

IN THE COURT OF APPEAL FOR EAST AFRICA  
AT KAMPALA

**CORAM: (LAW AG. V-P, LUTTA AND MUSTAFA, JJA)**

**CIVIL APPEAL NO 44 OF 1971**

BETWEEN

JAYANTILAL SOMABHAI SHAH .....APPELLANT

AND

1. CONSOLIDATED PRINTERS Ltd)

2. UGANDA ARGUS NEWSPAPERS LIMITED)

3. CHARLES HARRISON).....RESPONDENTS

(Appeal from a judgment and decree of the High Court of Uganda at Kampala  
(Youds, J.) dated 11<sup>th</sup> May, 1971 in Civil Suit No. 456 of 1968)

**22<sup>nd</sup> December,1971**

The following judgments were read:-

**MUSTAFA, J A**

On the 25<sup>th</sup> January, 1968 the newspaper known as Uganda Argus published an article on its front page as a news item. The article was supposed to be a summary and edited version of a hand-out released by the Ministry of Information of the Uganda Government the previous day, 24<sup>th</sup> January, 1968.

The appellant complained that he was libelled in the article and sued the Consolidated Printers Ltd., Uganda Argus Newspapers Ltd. and Charles Harrison who were the printers, publishers and editor respectively of the Uganda Argus, claiming damages for the alleged libel.

The learned trial judge found that the publication was defamatory and that the publication referred to the appellant. He also found that the article was published on an occasion of qualified privilege and

that the respondents were not actuated by malice.

He dismissed the action of the appellant. He went on to find that if he was wrong in dismissing the action he would have assessed general damages at Shs.4, 000. From that judgment, the appellant appeals. There is no cross-appeal as regards the findings of the learned judge in respect of (1) that the publication was defamatory and (2) that it referred to the appellant.

The appellant's appeal is based on two main grounds. The first ground of appeal is that the learned trial judge was wrong in holding that the article was published on an occasion of qualified privilege and (2) that even if it was the privilege was destroyed on account of factual inaccuracy and material alterations which amounted to distortion constituting malice.

I think it is convenient at this stage to set out the hand out released by the Ministry of Information and the article complained of.

The hand-out reads as follows:-

"UGANDA NEWS

Published by The Ministry of Information Broadcasting & Tourism

January 24<sup>th</sup>, 1968

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No. 218/68 (FXBK).

A spokesman of the Ministry of Internal Affairs said today that ten Ugandans of Asian Origin had been apprehended in order to assist the Police in their enquiries relating to suspected illegal practices in the Immigration Department.

The spokesman also confirmed that the apprehension of those persons was related to matters concerning five immigration officers who have been suspended from the exercise of their duties.

He concluded by appealing to the public to render all possible assistance to the Police when approached for information in matters connected with this enquiry."

The article complained of as published in the Uganda Argus reads:-

#### “ASIANS HELD

Ten Ugandan Asians have been arrested in connection with an alleged passport and immigration racket, it was disclosed yesterday.

The ten have been arrested 'in order to help the police in their inquiries relating, to suspected illegal practices in the Immigration Department,' a Ministry of Internal Affairs spokesman said yesterday.

He confirmed that the arrests were connected with the suspension from duty of five immigration officers.

The Ministry appeals to the public to help the police when approached for information in matters connected with the inquiry. "

Mr. Gautama for the appellant has submitted that the hand-out released by the Ministry of Information contained libellous and inaccurate matter. Evidence was led by the appellant to show that he was not arrested because of any connection with alleged illegal practices in the Immigration Department, that he was in fact detained under the Emergency Regulations and that he was given no other reason for his detention.

Mr. Gautama submitted that if the hand-out released by the Ministry of Information was inaccurate and libellous, the respondents would be liable in damages for publishing such libellous matter. He submitted that Government pronouncements which are libellous are subject to the ordinary law of defamation, and a newspaper publishes such pronouncements at its own risk.

The respondents did not seek to justify what they had published, and Mr. Gautama submitted that the respondents had not given any evidence of facts or circumstances creating the occasion which gave rise to qualified privilege.

As such there was no basis for the existence of qualified privilege and the respondents therefore could not invoke that as a defence.

