REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No P-022 of 2016
CV 2014-02122

BETWEEN

PRAKASH RAMADHAR **Appellant**

AND

KISHORE RAMADHAR
RUDOLPH A. HANAMJI
SATU-ANN RAMCHARAN **Respondents**

PANEL: I. ARCHIE CJ
G. SMITH JA
P. MOOSAI JA

APPEARANCES: Mr. R. Maharaj SC, Mr. L. Lalla, Mr. M. Rooplal
for the Appellant

Mr. M. Campbell instructed by Mr. Y. Saunders
for the 2nd Respondent
Mr. F. Gilkes for the 1st and 3rd Respondents

DATE DELIVERED: 14th July, 2017

I have read the judgment written by Smith JA.

I agree with it and have nothing to add.

.....

I. Archie
Chief Justice

JUDGMENT

INTRODUCTION

1. The Congress of the People (COP) is a political party in Trinidad and Tobago. At the time of the events giving rise to this case, the Appellant was the political leader of the COP. He was also the member of Parliament for the constituency of St Augustine and the Minister of Legal Affairs and Justice.

The Respondents held various positions in the COP.

2. Following a meeting of the National Council of the COP on 10th November, 2013 the Appellant made certain statements at a press conference. The Respondents claimed that these statements were defamatory of them and they sued the Appellant. After a 2 day trial, the trial judge, Kokaram J, upheld the Respondents' claim against the Appellant and awarded them various sums of money as damages.

3. The Appellant now appeals the decision of the trial judge on the basis that he had properly made out 4 defences to the libel claim of the Respondents. I summarize them as follows:-

(i) That the words spoken at the press conference were neither referable to nor defamatory of the Respondents;

(ii) The words were the subject of qualified privilege;

(iii) The words were a proper reply to an attack by the Respondents; and

(iv) The words were fair comment on a matter of public interest.

4. For the reasons that appear later in this judgment, I find that the decision of the trial judge cannot be faulted on the grounds advanced by the Appellant and accordingly I would dismiss this appeal.

BACKGROUND FACTS

5. Before delving into the issues it is necessary to summarize the course of events that led to the Appellant's statements at the press conference on 10th November 2013.

6. In 2010 the COP was part of a coalition government that had won the national elections for Trinidad and Tobago. The coalition government was known by the name, the People's Partnership. The main party in that People's Partnership was the United National Congress (UNC). The People's Partnership replaced the former government of the People's National Movement (PNM) political party.

7. On 21st October 2013, local government elections were held in Trinidad. The performance of the People's Partnership at the local government elections was disappointing. The PNM won the majority of the local government Corporations.

8. Prior to these local government elections the Respondents were openly critical of the Appellant's role in the People's Partnership and also of the COP's role in the People's Partnership.

9. The Respondents, Kishore Ramadhar (who incidentally is the Appellant's brother) and Rudolph Hanamji, had desired to vent their criticisms of the Appellant and the COP by way of 2 motions; namely a notice to quit motion and a resurrection motion. These motions had been delayed to the meeting of the National Council of the COP.

10. The National Council of the COP is its governing body. As the trial judge observed, "***The National Council is the governing unit of the COP and is responsible for the implementation of the fundamental principles aims and objectives and formulation of policies and programmes of the COP and for ensuring adherence to the COP's constitution and Code of Ethics***."[1]

11. The meeting of the National Council was held on the 10th November 2013. Members of the media were invited to this meeting but they waited outside the meeting room.

12. The atmosphere of the meeting was highly charged. The trial judge described it as "***the perfect storm***."[2]

13. The Respondents, Ramadhar and Hanamji eventually withdrew their motions after voicing concerns over the proceedings. However, significantly at the meeting, a veritable bombshell was presented. One Mr. Iqubal Hydal, a founding member of the COP, read out a letter purportedly signed by the Respondents. That letter and a CD which contained the membership information of the COP were purportedly sent to the PNM before the local government elections. The letter alleged, inter alia, that certain candidates of the COP were ineligible to run as COP candidates at the local government elections.

