JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 46/2003

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A.

BETWEEN: C.V.M. TELEVISION APPELLANT

AND: FABIAN TEWARIE RESPONDENT

Winston Spaulding, Q.C., John Givans, Jeffrey Daley and Mrs. Helene Coley-Nicholson, instructed by Blackridge Covington for the Appellant.

Earl Witter, Barrington Frankson and Maurice Frankson, instructed by Gaynair and Fraser for the Respondent.

September 26, 27, 28, 29, 30; October 19, & 20, 2005; July 31 and November 8, 2006

FORTE, P.

I have read in draft the judgments of Panton and McCalla, JJ.A. and I am in agreement with the reasons stated therein and have nothing useful to add.

PANTON, J.A.

1. On July 31, 2006, I expressed my agreement with my learned colleagues Forte, P. and McCalla, J.A. in respect of the disposition of this appeal. McCalla, J.A. has set out in full the relevant facts, arguments and the law governing the situation. Consequently, in giving these views of my own, there shall be no unnecessary repetition.

2. Paragraph 3 of the statement of claim reads:

> "On or about the 12th day of November, 1998, at or about 8 p.m. and later repeated at or about 11 p.m. on the said date the defendant caused to be broadcast and published as part of its news, words and images of and concerning the plaintiff which were defamatory of the plaintiff".

Paragraph 3 of the defence reads:

> "Paragraph 3 of the statement of claim is admitted".

I am of the view that a proper interpretation of the pleadings lends itself to the conclusion that the appellant had indeed admitted that

the words used were defamatory. It seems therefore that the learned judge was extraordinarily generous in leaving that matter for the determination of the jury. The only matters for determination were:

> (a) whether qualified privilege applied; and
> (b) the quantum of damages, if the defence failed.

3. The appellant contended that the defamatory words were published on a privileged occasion, in that it had a duty to publish same to its viewers and listeners, and they had a corresponding right to receive the communication. The appellant's manager of news and current affairs admitted in evidence that what was published was "a lie" and "was not fair" to the respondent. His responsibilities, he said, included "editing scripts for accuracy ... fairness and objectivity". It is very evident that he fell down on the job. Here was a situation in which the appellant, with its microphone and camera, facilitated and encouraged the presentation of an account of an incident by someone who was not a witness. The appellant never even tried to investigate or verify the story. It simply broadcast it unchecked and unedited, totally uncaring and reckless as to whether

it was accurate or not. In addition, the appellant repeated the story even after a complaint had been made by the respondent. The appellant also failed to apologize for its errant ways. It is in that context that the appellant claimed that the occasion was privileged.

4. It seems to me that a few quotations from the judgments in **Reynolds v. Times Newspapers Ltd** (1999) 3 W.L.R. 1010 may be of assistance in understanding the nature of the defence of qualified privilege and its relevance in the instant case. At page 1017 C thereof, Lord Nicholls of Birkenhead said:

> "The underlying principle is conventionally stated in words to the effect that there must exist between the maker of the statement and the recipient some duty or interest in the making of the communication."

Further, at page 1024 F-H, he said:

> "... the common law solution is for the court to have regard to all the circumstances when deciding whether the publication of particular material was privileged because of its value to the public. Its value to the public depends on its quality as well as its subject matter. This solution has the merit of elasticity. As observed by the Court of Appeal, this principle can be applied appropriately to the particular

> circumstances of individual cases in their infinite variety. It can be applied appropriately to all information published by a newspaper, whatever its source or origin.
>
> Hand in hand with this advantage goes the disadvantage of an element of unpredictability and uncertainty ... A degree of uncertainty in borderline cases is inevitable.... However, the extent of this uncertainty should not be exaggerated. With the enunciation of some guidelines by the court, any practical problems should be manageable. The common law does not seek to set a higher standard than that of responsible journalism, a standard the media themselves espouse."

5. Lord Cooke of Thorndon, said, at page 1040 E-F:

> "...and it is certain that neither in the United Kingdom nor anywhere else in the Commonwealth could it be maintained that the people have knowingly staked their all on unfettered freedom to publish falsehoods of fact.... provided only that the writer or speaker is not actuated by malice."

