman C.M.G., sitting with a Special Jury) dated the 18th day of November 1961. By that Judgment the Court upon the verdict of the Jury entered judgment for the Plaintiff, the Respondent to this Appeal, against the Appellants and each of them for the sum of £600 and the costs of the action. The Special Jury consisted of nine Jurors but after the second day the trial in fact proceeded (by consent) with eight Jurors. After the hearing, a Motion on behalf of the Appellants for a new Trial, or alternatively that Judgment be entered for them, on the grounds set out in the Notice of Motion dated the 1st day of December 1961, came before the said Trial Judge sitting alone and was dismissed by him on the 13th day of December 1961.
2. This Appeal involves consideration of the

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pp.78 to 85

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pp.51 to 75

principles of the main defences to an action for libel, their application to this case and the directions, rulings and observations of the learned Trial Judge thereon during the course of the Trial and in his Summing-Up to the Jury. It also involves consideration of (a) the principles of natural Justice as between Employer and Employee and (b) the interpretation properly to be given to certain words when used in the context of employment, principally the words "threatens the workmen and even suspends them". It is the contention of the Appellants (1) that the case should have been withdrawn from the Jury and the action dismissed, (2) that the learned Trial Judge mis-directed the Jury in several important respects, (3) that the whole Summing-Up to the Jury was unsatisfactory, (4) that as a matter of law the Jury's verdict and the consequential Judgment cannot be supported, (5) that the Jury's verdict was against the weight of evidence and was unreasonable and wrong, (6) that upon the evidence and the points of law involved Judgment should have been entered for the Defendants, Appellants, (7) that Judgment should now on Appeal be entered for the Appellants or (8) alternatively that the Trial was so unsatisfactory that a new Trial should be ordered, and (9) that the damages awarded were excessive and unreasonable and should be reviewed and reduced. It is recognised by the Appellants that a review of damages on appeal is exceptional but it is submitted that by reason of misdirection with regard to malice the award here was unduly influenced by the erroneous finding of malice.

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3. The action was commenced by the Respondent, the Departmental Civilian Officer in Charge of Administration of the War Department Works Organisation in Gibraltar, on the 2nd day of November 1960 by a Writ of Summons of that date claiming damages against the Appellants and each of them for libel contained in a letter to the Editor signed "G.F.W.U." printed and published in the correspondence column of the edition of the 7th day of October 1960 of the newspaper "VOX", which is admittedly a weekly Gibraltar newspaper at the material times edited by the Appellant Edward Campello, printed by the Appellants Simpress Limited and published by the Appellants Vox Publications Limited. With regard to the signature "G.F.W.U." to the said letter this was on all sides taken at Trial to stand for and

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refer to a local Trade Union, The Gibraltar Free Workers Union.

10 4. No question arises as to the fact of publication of the said letter, but it was written and published in the Spanish language and the parties were not at Trial agreed as to the proper literal translation of the material part thereof into the English language, in which language the Trial was conducted. The Respondent by his Statement of Claim dated the 2nd day of December 1960 contended that the proper translation of the relevant part was as follows :

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20 "These are not the only anomalies existent in this department of R.E. Viney Quarry. There is more. Mr. Sene, chief clerk threatens the workmen and even suspends them simply on any sort of report from the foremen or gangers without pausing to make any investigations as if we were still living in the era of the Torquemadas and the Neroes".

The Appellants on the other hand by their Amended Defence, for which leave in this respect was given on the 14th day of November 1961 during the Trial, contended that the proper translation of the said part was as follows :

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30 "These are not the only anomalies existent in this department of R.E. Viney Quarry. There is more. Mr. Sene chief clerk threatens the workmen and even suspends them simply on any report from those in charge, without spending time in investigation as if we still lived in the era of the Torquemadas and the Neroes".

40 A translation of the whole letter as put in by the Respondent appears in the Record at page 111 et seq. Apart from the question of the translation no innuendoes were alleged on behalf of the Respondent.