In this connection the learned judge has held that the newspaper article was published in the discharge of a public duty which all responsible newspaper proprietors and editors have to perform of keeping the general public informed of matters of public concern and interest.

There was evidence that this was a special release by the Ministry of Information and that the respondent newspaper was specially asked by the ministry to collect the release for publication. It was an important public announcement and although the respondent newspaper was under no physical obligation to print any Government or Ministry announcement, it was under a strong moral obligation to do so as the newspaper was a medium of mass information for the public of Uganda and the Government or Uganda relied on this newspaper for the propagation of its policies and public announcements.

The learned judge held that in publishing the article the newspaper discharged a moral and public duty in communicating Government inspired announcements to the general public and the general public had a corresponding interest or duty to receive and read such information.

The learned judge quoted from the case *Adam v. Ward (1917) A.C. at p. 334*

" 'A privileged occasion is ...an occasion where the person who makes a communication has an interest or 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.' "

The learned judge came to the conclusion that in the circumstances the respondents, although having published a defamatory and an untrue article concerning the appellant, did not incur legal liability unless the appellant could prove malice.

He held in effect that the publication of the article was done on an occasion of qualified privilege. In the circumstances of this case the learned judge was quite justified in so finding. In this connection I refer to a head note in *Mangena v. Wright (1909) 2 K.B. 958* which reads

" A communication by a public servant of a matter within his own province concerning the conduct of a person who is for the time taking a public part, the matter being one of public interest as to which the public are entitled to information, may be a privileged communication on the part of that public servant, and, if sent by him to a newspaper and published therein, it may also be the subject of privilege in the proprietor of the newspaper, as that is the ordinary channel by means of which the communication can be made public."

Lopes L.J. in *Albutt v. General Council of Medical Education and Registration* 23 O.B.D. 400 at page 412 stated as follows:-

“The publication of a matter of a public nature and of public interest and for public information was privileged, provided it was published with the honest desire to afford the public information and with no sinister motive.”

I think this was an occasion when the respondent newspaper had a moral duty to publish a matter of a public nature and of public interest and for public information, and qualified privilege attached to the publication.

The first ground of appeal fails.

I will now deal with Mr. Gautama's submission that the qualified privilege attaching to the publication was destroyed because the newspaper article did not correctly represent what was stated in the Ministry's hand-out. He submitted that the newspaper article contained factual inaccuracies, was distorted and mutilated, and that excessive language was used and as a result there was a shift in emphasis and the general sense was substantially altered.

He submitted that the newspaper had done so in order to increase its circulation and that would be evidence of indirect motive constituting malice .It will be necessary to compare the wording and sense in the Ministry's hand-out and the newspaper article. In the hand-out the first paragraph reads:-

“A spokesman of the Ministry of Internal Affairs said today that ten Ugandans of Asian Origin had been apprehended in order to assist the Police in their enquiries relating to

suspected illegal practices in the Immigration Department."

In the article the first paragraph reads:-

“‘Ten Ugandan Asians have been arrested in connection with an alleged passport and immigration racket, it was disclosed, yesterday.’ ”

Mr. Gautama submitted that in the hand-out the word used was "apprehended" while in the article the word used was "arrested". Again in the hand-out the words used were "illegal practices in the Immigration Department" whereas in the article the words used were "passport and immigration racket." He submitted that the substitution of the words "arrested" for "apprehended" and "passport and immigration racket" for "illegal practices in the Immigration Department" was calculated to distort by exaggeration.

He submitted that "arrested" would imply that the person had committed a criminal offence whereas "apprehended" would connote mere detention under the Emergency Regulations. He also submitted that "racket" bears a more sinister connotation than that attached to illegal practices".

He said in effect that the first paragraph in the article contained factual inaccuracies as compared with what was stated in the hand-out. He also submitted that the alterations made by the newspaper had shifted the emphasis and substantially altered the sense. Reading the hand-out as a whole, the impression one gained would be that ten Asians were apprehended in order to help the police in their enquiries concerning some illegal practices in the Immigration department concerning five suspended immigration officers.