Later at page 1059 B-E, Lord Hobhouse expressed himself thus:

> "The liberty to communicate (and receive) information has a similar place in a free society but it is important always to remember that it is the communication of information not misinformation which is the subject of this liberty. There is no human right to disseminate information that is not true. No

> public interest is served by publishing or communicating misinformation. The working of a democratic society depends on the members of that society being informed, not misinformed. Misleading people and the purveying as facts statements which are not true is destructive of the democratic society and should form no part of such a society. There is no duty to publish what is not true: there is no interest in being misinformed. These are general propositions going far beyond the mere protection of reputations."

And, finally, at 1060 B-C, he said:

> "To attract privilege the report must have a qualitative content sufficient to justify the defence should the report turn out to have included some misstatement of fact. It is implicit in the law's insistence on taking account of the circumstances in which the publication, for which privilege is being claimed, was made that the circumstances include the character of that publication. Privilege does not attach, without more, to the repetition of overheard gossip whether attributed or not nor to speculation however intelligent."

6. In a case from our jurisdiction, **Bonnick v Morris and another**, Privy Council Appeal No. 30 of 2001, delivered on June 7, 2002, Lord Nicholls referred to the Reynolds case in the following terms:

> "...the Reynolds privilege is concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern. Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals. Maintenance of this standard is in the public interest and in the interests of those whose reputations are involved. It can be regarded as the price journalists pay in return for the privilege. If they are to have the benefit of the privilege, journalists must exercise due professional skill and care." (para. 23)

7. I am of the view that whereas the appellant may have a duty to publish news of criminal activities and of the behaviour of the police in that respect, and there may be a right on the part of the general public to receive such information, there is no duty to publish inaccuracies. There is certainly no duty to publish a story that gave false details as to an act amounting to murder having been committed by the respondent. A television station takes unto itself the duty of reporting facts and events. It may also provide commentaries but such commentaries must be on facts. It has no duty to report falsehoods and inaccuracies. Where there are such

mistaken reports, immediate sincere apologies are required accompanied by publication of appropriate corrections. The constitutional right of freedom of expression that a person has in Jamaica is not a licence for the taking away of another person's constitutional right to the protection of the law. Hence, freedom of expression does not allow one to injure another's reputation. In the instant case, given all the circumstances, there can be no doubt that the defence of qualified privilege cannot avail the appellant.

8. **Damages**

The jury awarded the respondent the significant sum of twenty million dollars ($20,000,000.00) as general damages. The respondent had told the jury that when he heard the news broadcast and the role he was alleged to have played in the activity being reported, he felt as if someone had hit him in his head with something heavy. He subsequently had to seek medical help for persistent headaches and stress. He ceased visiting the community in which the killing had taken place, due to fear for his safety. Since the broadcast, he has continued to receive his remuneration and

although he has not been promoted, he has received commendations on a regular basis. It is also obvious that he has not lost his friends as a result of the publication.

9. In recent years, there have been two other cases in which juries have made significant awards for defamation. These were **Strachan v The Gleaner Co. Ltd**. (SCCA 133/99 – delivered April 6, 2001) ($22,500,000.00) and **The Gleaner Co. Ltd. v. Abrahams** (SCCA 70/96 – delivered July 31, 2000) ($80, 700,000.00). Both cases have added to our jurisprudence in that they had their full quota of appeals. In **Strachan,** the judgment was set aside by a Supreme Court Judge and the eventual point for determination by the Privy Council was a jurisdictional one which is of no relevance to the present case. In **Abrahams,** this Court reduced the award to $35,000,000.00 but the Gleaner Company's unhappiness with the reduced amount resulted in the matter going before the Privy Council. Their Lordships upheld the judgments of Forte, P., Harrison, and Langrin JJA.. Lord Hoffmann reminded that an award of damages "ought to be of a sum reasonably required to protect the

plaintiff's reputation". The damages must show that the plaintiff's reputation has been vindicated. He explored the question of comparative awards which had been the subject of much discussion in the Court of Appeal. The discussion had encompassed personal injury awards, other defamation cases and the purchasing power of the money. In the end, the prevailing view seems to be that it is difficult to fix any hard and fast rule as to how the damages are to be computed and assessed by a jury. The circumstances of each case will be the guide, as so often happens in matters of law.

10. The **Abrahams** case was extraordinary. Evidence of loss of good health and earnings as a result of the libel were clearly proved. In addition there had been aggravated circumstances with the deliberate repetition of the libel and the refusal to apologize. Abrahams had to live with the consequences for several years. The libel continued even before the Privy Council. In the instant situation, the result of the libel was not devastating. The respondent suffered discomfort and unease for sure but nothing that would warrant as much as $20,000,000.00. In Jamaica, that sum, even

with the high inflation rate with which we have been afflicted for years, is substantial. It exceeds by far what is required to compensate for the injury to the respondent's reputation. It is inordinately high and has to be reduced. I agree that the sum of $3,500,000.00 would be quite adequate in the circumstances.

