15th June, 1957

Judge:—

The Hon. Mr. Justice W. Harding, K.M., B.Litt., LL.D.

Thomas W. Hedley pr. et ne. *

versus

The Honourable Notary Doctor Joseph Felix Abela, M.L.A., ne. et

Defamation — Broadcast — Rediffusion — Parliamentary Debates — Minister — Public Officer — Malice — Proof — Privilege — Section 36(c) and (d) of the Press Law (Chap. 117)

The Press Law negatives action for defamation, "inter alia", in respect of publications made by a public officer in the exercise of his functions, and also where the publication consists of a 'bona fide' report of debates of the Legislative Assembly, provided the relevant part of the debate is published, and the defence of any person against whom any charge is made is not suppressed, or maliciously or negligently curtailed or altered.

If a Minister, who intends to make a speech in the Legislative Assembly, causes that speech to be recorded, and later on, after the speech has been made, to be broadcast to the public in general, he is not in the position of a person who publishes a report of parliamentary proceedings, but he is simply and solely repeating his speech no longer under cover of the absolute privilege which attaches to a speech made in the Legislative Assembly, but outside that body, and, by means of the recorded broadcast, to the public at large. And in such case no privilege applies under the second of the two above mentioned grounds of negation of action.

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* Fis-26 ta' Gunju, 1957, dan l-appell gie rinunzjat.

A broadcast is a publication of printed matter in terms of the Press Law, the recording thereof being tantamount to a gramophone record; and it is protected by privilege if it is made by a public officer in the exercise if his functions. But if that officer exceeds the limits of his functions, then the privilege does not attach; so that, if the public officer uses the occasion maliciously for some wrong motive, or for some other motive other than a sense of duty, then proof of such indirect and wrong motive will defeat the privilege.

Of course, the burden of proving malice is cast on the plaintiff; but the Court is not entitled to shut out the complainant from his right to lay before the tribunal such evidence as he alleges to have at his disposal to prove that the defendant public officer was not using the occasion of the broadcast honestly.

In the case of the manager of the broadcasting company, the case is different; because such a broadcast unquestionably falls to be considered as a report of parliamentary debates. And if it is a "verbatim" report of a speech made in parliament, there can be no question that the report was a "bone fide" one, that is fair and accurate; in as much as, being a "verbatim" report, it could in no way be garbled or distorted; nor could there have been any suppression, or any malicious or negligent curtailment or altering of the defence of the complainant.

In cases falling under the Press Law, the complainant, differently from the general law, may enter an appeal in all cases.

This is an appeal of plaintiffs from a judgment given by the Criminal Court of Magistrates on the 11th April, 1957;

Plaintiffs filed a complaint against defendants, containing the charge that in Valletta and in other places, on the 23rd November, 1956, at about 7.15 p.m., in a broadcast over the Rediffusion, defendant Abela, with the connivance of defendants Hamilton Hill and Slater, defamed plaintiffs in that, by means of false allegations, they exposed plaintiffs to public contempt;

The Court below, in its judgment accepted the plea in bar raised by defendants, and declared that the publication complained of was a publication of printed matter as defined by the Press Ordinance, that no action lay against defendant Abela, because the publication was made by a public officer in the exercise of his functions, and that no action lay against the other defendants, because the publication was a "bona fide" report of a debate in the Legislative Assembly, and consequently acquitted defendants, with costs against complainants;

After hearing the arguments of counsel for the appellants and the respondents, this Court considers as follows:—

The facts relevant to the plea in bar do not appear to be in dispute between the parties, and are correctly stated thus in the judgment of the First Court:—

"Some time prior to the discussion of the General Estimates in the Legislative Assembly, the Ministers in Cabinet decided that each of them would record the speech which he intended making during the debate covering the activities of his Ministry, and this for the purpose of broadcasting it over the Rediffusion system after its delivery in Parliament. On the 23rd November, 1956, defendant Abela, in the company of witness Pellegrini, the Information Officer, went to the studio of the Rediffusion Company, where he recorded by means of a tape recorder the speech which he intended making, later on, on the same day, in the Legislative Assembly. The speech, which covers the activities of his Ministry during the past year, and which deals with its requirements for the coming financial year, contains the words alleged to be defamatory to them..... When witness Pellegrini had heard defendant Abela finish delivering his speech in the Legislative Assembly, he telephoned to the Rediffusion Studios and instructed them to broadcast the recording of defendant's speech. This was done

at the time stated in the complaint, that is, at about 7.15 p.m.";

In order to clear the ground as much as possible of extraneous matter, it should be stated at once that this Court will not be dealing in any way with that part of the submissions of complainants wherein it is argued that an offence was committed as soon as defendant Abela recorded his statement in the presence of the Information Officer and the technicians of the Rediffusion Company. The complainants mention specifically the actual broadcast of the speech made at 7.15 p.m., and, at least on appeal, the complaint and the writ of summons, which incorporates the complaint, do not fall to be altered;

Defendant Abela contends that no action lies against him in view of paragraphs (c) and (d) of section 36, Ch. 117 Rev. Edit. Laws of Malta, which, "inter alia", negatives any such action where the publication is made by a public officer in the exercise of his functions, and, also, where the publication consists of a "bona fide" report of debates of the Council of Government (now read Legislative Assembly), provided the relevant part of the debate is published, and the defence of any person against whom any charge is made is not suppressed or maliciously or negligently curtailed or altered;