The emphasis there was on the five suspended immigration officers. Reading the article the impression one gained would be that the Asians had been arrested because they were connected with an alleged passport and the immigration racket themselves, and the heading "Asians Held" would give emphasis to this impression.

Mr. Gautama submitted that the change of words and the shifting of the emphasis in the article had resulted in a significant alteration of the sense and the meaning as compared with the hand-out. The article therefore contained exaggerations and irrelevant matter and had also gone outside the scope

of the privilege attached to it and to that extent it would not be protected.

He submitted that if the article had merely re-produced the wording as contained in the hand-out, the respondents might have been entitled to the protection of privilege. Here the respondents had "spiced and garnished" and sensationalised the hand-out so as to distort its meaning, presumably because the respondents had wanted to increase the circulation of the newspaper. He submitted that this was evidence of indirect or improper motive amounting to malice which would destroy the protection of qualified privilege. He submitted that the respondents had published a garbled, exaggerated and altered account of the Ministry's hand-out.

The learned judge had dealt fully with this question of malice.

He referred to a passage in the judgment of Lord Esher in *Nevil v. Fine Arts and Insurance Company (1895) 2 Q.B. 156 at 170*

"There may be an excess of the privilege in the sense that something has been published which is not within the privileged occasion at all, because it can have no reference to it But when there is only an excessive statement having reference to the privileged occasion, and which therefore comes within it, then the only way in which the excess is material is as being evidence of malice. . "

The learned judge then dealt with the words "passport and immigration racket", and "illegal practices in the immigration department," and "apprehended" and "arrested" and asked himself the following questions (a) "have the defendants published something going; beyond what was germane and reasonably appropriate to the occasion, (b) have the respondents published an article which has no relevance or reference to the privileged occasion, or is this article only an excessive statement within the privilege, the excessive language only being material as being possible evidence of malice"?

The learned judge came to the conclusion that the newspaper article did not go beyond what was germane and reasonably appropriate to the occasion. He also came to the conclusion that the article contained nothing which had no relevance or reference to the privileged occasion, and that the most that could possibly be said against the article was that it was "an excessive statement" and made use of excessive language.

He then dealt with the meaning of words like "racket" etc. and came to the conclusion that the respondents did not forfeit the privilege by using "picturesque and journalistic Language and words when seeking to create the maximum impact upon and understanding by members of the public reading their article."

Like the learned judge I do not think that the use of the words "arrested" for "apprehended" and "racket" for "illegal practices" by themselves amounted to such unnecessary strong and excessive language as to amount to some evidence of malice.

There must be extremely strong and entirely disproportionate language to displace the presumption of innocence in a matter which concerns qualified privilege. However, the submission by Mr. Gautama before this Court, i.e. that there was a shift of emphasis and alteration of the sense because of the change in the words and of presentation was not argued before the learned trial judge.

I do not therefore have the benefit of his opinion on this point. Comparing the article and the hand-out it does seem at first sight that there was a shift of emphasis in the article. It would seem that the arrest of the ten Ugandan Asians in connection with an alleged immigration racket was the primary item in the article, whereas in the hand out the main item would seem to be the suspected illegal practices in the immigration department resulting in five of the immigration officers being suspended.

However, even in the hand-out the only people who were apprehended were the ten Asians and they were apprehended in order to assist the police in their enquiries about the alleged illegal practices in the Immigration Department. In the article the heading was "Asians Held". I think the heading was accurate and although there was some shift in emphasis I cannot say that the general sense had in any material particular been altered. This is one of those difficult and border-line cases.

Did the article shift the emphasis to such an extent that the general sense conveyed in the Ministry's hand-out had been altered? I must say I find this question rather difficult but on further consideration I am of the view that the article just stopped short of doing so. It was on the whole a reasonably accurate paraphrase of the contents in the hand-out.



The learned trial judge had found that the defendants in publishing the article were "actuated by the best possible motives and had the honest desire to afford the public information and were seeking to assist the Government, police and general public in ridding Uganda of suspected illegal practices in the Immigration Department". I agree

I find that there was no evidence of indirect or improper motive to constitute malice and that in publishing the article the respondents were protected by qualified privilege which was in no way destroyed. It is therefore unnecessary for me to deal with the ground of appeal relating to damages.