McCALLA, J.A.

This is an appeal against the verdict and the award of damages made by the jury on June 3, 2003 after a trial before Donald McIntosh J. Judgment was entered for Fabian Tewarie ("the respondent") against CVM Television Limited ("the appellant") in the sum of Twenty Million Dollars with costs amounting to One Hundred and Fifty Thousand Dollars.

Before setting out the grounds of appeal filed it is necessary to give a brief history of the circumstances in which the appeal came before this Court.

The respondent was a Detective Sergeant in the Jamaica Constabulary Force and the appellant was a producer and broadcaster of television programmes and news for island wide consumption.

The respondent alleges that on November 12, 1998, at 8:00 p.m. and repeated at 11:00 p.m., the appellant caused to be broadcast and published as part of its news, certain words and images which were defamatory of him to wit the following:

Ingrid Bryan: CVM Reporter

INGRID BRYAN: "A grieving girlfriend, a fatherless child, the aftermath of another controversial Police shooting. The residents allege that 22 year old Garfield Brown who had just returned to the Island from New York was standing on Baracuda

Way when he was pounced on by the law men."

ONLOOKER: "While him friend inside, the Police dem come round and see him and grab him up. Di Police who grab him up is an Indian who go by the name of Bad Indian, right, Fabian Tewarie, Him know him from a fren a in different incidents, right. When the friend come round and saw them di fren run off, based on what I heard, and run the fren run off, dem open fire on the fren, right, and dem take my son from where he was standing, carry him about a chain and a half or 2 chain away and go shoot him..."

INGRID BRYAN: "Was Garfield indeed a criminal whose luck ran out, or was he the unwitting victim of an overly aggressive Police party?"

The respondent is commonly known as "Bad Indian" among those who reside in the communities of Portmore and Old Harbour. At the time of the incident which gave rise to the publications the respondent was at his home. He contends that in their natural and ordinary meaning the words meant and were understood to mean that he was a renegade policeman who had committed the offence of murder and who was one of the policemen involved in the controversial shooting of Garfield Brown.

The respondent says that as a result of the broadcast his reputation has been damaged and he has suffered distress and anxiety also caused by numerous telephone calls that he received concerning the

publication. He contends that the words were published knowing that they were false, or recklessly, not caring whether they were true or false, having calculated that the benefit from them in terms of increased listeners and watchers would outweigh any compensation payable to him.

The appellant admitted that the words were published but denied that they could have referred to the respondent or were capable of the meaning attributed to them. It also denied the effect on the respondent's reputation as contended or that it had published the news and images recklessly or with knowledge of falsity. The appellant expressly denied that the words implicated the respondent in the commission of any offence including murder or that he was involved in any controversial shooting.

The appellant averred in the alternative that the said words were published on an occasion of qualified privilege.

The amended grounds of appeal filed on February 18, 2004, do not readily lend themselves to reproduction in summary form, and are set out in full as follows:

> "1. (a) The Learned Trial Judge misdirected the jurors on an issue vital to the defence in telling them that there was a tacit admission by the defence that the words are defamatory, per se without more and that the Defendant was saying it had a good defence that the words were published on a privileged occasion. This direction ignored the core of a vital element of the defence

which, contrary to that direction, had in fact specifically denied the libellous meaning pleaded and vied for by the plaintiff. This was further compounded by the direction to the jurors that there was evidence which should have left them in no doubt that the words were in fact defamatory, thereby negating and effectively withdrawing the defence's case on a fundamental issue which was also vital to the case overall as contended below.

(b) The Learned Trial Judge further compounded his error in directing the jurors on the premise not supported by the evidence, but consistent with the assertion of the plaintiff that the deceased's father had stated that the man who shot his son is the police officer who goes by the name of Bad Indian otherwise Fabian Tewarie. Additionally, the Judge did not adequately put to the jury the defence that the words were not reasonably understood or bore the meaning or meanings pleaded and vied for by the plaintiff. He further erred in failing to direct the jurors that the words were reasonably capable of more than one meaning, including innocuous meanings, an error which further prejudiced the case for the Defendant.

