YANNI *v.* EDITOR AND PROPRIETORS OF SIERRA LEONE DAILY MAIL and MACAULAY

SUPREME COURT (Marke, J.): March 31st, 1967
(Civil Case No. 54/65)

[1] **Tort — damages — measure of damages — defamation — defendant's whole conduct including conduct in court to be considered:** In assessing damages in a defamation action, the court may look at the whole conduct of the defendant, before action, after action and in court during trial (page 107, lines 25–27).

[2] **Tort—defamation—damages—measure of damages—defendant's whole conduct including conduct in court to be considered:** See [1] above.

[3] **Tort—defamation—defamatory statements—statements imputing moral obliquity—statement that prosecution instituted for political reasons defamatory:** A statement that a person instituted a prosecution for political reasons is capable of a defamatory meaning (page 101, lines 1–3).

[4] **Tort—defamation—fair comment—comment not to misstate facts, or convey evil imputations except as facts truly stated warrant:** To support a defence of fair comment in an action for defamation, the comment must not misstate facts, or convey evil imputations except so far as the facts truly stated warrant them (page 104, lines 34–38).

[5] **Tort—defamation—functions of court—trial by judge alone—judge to determine whether words capable of defamatory meaning and whether they have it in fact:** A judge trying a defamation action without a jury must first decide whether the words complained of are capable of bearing a defamatory meaning in the circumstances of the case, and if he so holds must then consider whether the words in fact bear that meaning (page 100, line 37—page 101, line 6).

[6] **Tort—defamation—objective test—disparagement should be in eyes of reasonable man:** In deciding whether words alleged defamatory bear a defamatory meaning in fact, a judge trying a defamation action without a jury should consider whether an ordinary reasonable man to whom the words were published would say that the plaintiff was disparaged by them, or, would be likely to understand them in a defamatory sense (page 101, lines 4–13).

The plaintiff brought an action against the defendants in the Supreme Court for damages for libel.

The plaintiff was a former senior employee of the Sierra Leone Produce Marketing Board. The third defendant was the Attorney-General at the material time, and the first and second defendants were the editor and proprietors respectively of the newspaper in which the alleged libel was published.

Early in October 1964, according to the plaintiff's evidence, he and a senior C.I.D. officer named Wray were taking a statement from one Nylander, a contractor to the Board, when they were interrupted by persons working in association with a senior officer of the Board named French.

Nylander then instituted a private prosecution against the plaintiff. He swore an information stating that Wray and the plaintiff offered him money to make a false statement for the purpose of instituting criminal proceedings against French, Jabatti the Managing Director of the Board and Chief Gamanga its Chairman. The summons alleged that the money was paid to Nylander to enable him to prefer a false charge against Jabatti. On October 7th the third defendant entered a *nolle prosequi* in this prosecution.

In the middle of October, the plaintiff wrote to the third defendant alleging certain irregularities on the part of senior officials of the Board, and stating that he had brought these irregularities to the notice of the Minister in whose portfolio the Board was. The third defendant did not reply.

On January 5th, 1965, the plaintiff instituted a private prosecution against the Minister, Chief Gamanga, Jabatti and two other officials of the Board for conspiracy to conceal a crime, and other offences. The third defendant entered a *nolle prosequi* in the prosecution and on January 9th published an article intended to justify this step, which contained the statement complained of.

The article was headed "The A.-G. Speaks" and stated, *inter alia*, that persons with political interests had unwittingly sought to embarrass the investigation of the affairs of the Board by the Law Officers and the police, and had in one case instituted a private prosecution against a senior police officer and a one-time senior employee of the Board, in which the Attorney-General had entered a *nolle prosequi* on October 7th, 1964. The article went on to state that ". . . now apparently again for political reasons, the said senior employee" had instituted a private prosecution against those connected with the private prosecution against him. That was the statement complained of in the present proceedings.