Mr. Gautama has submitted that the learned judge had erred in principle in his provisional award of damages.

I will only say this. If the learned judge had awarded reduced damages because the appellant's reputation had already been tarnished by reason of previous gossip or radio broadcasts then I think he was wrong in doing so, see "*Associated Newspapers Ltd. v. Dingle (1962) 2 All E.R. 737 at 754.*"

I would dismiss the appeal with costs with a certificate for two counsel.

## **LAW, AG. V-P.**

The facts and background relative to this appeal have been fully set out in the judgment prepared by Mustafa J.A. and need not be repeated.

The learned trial judge found that the article, the subject of the appellant's suit for libel against the respondents, was defamatory of the appellant, and there has been no cross-appeal against this finding. However, he dismissed the suit, holding that the article was published on an occasion of qualified privilege, and that there was no evidence of malice or improper or dishonest motive on the part of the respondents such as to deprive them of the protection of that privilege. In the event of his being held wrong on appeal, he rightly considered the question of damages, and fixed the amount which he would have awarded, had the appellant's suit succeeded, at Shs. 4,000/-.

Mr. Gautama, for the appellant, relied on three main grounds of appeal. Firstly, he submitted that

there was no evidence of circumstances pointing to the existence of facts supporting qualified privilege.

Secondly, he submitted that even if the occasion was one of qualified privilege, the respondents had forfeited the protection of that privilege by reason of the alterations they made to the official communique (which I shall refer to hereinafter as the hand-out) when they reproduced it in edited form in the "Uganda. Argus" newspaper (hereinafter referred to as the Argus).

Thirdly, he submitted that the damages tentatively awarded by the learned judge were so inadequate as to amount to a totally erroneous estimate, and that the award was based on ) wrong principle.

I will deal first with the question of qualified privilege. The editor of the Argus deposed that he received a special telephone call from an official of the Ministry of Information, department of the Uganda Government, informing him that an important announcement concerning irregularities discovered in relation to immigration matters had been made, and asking him to collect it. There was evidence that the Government relies on the various news-propagating media, such as the radio and newspapers, to bring to the attention of the public announcements considered to be of importance; and the editor of the Argus, whilst conceding that he was under no legal duty to publish this particular announcement, deposed that he felt under a strong moral obligation to do so. In the hand-out, the subject of this appeal, the, public were asked to render all possible assistance to the police in their inquiries into the suspected illegal practices.

The learned trial judge, after referring to such persuasive authorities as *Pullman -v- Walter and Co. (1891) 1 Q.B.524 and Adam -v- Ward (1917) A.C. 320*, found that in publishing the cuticle based on the hand-out, the respondents did so in discharge of the moral and public duty which they had to communicate government-inspired announcements to the general public, and that the general public had a corresponding interest or duty to receive and read the information contained in the article.

He accordingly held that the occasion of the publication of the article was privileged. Mr.

Gautama submitted that no solemnity or sanctity attaches to Government announcements, and that if they contain defamatory matter, a newspaper which publishes such announcements does so at its peril. He submitted that there was no authority for the proposition that a newspaper, which publishes a Government hand-out containing defamatory matter, can absolve itself from liability by relying successfully on the plea that the publication was made on an occasion of qualified privilege.

It is, no doubt, often very difficult to determine whether a particular occasion is privileged or not.

As Lord Buckmaster L.G. said in *London Association for Protection of Trade -v- Greenlands (1966) 2 A.C15*

"...the circumstances that constitute a privileged occasion can themselves never be catalogued and rendered exact."

The facts of each case must be scrutinized in the light of its peculiar circumstances. In this case, the Government through a responsible officer had asked for publicity to be given to its hand-out, so that the assistance of the public be sought in connection with suspected illegal activities in a Government department. The Government and the public had a common and reciprocal interest to communicate, and receive the information contained in the hand-out, as being for the common convenience and protection of society, see the speech of Lord Atkinson in *Greenland's case (Supra)*. In the circumstances of the present case I have come to the same conclusion as the learned judge, that the article complained of was published on an occasion of qualified privilege.