14. The trial judge summarized the effect of identifying the letter with the Respondents as containing "***an imputation that the Claimants*** (Respondents) ***had stolen confidential information and betrayed their party, that they were unethical, corrupt, acted in bad faith and adverse to the interests of the party; violating the trust reposed in them by abusing their access to the COP database; and had engaged in the highest act of treachery against the party by stealing information from the party and handing it over to the Opposition party***."[3]

15. Importantly, the trial judge found as a fact that "***These allegations were not true and no attempt was made to justify the substantive allegations***...". Further he found that "***Mr. Hydal… acted recklessly in acting on this information*** (in the letter). ***He could not vouch for its authenticity. He had no knowledge of the source of the document…and there was no urgency***

[1] See Judgment of Trial Judge at paragraph 12
[2] See Judgment of Trial Judge at paragraph 17
[3] Ibid at paragraph 45

to add this allegation to the debate. The only reasonable inference to be drawn is that the letter was added with invective to tarnish the Claimants (Respondents) ***or in local parlance to "do for them"***."[4] Mr. Hydal, had been sued along with the Appellant. The trial judge held that Mr. Hydal's defences to defamation failed and he awarded the Respondents damages against Mr. Hydal. There is no appeal by Mr. Hydal.

16. But the story continues. After the letter was read "***confusion erupted the members became rowdy and unruly and Mr. Hanamji was involved in a fracas with other members of the meeting***."[5] As a result, the chairman of the COP, Mrs. Carolyn Seepersad-Bachan successfully moved a motion for Mr. Hanamji to be ejected from the meeting. Mr. K. Ramadhar had also left the meeting. A motion was eventually passed at the meeting suspending the Respondents pending an investigation into their conduct. The 3rd Respondent had also left the meeting to inform Mr. K. Ramadhar at his house of the events.

17. After the meeting a televised press conference was convened. Mrs. Seepersad-Bachan and the Appellant made statements at that press conference.

18. At the press conference, Mrs. Seepersad-Bachan spoke before the Appellant. She mentioned that the Respondents had been discouraging candidates from running for office in the recently concluded local government elections and that the Respondents had run ground campaigns against many of the candidates. She stated that "***we were presented this morning"*** with the bombshell letter addressed to the PNM which I referred to above "***purportedly signed***" by the Respondents. She also mentioned that the letter indicated that it had attached a CD of all the membership of the COP. This she considered as "***inimical to the party's interests and we condemn that type of behavior of our members***." She then mentioned that the Respondents had been suspended from the membership of the party pending an investigation.[6]

19. The trial judge held that Mrs. Seepersad-Bachan's words in the press conference carried the meanings as stated in paragraph 14 above. He had heard her testimony and found that "***As the Chairman of the party she added force to the allegations and gave "legs" to the story…The letter was unauthenticated and from dubious sources. No attempts at prior verification was***

[4] Ibid at paragraph 46
[5] Ibid at paragraph 19
[6] See Judgment of Trial Judge at paragraph 52 for full text of Mrs. Seepersad-Bachan's Statement

made nor any attempt to balance the report with the Claimants' (Respondents') ***side of the story nor of course attempts to get their comments as the motions were passed in their absence. There was absolutely no cause to delve in the details of these allegations and for her to give the allegations such force that it morphed into truth…In my view it was not the product of responsible speech***."[7]

20. The trial judge found the case of defamation of the Respondents proved as against Mrs. Seepersad-Bachan and awarded varying sums of damages to the Respondents. There is no appeal from Mrs. Seepersad-Bachan.

The Appellant's Statement at the Press Conference

21. The Appellant spoke at the press conference after Mrs. Seepersad-Bachan. The trial judge found that "***What was bad in the reporting of the Chairman*** (Mrs. Seepersad-Bachan) ***was made worse by the Political Leader*** (the Appellant) ***when he made his speech. He was overly critical of the conduct of the Claimants*** (Respondents) ***condemning them of the very allegations which he sought to characterize as mere allegations."***[8]

I set out the text of the statement and emphasize parts.