The first and second defendants denied that they published the words complained of falsely or maliciously, and pleaded privilege and relied on the Defamation Act, 1961, s.10. The third defendant admitted publication but denied that the words complained of were capable of any libellous or actionable meaning, and pleaded fair comment.

In reply to the defence of the first and second defendants, the plaintiff denied that the occasion was privileged and alleged that they did not honestly believe the words complained of to be true, and in the alternative that they acted with actual malice and that they refused to publish a statement of explanation or contradiction at his request. In reply to the defence of the third defendant, he denied that the publication was fair comment and alleged that it was made on false assertions of fact, and alternatively that the third defendant was actuated by malice.

There was no evidence that the plaintiff instituted his private prosecution for political reasons or that the defendants were connected with Nylander's prosecution against him. There was no evidence of malice on the part of the first and second defendants or that they did not publish the plaintiff's statement of explanation or contradiction.

Cases referred to:

(1) *Capital & Counties Bank, Ltd.* v. *George Henty & Sons* (1882), 7 App. Cas. 741; [1881–5] All E.R. Rep. 86, *dictum* of Lord Selborne applied.

(2) *Joynt* v. *Cycle Trade Publishing Co.*, [1904] 2 K.B. 292; (1904), 91 L.T. 155, applied.

Statute construed:

Defamation Act, 1961 (No. 32 of 1961), s.10:

> "(1) Subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in the Schedule to this Act shall be privileged unless the publication is proved to be made with malice.
>
> (2) In an action for libel in respect of any such report or matter as is mentioned in Part II of the Schedule to this Act, the provisions of this section shall not be a defence if it is proved that the defendant has been requested by the plaintiff to publish in the newspaper in which the original publication was made a reasonable letter or statement by way of explanation or contradiction, and has refused or neglected to do so. . . ."

Schedule, Part II, s.12: "A copy or fair and accurate report or summary of any notice or other matter issued for the information of the public by or on behalf of any government department, officer of state . . . or . . . ."

Gelaga-King for the plaintiff;
D.E.F. Luke for the first and second defendants;
D.M.A. Macaulay, Sol.-Gen. and *Okeke, Crown Counsel* for the third defendant.

MARKE, J.:

The plaintiff in this action is seeking damages for alleged libel written of and concerning him by the third defendant and published by the first and second defendants in the *Sierra Leone Daily Mail* newspaper for January 9th, 1965.

The first and second defendants in their statement of defence denied that they falsely and maliciously printed the words complained of. They have pleaded qualified privilege, and rely on s.10 of the Defamation Act, 1961.

The third defendant in his statement of defence admitted that he wrote and published the words complained of but denied that the words were capable of any libellous or actionable meaning. He averred that the words were a fair and *bona fide* comment made in good faith and without malice "on facts truly stated in the said *Daily Mail* publication on January 9th, 1965" which were matters of public interest. In para. 5 of the statement of defence, the third defendant pleads as follows:

> "5. In so far as the said words consist of allegations of fact they are true in substance and in fact and in so far as they consist of expressions of opinion they are fair comment, made in good faith and without malice upon the said facts, which are matters of public interest."

Then follow particulars of statements of fact.

In his reply to the defence of the first and second defendants, the plaintiff alleged that the occasion was not a privileged one, that the first and second defendants did not honestly believe the words complained of to be true, and in the alternative that the first and second defendants acted with actual malice. Then follow particulars of the alleged malice.

In his reply to the third defendant, the plaintiff denied that the publication was a fair or *bona fide* comment and alleged it was made on false assertions as to matters of fact, and in the alternative alleged that the third defendant was actuated by malice in writing and publishing the words complained of. Then follow particulars of the alleged malice.

Upon these pleadings issue was joined.

The first duty of the court is to consider whether the words complained of are capable of bearing a libellous meaning. Here there are no innuendoes. The words used are ordinary English words. Taking the words complained of in their natural and ordinary meaning and also the circumstances in which they were

published, to say of anyone that he instituted a prosecution for political reasons could in my opinion make the words capable of bearing a libellous meaning.