5. The difference between the parties as to the proper translation of the said part consists of (a) "the foremen or gangers" as against "those in charge", (b) "on any sort of report" as against "on any report" and (c) "without pausing to make any investigations" as against

"without spending time in investigation".  
The Appellants attached particular importance to  
(a) above, being a question of the proper  
translation of the Spanish word "Encargados".  
They contended and contend that the ordinary,  
plain, literal translation thereof is "those  
in charge", that the Respondent argued for an  
artificial, restricted meaning which lent more  
weight to his case and that the learned Trial  
Judge did not adequately or properly direct the  
Jury on this point. Similar contentions are  
advanced by the Appellants with regard to the  
two other points of difference. 10

6. The Appellants are nevertheless equally  
prepared to base their Appeal herein on the  
translation put forward on behalf of the  
Respondent as pleaded in the Statement of Claim  
reproduced above.

7. In the words complained of the Appellants  
attach particular importance to the word  
"threatens" and the words "as if we were still  
living in (or still lived in) the era of the  
Torquemadas and the Neroes". It is respect-  
fully submitted that these two sets of words  
were of particular importance on the issues of  
Justification and Fair Comment and that the  
Summing-Up contained mis-directions and lack of  
proper direction with regard to them in the  
respects hereinafter specified. 20

p.6 8. The Appellants by their Defence dated the 16th day of December 1960 (later amended, but only in the one respect hereinbefore mentioned) and at the Trial contended that part of the words complained of consisted of statements of fact and were true in substance and fact and that part consisted of expressions of opinion and were fair comment on a matter of public interest, and also put all questions of libel in issue. The Respondent by his Reply dated the 24th day of December 1960 in turn joined issue upon the matters pleaded in the Defence, expressly pleaded that all the words complained of were false assertions of fact, and expressly pleaded that the Appellants were actuated by malice. 30  
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9. Further and Better Particulars were sought and given on both sides and in addition an Order for certain Particulars was made against  
pp.10 to 15

the Appellants. Interrogatories were also ordered to be answered by the Respondent. The Interrogatories and Answers formed part of the filed documents in the case and were and are relied upon by the Appellants. Discovery of Documents also took place.

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10 10. The Trial of the Action occupied six days. On behalf of the Respondent he himself gave evidence and there were also called as witnesses on his behalf Cecil Eric Prescott (a Translator), Stanley Cooper (Supervising Engineer Electrical and Mechanical Installations) and Ernest Mor (General Secretary of the Gibraltar Confederation of Labour).

p.25 et seq

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20 11. It was at trial, and remains, the Appellants' case that the Respondent in his said capacity in fact acted as asserted in the first part of the words complained of, namely threatened and even suspended workmen on a report and without investigation, and that in doing so he acted contrary to Civilian Staff Regulations and Civilian Employees Orders (which give no power to delegate with regard to disciplinary action) and acted contrary to natural justice. It was, and is, further their contention that in respect of the comment it was not their comment but the comment of the writers of the letter and it did not exceed the bounds of fair comment, a defence which permits strongly-worded criticism. They did not call evidence but rely with regard to the above upon the evidence of the Respondent and of his witnesses under cross-examination, upon the Interrogatories and Answers filed in the case and upon the documents exhibited in the case and contained in the record herein. The Civilian Staff Regulations and Civilian Employees Orders are not contained in the Record but will be available at the hearing of this Appeal for such reference as may be necessary.

40 12. At the close of the Plaintiff-Respondent's case the Appellants by their Counsel (and without being put to their election as to calling evidence) made a submission in the absence of the Jury of "no case to answer" in the form of a submission that the case be withdrawn from the Jury. This submission was rejected by the Trial Judge, and as the

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pp.44-45

RECORD

Appellants submit wrongly rejected. The Appellants rely in this respect upon the arguments of the said submission contained in the Record and the reasons for its rejection also contained therein.

