

## **SULLIVAN v ATTORNEY-GENERAL**

**(2012) SLR 213**

A Derjacques for the petitioner

D Esparon Principal State Counsel for the first and second respondents

**Judgment delivered on 31 July 2012**

**Before Egonda-Ntende CJ, Gaswaga and Burhan JJ**

The petitioner is moving this court for the following prayers:

- (a) Declaring that the arrest and detention of the petitioner on 30 October was unconstitutional.
- (b) Declaring that the proceedings and charge in Criminal Side No 852 of 2010 are unconstitutional and violate the petitioner's rights under article 22 of the Constitution.
- (c) Declaring that the Penal Code of Seychelles, Chapter 158, sections 184 to 191, are unconstitutional and breach article 22 of the Constitution.
- (d) Order the first and second respondent to pay the petitioner the sum of R100,000 with interest and costs.

The material facts of the case are that the petitioner was arrested on 30 October 2010 at 13:38 at Beau Vallon by police officers while at his home and placed in the police cell until 31 October 2010 at 14:33 hours when he was released. Subsequently, on 23 December 2010 the petitioner was charged in the Magistrate's Court (Criminal Side No 852 of 2010) with the criminal offence of libel contrary to section 184 as read with section 35 of the Penal Code Cap 158. The particulars of offence, referring to events that had happened on 30 October 2010, and 16 and 19 November 2010, allege that the petitioner published a defamatory matter concerning one Mr Joel Morgan in the form of a print which contained the picture/ image of the said Mr Joel Morgan with the word "Traitor" and that his intention was to defame Mr Joel Morgan, who serves as a Cabinet Minister in the Seychelles Government.

The petitioner seeks to challenge the constitutionality of section 184 of the Penal Code Cap 158 on the grounds it is contrary to article 22 (1) of the Constitution of the Republic of Seychelles and further contends that the civil laws in respect of defamation in the Republic of Seychelles are sufficient and therefore the criminal law as contained in section 184 of the Penal Code should be struck down by this court on the ground of unconstitutionality.

Section 184 of the Penal Code reads –

Any person who by print, writing, painting, effigy, or by any means otherwise than solely by gestures, spoken words or other sounds, unlawfully publishes any defamatory matter concerning another person, with intent to defame that other person, is guilty of a misdemeanor termed "libel".

It is the contention of the respondents that the said law falls within the framework of the Constitution and within the ambit of article 22(2) of the Constitution of the Republic of Seychelles.

Article 22(1) of the Constitution of the Republic of Seychelles reads –

Every person has a right to freedom of expression and for the purpose of this article this right includes the freedom to hold opinions and to seek, receive and impart ideas and information without interference.

Article 22(2)(b) states that –

the right under clause (1) may be subject to such restrictions as may be prescribed by a law and necessary in a democratic society -

(a) .....

(b) for protecting the reputation, rights and freedoms or private lives of persons.

While article 22(1) of the Constitution of the Republic of Seychelles guarantees the right to freedom of expression, a reading of article 22(2) together with this article clearly establishes the fact that the right to freedom of expression is not an absolute right. It is apparent on a reading of article 22(1) and article 22(2)(b) of the Constitution that the right to freedom of expression is subject to such restrictions as may be prescribed by law and necessary in a democratic society for protecting the reputation, rights and freedoms or private lives of persons.

In the case of *Silver and Ors v United Kingdom* A 61 1983 at 32-33 it was held that the requirements of a prescribed law are –

The law must be adequately accessible: the citizen must be able to have an indication that it is adequate in the circumstances, of the legal rules applicable to a given case” and, “a norm cannot be regarded as “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able if need be with appropriate advice to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

When one considers the prescribed law as set out in section 184 of the Penal Code and all the relevant sections coming within the scope of Chapter XVIII ie sections 184 to 191 pertaining to the law of defamation, we observe that the law on defamation gives a clear indication of the legal rules applicable to the offence of libel and the said laws specifically set out not only the nature of the offence but the defences available to an individual charged with the said offence, namely privilege both absolute and conditional privilege based on “good faith”.

Section 187 reads –

Any publication of defamatory matter concerning a person is within the meaning of this chapter, unless (a) the matter is true and it was for the public benefit that it

should be published or (b) it is privileged on one of the grounds hereafter mentioned in this chapter.

The law as contained in section 188 of the Penal Code deals with absolute privilege and sets out instances where publication of defamatory matters is absolutely privileged. Section 189 of the Penal Code refers to a publication of a defamatory matter being privileged on condition inter-alia that it was published in good faith and the publication does not exceed either in extent or matter what is reasonably sufficient for the occasion. The section further sets out several instances where such publication within the above mentioned limits does not amount to libel and are conditionally privileged.

Section 190 (a) and (b) of the Penal Code makes specific reference to the term “good faith” and gives instances where publications shall not be deemed to have been made in “good faith” by a person, namely where the defamatory publication was untrue and that the person did not believe it to be true or did not take reasonable care to ascertain whether it was true or false. Section 191 of the Penal Code extends the limits of good faith and states if the defamatory material was published under such circumstances that the publication would have been justified if made in good faith, then good faith could be presumed and the burden to prove the contrary rests on the prosecution.

