08/02; [2002] VSC 149

SUPREME COURT OF VICTORIA

PRICE and ANOR v HESSE

Byrne J

24 April, 7 May 2002

CIVIL PROCEEDINGS – DEFAMATION – COMMENTS MADE BY BROADCASTER ON RADIO TALK-BACK PROGRAM – REFERENCE TO PLAINTIFF AS A 'NO-HOPER', 'NO TALENT WHACKO' – FINDING BY MAGISTRATE THAT WORDS USED CONVEYED THE IMPUTATION THAT THE PLAINTIFF WAS NOT A PERSON OF GOOD REPUTATION AND THAT HE HAD NO CREDIT OR RELIABILITY – DEFENCE OF FAIR COMMENT REJECTED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR – WHETHER DEFENDANTS ESTABLISHED THE QUESTION OF REASONABLENESS – NO SUFFICIENT OPPORTUNITY PROVIDED TO PLAINTIFF TO RESPOND – AWARD OF DAMAGES BY MAGISTRATE TO PLAINTIFF – WHETHER MAGISTRATE IN ERROR.

In a radio program, P. and 3AW broadcast the following words:

> "watch the parasites now come out of the woodwork — now the whingeing, whining loonies we exposed last time, the gun nuts and the no-hopers, the John of Brightons and the Ces Hesse's of the world. Just when we thought our political debate was cleared of these no talent whackos, they come storming back aided and abetted by political commentators just hungry for some colour ".

At the time of the broadcast, P. knew that H. had not been a member of the One Nation Party for many months and that it was not until some 5 weeks after the broadcast, that P. sought a response from H. H. subsequently took proceedings against P. and 3AW seeking damages for defamation. In awarding H. the sum of $40,000 damages, the magistrate found that the words used by P. were capable of conveying the imputation that H. was not of good reputation and had no credit or reliability. Further, the magistrate found that the words used were not comment and rejected the defence of fair comment. The magistrate also concluded that the defendants had not discharged the burden of establishing reasonableness nor was any sufficient opportunity given to H. to respond to what P. said. Upon appeal—

HELD: Appeal dismissed.
A person possessing the characteristics attributed to H. in the words complained of could well be seen as a person of no credit, reliability or good reputation. There was no imprecision or ambiguity in the imputation. In relation to the defence of fair comment, the magistrate in rejecting this defence, looked at the antecedent and surrounding circumstances by examining the broadcast as a whole and by drawing upon facts assumed to have been known by the ordinary and reasonable listener. The magistrate was entitled to conclude that the words contained only statement of fact so that the defence of fair comment was properly rejected. Further, in concluding that the defendants had not discharged the burden of establishing reasonableness, it was open to the magistrate to take into account the fact that H. had not been a member of the One Nation Party for many months prior to the publication of the broadcast and that no sufficient opportunity was provided to H. to respond to what was said in the broadcast.

BYRNE J:

1. On 30 November 2001, following a three day hearing, the Magistrates' Court of Victoria, sitting at Melbourne, held that the appellants Steven William Price and 3AW Southern Cross Radio Pty Ltd ("3AW") had libelled the respondent, Douglas Cecil Hesse. The Magistrate awarded damages for the libel in the sum of $40,000. The appellants appeal against this order pursuant to s109 of the *Magistrates' Court Act* 1989.

2. The words complained of were spoken by Mr Price and broadcast by 3AW in his talk-back programme of 12 February 2001. The words were spoken in the course of his introductory comments upon the political and social significance of the results of the elections for the Western Australian Parliament on the preceding Saturday. Mr Price had expressed the view that the election result should not be understood as a good result for the One Nation Party, but he apprehended that this party and its adherents would see it as such, or at least proclaim this to be the case. This apprehension was forthrightly expressed by him in the words complained of:

> "watch the parasites now come out of the woodwork — now the whingeing, whining loonies we exposed last time, the gun nuts and the no-hopers, the John of Brightons and the Ces Hesse's of the world. Just when we thought our political debate was cleared of these no talent whackos, they come storming back aided and abetted by political commentators just hungry for some colour "

3. The respondent who is the Ces Hesse mentioned in these words, alleged five defamatory imputations. He pleaded that the words were intended and understood to mean that he was:

- suffering a psychological condition;
- not of full mental faculties or capacity;
- a lunatic;
- opportunistic and self-seeking to the detriment of others;
- a person of no credit, reliability or good reputation.