"*Contrary to the many efforts by a few to destroy the party, the party stood in its resolve (…). Those who moved motions of no confidence against the leader of this party knew full well, that they grounded their ambitions in an effort to destroy this party by attacking the leader. They made it clear in other statements that <u>their intent was to destroy this party and that their efforts had nothing to do with the lack of confidence in the leader, that everything to do with their wanting to destroy the leader and therefore the party</u>. The party today resoundingly rejected them and they know full well they could not have succeeded did not pursue their trouble making efforts in the face of the National Council. They would do so in the media, in solitary effort where they had open space to spread their poison but here where it mattered, where their voices would have been heard so the party would say whether we agree or reject you, they ran away like cowards.*

[7] See Judgment of Trial Judge at paragraph 53
[8] See Judgment of Trial Judge at paragraph 55

And then to have found that the very personalities who have been making all the mischief on the outside, that this letter has come to us and I make no pronouncements as to its authenticity, it may be all the media they have garnered for the last several weeks or months, maybe they should go to the media and explain whether they did in fact put their signature to such a letter, betraying the party by disclosing its membership list, something we hold very dear. And let me explain why it is important, when people join a political organization they are much afraid by that they may be discriminated against by the mere fact that they hold membership in a party. Many may not feel that way, but many do feel that way, why we held it in terms of a high level of confidentiality.

If it is true that they did do these things then that is the highest level of treachery, that we condemn in politics generally and in the COP unreservedly. And that is why the suspension, without a finding of guilt, and that is why we ask that a proper and full investigation into the matter and if it proved true, the next step is expulsion from the party (...)".

22. The trial judge found that "***The speech went well beyond the boundaries of responsible speech and was commentary based on facts which were simply not true. Far from a legitimate reply to an attack on his leadership it was a collateral unrelated attack on the Claimants*** (Respondents) ***with the intention of bolstering his position as leader of the party and the direction of the party at the expense of the Claimants'*** (Respondents') ***reputation***."[9]

The trial judge found that the Appellant's "***embellishment of the report of the Chairman gave the allegations even more credibility and currency. His attempt to couch his speech in terms of not accepting the truth of the letters was diluted by the force that he gave to the actual substance of the charges***."[10]

He found that the Appellant used the speech as "***an opportunity to silence the detractors***"[11]; they were "***simply hung out to dry and tried in public even before they knew of the charges levelled against them***."[12]

[9] See Judgment of Trial Judge at paragraph 56
[10] Ibid at paragraph 57
[11] Ibid
[12] See Judgment of Trial Judge at paragraph 58

He further found that his speech was a disproportionate response -"***Using a nuclear weapon of the press conference, so to speak, to nuke a fly***."[13]

He found that the Appellants' defences to the defamation action failed and he awarded damages to the Respondents as follows:-

$90,000 to K. Ramadhar

$90,000 to R. Hanamji

$75,000 to S. Ramcharan

The Appellant now appeals this judgment against him.

23. A point of note is that after the National Council Meeting and the press conference of the 10th November 2013, the investigatory committee concluded their inquiry in respect of the allegations that the Respondents had sent the bombshell letter and CD to the PNM. The committee concluded in a report dated 19th July 2014 that the allegations against the Respondents could not be sustained. The trial judge also found that there was no evidence of any action taken either by the Appellant and the other parties sued or by the COP to publicly absolve the Respondents of the charges.[14]

ANALYSIS

24. I will deal with the arguments presented on appeal in four sections as follows:

A. The words were both referable to and defamatory of the Respondents
B. The words were not covered by qualified privilege
C. The words were not a proper reply to an attack
D. The words were not fair comment on a matter of public interest.