Having held that the words are capable of a defamatory meaning, it is for me, sitting as a jury, to consider whether the words in the circumstances of the case in fact bear that meaning—in other words, whether the ordinary reasonable man on reading those words would say that the plaintiff had been disparaged thereby. Or, as Lord Selborne said in *Capital & Counties Bank, Ltd.* v. *George Henty & Sons* (1) (7 App. Cas. at 745; [1881–5] All E.R. Rep. at 89)— "whether under the circumstances in which the writing was published, reasonable men, to whom the publication was made, would be likely to understand it in a libellous sense."

To enable one to say whether the plaintiff has been defamed, the whole article in Exhibit 2 should be read. The article contains 12 paragraphs. The first two may be considered introductory, and at the end of the second appear the words "the statement reads," which make it not unlikely that those two paragraphs may not have been written by the third defendant. But nothing turns on that, nor on paras. 3, 4, and 5, which contain general remarks on ss.73 and 74 of our 1961 Constitution on the powers of the Attorney-General to institute or discontinue criminal proceedings against any person or authority.

Paragraph 6 states that the affairs of the Sierra Leone Produce Marketing Board had for some time been investigated by the Law Officers and the police but that those officers had been "embarrassed" in their investigations by "those with political interests," and gives as an example the case of a private prosecution instituted against a senior employee in which on October 7th, 1964, the Attorney-General entered a *nolle prosequi.*

Paragraph 7 contains the words complained of and the remaining paragraphs (8–12 inclusive) attempt to justify the Attorney-General's action in entering a *nolle prosequi* in the private prosecution instituted by the plaintiff.

No names were mentioned in the article in Exhibit 2 part of which contained the words complained of. But the plaintiff's witness Joseph Hadson Taylor testified before me that when he read Exhibit 2 and the article headed "The A.-G. Speaks" he knew that the words "the said senior employee" in the article referred to the plaintiff.

Coming now to what would be the natural and ordinary meaning

of the words complained of, to the ordinary reasonable man, it must be conceded that it is the duty of every citizen who sees or knows that a crime is being committed or has been committed, to bring such fact to the notice of the police or the Law Officers for the sole purpose of bringing to justice the perpetrators of such crime. But there is a distinction with a difference between the citizen who from a genuine belief in the guilt of another, and for the sole purpose of bringing that person to justice, institutes a criminal prosecution against such a person, and the other type of citizen, in quite a different category, who from indirect and improper motives institutes a criminal prosecution against someone without any belief in such person's guilt. Citizens in this category who institute such criminal prosecutions, when found out have been the objects of the hatred and contempt of the members of the society in which they live. They are, in short, scorned and avoided by their friends and can find no place in decent society.

Into this category the words complained of have placed the plaintiff, particularly the words—"And now apparently again for political reasons, the said senior employee . . . ." In my view any ordinary reasonable person reading the article in Exhibit 2, on reading para. 7 thereof which contains the words complained of, might feel that the plaintiff had no genuine belief in the guilt of the person against whom he instituted his prosecution, but did so in order to secure some political end. This would disparage the plaintiff, not only in the eyes of all who knew him before the words complained of were published, but also in the eyes of anyone reading that article. The plaintiff's witness Mr. Hadson Taylor said in his evidence that he was a good friend of the plaintiff and they both exchanged visits, but after reading the words complained of he felt that the plaintiff was a mean and dishonourable person and he broke up the very friendly relationship that had previously existed between them. Performing now the functions of a jury, I find that the words complained of were a libel on the plaintiff and exposed him to hatred and contempt.

The third defendant has also pleaded the defence of fair comment or, to quote the relevant paragraph in his statement of defence—

> "4. The words complained of are fair and *bona fide* comment made in good faith and without malice on facts truly stated in the said *Daily Mail* publication of January 9th, 1965 which are matters of public interest."

