

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: 458/2006

[2017] SCSC

Wavel Ramkalawan

Plaintiff

versus

Parti Lepep (formerly The Seychelles Peoples Progressive Front)

Marie-Antoinette Rose

Defendants

Heard: 20 October 2011, 8 November 2016, 10 February 2017, 22 March 2017.

Counsel: Mr. Anthony Derjacques for the Plaintiff
Mr. Elvis Chetty for the Defendant

Delivered: 30 May 2017

JUDGMENT

M. TWOMEY, CJ

[1] On 14 December 2006, the Plaintiff filed a defamation suit against the Defendants in which he avers that in the December 2006 edition of its newsletter, The People Plus, false and malicious statements were published calculated to expose him to public ridicule, odium and hatred.

[2] The statements complained of are as follows:

SNP is planning to create disorder in the country as from this coming month. They have chosen during (sic) the Christmas season because that's the time when there are lots of activities, more people in town and it is normally a time of

festivities. “After one year marked by intense politics, our people deserve a peaceful and festive Christmas. But it not what the SNP wants for our country. During a meeting which was held at Arpent Vert on Monday, Ramkalawan has asked his activists to destabilise our country, and create disorder where they can. The principal places which are being targeted are the DA’s offices which normally organise social gatherings for the pensioners and the children, and also the town of Victoria. Certain people are also being targeted. That’s what the SNP wants for our people, and we, we will let our population know what is the true intention of the SNP. What is interesting is that the SNP has accused the SPPF that it practices political violence. But when it orders its representatives in the districts to start sabotaging the activities in December, what type of politics is this called? He will not practice gentleman politics, so he will practice dirty politics. And when we speak of dirty politics a big component is violence, so he is ordering them to practice violence? But his own colleagues don’t see life in his demonic way and are starting to revolt. Not in a small misplanned convention will the internal problems be resolved. If you practice dirty politics and it rebounds don’t blame us afterwards.”

- [3] The Plaintiff avers that the statements in their natural and ordinary meaning or by innuendo mean and are understood to mean that the Plaintiff is violent, destructive, a saboteur, and a criminal wishing to destroy his people and country.
- [4] It is his case that he has suffered prejudice in his capacity as the Leader of the Opposition and the Leader of the Seychelles National Party (hereinafter SNP) and member of the clergy which he estimates at SR 1, 000,000.
- [5] In a joint Statement of Defence, the Defendants admit writing and publishing the article but deny that the words were false, malicious and state that the words are fair comment upon a matter of public interest, namely the conduct of the Plaintiff as Leader of the Opposition in the National Assembly, Party leader of the SNP and a member of the clergy of the Anglican Church Diocese of Seychelles.

- [6] They further deny that the said words bore or were understood to bear or capable of the meaning as alleged by the Plaintiff or have any defamatory meaning and that the words in their natural and ordinary meaning were true in substance and fact.
- [7] They also deny that the statements constitute defamation or were calculated to expose the Plaintiff to public ridicule, odium and hatred as alleged and deny that he suffered any prejudice.
- [8] This case though filed in 2006 and heard partly before Karunakaran J in 2011 was completed by myself in 2016 and 2017 after his suspension from court duties. Several difficulties arise from the delay in hearing this case. The First Defendant has been subsumed under the new name Parti Lepep (hereinafter PL) and politics has moved on considerably with the Plaintiff heading the largest party in the National Assembly.
- [9] Another difficulty is the fact that the Plaintiff had testified but some of his testimony could not be traced given the inordinate delay in completing this matter. It was agreed that he would give fresh testimony. I bear in mind that the events are now hazy in his mind.
- [10] Mr. Roger Mancienne testified in 2011 before Karunakaran J. The parties to this suit have unanimously agreed that I adopt his testimony and proceed with the case on that basis.
- [11] I did so. Mr. Mancienne testified that he runs a printing shop and knows the Plaintiff. He is the Secretary General of the SNP. He stated that the SNP was the major opposition party in Seychelles and in 2006 had 46% of the national votes. He explained that the leader of the opposition was then the leader of the minority block in parliament which made Mr. Ramkalawan very important in that respect. He also continued to be a priest.
- [12] With regard to SPPF, it was the largest political party and had been in government since the coup in 1977 and after the return to multiparty democracy in 1993. It had since changed its name to PL. People Plus is the newsletter of the PL. At the time of the election it was published two or three times a week, otherwise weekly or fortnightly. Its readership circulation would be around 15,000 to 20,000.