In their amended notice of defence the appellants denied this allegation.

4. The magistrate found that the fifth imputation was made out. She made no finding as to the first four suggested imputations and the appeal proceeded before me on the basis that the judgment depended upon a finding that the words bore only the fifth meaning.

5. The first question of law, as it was argued before me, therefore, was as follows:

> "Whether a Magistrate properly instructed could have concluded that any of the imputations complained of by the respondent, being that he was: ... (v) a person of no credit, reliability or good reputation were capable of being conveyed or were in fact conveyed by the words complained of?"

6. In her reasons for judgment the magistrate, after referring to the relevant law, said this:

> "I consider that the words are capable of conveying the imputations as pleaded, to the ordinary reasonable listener. That is the plaintiff is not of good reputation and that he has no credit or reliability. The words combined would in my view cause the ordinary reasonable listener who may have tuned in to the whole of the broadcast or only part thereof, to believe that Mr Hesse is a person of no credit, reliability or good reputation."

7. Counsel for the appellants argued that the magistrate should have addressed this question in two stages, like a judge hearing such a case with a jury. She, like the judge, should first address the question whether the words were capable of bearing the suggested meaning and, if so, she, sitting as a jury, should then consider whether the words do in fact bear that meaning.

8. As to this, the following should be said. First, this is in fact what she did. Second, her finding that the words bear the suggested meaning carries with it a finding that they were capable of bearing such a meaning. Third, where the magistrate is sitting alone it is perfectly proper for her to address the ultimate question, whether the words did in fact bear the suggested meaning. Finally, her conclusion that they did is a conclusion of fact.

9. Next, it was put that the words could not as a matter of law bear the suggested meaning. Accepting that the word "credit" in the fifth suggested imputation is not used in the financial sense, I do not agree. A person possessing the characteristics attributed to Mr Hesse in the words complained of could well be seen as a person of no credit, reliability or good reputation.

10. Next, it was argued that the suggested imputation was uncertain and imprecise - so much so that the words could not carry the suggested imputation. There is no substance in this. The appellants were content to go to trial on this imputation. The question now arises after a trial at which no concern about imprecision or ambiguity in the imputation is expressed by the magistrate. She is clearly correct.

11. The appellants in their amended notice of defence raised two affirmative defences: the defence of fair comment and the defence of qualified privilege arising from a discussion of political matters. The remaining questions of law deal with the rejection by the magistrate of each of these two defences and I shall consider them in turn.

12. The question of law with respect to the fair comment defence is the following:

> "Whether the Magistrate properly instructed on the whole of the evidence was justified in (i) failing to uphold the defence of fair comment?"

If I may say so, with respect, this is not a happily worded question of law if indeed it is a question of law at all. In her reasons for judgment the Magistrate identified the issue whether the words were fact or comment and the appeal before me was conducted on the basis that she concluded that they were not comment.

13. In the interlocutory stages of the proceeding in the Magistrates' Court, particulars were sought of this plea:

> "Specify the substance of the comment. Response: The substance of the comment was that the plaintiff and others like him who were candidates for Pauline Hanson's One Nation Party in the 1998 Federal election were persons with extremists and eccentric political views. State the facts upon which the comment was based. Response: The comment was based on the following facts; (i) the plaintiff had been a candidate for Pauline Hanson's One Nation Party in the 1998 Federal election; (ii) the plaintiff had participated in broadcasts to disseminate his political views and the policies of Pauline Hanson's One Nation Party, including a broadcast with the first defendant on 9 September 1998; (iii) the plaintiff was known to members of the public as a candidate for Pauline Hanson's One Nation Party who had participated in broadcasts in which he had expressed his political views and promulgated the policies of Pauline Hanson's One Nation Party."