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pp.44 45

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13. The Appellants called no evidence and respective Counsel then addressed the Jury. The fact that the Appellants called no evidence was frequently referred to by Counsel for the Respondent in his address to the Jury and frequently referred to by the Trial Judge in his Summing-Up to the Jury. It is respectfully submitted that the Trial Judge greatly over-emphasised this fact to the Jury and in doing so erred and mis-directed them in a very important respect. 10

p.76

14. The form of the Questions subsequently put to the Jury was accepted by both sides and is accepted by the Appellants. The Jury found firstly that the words complained of were partly statements of fact and partly expressions of opinion. This was always the contention of the Appellants and is accepted by them. The Jury next found that the statements of fact were not true, and this finding the Appellants challenge. The Jury then found that the expressions of opinion exceeded the limits of fair comment, and this finding too the Appellants challenge. The Jury further found that the Appellants were actuated by malice. This finding was quite unnecessary in view of the immediately preceding findings and is challenged by the Appellants, who also contend that it had a material, prejudicial and erroneous bearing on the Jury's final finding of £600 damages. 20 30

15. It was and is the Appellants' case (1) that the statements of fact were, on the oral and documentary evidence, true, (2) that the comments thereon were, on the oral and documentary evidence, fair and (3) that there was no evidence at all of malice and that the Respondent did not discharge his burden of proof thereon. The Appellants further contend that the Trial Judge firstly wrongly ruled and then in addition mis-directed the Jury on each of these points. The reasons for these contentions and for the further contention that the damages awarded were in the particular circumstances excessive and should 40 50

be reviewed are dealt with in the next succeeding paragraphs of this Case.

16. With regard to the assertions of fact contained in the words complained of it is submitted firstly that these were established to be true on the evidence of the Respondent himself, particularly under cross-examination, and by the documents: secondly that the learned Trial Judge erred in not withdrawing this issue from the Jury: thirdly that the learned Trial Judge misdirected the Jury on this matter in his Summing-Up (a) in not directing them sufficiently or at all as to the evidence of the truth of the assertions of fact, (b) in commenting, adversely and irrelevantly in this context, on the failure of the Appellants to call evidence, (c) in saying with regard to the word "threatens" - "You may think the man reading it would think this is accusing Mr. Sene of a threat, not necessarily by word" and (d) in not properly or adequately directing the Jury as to the facts relied upon by the Appellants or as to the principles of natural justice involved in their assertions; and fourthly it is submitted that the Jury's verdict on this issue was unreasonable, against the weight of evidence and wrong. With regard to the word "threatens" it is submitted that it could not in its context possibly mean any other threat than one of disciplinary action and could not possibly mean any threat other than one by Employer to Employee by word, and in context must mean something less than "suspension".

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p.25 et seq  
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p.61 ll.18-20

17. With regard to the issue of Fair Comment it is submitted firstly that there was no evidence that the comment was unfair; secondly that the learned Trial Judge erred in not withdrawing this issue from the Jury: thirdly that he mis-directed the Jury on this matter in his Summing-Up (a) in saying ".... and so I do decide that there is some evidence that the comment is unfair", (b) in saying "You may agree this is fair comment but .....", then immediately qualifying the observation by a very long reference to the quite separate and difficult question of malice, (c) in not putting sufficiently or with proper emphasis the Appellants' contentions on this issue, (d) in saying with regard to the Respondent's evidence

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pp.44 45  
p.51 et seq

p.57 ll.28-29

pp. 58 59

RECORD

p.66 11.44 45 46 "Anyway, he says he has nothing in common with Torquemada and Nero and it is for you to decide whether he has or not", and (e) in failing to summarise this issue with sufficient clarity for the Jury: and fourthly it is submitted that the Jury's verdict on this issue was unreasonable and wrong. With regard to the reference to Torquemada and Nero it is submitted that it should have been emphasised to the Jury that the question was not one of the Respondent being equated to Torquemada or Nero or being personally compared to them but was a case of comparison with the era of Torquemada or Nero in the sense of Natural Justice. 10

18. With regard to the issue of Malice the Appellants attach very particular importance to the learned Trial Judge's directions and Summing-Up on this matter and respectfully submit that their contentions hereinafter specified render the whole Summing-Up and trial unsatisfactory and the whole Verdict of the Jury incapable of support. They rely upon their contentions about this as affecting the whole of the case and in the final analysis the damages awarded. Their contentions are firstly that there was no evidence of Malice to go to the Jury and the Trial Judge erred in leaving such issue to the Jury and when it was left to them they erred in finding Malice: secondly that in his Summing-Up the Trial Judge gave undue prominence to and laid undue emphasis upon this issue: and thirdly that he seriously mis-directed the Jury (a) in saying "... and as far as I can see the Plaintiff says that the malice comes from reckless indifference, it was reckless indifference as to whether those words were true or false....", (b) in saying "the malice may be inferred from the violence of the language used and the persistence of the Defendants that the words they used are perfectly true and fair comment", (c) in saying "they (the Respondent's Side) also say they failed to check the information, the editor, Publishers and Printers, before they published it": and particularly in going on to say "It is very difficult for the Plaintiff to call any evidence on that point because the Defendants have not come into the box to give him any sort of opportunity of finding out whether that is so or not": (d) in saying "the question is, and here again I quote, the question is did the 20