A. The words were referable to and defamatory of the Respondents

[13] Ibid at paragraph 59
[14] See Judgment of Trial Judge at paragraph 23

25. Words which are alleged to be defamatory are normally construed in their natural and ordinary meaning. That natural and ordinary meaning is "***the meaning in which reasonable people of ordinary intelligence, with the ordinary person's general knowledge and experience of worldly affairs, would be likely to understand them***."[15]

Further, the natural and ordinary meaning of words may "***include any implication or inference which a reasonable reader guided not by any special but only general knowledge, and not fettered by any strict legal rules of construction would draw from the words***."[16]

26. The trial judge correctly stated that the relevant law to apply as adapted to Trinidad and Tobago:

"***The Court would give the words published its natural and ordinary meaning it would have conveyed to the ordinary reasonable reader of the Sunday Guardian/Newsday/Express reading the article once. The traits of such a person are one who is not naïve; she can read between the lines but he is not unduly suspicious, nor avid for scandal. He would not select one bad meaning where other, non-defamatory meanings are available. The court must read the entire publication and eschew over-elaborate analysis and, also too literal an approach. The natural and ordinary meaning refers not only to the literal meaning of the words but also to any implication or inference that the ordinary reasonable reader would draw from the words***."[17]

27. Applying this test, the trial judge found that the Appellant's "***speech following closely on the heels of her*** (Mrs. Seepersad-Bachan) ***statement does incorporate and adopt(s)***"[18] Mrs. Seepersad-Bachan's statements which were defamatory of the Respondents. He also found that the words in the Appellant's speech carried the meanings as outlined earlier in the judgment, namely, that "***the Claimants*** (Respondents) ***had stolen confidential information and betrayed their party, that they were unethical, corrupt, acted in bad faith and adverse to the interests of the party; violating the trust reposed in them by abusing their access to the COP database; and***

[15] Gatley on Libel and Slander 12th ed paragraph 3.17
[16] Gatley on Libel and Slander 12th ed paragraph 3.18 citing *Jones v Skelton* [1963] 1 WLR 1362 PC
[17] See Judgment of Trial Judge at paragraph 31
[18] Ibid at paragraph 30

had engaged in the highest act of treachery against the party by stealing information from the party and handing it over to the Opposition party."[19]

28. In arriving at this conclusion, the trial judge heard and saw the witnesses giving evidence over a period of 2 days and considered the rest of the evidence including the words spoken at the press conference.

29. The exercise of deciding on the ordinary meaning of words is essentially one of impression; "***provided that the impression is not of what the words mean but of what a jury could sensibly think they meant. Such an exercise is an exercise in generosity, not in parsimony. It is why, once fairly performed, it will not be second-guessed on appeal…the longstop is the jury***."[20] Further, *"**where a judge has to determine meaning it has been said that the correct approach is to ask himself what overall impression the material made on him…**"*.[21]

30. In the present matter, as I indicated before, the trial judge was patently aware of the law to apply to the facts and as the "jury" or arbiter of the facts, he applied the law to the facts and circumstances before him. The exercise was fairly performed and in the present case, I find no reason to second guess the impressions he formed and the findings he made on the contested facts before him.

31. The words used were in my view capable of creating the impressions formed on the trial judge and conveying the defamatory meanings found by him.

32. In oral submissions the Appellant sought to clarify his arguments on the natural and ordinary meaning of the words under 3 heads, namely:

(i) There was no identification of the Respondents;
(ii) There was no pleading or proof of adoption of Mrs. Seepersad-Bachan's statements about the letters; and
(iii) The words were not defamatory in their natural and ordinary meaning.

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[19] See Judgment of Trial Judge at paragraph 56. Note that the reference in the judgement to "paragraph 41 above" is an error and should really be a reference to paragraph 45 of the Judgment; and See pages 16 and 17 of the transcript of proceedings in the Court of Appeal especially page 17 lines 20-25
[20] See Gatley on Libel and Slander 12th ed paragraph 3.14 citing *Berezovsky v Forbes Inc.* [2001] EWCA Civ 125
[21] See Gatley on Libel and Slander 12th ed paragraph 3.14

33. These arguments are without merit.

34. With regard to (i) and (ii) above, which for the sake of convenience I summarize as Identification and Adoption, I note the following four factors:

First, in the Statement of Agreed Facts for the trial, dated 6th March 2015, at paragraph 9, the parties agreed that at the Press Conference, the Appellant "***also made a statement in which he referred to the said letter dated 1st October, 2013 and its contents and mentioned that the letter purported to have been signed by the Claimants*** (Respondents)."