From the evidence before me, there was a private prosecution

against the plaintiff and a senior member of the Criminal Investigation Department called Wray on October 6th, 1964. That obviously was the private prosecution referred to in para. 6 of Exhibit 2, in which the article states:

> ". . . but those with political interests have unwittingly sought to embarrass the professional investigation by the Law Officers (with the assistance of the police) and, in one case, instituted a private prosecution against a senior police officer and a one-time senior employee of the Board. I therefore decided on October 7th, 1964 to enter a *nolle prosequi* in that case."

The person referred to in the quotation from para. 6 of Exhibit 2 as having instituted a private prosecution was one Cosmo Nylander. The third defendant put in evidence as Exhibit 5 the case file of that prosecution. The plaintiff gave evidence that Cosmo Nylander was a contractor of the Board. After reading through Exhibit 5, I can find no evidence to justify the statement in para. 6 of Exhibit 2 that Cosmo Nylander was one of those with political interests who were embarrassing the Law Officers and the police in their professional investigations into the affairs of the Board.

Paragraph 7 of Exhibit 2 opens with these words: "And now apparently again for political reasons, the said senior employee . . . ." These words suggest that the plaintiff instituted his private prosecution for political reasons just as Cosmo Nylander did in bringing his own private prosecution against the plaintiff and another.

On October 16th, 1964, the plaintiff wrote a letter, Exhibits 1 and 1A, to the third defendant. In that letter the plaintiff went into some detail about the happenings in the affairs of the Board, relating how some senior Board officials were using materials and workmen of the Board for their own private purposes, such as erecting houses and a mosque for them. The plaintiff stated in that letter that he had brought these irregularities to the notice of the Minister in whose portfolio the Board was.

I am bound to hold that the third defendant received this letter, as it was allowed to go in evidence without any objection. However, there is no evidence that the third defendant sent a reply to the letter, or even an acknowledgment of its receipt.

On January 5th, 1965, the plaintiff instituted criminal proceedings against Salia Jusu Sheriff and Paramount Chief Kenewa Gamanga for conspiracy to defeat the ends of justice by concealing a crime; and also against S.A. Jabatti, T.N.V. Stevens and P.A. Jarrett Thorpe for conspiracy to libel and incitement to libel.

These two proceedings began by warrants of arrest which were issued by a senior police magistrate on or about January 5th, 1965. The warrants were not executed, and on January 9th, 1965 the article complained of was published by the third defendant. Salia Jusu Sheriff was Minister for Trade and Industry in whose portfolio the Board was; Kenewa Gamanga was Chairman of the Board; S.A. Jabatti was Managing Director of the Board, T.N.V. Stevens was Cashier of the Board; and Jarrett Thorpe was the Accountant in the Production Division of the Board.

Counsel for the third defendant tendered a letter dated May 25th, 1964, signed by the plaintiff and addressed to the Permanent Secretary, Trade and Industry and copied to S.A. Jabatti. That letter was put in evidence and marked Exhibit 7. The letter unreservedly withdrew all allegations made by the plaintiff against any member of the Board and particularly against S.A. Jabatti. In re-examination the plaintiff explained:

> "Mr. Jusu Sheriff threatened me first with the loss of my job and with deportation from this country; and reminded me that under the laws of this country I was not a Sierra Leonean; and unless I withdrew my allegations unreservedly, and followed it with an apology in writing with a copy to the Prime Minister, as that was the instruction of the Prime Minister, he was prepared to bring the full weight of Government against me. He gave me one week to consider this."

He went on to say that he consulted Mr. Cyrus Rogers-Wright who was then his solicitor, and that Mr. Rogers-Wright advised him and prepared Exhibit 7 which he signed. As the third defendant brought no evidence to contradict this evidence of the plaintiff, I accept it as likely to have happened in view of the other oral evidence of the plaintiff.

At this stage it may be helpful to remember the words of Kennedy, J. in *Joynt* v. *Cycle Trade Publishing Co.* (2) when he said ([1904] 2 K.B. at 294; 91 L.T. at 155):

> ". . . [T]he comment must . . . not misstate facts, because a comment cannot be fair which is built upon facts which are not truly stated, and further it must not convey imputations of an evil sort, except so far as the facts truly stated warrant the imputation."