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p.59 1.11 et seq 40

p.59 1.20 et seq 50



Defendants in fact believe what they said", and (e) in saying "Now there is another way in which malice can be shown and that is of course it can be inferred from the general conduct of the Defendants in the case". It is respectfully submitted that the Trial Judge did not sufficiently emphasise to the Jury (i) that the burden of proving Malice rested upon the Respondent, (and indeed in places suggested otherwise), (ii) that they should examine the issue of Malice from that starting point, (iii) that the Appellants were publishing a letter to the Editor, (iv) that the Respondent expressly disclaimed that any reason existed why the Appellant Campello should have had spite against him, (v) that the other two Appellants were Limited Companies, (vi) that the Appellants were fully entitled to contest and argue the issues of justification and fair comment and should not by reason thereof be held malicious, (vii) that the Appellants' conduct of and in the action exhibited no indication of malice whatsoever, and (viii) that the open pre-trial correspondence was important and should be carefully considered by the Jury on this issue. It is further respectfully submitted that the Trial Judge summed-up on this issue markedly and unfairly in favour of the Respondent and did not put the Appellants' case on it fully or fairly to the Jury: also that he gave this issue such prominence that it became in effect a major part of the whole case and necessarily influenced the whole case and the Jury's consideration of the other issues.

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19. It is further respectfully submitted that the Summing-Up taken as a whole was unsatisfactory and confusing and in particular frequently confused matters relevant on one issue with those relevant on other issues.

20. On the question of damages while it is appreciated that damages awarded by a Jury will only be reviewed in exceptional circumstances it is respectfully submitted that the circumstances here are exceptional in that (i) the question of Malice was given undue prominence throughout the Trial Judge's Summing-Up and was so dealt with that it was bound to affect the Jury's consideration of damages, (ii) the pre-trial correspondence was important on this issue and was not adequately or properly put to the

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Jury by the Trial Judge, (iii) the Trial Judge did not sum up adequately or properly on the issue of damages and (iv) judged by local standards and the circumstances of the case the damages were excessive and unreasonable.

21. On a review and examination of the Summing-Up and the evidence the Appellants contend that Judgment should be entered for them or alternatively a new trial ordered or alternatively the damages reduced, for the reasons aforesaid and for the following amongst other 10

R E A S O N S

- (1) THAT the learned Trial Judge should have acceded to the submission made on behalf of the Appellants and should have withdrawn the case from the Jury and/or should have withdrawn individual issues from the Jury. 20
- (2) THAT the learned Trial Judge mis-directed the Jury on several material matters.
- (3) THAT the learned Trial Judge failed to direct the Jury sufficiently or at all as to the Appellants' case.
- (4) THAT the Summing-Up to the Jury was unsatisfactory.
- (5) THAT judgment should have been - and should now be - entered for the Appellants; or alternatively that the verdict of the Jury should be set aside and a new trial ordered. 30
- (6) THAT the damages awarded were excessive and should be reduced
- (7) THAT the verdict of the Jury on each issue was wrong and should be reversed or set aside.

JAMES COMYN.

J.J. TRIAY.

J.E. TRIAY.

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Appeal No.33 of 1962  
IN THE PRIVY COUNCIL

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O N A P P E A L  
FROM THE SUPREME COURT  
OF GIBRALTAR

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B E T W E E N :

EDWARD CAMPELLO,  
SIMPRESS LIMITED  
and VOX PUBLICATIONS  
LIMITED (Defendants)  
... .. Appellants

- and -

JULIUS C. SENE  
(Plaintiff)  
... .. Respondent

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CASE FOR THE APPELLANTS

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