The Magistrate addressed the question as to whether the words complained of were in fact comment, by referring to the following dictum of Field J in *O'Brien v Salisbury*[1]

> "If a statement in words of fact stands by itself naked, without reference, either expressed or understood, to other antecedent or surrounding circumstances notorious to the speaker and to those to whom the words were addressed, there would be little, if any room for the inference that it was understood otherwise than as a bare statement of fact, and then if untrue there would be no answer to the action."

14. The Magistrate looked for the antecedent and surrounding circumstances by examining the broadcast as a whole and by drawing upon facts which she assumed to have been known by the ordinary and reasonable listener. She observed that the words were published orally and in transient form. She devoted a little time to a consideration of the words "we exposed last time" to see if these bore upon the issue. She drew attention to the fact, as she saw it, that Mr Price chose to express himself in words which she characterised as vitriolic and invective. In so doing her Worship was treading the path of orthodoxy and no criticism was directed to her in this regard.

15. To my mind, notwithstanding the arguments addressed on behalf of the appellants, the Magistrate was entitled to conclude, as she did, that the words contained only statement of fact so that the defence of fair comment was properly rejected.

16. The Magistrate's rejection of the plea of political discussion privilege, the defence, was the subject of two questions of law.

> "(c) Whether the Magistrate properly instructed on the whole of the evidence was justified in... (ii) ... failing to uphold the defence of qualified privilege in respect of political discussion? (d) Whether the Magistrate failed to apply the correct legal test in determining that the appellants in publishing the words complained of 'had not acted reasonably'?"

The first of these questions suffers from the same infirmities as that with respect to the defence of fair comment.

17. There was no dispute that the publication concerned the discussion of government and political matters. The debate before me turned upon whether the appellants had discharged the burden which lies upon them of establishing reasonableness. The magistrate addressed this question in the terms set out by the High Court in *Lange v Australian Broadcasting Corporation*[2]. It cannot be doubted that this is the correct test. Having set out the relevant passage from this judgment she concluded that the defendants had not discharged that burden. She observed that Mr Price had no reasonable grounds for believing the imputation to be true and that he presented no evidence that he sought to verify the accuracy of the material contained in it. Rather the contrary, he knew that Mr Hesse was not a member of the One Nation Party many months prior

to the publication of the broadcast. She added that Mr Price did not seek a response from Mr Hesse at or near the time of the offending broadcast. It was not until 19 March 2001, some five weeks after the broadcast, that he extended to Mr Hesse an invitation to respond. She concluded, and in my view she was entitled to do so, that Mr Hesse was entitled to decline this invitation in the circumstances, so that there was not a sufficient opportunity to respond provided to him.

18. I am unable to conclude that the questions relating to this defence, if indeed they be questions of law, should be determined in favour of the appellants. I propose that the appeal be dismissed with costs.

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[1] (1889) 54 JP 215 at 216, quoted in *Gatley on Libel and Slander*, 9th ed. para 12.7.
[2] [1997] HCA 25; (1997) 189 CLR 520 at 574; (1997) 8 FLR 216; (1997) 145 ALR 96; (1997) 71 ALJR 818; [1997] Aust Torts Reports 81-434; 2 BHRC 513; [1997] 2 CHRLD 231; (1997) 10 Leg Rep 2.

APPEARANCES: For the appellants Price and 3AW: Mr J Ruskin QC with Ms GL Schoff, counsel. Corrs Chambers Westgarth, solicitors. For the respondent Hesse: Mr MF Wheelahan, counsel. Coadys, solicitors.