- [13] He asserted that the SNP never planned disorder. There were regular meetings at Arpent Vert which was the headquarters of the party. There was however no request by the Plaintiff to destabilise the country, incite or organise violence. There was also no request to target administrative officers and Mr. Ramkalawan had not practised dirty politics. He did not think that Mr. Ramkalawan led a demonic way of life as he was a peaceful family man who cared for his family and children and was considerate and respectful towards his colleagues. As a priest he preached the Christian message of peace, love and respect for God and other people.
- [14] Mr. Ramkalawan had been a presidential candidate in 1998, 2003, 2006 and 2011 and in that last election won over 45% of the votes. The article in 2006 was deliberated at presenting him as a person unfit to be president and to turn people against him. He was very unhappy about it.
- [15] He did not agree that in politics one should expect that people talk about them- rather one should expect that people speak the truth and not spread lies or make malicious statements to destroy their character. He accepted that in the defamation case of Mr. Claude Vidot he was penalised in court for statements his paper Regar made about the latter.
- [16] Mr. Ramkalawan also testified. He stated that earlier in the court proceedings he had produced a newsletter of the SPPF of December 2006 and on the same page of that newsletter was the offending article.
- [17] Mr. Ramkalawan stated that the Official Gazettes exhibited contained the results of the presidential elections of 2006 and the National Assembly elections of 2007. He had taken part in the July presidential elections and had won 45.71 % of the vote. In the 2007 National Assembly elections, SNP had won eleven seats.
- [18] In his testimony he stated that he had been a priest for 33 years. He was the leader of the SNP, previously the United Opposition. In the presidential elections of December 2015 he scored 49.85 % of the vote. The SNP together with other parties then came together under the banner of the Linyon Demokratik Seselwa (LDS) for the National Assembly

elections and together with proportional representation vote received 19 seats to 14 seats for PL in the Assembly.

- [19] In regard to the newsletter of December 2006, its publication was by distribution by party activists in town and in the districts. He estimated that about 10,000 copies would have been distributed.
- [20] The alleged defamatory article in the 2006 newsletter referred to him as someone who was organising disorder, leading politics of violence especially during the Christmas period so as to disrupt the festivities. It also referred to an order he gave described as evil which his own supporters supposedly had revolted against. The whole article was a lie.
- [21] The newsletter was a character assassination aimed at destroying his chances in the National Assembly elections of 2007. To him personally, it had been particularly hard hitting as he had a family and was a member of the clergy. Although he had a tough skin it made him angry. He did expect criticism as a public figure but not to that extent. He accepted that his supporters did not leave him as a result of the publication.
- [22] The Defendants did not testify. In their written final submissions they relied on the authority of *Prea v SPPF* (2007) SLR 108 for their argument that public figures are bound to be within the focus of public scrutiny including that of the fourth estate, so as to render any damages payable at a conservative rate. Comparison was made with the case of *New York Times v Sullivan* 376 U.S. 254 (1964) in which the Court held that when a public figure brings a defamation case an additional element of actual malice must be proven.
- [23] In *Sullivan*, although the Times's story included false allegations, as the publisher had not acted with actual malice no damages were awarded. It is the Defendant's submission that in the highest appellate courts of Australia, New Zealand and the UK, the courts have attempted to strike a balance between freedom of expression and the protection of public reputation and three common heads have generally been agreed upon: first, in a modern democratic society, a freedom to communicate widely about the use of political power is essential; secondly the law must allow the media some margin of factual error if the

freedom is not to be unduly inhibited by the threat of having to pay substantial damages and third, some form of qualified privilege is the most appropriate method of securing an expanded freedom of expression while continuing to offer suitable protection to reputation.

[24] Relying on *Turner v MGM* [1950] 1 All ER 449, they further submitted that their defence of fair comment implied that they held their comments honestly and that there had been no actual malice in the publication of the article.

[25] As far as the quantum of damages is concerned, they submitted that the court ought to take into account whether the Plaintiff suffered any damage to his reputation as a direct result of the alleged defamatory statements. They relied on the authorities of *Laporte v Fanchette* (2013) SLR 593 and *Francourt v Didon* (2006) SLR 186 for the principle that although it is not necessary for the claimant to show specific proof a prejudice, moral damages should be compensatory and not punitive.

[26] Relying on *Cleese v Associated Newspapers* [2004] EMLR 3, they further submitted that the court must also take into account the extent of any impact on the claimant's feelings or reputation. In this respect, they noted that in the 2007 parliamentary elections although Anse Etoile was not a strong district for SNP, the Plaintiff managed to win the seat which highlighted the fact that his image, reputation and career were not in any way tarnished by the publications.

