Privy Council Appeal No. 15 *of* 1960

"Truth" (N.Z.) Limited – – – – – – – *Appellant*

v.

Philip North Holloway – – – – – – – *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH JULY, 1960

Present at the Hearing :

VISCOUNT SIMONDS

LORD REID

LORD TUCKER

LORD DENNING

LORD MORRIS OF BORTH-Y-GEST

[*Delivered by* LORD DENNING]

On 24th March, 1959, a weekly newspaper in New Zealand called "N.Z. Truth" published an article which contained a reference to the Hon. Philip North Holloway the Minister of Industries and Commerce. On 24th April, 1959, Mr. Holloway brought an action for libel against the newspaper in respect of a passage in this article. He pleaded that it bore an innuendo which was defamatory of him. The newspaper denied that it bore this innuendo. It also pleaded that the occasion was privileged. The case was tried in the Supreme Court of New Zealand between the 2nd and the 8th June, 1959, before Hutchison, A.C.J. and a common jury. The jury gave a verdict in favour of Mr. Holloway and assessed the damages at £11,000. Despite this verdict, the newspaper moved Hutchison, A.C.J. for judgment in its favour on the ground that the occasion was privileged: or alternatively for a new trial on the ground that the Judge had misdirected the jury. The Judge ruled that the occasion was not privileged. He refused the motion for a new trial and on 23rd July, 1959, he ordered judgment to be entered for Mr. Holloway for £11,000. The newspaper appealed to the Court of Appeal of New Zealand who heard the appeal between the 21st and 24th September, 1959. On 16th November, 1959, the Court of Appeal dismissed the appeal. The newspaper now appeals to Her Majesty in Council.

The newspaper did not raise before their Lordships many of the issues which had been debated in the Court of New Zealand. It did not challenge the ruling that the occasion was not privileged. It confined itself to the contention that the Judge had misdirected the jury and sought a new trial on this ground. In order to explain this contention their Lordships must set out the material facts and pleadings.

On 24th March, 1959, the newspaper published an article calling for an inquiry into the activities of one Harry Judd, whose real name, it said, was Hyman Yudt. He was said to be a Russian by birth but had taken British nationality. The article was headed in bold letters: "This Ex-Russian's Import Licences should be investigated". It started with the opening words: "The Government should take immediate steps to hold a full, searching and impartial inquiry into import and other dealings between an Auckland importer of Czechoslovakian glass, one Harry Judd of 160 Upland Road, Remuera, and Mr. Warren Freer, M.P. . . ." And

it finished with the concluding words: "In Truth's view the New Zealand Labour Government should show itself no less meticulous in preventing any suspicion of under-the-counter dealings with Parliamentarians than did the British Labour Government when it dealt with Sidney Stanley."

So the article opened and finished with a call for an inquiry. In the course of the article the newspaper described an interview with Mr. Judd. It is the description given of this interview which is said to be a libel on Mr. Holloway. The words complained of were as follows:—

> "He (Mr. Judd) told a man who approached him some time subsequently about import procedure that he was 'sick of things here' and that '25,000 smackers had just gone like that'.
>
> He (Mr. Judd) gave the impression that there was nothing doing (in the import field) for him any longer. He told the caller that he had come too late, that there was 'no use talking' and that the Prime Minister, Mr. Nash, had put his foot down.
>
> At a subsequent discussion with the same man, the disconsolate Judd told his caller to 'see Phil and Phil would fix it'. He warned him, whatever he did, not to let Mr. Nash hear about it.
>
> By 'Phil' his caller understood him to mean the Hon. Philip North Holloway, the Minister of Industries and Commerce."

It was not suggested at the trial that those words, when taken in their natural and ordinary meaning, were defamatory of Mr. Holloway: but it was said that there was an innuendo which was defamatory of him. The innuendo was pleaded in the Statement of Claim in this way:

> "By the said words the Defendant meant and was understood to mean that the Plaintiff is and was a person who has acted and is prepared to act dishonourably in connexion with the issue of import licences."

In answer to a request for particulars of the facts and matters relied upon in support of the innuendo, the plaintiff said he relied "on the fact that the words 'see Phil and Phil would fix it', in the context in which the said words were used, were capable of being understood and were understood in a sense defamatory of the plaintiff, more particularly in that the word 'fix' was used in the said context in a secondary or colloquial meaning, connoting irregular and dishonourable conduct on the part of the plaintiff in connection with the issue of import licences."