(2) The Learned Trial Judge did not deal adequately with the defence of qualified privilege and in particular:-

(i) the Judge erred in not specifically ruling and directing the jury that the occasion was one of qualified privilege, although clearly implying this in various ways including leaving the issue of malice with the jury in relation to defeating an occasion of privilege, an issue and direction which could only reasonably have been left for consideration if the Judge accepted and implicitly ruled that the occasion was one of privilege.

(ii) (a) The judge further failed to properly direct himself and to deal with the unavoidable principle that since the issue of express malice arose in the case, such malice had to have been specifically pleaded in a Reply by the plaintiff to ground the plaintiff leading evidence to defeat the occasion of privilege. Consequently, as a matter of law the Defendant was entitled to judgment in the case.

(b) The Judge's error complained of at (i) (a) above, was further compounded by misdirecting the jurors on the significance of the evidence led by the plaintiff in order to establish express malice.

(iii) (a) The judge further erred in the context of this case in directing the jury that malice could have been inferred by the Defendant not modifying the news item before the second broadcast without addressing in that context that the issue of any disregard for the truth or recklessness in respect of the libel alleged had to be viewed in the context of the special treatment and presentation of the news segment challenging the assertions made by Mr. Brown and that any omission to make enquiry in such circumstances could not by itself have constituted express malice.

(b) Further, the Learned Judge did not adequately address the Defendant's contention about needing time to have confirmed the identify of the caller purporting to be the plaintiff Tewarie and also to investigate what was said to him. Additionally, the judge did not direct the jurors adequately that Milton Walker for the Defendant had testified that it was felt that it

was not necessary to have made any further comment, an explanation most relevant to the state of mind, motive and intent of the Defendant.

(iv) The Judge failed to direct the jury that by publishing in the investigative report the police statement that the deceased had been killed in a shootout and exhibiting the Mac II weapon allegedly used by the deceased in the shootout, the Defendant had not adopted or sought to leave as truthful Mr. Brown's non-specific comments about how the deceased was shot. Consequently, this should have been taken into account in considering whether the Defendant had been indifferent or reckless with regard to the truthfulness of the allegations.

(v) The Learned Judge erred and/or confused the jury in his directions on qualified privilege by leaving the impression that in the context of the case, the defence of qualified privilege would have been defeated by the Defendant not having checked the story before publication.

(3) The verdict of the jury on liability, particularly in the context in which it was determined is unreasonable, unsatisfactory and unfair having regard to the evidence and the various issues raised in the Grounds of Appeal herein. The Learned Judge did not adequately and clearly direct the jury on the case for the defence and misdirected and misled the jury, thereby causing an imbalance in the conduct and summation of the case to the prejudice of the Defendant's case, making the overall trial unfair and unreasonable.

(4) (i) The Learned Judge generally did not adequately direct the jurors on the measure of damages in a defamation case, gave no guidance or sufficient guidance on which the jurors could have based their determination and did not explain to them and confused them on what was meant by damages being at large. The summation left the wrong impression that damages could be unbounded in their discretion omitting to explain clearly and explicitly that as a matter of law and the Constitution of Jamaica damages had to be proportionate to the injury and be an amount no more than was reasonably necessary to compensate the plaintiff and to restore his reputation.

(ii) The amount awarded for damages is excessive being unnecessary to compensate the plaintiff and restore his reputation in respect of any damage which he could reasonably have sustained by the publication. No reasonable jury properly directed could have made such an award particularly having regard to the law and the relevant provisions at Sec. 22 of the Constitution of Jamaica concerning freedom of expression".

Ground 1(A)

The issue of withdrawing a core aspect of the defence on the wrong premise that the defence had tacitly admitted that the words were libellous.

Mr. Spaulding Q.C. contended that in the context where the natural and ordinary meaning of the words as contended by the respondent was denied, liability depended on the meaning that the

words could reasonably bear. The passage complained of is at page 374 of the record where the learned trial judge directed the jury as follows:

> "There is evidence which should leave you in no doubt that those words were in fact defamatory, but that's the first question you have to ask yourselves because there is a defence to the use of the words and that defence was that they were used in a condition known as privilege, not absolute, but qualified."

Counsel maintained that the words of the father as published did not convey or give rise to the meaning that the plaintiff was a renegade policeman who had committed the offence of murder. The second meaning attributed to the words "one of the policemen involved in the controversial shooting of Garfield Brown" is not an accusation of murder and is significantly in conflict with the first meaning pleaded by the respondent.