That letter of the 1st October 2013 is the same bombshell letter read out by Mr. Hydal and expanded on by Mrs. Seepersad-Bachan, which the trial judge found was advanced for the purpose of defaming the Respondents. The parties had previously agreed that the Appellant's references to the letters in his press conference were references to the bombshell letter that had been associated with the Respondents. There can be no argument that the Appellant was referring to and had therefore identified the Respondents in his press conference. Further, the Appellant himself went on to make comments on the letter by saying that if it was signed by the Respondents, it was a betrayal of the party and "***the highest level of treachery***" which he condemned. There can be no fault in the finding of the trial judge that the Appellant adopted the statements in the letter.

Second at paragraph 11 of the Statement of Case, the Respondents had expressly pleaded that the Appellant (inter alia) adopted the letter as his own.

Third, I also note that these issues of identification and adoption were not mentioned by the trial judge as arising for his consideration.[22] This supports the argument of the Respondents that these were never live issues at the trial.

35. Fourth and in any event, in Mrs. Seepersad-Bachan's prior address at the press conference, she had expressly identified the Respondents with the bombshell letter, and, as the trial judge found, in her statement she had made defamatory imputations against the Respondents in respect of that letter. Having heard and seen the witnesses and the rest of the evidence at the trial, the trial judge formed the impression and found as a fact that the Appellant's speech

[22] See Judgment of Trial Judge at paragraph 26

"***following closely on the heels of her*** (Mrs. Seepersad-Bachan's) ***statement does incorporate and adopt(s) her statements***."[23]

There has been no argument that the trial judge's impression and/or findings of fact were inaccurate or that they could not arise on the evidence presented at trial.

36. Given these four factors, I find that there is no merit in the issues of Identification and Adoption.

37. With respect to (iii) which for convenience I summarize as the defamation in the natural and ordinary meaning of the words, the trial judge found that the words of the Appellant at the press conference carried the same defamatory meanings as he had previously outlined with respect to the other parties who had identified the bombshell letter with the Respondents.[24]

I also reiterate that the trial judge was patently aware of the balancing act he had to perform with respect to the natural and ordinary meaning of words. In short he could not be oversensitive or naïve.[25] He heard the testimony of the witnesses and the rest of the evidence; specifically he would have seen the cross examination of the Appellant and formed an impression of the man and of the circumstances. It was open to him on these facts to conclude that the words used in the statement of the Appellant in the context of the press conference were meant to and did have the defamatory meanings and imputations that he had ascribed to them.

38. The trial judge commendably also noted that the Appellant had attempted to put certain caveats on his comments "***in terms of not accepting the truth of the letters.***"[26] So, for example, the Appellant had stated in his speech "***I make no pronouncements as to its authenticity***" (the letter) and "***If it is true that they did these things***" (send the letter and party list to the PNM). However, having seen and heard the Appellant's testimony he formed an impression that the Appellant's "***attempt to couch his speech in the terms of not accepting the truth of the letters was diluted by the force he gave to the actual substance of the charges***."[27] Further he found that "***Obviously upset about the Claimants*** (Respondents) ***challenge it was an opportunity to silence the detractors***." The trial judge therefore concluded that "***Taking <u>the speech in its entirety</u> and***

[23] See Judgment of Trial Judge at paragraph 30
[24] See Judgment of Trial Judge at paragraph 56 and; See paragraphs 14, 27 and Note 18 above
[25] See paragraph 26 above
[26] See Judgment of Trial Judge at paragraph 57
[27] Ibid

in its <u>proper context</u> the Claimants were simply hung out to dry and tried in public even before they knew of the charges levelled against them."[28] (my emphasis)

39. This was within the wide range of impressions or stings of the Appellant's speech and I am not prepared to second guess the trial judge's findings that in their natural and ordinary meaning, on the totality of the circumstances, the words used in the Appellant's press statement were defamatory of the Respondents.