[27] As for the method of assessing damages relying on the authorities of *KC v MGN* [2012] EWHC 483 (QB), *Turner* (supra) and *Nail v News Group Newspapers Ltd* [2005] 1 All ER 1040, they submitted that the court must perform a two-stage assessment:

The process is first to identify the figure that should be awarded at the conclusion of a hypothetical trial in which the Defendant had done nothing to aggravate or to hurt the claimant's feelings and nothing to mitigate.

The second stage to be considered is to what extent if at all, that figure should be discounted to give effect to those mitigating factors which the Defendant is able to take advantage of.

- [28] Hence, if the Defendant aggravates the publication, the amount of damages may be increased and if for example, there was an earlier qualified offer to make amends which was accepted, then there would usually be a substantial discount. Further, the court would have to consider the gravity of the defamation on the complainant (*John v MGN* [1997] QB 586).
- [29] In terms of comparative figures, the Defendants submitted that in the case of *SBC and anor v Barrado* (unreported) SCA 9/94 and 10/94, the principle of “the higher the Plaintiff’s position, the higher the damages” should be taken into consideration”. Barrado, the personal assistant to the President was awarded SR 550,000 in the lower court and this was reduced to SR 100,000 by the Court of Appeal. In *Pillay v Regar Publication and Ors* (unreported) CS 11/1996 the initial award of SR 450, 000 was reduced to SR 175, 000 on appeal. Mr. Pillay was a senior minister in government.
- [30] In his final submission, the Plaintiff submitted that in terms of the publication it was irrelevant whether a reasonable person would believe the article. This does not affect the right of action but is only reflected in the assessment of damages (*Hugh v London Express Newspaper* [1940] 2 KB 507, *Morgan v Odhams Press Ltd* [1971 2 All ER 1156).
- [31] It is the Plaintiff’s submission that it has proven its case as there is no evidence controverting his and that of his witness and the wording of the defamatory article is clear, concise and should be given its ordinary interpretation. It is also his submission that that the defences of fair comment and qualified privilege are defeated by proof that the Defendants maliciously published the words complained of (Halsbury’s laws of England 76 para 145). Further, although public interest was pleaded it was not supported by evidence. The fact that the Plaintiff was a clergyman and a political leader is not sufficient to prove the matter raised. It must be proven that the public interest consideration outweighs all considerations towards the Plaintiff’s character, reputation and standing in the community.
- [32] The Plaintiff also referred to the case of *Pillay and Barrado* (supra) to show comparative awards and the principles used by the courts in making the awards. More recently in

Ramkalawan v Gill (unreported) CS 111/2013, the court awarded the sum of SR 200, 000 in compensation in relation to a defamation by social media.

[33] I find the submissions of the parties very helpful in many respects but unhelpful on some aspects given the present state of our defamation laws, frozen in time as it were. Article 1383(3) of the Civil Code of Seychelles provides -

“The provisions of this article and of article 1382 of this Code shall not apply to the civil law of defamation which shall be governed by English Law.”

[34] The Civil Code was enacted in 1975 and this means that the English law applicable to Seychelles is English law as it was in 1975 when the Civil Code came into effect (see *Biscornet v Honoré* (1982) SLR 451). The references to English defamation law after that date in *Ramkalawan v Gill* in CS 111/2013 (unreported) are therefore *per incuriam*.

[35] Defamation essentially is concerned with a balancing exercise between the right to free speech on the one hand and an interference with a person’s right to privacy and the right to a good name on the other hand. The law of defamation of Seychelles as summarised by Sauzier J in *Esparon v Fernez and anor* (1980) SLR 148 is as follows:

“Under article 1383 of the Civil Code of Seychelles, defamation is governed by the principles of English Law. The following are the relevant principles for this case:

1. A man commits the tort of defamation when he publishes to a third person words containing an untrue imputation against the reputation of another.

2. Words which impute to the plaintiff the commission of a crime for which he can be made to suffer corporally by way of punishment are actionable without proof of special damage.

3. A man, stating what he believes to be the truth about another, is protected in so doing, provided he makes the statement honestly and without any indirect or improper motive.”

[36] Dodin J in *Pillay v Pillay*(unreported) [2013] SCSC 68 expounded on the law in Seychelles. He stated

“There are five essential elements that a plaintiff must prove to establish defamation: (1) The accusation is false; (2) it impeaches the subject's character; (3) it is published to a third person; (4) it damages the reputation of the subject; and (5) that the accusation is done intentionally or with fault such as wanton disregard of facts or with malicious intention...

Allowable defences against defamation are justification which includes the truth of the statement, fair comment which is determined by whether the statement was a view that a reasonable person could have held, absolute privilege when the statements were made in Parliament or in court, or they were fair reports of allegations in the public interest and qualified privilege, where it is determined that the freedom of expression outweighs the protection of reputation, but does not amount to the granting of absolute immunity. A defamatory statement is presumed to be false unless the Defendant can prove its truth.