Counsel contended further that the learned judge's direction had the effect of withdrawing the fundamental defence pleaded that the words in issue were not capable in their natural and ordinary meaning of importing the pleaded meanings. He said that one of the effects of the judge's directions was to indicate an admission of the libellous meanings that were denied by the appellant. He stated that the judge reinforced the damage to the appellant's case in the directions at pages 74-75 of the record, reproduced in part as follows:

> "...of course, as you know the Defendant... has joined issue with that claim, and they have joined issue in that they are saying, we did publish this broadcast, but it was because we had a duty to do so, and that this duty in law would amount to a defence of qualified privilege, so that what the Defendant is doing is joining issue with the claim of the Plaintiff and saying that he has a defence to the action and that basically, Madam Foreman and member of the jury is what this case is about."

The above directions counsel asserted, in effect left only the issue of qualified privilege to be considered, thereby depriving the appellant of a consideration of its pleaded defence and consequently was a fundamental misdirection.

The judge's treatment of the issue, he argued, was such that the pleaded meanings were regarded as the actual words of Mr. Brown as opposed to the interpreted meanings, as Mr. Brown had not stated that the respondent had killed the deceased.

Since Mr. Tewarie was not on the scene at the material time, any such allegation or imputation would be untrue and would be the source of hearsay information received by Mr. Brown.

He said that there was no admission of the claimant's case or the meaning pleaded. The jury ought therefore to have been directed to decide whether or not the meaning was defamatory only after the judge had ruled whether the actual words used were capable of a defamatory

meaning. (***Jones v Skelton*** [1963 1 W.L.R. 1963). Liability should be based not upon the meaning assumed, but on the meaning that the defamatory words will reasonably bear. Counsel argued strenuously that the wrong withdrawal of a question or issue from the jury is fatal. He said that of necessity, the respondent ought to have indicated which of the two inconsistent meanings were being vied for. The trial judge had a duty to point out to the jury that if they were to make a finding of defamation, it would have to be in relation to a specific meaning and not two inconsistent meanings. McIntosh J should therefore have ruled on whether the meaning was supported by the words of the father as broadcast.

Mr. Spaulding Q.C. contended that the appellant was not alleging that the statement was true but on the contrary, was making comments of skepticism in the context of broadcasting a rebutting account of the father's hearsay remarks and labelling the issue as controversial. It was persons, including the respondent himself, who falsely accused Mr. Brown of having said that it was the respondent who had shot his son. Mr. Brown had made a distinction between a group and the respondent when he mentioned the specific act he was told that the respondent had done.

Mr. Earl Witter for respondent relied on the pleadings in submitting that the defence was a mere denial that the words complained of did reasonably bear the meaning contended for by the respondent. He said

there was admission by the appellant that the publication was defamatory. As Mr. Winston Spaulding Q.C. took issue with that submission, it is necessary to set out in full the relevant paragraphs of the pleadings:

Statement of Claim

"1. The plaintiff is and was at the material times a Detective Sergeant of Police and was a Member of the Jamaica Constabulary Force.

2. The Defendant produces, markets and broadcasts Television programmes and News for general reception in the Island of Jamaica.

3. On or about the 12th day of November, 1998 at about 8:00 p.m. and later repeated at or about 11:00 p.m. on the said date, the Defendant caused to be broadcast and published as part of the News, words and images of and concerning the plaintiff **which were defamatory of the plaintiff**"(emphasis supplied)

4. These words and images referred and were understood to refer to the Plaintiff.

Particulars

i) Paragraph 1 hereof is repeated
ii) The plaintiff is commonly known as Bad Indian and his name is in fact Fabian Tewarie.
iii) The above facts are widely known among those who reside in and around Portmore and Old Harbour.

5. In their natural and ordinary meaning the said words and images meant and were understood to mean that the Plaintiff was a renegade Policeman who had committed the offence of murder and who was one of the Policemen

involved in the controversial shooting of Garfield Brown.

6. By reason of the matters aforesaid the Plaintiff's reputation both personal and as a Detective Sergeant of Police has been seriously damaged and he has suffered considerable distress and anxiety including numerous telephone calls from persons concerning the broadcast complained hereof.

7. Further, the Plaintiff will rely on the following facts and matters to support a claim for exemplary damages.

Particulars

(i) The broadcast complained of was aired at a time when a wide cross-section of persons in Jamaica would see and hear the broadcast complained of.