It was, of course, entirely a question for the jury whether the words bore the innuendo which the plaintiff alleged they did: but the jury had to be warned that no lesser meaning would suffice. And the Judge gave them that warning. He said to them: "When he (the plaintiff) alleges a special defamatory sense, he is bound by that special sense, or innuendo as we call it, and nothing short of that will suffice . . . if he does not succeed in showing that the words to the ordinary reader would mean that the plaintiff is and was a person who has acted and is prepared to act dishonourably in connection with the issue of import licences, then the plaintiff will fail. He sets up that meaning and it is on that meaning that he takes his stand."

No exception was taken to that direction which was clearly right and, indeed, favourable to the defence. Once the plaintiff had acknowledged that the words were not defamatory of him when taken in their natural and ordinary meaning, then it was absolutely incumbent on him to prove they bore the meaning alleged in the innuendo. If he only proved a lesser meaning, he would fail. A good illustration was given in the course of the argument. The innuendo in this case imputed that the plaintiff "has acted and is prepared to act dishonourably". That is an imputation of *guilt*. If the jury thought that the words conveyed, not an imputation of *guilt*, but only of *suspicion*, the plaintiff would fail to prove his innuendo, with the result that he would fail in his action, see *Mountney* v. *Watton* (1831) 2 B. & Ad. at p. 678 by Lord Tenterden, *Simmons* v. *Mitchell* (1880) 6 App. Cas. 156. The reason is this: If the plaintiff had by his innuendo said the words only imputed *suspicion*, it would be open to the

defendant to plead justification if it had sufficient evidence at its disposal to warrant suspicion: but as the plaintiff says that the words impute *guilt*, the defendant cannot justify that meaning unless it has sufficient evidence to prove guilt, which is, of course, a higher burden than proving suspicion. So as matter of pleading, in order not to put the defendant to any disadvantage, the plaintiff is pinned to his innuendo.

Their Lordships notice, however, that this distinction between guilt and suspicion which was taken so clearly before them, was not pressed before the jury: and they think they can understand why. The jury would not be likely to view with favour defendants who came into Court saying: "We did not say he was actually *guilty* of dishonourable conduct. Our words only meant that he was *suspected* of it". It is defamatory to say of a man that he is suspected of dishonourable conduct. The defendants would, by imputing suspicion, be willing to wound, and yet afraid to strike—an attitude which a New Zealand jury would like no better than an English jury.

The case which the defendants put before the jury was rather different. They said that the words bore a lesser meaning than that alleged in the innuendo. In looking to see what that lesser meaning was, their Lordships find it succinctly expressed in the words of Mr. Cooke when he addressed the Judge at the end of the summing-up:

> "If the jury thought that the meaning was, in view of Judd's remarks, that an inquiry should include the question whether or not the plaintiff has acted dishonourably in connection with import licences—if they thought the words bore that lesser meaning, a different meaning from the one assigned by the plaintiff, then the defendant would be entitled to a verdict."

There was some question as to the exact answer given by the Judge, but it may for present purposes be accepted to be as follows. The Judge said:

> "I do not wish to add anything to what I have already said on that matter. I have told the jury that it should be established by the plaintiff that the words bear the meaning alleged by him and I want to leave it at that."

Their Lordships find it a little difficult to understand quite what Mr. Cooke was contending the words did mean: but he stressed the importance to his case of the call for an inquiry; and their Lordships can only conclude that, according to the defendants, the words meant this: "We call for an inquiry because, amongst other things, Mr. Judd has made remarks about Mr. Holloway. And we say that, in view of his remarks, the inquiry should include the question whether Mr. Holloway has acted dishonourably." But their Lordships would observe that this does nothing to elucidate what Judd's remarks did mean: and this is the crux of the case.

Their Lordships have no doubt that Mr. Cooke put before the jury the lesser meaning for which he contended: and it is plain that the jury rejected it. They held that the words did bear the innuendo alleged by the plaintiff and they awarded £11,000 damages. That being so, the defendants have no hope of upsetting this award unless they can show a misdirection by the Judge on an important ground. Mr. Cooke originally complained of eleven passages in the summing-up which he said were misdirections, but when the case reached their Lordships, the passages were reduced to three. The first of these was this:

> "(d) *Directing the jury that on the question whether the passage complained of bore the meaning alleged by the plaintiff the fact that the newspaper might have been asking for a general inquiry had no bearing at all.*"

The words actually used by the Judge to the jury were these:

> "For your purposes on the question as to whether the passage was defamatory, in my direction to you, the fact that the paper was calling for a general inquiry is not an answer on the question whether

the passage was defamatory. That fact that it was so calling may be a circumstance to be considered on the question of damages if you come to the question of damages, but I will mention that later, but my direction to you is that, on the question of whether the passage that is complained of bears the meaning that the plaintiff alleges that it bears, the fact that the newspaper might have been calling for a general inquiry, has no bearing at all."