B. The words were not covered by qualified privilege

40. The Appellant sought to invoke the defence of qualified privilege based upon the **Reynolds**[29] case.

Although this defence is normally used by Newspapers, it can be extended to a press conference as occurred in this case.

41. The privilege attaches to reports based upon the duty-interest principle. The newspapers/publisher of the information has a duty to publish matters of public concern. The public has a legitimate interest to receive such information.

42. In the **Reynolds** case the House of Lords expounded 10 non exhaustive criteria of responsible journalism which affect the availability of the **Reynolds** privilege. They are:

1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
2. The nature of the information, and the extent to which the subject-matter is a matter of public concern.
3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
4. The steps taken to verify the information.
5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.

[28] Ibid
[29] *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 HL

6. The urgency of the matter. News is often a perishable commodity.
7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
8. Whether the article contained the gist of the plaintiff's side of the story.
9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
10. The circumstances of the publication, including the timing.[30]

43. The "balancing operation" in respect of the effect of all or any of the criteria is a matter best left for a judge.[31] In the **Reynolds** case factor 8 seems to have been the decisive point in deciding the case. Namely, the subject/plaintiff's side of the story was not contained in the article and the defence of qualified privilege was ruled out.[32]

44. In the present matter the Appellant admitted in cross-examination that he only became aware of the bombshell letter during the stormy meeting of the National Council on the very morning of the 10th November 2013. His statement to the press occurred at the conclusion of that meeting. Like in the **Reynolds** case, the statements at the press conference never gave the gist or any mention of the Respondents' side of the story.

Additionally, the trial judge found the following facts which have not been challenged; namely; that "***The letter was unauthenticated and from dubious sources. No attempts at prior verification was*** (sic) ***made nor any attempt to balance the report with the Claimants' side of the story nor of course attempts to get their comments as the motions*** (for their suspension and investigation) ***were passed in their absence***."[33] Criteria 3, 4, 7 and 8 of the **Reynolds** criteria were not observed.

The trial judge also found that the Appellant used the letter as an opportunity "***to silence his detractors***",[34] "***to hang them out to dry and*** (be) ***tried in public even before they knew of the charges levelled against them***."[35] Criteria 1, 9 and 10 seemed not to have been observed.

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[30] Ibid per Lord Nicholls at page 205
[31] *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 HL per Lord Nicholls at page 205
[32] Ibid at page 206
[33] See Judgment of Trial Judge at paragraph 53
[34] Ibid at paragraph 57
[35] Ibid at paragraph 58

He therefore concluded that the Appellant's statement to the press was not responsible speech but an attack to destroy his opponents by the use of a "***nuclear weapon of the press conference to nuke a fly.***"[36] Hence the defence of qualified privilege failed.

45. In the light of his application of the **Reynolds** criteria to the facts, I find no fault with the trial judge's conclusion. At the very least, he was not plainly wrong in his fact finding and his application of the law to the facts and I am not prepared to second guess these findings.

C. The words were not a proper reply to an attack

46. At paragraph 35 of his judgment, the trial judge set out the defence of Reply to Attack. I summarize it as follows.

Where a person's character or conduct has been attacked, that person is entitled to answer or reply to such an attack and any defamatory statements he makes about his attacker(s) will be privileged.

The privilege is a species of conventional qualified privilege. The attack must be made bona fide and be fairly relevant to the attack. The law allows a considerable degree of latitude in such a reply to an attack and does not concern itself with the niceties of the reply.

47. However, the privilege can be lost if it is not a proportional response to an attack or was mere retaliation.[37] Further, as with conventional forms of qualified privilege, it would be lost if there was proof of express malice.[38]

48. In this case, the trial judge considered the statement as a whole and heard the evidence of the witnesses on this issue. Having done so he formed the opinion that the Appellant's statement to the press was both (a) not a proportional response to an attack and (b) mere retaliation.[39] I support his findings and am not prepared to second guess them. Further, I find that based on the trial judge's findings, the privilege (if any) would have been lost because of express malice on the part of the Appellant.