(ii) In the premises the Defendant caused to be broadcast and published the said words and image knowing they were false or recklessly not caring whether they were true or false having calculated that the benefit to them in terms of increased listeners and watchers would outweigh any compensation payable to the plaintiff.

Defence

1. ...

2. ...

3. **Paragraph 3 of the Statement of Claim is admitted.**

4. Paragraph 4 of the Statement of Claim and the Particulars thereunder are expressly denied.

5. Paragraph 5,6, and 7 of the Statement of Claim are denied.

6. In further response to paragraphs 4 and 5 of the Statement of Claim the Defendant denies that the said words in their natural and ordinary meaning, the said words and image meant and were understood to mean that the Plaintiff was a renegade policeman who had committed the offence of murder and was one of the policemen involved in controversial shooting of Garfield Brown. The Defendant further denies that the word and/or images could have referred to the said Plaintiff and/or otherwise disparaged the said Plaintiff. The Defendant expressly denies that the said words implicated the policeman in the commission of any offence including murder or that the said policeman was involved in any controversial shooting.

7. Further and/or in the alternative, the Defendant says that the said words were published on an occasion of qualified privilege.

Particulars

(a) it involved the activities of the Jamaica Constabulary Force of which the plaintiff was part;

(b) the Jamaica Constabulary Force is payed (sic) from the public's purse and is answerable to the people of Jamaica through Parliament;

(c) crime and violence in Jamaica is a matter of public interest and public concern;

(d) the manner and effort used by members of the Jamaica Constabulary Force in carrying out their duties are matters of public interest public concern.

8. In the premises the Defendant and the members of the public have a common and corresponding interest in the subject matter and publication of the said words. Alternatively, the Defendant was under legal and/or social and/or moral duty to publish the said words to the public at large who had a like duty and/or interest to receive them.

9. Save as is hereinbefore specifically admitted or not admitted, the Defendant denies each and every allegation contained in the Statement of Claim filed herein as if same were set forth and traversed seriatim." (Emphasis supplied)

From the pleadings quoted above, it is apparent that paragraph 3 of the defence expressly admitted that the words were defamatory. In the absence of any alternative meanings pleaded or contended for by the appellant, the learned trial judge, notwithstanding the above pleadings, left it open to the jury as to whether or not the words complained of were defamatory.

In arriving at their verdict the jury must have found that the words were capable of bearing a defamatory meaning. In ***Hayward v Thompson*** [1981] 3 All ER 450 the trial judge had directed the jury that the words complained of were capable of meaning that the plaintiff was guilty of as well as being reasonably suspected of participating in or condoning a murder plot. It was held that the learned judge had properly

directed the jury that it was open to them to decide whether the words used did bear those meanings without giving separate verdicts of guilt and suspicion of guilt. At page 458 of his judgment Lord Denning MR states thus:

> "As Lord Reid said, the meaning of the words in a libel case is not a matter of construction as a lawyer construes a contract."

In numerous passages throughout his summation the learned trial judge made it abundantly clear to the jury that the evidence was entirely a matter for their consideration. At page 86 of the record he directed the jury, in part, as follows:

> "The first question that will be asked of you to decide, the first issue for you to decide is whether the words... as you have seen and heard them...are defamatory of the claimant."

I am of the view that this ground of appeal is without merit.

Ground 1(B)

The issue of the natural and ordinary meaning of the words in the context of the defence and the direction at 1(A) above.

This ground dealt with the appellant's submissions that the learned trial judge did not adequately put to the jury the defence that the words were not reasonably understood or bore the meaning or meanings pleaded. He asserted that the learned judge failed to direct the jury that

the words were reasonably capable of bearing more than one meaning including innocuous meanings.There was no express allegation that the appellant had committed murder and was involved in shooting the deceased.

Counsel maintained that the case proceeded on the basis that by alleging that the plaintiff had been on the scene this was equivalent to alleging that he had done the specific wrong as pleaded by the respondent. He argued that in such a situation it would mean that the mere reporting of his presence would automatically amount in law to accusing him of involvement in some wrongdoing and left no scope for any alternative meanings of the words. Counsel also contended that the learned trial judge wrongly allowed the two distinctly different meanings to be left to the jury without advising them that they would have to determine the meaning of the words. It was, he said, clearly misplaced, unreasonable and artificial to have concluded that involvement with a team of policemen as a member of the team automatically meant involvement with the team in murder.