Their Lordships see nothing wrong in that direction. If a newspaper says: "We call for an inquiry because a man called Judd has made such and such remarks about Mr. Holloway", and you want to know what the newspaper is talking about, you have to know what Judd's remarks were. To get at the meaning of the passage, the jury have to see what remarks were attributed to Judd and then ask themselves what those words mean. If Judd had said that the Minister was "bungling" or "imprudent", there might still be a call for inquiry. If he had said that the Minister was "suspected" of dishonourable conduct, a call for inquiry might be made just the same. In any case the call for an inquiry does not help.

The second of the alleged misdirections was this:

"(e) *Directing the jury that the case was properly to be dealt with as if the defendant itself had said: 'See Phil and Phil would fix it'.*"

The words actually used by the Judge to the jury were these:

"If you accept that those words were spoken by Judd, it is not a defence at all that a statement that might be defamatory is put forward by way of report only. It does not help the defendant that the way that it is put is that Judd said 'See Phil and Phil would fix it'. The case is properly to be dealt with as if the defendant itself said 'See Phil and Phil would fix it'."

Their Lordships see nothing wrong in this direction. It is nothing more nor less than a statement of settled law put cogently to the jury. Gatley opens his chapter on Republication and Repetition with the quotation: "Every republication of a libel is a new libel, and each publisher is answerable for his act to the same extent as if the calumny originated with him", see Gatley on Libel 4th Edn. p. 106. This case is a good instance of the justice of this rule. If Judd did use the words attributed to him, it might be a slander by Judd of Mr. Holloway in the way of his office as a Minister of the Crown. But if the words had not been repeated by the newspaper, the damage done by Judd would be as nothing compared to the damage done by this newspaper when it repeated it. It broadcast the statement to the people at large: and it made it worse by making it one of the grounds on which it called for an inquiry, for thereby it suggested that some credence was to be given to it.

The third of the misdirections alleged is this:

"(f) *Directing the jury that they should find for the defendant if they thought that the words sued on did not mean what was alleged by the plaintiff, but might mean something less than that, that the Minister was bungling or incompetent or something of that sort, but refraining from specifically directing the jury upon request that they should find for the defendant if they thought the meaning was that, in view of Judd's remarks, an inquiry should include the question whether or not the plaintiff had acted dishonourably in connection with import licences.*"

Their Lordships have referred to this request earlier: and they find no fault in the answer the Judge gave to it. It is difficult to know what meaning the defendants were seeking to put on the words complained of. The request by counsel did nothing to elucidate the meaning of "Judd's remarks" on which the whole case turned. The Judge gave the right answer when he declined to embark on a course so confusing to the jury. He said: "I have told the jury that it should be established by the plaintiff that the words bear the meaning alleged by him and I want to leave it at that." That was short, simple and correct.

Their Lordships are therefore of opinion that there was no misdirection: and they think that Hutchison, A.C.J. was right in refusing the motion for a new trial.

The Court of Appeal seem to have thought that there may have been a misdirection in directing the jury that the call for an inquiry had no bearing: but they dismissed the appeal on the ground that the summing-up considered as a whole provided the jury with a fair guide when they came to consider their verdict. Their Lordships think there was no misdirection. But if there had been, they would unhesitatingly affirm the view of the Court of Appeal. It has been well said that "a summing-up is not to be rigorously criticised: and it would not be right to set aside the verdict of a jury, because in the course of a long and elaborate summing-up the Judge has used inaccurate language", see *Clark* v. *Molyneaux* [1877] 3 Q.B.D. 237 at p. 243 by Bramwell, L.J.

The issues in this case were fairly and properly left to the jury. There is no ground for upsetting their verdict. Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs.

(39235) Wt. 8109—53 100 8/60 D.L.

In the Privy Council

"TRUTH" (N.Z.) LIMITED

v.

PHILIP NORTH HOLLOWAY

DELIVERED BY LORD DENNING

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1960