In the case of *Lingens v Austria* (1986) Series A, No 103.8 EHRR 407 the Court drew a distinction between criticism of public figures and private individuals and stated that public figures were subject to closer scrutiny by way of comment in the public interest than private individuals, and as the truth of the facts on which Lingen had founded his value judgments were undisputed and so was his good faith, the European Court held that Lingen’s freedom of expression had been violated.

In the United States special rules apply in the case of statements made in the press concerning public figures, which can be used as a defence. A series of court rulings starting with *New York Times Co v Sullivan* 376 US 254 (1964) established that for a public official or other legitimate public figure to win a libel case, the statement said to be defamatory should have been published knowing it to be false or with reckless disregard to its truth, also known as actual malice. If malice can be shown, qualified privilege is not a protection against defamation.

In our law too, section 189 of the Penal Code refers to a publication of a defamatory matter being privileged on condition inter-alia that it was published in good faith and the publication does not exceed either in extent or matter what is reasonably sufficient for the occasion.

Specific reference may be made to section 189 (c) and (d) which provide that –

A publication of defamatory matter is privileged, on condition that it was published in good faith, if the relation between the parties by and to whom the publication is made is such that the person publishing the matter is under some legal, moral or social duty to publish it to the person to whom the publication is made or has a legitimate personal interest in so publishing it, provided that the

publication does not exceed either in extent or matter what is reasonably sufficient for the occasion and in any of the following cases ,namely -

(a).....

(b).....

(c) if the matter is an expression of opinion in good faith as to the conduct of a person in a judicial, official or other public capacity or as to his personal character so far as it appears in such conduct; or

(d) If the matter is an expression of opinion in good faith as to the conduct of a person in relation to any public question or matter, or as to his personal character so far as it appears in such conduct; or .....

From a reading of the above it appears to us that “privilege” as contained within the precincts of our Penal Code provides a complete bar and answer to criminal libel, though conditions may have to be met before this protection is granted. In our criminal law the defence of privilege recognizes societal and individual interest in the expression of opinions against public officials. This stems from an interest of social and political importance and that society wants to protect such interests by not punishing those who pursue them. Privilege can be argued whenever an accused can show that he acted from a justifiable motive.

Therefore, on the above analysis we are satisfied that the said law as contained in Chapter XVIII of the Penal Code has been formulated with sufficient precision to enable a citizen to regulate his conduct and clearly foresee the consequences his act may entail and therefore contains all the requirements of a prescribed law as set out in the case of *Silver and Ors v United Kingdom* (supra). Secondly the reach of criminal libel as contained in the Penal Code has been substantially whittled down by the available defences to such an extent that it is no threat to the freedom of expression. In reality, the area that may be covered by criminal libel is very narrow, posing no risk to social or political discourse in society.

Article 17 of the United Nations International Covenant on Civil and Political Rights (ICCPR) 1966 states –

- (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation,
- (2) Everyone has the right to the protection of the law against such interference or attacks.

Article 10 of the European Convention on Human Rights (ECHR) 1950 permits restrictions on freedom of speech when necessary to protect the reputation or rights of others.

In the case of *Jang Bhadur v Principal Mohindra College* AIR (1951) SC 59 it was held by the Supreme Court of India that the right to freedom of speech and expression as contained in article 19(1) of the Constitution of India in addition to the qualifications laid down in article 19(2) had a further qualification in that the said right should not violate the rights of others and further that the said right did not entitle a person to defame

others. While in the case of *Dissanayake v Sri Jayawardenapura University* [1986] 2 Sri LR 254 it was held by the Sri Lankan Supreme Court that:

A student may also exceed his constitutional rights of speech and expression by adopting methods of expression that materially and substantially interferes with the Vice Chancellor's right to his reputation.

On consideration of the aforementioned articles of our Constitution, it is our view that the said law is necessary in a democratic society as the need for such laws exists in order to ensure that the freedom of expression does not include a licence to defame and vilify innocent individuals and therefore the freedom of expression is subject to the said restriction contained in article 22(b) ie a restriction prescribed by a law and necessary in a democratic society for the protection of the reputation of individuals.

We are aware that there is a broader consensus against laws that criminalize defamation. Human rights organizations and other organizations such as the Council of Europe and Organization for Security and Co-operation in Europe have campaigned against strict defamation laws that criminalize defamation. The European Court of Human Rights has placed restrictions on criminal libel laws because of the freedom of expression provisions of the European Convention on Human Rights as in the case of *Lingens v Austria* (supra).

However, we are of the view that the matter of repealing the criminal law on defamation is not within the purview of this court but is a matter to be decided by the legislature of the country.

In light of the above constitutional provisions, it cannot be said that the arrest and subsequent institution of criminal charges against the petitioner was an infringement of his rights. Rather, it was an exercise executed in line with the subsisting law and procedures, and within the restrictions so permitted by the Constitution. The respondent's worries of the trial resulting in a conviction and sentence of imprisonment or fine (vide paragraph 14 of the affidavit) are immaterial to this court as long as the whole process is lawful. It could even result in an acquittal. Besides, the trial is still ongoing in the Magistrate's Court. In addition, those fears alone cannot be a ground for the court to declare the questioned provisions of the Penal Code and or the criminal proceedings in Criminal Side No 852 of 2010 as being unconstitutional.

For the aforementioned reasons on consideration of the existing provisions in our Constitution we see no unconstitutionality in the existing law. We therefore find no merit in the grounds urged by counsel for the petitioner and proceed to dismiss the petition. No order is made in respect of costs.