It was not disputed that the person named in the publication was the respondent and as the learned judge left the meaning of the words as contended by the respondent for the consideration of the jury there is in my view no basis for complaint by the appellant in the absence of any

alternative meanings being put by the appellant for their consideration. It would have been in my opinion improper for the learned judge to have placed before the jury a speculative list of meanings which, in his opinion, the words used could reasonably bear. This ground of appeal also fails.

Ground 2

The issue of Qualified Privilege

Mr. Spaulding Q.C complained that the learned judge should have dealt with the issue of the publication being made on an occasion of qualified privilege, which occasion could have been defeated by express malice. Counsel quoted from **Gatley on Libel and Slander** (10th Ed.) Para 44 page 383 as follows:

> "It may be unfortunate that a person against whom a charge that is not true is made should have no redress, but it would be contrary to public policy and the general interest of business and society that persons should be hampered in the discharge of their duty or the exercise of their rights by constant fear of actions for slander.
>
> It is better for the general good that individuals should occasionally suffer than that freedom of communication between persons in certain relations should be in any way impeded. But the freedom of communication which it is desirous to protect is honest and kindly freedom. It is not expedient that liberty should be made the cloak of maliciousness.

> The principle on which these cases are founded is a universal one, that the public convenience is to be preferred to private interests and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without actual malice notwithstanding that they involve relevant comments condemnatory of individuals.
>
> If the Defendant is malicious, that is, if he uses the occasion for some other purpose than that for which the law gives protection, he will not be able to rely on the privilege. It must, however, be observed that the House of Lords has held that there may be liability for negligence in one of the paradigm situations of qualified privilege and this, to some extent, represents a reversal of the law's policy of encouraging frankness of expression."

As to the necessity for the plaintiff to prove malice to defeat the occasion of qualified privilege, Counsel referred to page 870 paragraph 28.5 of the same work to the effect that:

> "Malice. In particular there is a specific rule of pleading that whenever it is intended to allege in answer to a plea of fair comment or qualified privilege that the Defendant was actuated by malice, the claimant must serve a reply giving particulars of the fact and matters from which the malice is to be inferred. It is not sufficient merely to plead that the Defendant acted maliciously".

Mr. Spaulding Q.C asserted that the duty on the part of the appellant to publish the remarks arose from sharing in an investigative and neutral report, the spontaneous remarks of the father of a person slain by

the police who made allegations on the death of his son. The remarks were admittedly reported as hearsay and said to be disputed and controversial.

The publication had left no version with the public as being truthful and to inhibit publication in these circumstances would effectively suppress the right of freedom of expression in the context of reports intended to inform the public of matters of importance to life in a democratic society.

The classic definition of qualified privilege was stated in the case of **Adam v Ward** [1917] A. C. 309,334 as follows:

> " ...a privileged occasion is...an occasion where the person who makes the communication has an interest or a duty, legal, social or moral to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential".

The eminent jurist Lord Diplock in the case of ***Horrocks v Lowe*** [1975] A.C. 149 made the following statement of law relating to qualified privilege:

> " The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters with respect to which the law recognizes that they have a duty to perform or an interest to protect. In doing so what is

> published in good faith on matters of these kinds is published on a privileged occasion."

At page 150 he had this to say:

> "...what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published, or as it is generally thought tautalogously termed "honest belief". If he publishes untrue defamatory matter recklessly without considering or caring whether it be true or not, he is in this, as in other branches of law, treated as if he knew it to be false..."

In the context of publications by the media the leading case is **Reynolds v Times Newspapers Limited and Others** [1999] 4 All ER 609. That case dealt with the striking of a balance between the right to freedom of expression and the limitation necessary for the protection of reputation.

There, Lord Nicholls laid down a non exhaustive list of matters to be considered when dealing with newspaper publications:

(1) The seriousness of the allegation

(2) The nature of the allegation and the extent to which the subject matter is a matter of public concern.

(3) The source of the information.

(4) The steps taken to verify the information

(5) The status of the information

(6) The urgency of the matter

(7) Whether comment was sought from the plaintiff.

(8) Whether the article contained the gist of the plaintiff's side of the story.

(9) The tone of the article.

(10) The circumstances of the publication including the timing.