In a case for defamation, in order to be granted compensatory damages, the Plaintiff must prove actual malice by establishing that the Defendant knowingly made the false statements or that the Defendant showed reckless disregard for the truth or that there was actual malice on the part of the Defendant. It must be noted that in such cases the Plaintiff has the burden only of proving that the statement was made by the Defendant and that it was defamatory. The Plaintiff is not required to prove that the statement was false although if that is proved it would certainly strengthen his claim. On the other hand, proving the truth of the statement is an affirmative defence available to the Defendant...”

[37] The standard of proof in this matter is on balance of probability. Given that the Defendants adduced no evidence and based on the legal expositions above and the evidence adduced by the Plaintiff, I find that the essential elements of the delict of defamation has been proved in this case.

[38] In his final submissions, as I have said, Mr. Chetty has referred to the American case of *Sullivan*. That case and subsequent authorities relying on its proposition is not English law and therefore not Seychellois law either. In England, unlike in the United States of America, the law does not recognise any special privileges attaching to the profession of the press as distinguished from the members of the public. This was clarified by the Privy Council in the Indian case of *Channing Arnold v. King Emperor AIR 1914 PC 116*, at 117:

“The freedom of the journalist is an ordinary part of the freedom of the subject and to whatever length, the subject in general may go, so also may the journalist, but apart from statute 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 any other subject”.

[39] Privilege remains limited to the president, members of the National Assembly, to makers of statements during judicial proceedings and where they were fair reports of allegations in the public interest. It is up to the Defendants to show that the reports were fair and made in the public interest. They did not.

[40] In the circumstances the only issue that this court has now to decide is the quantum of damages to award in this matter.

[41] As matter of principle it should also be pointed out that moral damages are not applicable in defamation cases for it is English law that applies.

[42] As I stated earlier, the longevity of this case in the court does not make the task of this Court easy. In 2006- 2007 awards for this type of case were SR 70, 000, SR 100, 000 and SR 175,000(*Prea v SPPF (2007) SLR 109, Barrado and Pillay Regar Publications* respectively).

[43] The defamatory statements made were certainly of a scurrilous nature and from the evidence adduced and unrebutted did cause prejudice to the Plaintiff for which compensation is due.

[44] In *Pillay v Regar Publications* (above) Perrera J explained the principles of assessment for such prejudice in defamation cases as follows :

“(1) Consideration of the injury suffered. Here, the good standing and repute, the nature of his profession and the gravity of the imputation are relevant.

(2) Regard must be had to the conduct of the defendant and the circumstances of the publication.

(3) Punitive damages may be awarded against the defendant by way of a deterrent”.

[45] Further in both *Derjacques v Louise* (1982) SLR 175 and *Prea*, the Court found that the assessment of damages must take into account the plaintiff’s position and standing, the nature of the defamation, the mode and extent of the defamation, the absence or refusal of any retraction or apology, and the whole conduct of the defendant. The higher the plaintiff’s position, the higher the damages.

[46] In 2006, the Plaintiff was the leader of the opposition and a clergyman. As leader of the opposition he enjoyed fifth position or so on the protocol list. His position was therefore very high as was that of Minister Pillay in the case of *Pillay v Regar Publications* (above). Hence, as was stated in *Dingle Associated Newspapers Ltd (1961) 2 QB 162*, “[the] damages awarded have to be the demonstrative mark of vindication.”

[47] However, here is where the court encounters difficulties. In the recent defamation case of *Ramkalawan v Gill* (above) the publication was through social media. McKee J referred to the quotation from the US Supreme Court in *Reno v American Civil Liberties Union*, 521 U.S. 844 (1997) that

“Through the use of chat rooms, any person with a chat line can become a town crier with a voice that resonates farther than it could from any soapbox”.

- [48] Based on that fact, that is, the magnified publication through the internet, he awarded Mr. Ramkalawan for a much worse defamation SR 200,000. That award was made in 2016.
- [49] I am aware that if the decision in this case was made in 2006 or thereabouts as it should have been, the developments in internet or social media as we know today together with enhanced publication would not have been a comparative factor but I am unable to close my eyes to it in deciding the award in this case given that I am making this decision in 2017.
- [50] In the circumstances, given all the above mentioned comparators I consider that a sum of Rupees 100,000 being a reasonable sum that should be awarded to the Plaintiff together with interest thereon and costs of the action.

Signed, dated and delivered at Ile du Port on 30 May 2017.

M. TWOMEY
Chief Justice