The article complained of alleges two things: (a), the plaintiff had instituted a private prosecution against those connected with the private prosecution against him; and (b), he had done so for

political reasons. It is the duty of the third defendant to prove the allegations in his statement of defence, particularly those which contain a defence of fair comment. The third defendant has set out in his pleadings, in paras. 5(a) and 5(b), particulars of statements of facts. Though these particulars may be helpful to a certain extent, they do not absolve the third defendant from supporting them by evidence unless they have been admitted by the pleadings of the plaintiff. Taking para. 5(a) for instance, there is no evidence that the plaintiff instituted a private prosecution against those who were connected with the private prosecution against him "in which I entered a *nolle prosequi.*" It is conceded by all parties that this "private prosecution against him" was that by Cosmo Nylander. The plaintiff was referred by counsel for the third defendant to p.7 of Exhibit 5, which contains the sworn information of Cosmo Nylander in which it was alleged that Wray and the plaintiff offered money to Cosmo Nylander for that man to make a false statement to Walter Wray for the purpose of instituting criminal proceedings against French, Jabatti and Chief Gamanga. Surely what appears on that sworn information is not the finding of any court, nor yet a finding of fact. It cannot affect the plaintiff. The third defendant had an opportunity of proving whether that allegation was true or false, but preferred to enter a *nolle prosequi* on the summons based on it. Further, on p.10 of the same exhibit, which is a copy of the summons which I presume was also served on the plaintiff, the allegation was that the money was paid to Cosmo Nylander to enable him to prefer a false charge against one Jabatti of the Produce Marketing Board. No mention of the names of French and Chief Gamanga appear on that summons, which was for the use of the magistrate who was to try the case. So that nothing turns on the sworn information of Cosmo Nylander.

The plaintiff on the other hand gave this evidence before me: He said that on an evening in October 1964, Wray collected him at his house and drove him to Wray's quarters at Bo. Wray then sent for Cosmo Nylander, and, on the latter's arrival at Wray's quarters, Wray asked Nylander to repeat in the plaintiff's presence what Nylander had told Wray. Nylander started making a statement which another police officer was taking down in writing. Nylander then halted in his statement and demanded payment for the information he was giving. Wray obtained from a friend a cheque which he gave to Nylander—from this point it will be best to quote the plaintiff's words:

"At this point, two men, Kpana and David Bull, came into the house from the back and grasped the cheque and said to Wray: 'We are going to have you arrested for bribing to get information.' It was Kpana who spoke the words. Wray then produced his police identity card.

The two men would not listen to Wray, but dashed out of the house with the cheque and returned afterwards with one French and a police constable in uniform. French was Acting Manager of the Production Division of the Board at Bo. Nylander went out with Kpana and Bull and returned with them and French and the police constable."

The next day, the plaintiff was arrested in French's office.

We have here those connected with the private prosecution instituted by Nylander against the plaintiff. They were Nylander (who swore to the information), Kpana, Bull and French. So that the allegation in para. 5(a) of the third defendant's statement of defence is not in accord with the facts before the court and has not been proved. Paragraph 5(b) of the third defendant's statement of defence I have already dealt with except for the last sentence—"Furthermore the said Mr. French," etc., about which there has been no evidence. Again I must call attention to the fact that allegations in pleadings are not evidence and cannot be treated as such, unless they have been admitted by the other side.

Looking at the whole of the evidence, the third defendant has not proved that the plaintiff for political reasons instituted a private prosecution against those who were connected with the previous private prosecution against the plaintiff, and has not discharged the onus of proving that his comment was fair and *bona fide*. What the third defendant has done is that he has created his own facts and attempted to comment on them. In such circumstances his plea of fair comment must fail: *Joynt* v. *Cycle Trading Publishing Co.* (2). The plaintiff, in answer to cross-examination by counsel for the third defendant, said among other things: "I took my private prosecution because I felt that I had been wronged and I wanted the wrong to be put right."