The question arises as to whether or not the learned judge's directions on the defence of qualified privilege, which was pleaded in the alternative, were adequate. The evidence does not reveal that the matters stipulated by Lord Nicholls were addressed by the appellant or that the learned judge referred to them in his directions. The appellant admitted that it produces, markets and broadcasts television programmes and news for island wide consumption. It must be noted that malice was not being imputed to the appellant and the appellant has adduced no evidence that it believed the statement to be true. Mr. Spaulding Q.C. complained that the narrative of words published made it clear that the matter was controversial. He said that there is therefore no issue of the assertion of the truth of the allegation but to the contrary there were comments of skepticism in the context of broadcasting a rebutting account of the father's hearsay remarks which labelled the issue as controversial.

It seems to me that in the absence of an assertion that the appellant honestly believed that the statement was true, the complaint that the learned judge did not deal properly with the defence of qualified privilege is not justified. The jury found that the words used were defamatory. In the circumstances of this case amplified directions on the defence of qualified privilege could not have availed the appellant and this ground of appeal also fails.

Ground 3

The verdict of the jury is unreasonable having regard to the evidence

In support of this ground Counsel submitted that the learned trial judge did not adequately and clearly direct the jury on the case for the defence. He misdirected and misled them thereby causing an imbalance in the conduct and summation of the case to the prejudice of the appellant's case making the overall trial unfair and unreasonable.

Mr. Spaulding Q.C. said that the conclusion arrived at by the jury is not consistent with the ordinary meaning of the publication in issue. The significance of the different meanings including the dual meanings were never explained to the jury and it is a matter of speculation which meaning the jury accepted and in what sense. This situation was aggravated by the fact that there was misdirection that the defence had implicitly accepted that the words were libellous.

Further, Counsel contended that as malice had not been pleaded the jury relied on material that should not have been in evidence. The issue of qualified privilege was not properly dealt with by the learned judge and as a result the jurors were misled and confused about the principles involved and the issues in the case. The verdict and the award should not stand because of the cumulative effect of the various errors, non-directions, and misdirections in the case. These complaints have already been addressed in the preceding grounds. The respondent was named in the publication and it was open to the jury to find that the words taken as a whole, were defamatory.

Ground 4

The issue of the quantum of damages awarded

Counsel for the appellant submitted that the amount of damages awarded was excessive being unnecessary to compensate the respondent and restore his reputation in respect of any damage which he could reasonably have sustained by the publication.

The two meanings of the words rolled up in one were unfairly left to the jury without specific directions on the different significance of the alternative meanings. There was no specific allegation of the part played by the claimant in the shooting. Since the claimant was not on the scene

his references to persons who knew him such as his wife and girlfriend could not be credible.

There was no loss of income or other special damages pleaded and proved as required. He lost no status in the Police Force and on the contrary received commendations for his work. Save on the date of the publication referred to there had been no further publication of the report and the appellant never sought to justify the reference to the plaintiff having been on the scene of the incident.

Further, the respondent is only entitled to compensation for the impact on his reputation and the hurt feelings he experienced. Counsel contends that the award is manifestly excessive when compared to awards for libel in the Jamaican jurisdiction. He referred to several cases including ***Abrahams v The Gleaner Company and Dudley Stokes*** Privy Council Appeal No 86 of 2001 delivered on 14th July 2003. In the ***Abrahams*** case the claimant was a former Minister of Tourism for Jamaica whose prospects for work in the government service and in his related consultancy had dried up as a result of the publication of libellous statements in the media. His earnings had been in the region of several million dollars per year. There were many aggravating features that extended over a period of several years. The jury awarded damages in the sum of $80.7 million dollars that was reduced to $35 million on appeal

to this Court. On further appeal to the Privy Council the court expressly approved the test that was applied by this Court in determining an appropriate award. The question to be answered is whether a reasonable jury could have thought that the award in the instant case was necessary to compensate the respondent and to re-establish his reputation. An award that exceeds that requirement is subject to interference by this Court. In the case at bar I am not unmindful that the libellous publication related to the offence of murder or involvement with murder by an officer of the Jamaica Constabulary Force. I am however in agreement with the appellant's Counsel that having regard to the matters alluded to under this ground and the circumstances of the case the award made by the jury is manifestly excessive. It exceeds the amount that is reasonable and necessarily required for the protection of the respondent's reputation and his hurt feelings. For the above reasons I would dismiss the appeal as to liability and allow the appeal as to damages. I would reduce the award of damages to $3.5 million. I would also grant one third costs to the appellant to be taxed if not agreed.

FORTE, P

ORDER:

1. The Appeal as it pertains to liability is dismissed.
2. The Appeal against Damages is allowed and the Award of Damages is reduced to $3.5 Million.
3. One third costs to the appellant to be taxed if not agreed.