

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 128/97

**BEFORE: THE HON. MR.JUSTICE BINGHAM, J.A.
THE HON. MR.JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE PANTON,J.A.**

BETWEEN	LLOYD B. SMITH	1st DEFENDANT/ APPELLANT
A N D	WESTERN PUBLISHERS LIMITED	2nd DEFENDANT/ APPELLANT
A N D	CPL. RODNEY LEE	PLAINTIFF/ RESPONDENT

H. Charles Johnson for Appellants

Garth E. Lyttle for Respondent

19th June and July 31, 2001

BINGHAM J.A.:

Having read in draft the judgment of Walker, J.A., I entirely agree and have nothing to add.

WALKER, J.A.:

On September 17, 1994 the second appellant of which the first appellant was the Managing Director and Editor published an article on the front page of its newspaper known as The Western Mirror. The article was captioned "Police

station being used as drug point? Five Policemen transferred". As a result of this publication the respondent who was then a Corporal of Police of the Jamaica Constabulary Force stationed at the Whitehouse police station sued the appellants for libel. The action, which was defended, was tried by Theobalds, J who on October 22, 1997 gave a judgment for the plaintiff (respondent) in the sum of \$750,000.00 with costs to be agreed or taxed. It is from this judgment that the present appeal is taken.

The article, captioned as aforesaid, reads:

"Five of the six regular policemen at the Whitehouse Police Station in Westmoreland have been transferred, effective last Thursday (September 15, 1994). Reports reaching The Western Mirror are that the station is being used as a 'drug trans-shipment point'.

The five police officers are Sergeant Clive Forbes, Corporal Rodney Lee, Acting Corporal Alva Douglas, Constable M. A. Gabbidon and Constable C. Gabbidon.

Allegations are that recently a quantity of 37 kilograms of coke was found at sea by fishermen. The drug was brought ashore and soon began to filter into the village. It is alleged that some of the coke went into the hands of the police then disappeared. It is further reported that words got to the ears of the higher authority who carried out investigations, leading to the men's transfer.

Speaking with Police Superintendent for the parish, Charles Scarlett, who ordered the transfer, he said that he had heard about the allegations but this was not true because contrary to popular belief, the transfers were routinely done and had nothing to do with any coke. He said that he was not aware that the station was being used as a drug point and that after hearing the rumours, preliminary investigations were actually done which had not revealed any evidence to support that claim.

The superintendent says that anyone who has substantial information is being urged to pass it on to him, Assistant Commissioner for Area One, or the Police High Command in Kingston. The matter, he has said, will be thoroughly investigated and dealt with. Mr. Scarlett added that he was hoping that the transferred officers would be able to utilize their training in their new posts."

The effective ground of this appeal complained as follows:

"The Judge erred in law in finding that the Defendants' plea of 'fair comment' could not stand, given the circumstances".

For the appellant Mr. Johnson submitted quite simply that the transfer of the policemen of which the article made mention was factual and that the respondent had failed to prove that the appellants had been actuated by malice. Contra, Mr. Lyttle argued strenuously that the element of malice was to be inferred from the fact that the article was published notwithstanding that, as was revealed in the article itself, Superintendent Scarlett had been consulted about the allegations mentioned in the article and had advised that those allegations were untrue.

It is a defence to an action of libel that the words of which complaint is made are fair comment on a matter of public interest. As Scott L.J. put it in

Lyon v Daily Telegraph [1943] 1 K.B. 746 at 753:

"The right of fair comment is one of the fundamental rights of free speech and writing ... and it is of vital importance to the rule of law on which we depend for our personal freedom".

The right is a "bulwark of free speech": (Faulks Committee Cmnd. 5909 [1975] at para 15). Where the media are concerned, they have a right of fair comment which they share with every member of the public: see **Campbell v**

Spottiswoode [1863] 32 L.J. Q.B. 185 at p. 201. A newspaper has the right to make fair comment upon a public officer or person occupying a public situation such as a police constable. Of this there can be no doubt. In **Langlands v Leng** [1916] S.C. (H.L.) 102 at p. 110 Lord Shaw said:

“ A newspaper has the right, and no greater or higher right, to make comment upon a public officer or person occupying a public situation than an ordinary citizen would have”.

Previously in **Arnold v King - Emperor** [1914] 83 L.J. P.C. 299 at p. 300 Lord Shaw had said:

“To whatever lengths the subject in general may go, so also may the journalist, but, apart from statute law, his privilege is no other and no higher... the range of his assertions, his criticisms or his comments, is as wide as, and no wider than, that of every other subject”.

But the defence of fair comment is defeated by proof of express malice. In the context of the tort of libel, malice does not necessarily mean personal spite or ill will against a plaintiff. “Malice in the actual sense may exist even though there be no spite or desire for vengeance in the ordinary sense”: (per McCardie J in **Pratt v B.M.A.** [1919] 1 K.B. 244 at p. 275). Again Lord Campbell C.J. said in **Dickson v Wilton** [1859] 1 F& E 419 at p. 427:

“Any indirect motive other than a sense of duty is what the law calls malice”.

In the present case there can be no doubt that the transfer of the policemen was factual. Equally there can be no doubt that that administrative exercise was a matter of public interest. Therefore, the only question remaining is whether the appellants' plea of fair comment is destroyed by malice. For his part the trial judge did not give a reasoned judgment. He gave an oral

judgment of which no note exists for the scrutiny of this court. The test of malice always is, whether there was a desire to injure the person who is defamed; and the clearest evidence of malice is where a statement is made with the knowledge that it is false. Here the onus of proving the existence of malice lay on the respondent who gave no evidence in that regard. Furthermore, the existence of malice could not be inferred from the article itself. The sting of the publication lay in the first part of the caption which read:

"Police Station being used as drug point?"

and also in the body of the article where it was stated:

"Allegations are that recently a quantity of 37 kilograms of coke was found at sea by fishermen. The drug was brought ashore and soon began to filter into the village. It is alleged that some of the coke went into the hands of the police then disappeared. It is further reported that words got to the ears of the higher authority who carried out investigations, leading to the men's transfer".

The fact of the matter is, however, that the caption merely posed a question. It did not purport to state a fact. Where the other passage is concerned, it was published in a context which made it clear that the reports reaching the newspaper had been checked and that the Superintendent of Police for the parish, Charles Scarlett, had said that the allegations being banded about were not true and that the transfer of the policemen had been routinely done. The article also made it clear that Superintendent Scarlett had denied any knowledge that the police station was being used as a drug point, and that preliminary investigations had unearthed no evidence to support such a claim. The article contained no evidence of personal spite or other improper motive on

the part of the appellants or either of them. There was, in fact, no evidence adduced to destroy the appellants' defence of fair comment.

It was for these reasons that I concurred with my learned brethren in allowing this appeal and in entering a judgment for the defendants/appellants with costs here and below to be agreed or taxed.

PANTION, J.A.:

I agree.