Coming to the case of the first and second defendants, they are brought into this case because they have published the article in Exhibit 2. They have pleaded qualified privilege and s.10 of the Defamation Act, 1961, and in their argument rely on Part II of the Schedule to that Act. The plaintiff in his reply denied that the occasion of the publication was privileged and alleged that

the first and second defendants did not honestly believe to be true the words complained of which they printed and published.

In the alternative the plaintiff averred that the first and second defendants were actuated by malice, and in his particulars referred to Exhibit 4, which the reply alleged the first and second defendants refused to publish in their paper. In order to establish the allegation contained in the reply, the plaintiff must prove actual malice, and there has been no evidence of malice by the first and second defendants. As regards the alternative plea, refusal to publish a reasonable statement, there is no evidence that the statement was not published. This is all I have in evidence about Exhibit 4, and it is the plaintiff's evidence:

> "I recognise the paper now produced to me as the document prepared by my solicitor and which we both handed to the first defendant. The document is dated January 11th, 1965.
>
> Document tendered; no objection by all three defendants; document put in evidence and marked Exhibit 4.
>
> xxd. by D.E.F. Luke—None.
>
> xxd. by Macaulay—On August 15th, 1961. . . ."

Again I am obliged to repeat that allegations in pleadings are not evidence unless admitted by the other side; and the first and second defendants did not in their pleadings say anything about Exhibit 4. This plea, therefore, of privilege has not been displaced and the action fails against them.

On the question of damages, the court is entitled to look at the whole conduct of the third defendant, that is, before action, after action and in court during trial. Though it is not clear what relationship, if any, existed between the third defendant and the Sierra Leone Produce Marketing Board, the plaintiff in October 1964 set out in Exhibits 1 and 1A in some detail the relations between that Board and himself, when he pointed to certain grave irregularities which he alleged were being perpetrated by some senior members of the Board. Whether or not the third defendant was the proper person to whom that letter should have been addressed, ordinary courtesy demanded that at least a letter acknowledging the receipt of the letter should have been sent to the plaintiff. Without any such acknowledgment, the third defendant published the article complained of.

During the trial the third defendant made one or perhaps two appearances in court, and no more. One would naturally expect that the third defendant would obtain information from his counsel

from time to time about how the case was progressing and give him such further instructions as might be necessary. The third defendant is a barrister-at-law and a Queen's Counsel and must be presumed to know the nature and purpose of pleadings in a civil action. Having pleaded fair comment, he attempted through his counsel to support that plea by bringing evidence of an information for the issue of a warrant to arrest the plaintiff, when he knew and must be taken to have known that such sworn information could not affect the plaintiff, unless and until the plaintiff was convicted on it.

If the third defendant during the course of the hearing felt he had made a mistake, it was open to him to tender a reasonable apology to the plaintiff; and I would add, that such an action would have been consistent with the high traditions of the Bar. Reputable counsel elsewhere have never considered it derogatory to whatever high office they may hold, to tender a reasonable apology in such circumstances. But the third defendant, knowing what facts he had with which to meet the allegations of the plaintiff, persisted in the action till the end.

The plaintiff on the other hand is a motor engineer, and a small man in the social scale when compared with the third defendant, and from the conduct of this case by the third defendant one could not help feeling that it was expected that the small man must remain quiet and not seek the protection of the courts even though he may have been libelled by someone higher up the social scale.

In view of all these considerations, I assess the damages at Le2,000.

The order of the court is:

1. The plaintiff succeeds in his claim against the third defendant.

1A. The third defendant is to pay the plaintiff Le2,000 (two thousand leones).

2. The first and second defendants are dismissed from the action.

3. The third defendant is to pay the costs of the plaintiff.

4. The plaintiff is to pay the costs of the first and second defendants.

5. Costs are to be taxed.

Order accordingly.