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[36] Ibid at paragraph 59

[37] See Judgment of Trial Judge at paragraph 35 and see generally Gatley on Libel and Slander 12th ed paragraph 14.51

[38] See Gatley on Libel and Slander 12th ed paragraph 17.1 et seq

[39] See Judgment of Trial Judge at paragraphs 59, 56-58; See paragraph 49 below

49. After weighing the testimony of the witnesses and the rest of the evidence, especially so the complete statement and while not being swayed by any fine principles of propriety, the trial judge characterized the Appellant's press statement in the following terms:

(i) It was a collateral and unrelated attack on the Respondents.
(ii) It was an opportunity to silence his detractors and even if there was an ultimate finding of innocence, the damage would have already been done.
(iii) The Respondents were simply hung out to dry and tried in public even before they knew of the charges levelled against them.
(iv) The Appellant's speech was an attack designed to destroy his opponent with a disproportionate response.
(v) The press conference was a nuclear response to "***nuke a fly.***"[40]

These statements collectively and individually show that the trial judge formed the impression that the statements had elements of both disproportionality and of being mere retaliation. The trial judge acted within his remit on the evidence and was, on these facts, not wrong to dismiss the defence of reply to attack.

50. In libel, express malice can be proved, inter alia, by proof of improper motive in making a statement. One form of improper motive is a decision to injure a claimant. Such proof of malice negatives the defence of qualified privilege.[41]

In this case the trial judge's findings clearly show that the dominant motive of the press conference was to injure the claimants and hence there was proof of malice such as would negative a defence of qualified privilege based on reply to attack. These findings were as stated at paragraph 49 above, especially so the findings that:

The Appellant used the press conference

(i) as an opportunity to silence his detractors and even if there was an ultimate finding of innocence the damage would have been done;
(ii) To hang the Respondents out to dry and be tried in public even before they knew of the charges levelled against them; and

[40] See Judgment of Trial Judge paragraphs 56-59
[41] See Gatley on Libel and Slander 12th ed paragraph 17.3 citing *Horrocks v Lowe* [1975] AC 135 HL per Lord Diplock at page 149

(iii) As an opportunity to destroy his opponent with a disproportionate response i.e to nuke a fly.

51. The defence of reply to attack is without merit.

D. The words were not fair comment on a matter of public interest

52. It is a defence to defamation that the words complained of were fair comment on a matter of public interest. However, all parties accept that the commentary in the words used must be based on a substratum of facts that are true. If the facts upon which the comments are based are not substantially true, this defence fails.

53. The trial judge held that the words used by the Appellant with respect to the bombshell letter, were commentary on facts which were simply not true. Therefore the defence of fair comment failed.

54. The Appellant stated that the letter was a "***betrayal of the party***", manifested "***the highest level of treachery***" and was to be condemned. Further, as stated above, the commentary on the letter bore the meanings as stated in paragraph 45 of the trial judge's judgment and repeated at paragraphs 14 and 27 above.

55. All these statements, comments and meanings were based on a presumption that it was the Respondents who wrote the bombshell letter. The COP's investigation found that the allegations, inter alia, that the Respondents signed the letter could not be proved. Neither could the Appellant (nor any of the other Defendants) in the high court trial prove that the Respondents signed or wrote the letter. The substratum of fact for the commentary could not be proved. It was not shown to be true. Hence the defence of fair comment could not be made out.

56. Even though the Appellant purported to put caveats on his commentary by the choice of words like "***if it is true that they*** (the Respondents) ***did these things,"*** as I have already indicated, the trial judge, after hearing and seeing the Appellant and the other witnesses and considering the rest of the evidence and the totality of the speech, formed the impression that those caveats "***were diluted by the force that he*** (the Appellant) ***gave to the actual substance of***

the charges."[42] The commentary was squarely an assertion against or attack on the Respondents based on a substratum of fact that was simply not true.

57. There is no reason to overturn the trial judge's finding that the defence of fair comment fails.

CONCLUSION

58. I would dismiss this appeal and I would award the Respondents the costs of this appeal.

……

G. Smith

Justice of Appeal

[42] See paragraph 38 above