I consider that the publication in a newspaper of a notice or report at the request of a Government office or department is privileged, provided the matter concerned is of public concern and published for the public benefit. For these reasons I think that this part of the appeal must fail.

However, the protection of such privileges is destroyed if the plaintiff can show that publication was made maliciously, and this brings me to the second, and in my view most important, ground of appeal. Malice, in this connection, does not necessarily connote ill-will or spite, it will include any indirect or wrong motive.

"A defendant is only entitled to the protection of the privilege if he uses the occasion in accordance with the purpose for which the occasion arise.

He is not entitled to the protection or the privilege if he uses the occasion for some indirect or wrong motive" - per Lopes L.J. in *Royal Aquarium -v- Parkinson (1892) I.Q.B. 431*.

Mr. Gautama's submission on this point is that of editing and altering the hand-out before publishing it in the Argus, the respondents have shifted the emphasis from the alleged irregularities in the

Immigration Department, with which the hand-out was primarily concerned, and unduly stressed the part played therein by "certain Uganda Asians" (including the appellant). The article speaks of the Asians being arrested, which denotes criminality, whereas they were in fact detained in order to assist the police in their inquiries.

The article speaks of "alleged passport and immigration racket", where as the hand-out referred to "suspected illegal practices". The hand-out bore no holding, but the article was headed "Asians held". Mr. Gautama submitted that these alterations to the hand-out made by the Argus' editorial staff amounted to sensationalism and use of excessive language designed to boost the newspaper's sales, and that they were evidence of malice in the legal sense such as to deprive the respondents of the protection afforded by the occasion being one of qualified privilege.

This again is a question of degree, and where the line is to be drawn has to be decided in the light of the facts of each case. As regards the heading, I can see nothing sinister or improper in the words "Asians held". The word "held" is appropriate to describe detention, and the heading was factually correct. As regards the use of the word "arrested", whereas the appellant was in fact detained, this seems to me to be somewhat a distinction without a difference. The appellant was taken from his home by a police officer, and detained in prison under the Emergency Regulations for over three weeks.

He himself described "what happened in the following words in the course of his evidence  
"I was arrested and detained at 10.30 p.m on the 23<sup>rd</sup> January, 1968."

As regards the use of the words "an alleged passport and immigration racket" in the article, whereas the hand-out only spoke of "suspected illegal practices in the Immigration Department", the learned judge expressed the view that the word "racket" means a scheme to do something illegal, so that the use of that word in the article did no more than express the phrase "illegal practices" used in the hand-out in a different way. As regards the word "passport", used in the article, the learned judge did not consider its use unreasonable.

He appreciated that the use of the words "racket" and "passport" might constitute an excessive statement, but he was unable to infer, from the use of this "excessive and slang language", any malice or improper or dishonest motive on the part of the respondents. After careful consideration, I have come to the same conclusion.

I see no reason to differ from the learned judge's view that the respondents

"...were actuated by the best possible motives and had the honest desire to afford the public information and were seeking to assist the Government, Police and general public in ridding Uganda of suspected illegal practices in its Immigration Department"

It follows from what I have said that I am of the opinion that this appeal fails and should be dismissed. It is therefore not strictly necessary to deal with the last ground of appeal relating to damages, but as the point raised does not appear to be covered by any local authority, it may be desirable for me to consider it briefly. In assessing the damages, the learned judge held that they should be mitigated because the hand-out had been broadcast several times on the day before the article appeared, and that "rumours and gossip" damaging to the appellant's reputation were rife in Kampala on that day. Mr. Gautama described this reasoning as representing a "profound and fundamental misdirection".

He referred to *Associated Newspapers -v- Dingle (1962) 2 All E.R. 737*, and in particular to the speech of Lord Denning at page 754

"At one time in our law it was permissible for a defendant to prove, in mitigation of damages, that previous to its publication, there were reports and rumours in circulation to the same effect as the libel. That has long ceased to be allowed"

As this ground of appeal does not have to be decided, it will be sufficient if I express the view that it may well have merit.

As Lutta and Mustafa, JJ.A agree that this appeal fails, and should be dismissed, it is so ordered.

There will be an order in the terms proposed by Mustafa J.A.

**LUTTA, J.A.**

I agree.