With regard to the exemption from liability on the second of these two grounds, defendant Abela is clearly in no way entitled thereto. It would be an utter misconstruction of facts so to hold. It is obvious that when that defendant caused his intended speech to be recorded and later on caused it to be broadcast to the public in general, he was not in the position of a person who publishes a report of parliamentary proceedings, but he was, simply and solely, repeating his speech no longer under cover of the absolute privilege which attaches to a speech made in the Legislative Assembly, but outside that body and, by

means of the recorded broadcast, to the public at large. To put it concisely, the privilege under paragraph (d) does not and cannot apply in defendant Abela's case;

There is no need to have recourse to text-writers on other laws to come to this conclusion, because, on a mere verbal construction, the word "report" in the relevant section of the Maltese Laws is at complete variance with the notion of a public officer broadcasting his own speech;

The position may be different in countries where it has been laid down "by law" that no action shall lie against any person for broadcasting or rebroadcasting any portion of the proceedings of Parliament. But in Malta, as yet, there is nothing similar on the Statute Book, and, therefore, no such exception is operative;

With regard to the first ground, this Court is inclined to hold, and in point of fact holds, that the broadcast was a "publication" of printed matter in terms of the Press Law, the recording thereof being clearly tantamount to a gramophone record in terms of section 3 of the Law. As Burnett James explains in his book "Hi-Fi for Pleasure" (1st edition, 1955, Phoenix House Ltd. p. 108-109), "tape records are just as much a reproducing medium as gramophone records, with evident advantages over the standard disc, and tape recording is simply another form of the same thing";

This Court holds, that the occasion, in view of all the surrounding circumstances, was a privileged occasion, i.e. an occasion of a publication made by a public officer in the exercise of his functions. In fact, there was undoubtedly a "duty" on the part of defendant Abela to make known the contents of his speech to the public at large, and there was, equally undoubtedly, an "interest" in the public to whom the broadcast was addressed. It is well settled that the word "duty" in this context is not to be intended in

the restricted meaning of a "legal" duty, but a moral or social duty is sufficient (vide, on this point, Gatley, Libel and Slander, p. 201 and notes; Odgers, On Libel and Slander, 5th edition, p. 209; Fraser, The Law of Libel and Slander, p. 143; Ball, The Law of Libel and Slander, p. 112);

The wording of the law, however, places a limit to this self-same privilege. The limiting words are "in the exercise of his functions". In English text-books on this matter, the expression "qualified" privilege is used. Counsel for defendant has argued that in the Malta Press Law the distinction between absolute and qualified privilege does not exist, and that the words of the section "No action shall lie....." are absolute. This argument is only acceptable up to the point that, purely as a matter of words, the distinction is not to be found in the law, and that no action lies, whatever the contents of the broadcast, if the public officer keeps himself within the bounds of his functions. But the wording of the Maltese Law is more than sufficient to warrant the interpretation that, if a public officer exceeds the limits of his functions, then the privilege does not attach; and in that sense the privilege is clearly "qualified". Otherwise, the words contained in the law "in the exercise of his functions" would be completely devoid of sense;

Now, it is evident that if a public officer uses the occasion maliciously for some wrong motive, or, as is aptly stated in a judgment quoted in the text-book by Burton, Libel and Slander, p. 136, if the public officer, in saying certain words, was acting for some other motive other than a sense of duty, then proof of such indirect or wrong motive will defeat the privilege. The defendant is only entitled to the protection of the privilege if he uses the occasion in accordance with the purpose for which the occasion arose (vide Burton, ibid. p. 127). The words used in this connection by Bankes L.J. in Gerhold v. Baker (1918) W.N. at page 369 are worth quoting:— "It is obviously right that a person should not be allowed to abuse a privileged occa-

sion by making it the opportunity of indulging in some private spite, or for using the occasion for some indirect purpose or under the influence of some indirect motive";

Of course, the burden of proving malice, once the occasion is privileged, is cast on plaintiffs. In order to succeed, plaintiffs must prove that defendant Abela was not using the occasion honestly for the purpose for which the law gives protection, but was actuated by some indirect motive not connected with the privilege;

The First Court was, therefore, clearly not entitled to shut out complainants from their right to lay before the tribunal such evidence as they allegedly have at their disposal to prove that defendant Abela was not using the occasion honestly;

The Court now passes on to consider the case of defendants Hamilton Hill and Slater;

Counsel for these defendants claims the privilege under para. (d) of sec. 36 Ch. 117;

There cannot be any question that, in the case of these defendants, the broadcast falls to be considered as a "report" under section 36(d) afore-quoted, their protection being different from that of the public officer who made the speech. Nor can there be any question that the report was a "bona fide" one, that is, "fair and accurate", in as much as it was a "verbatim" report, which could not, therefore, have been in any way garbled or distorted. Lastly, there could not have been, in the case of these defendants, "any suppression or any malicious or negligent curtailment or altering of the defence of the complainants", because during the course of the arguments before this Court it was agreed that, in the proceedings of the sitting of the the Legislative Assembly on that day there was no further reference to the indictment concerning the complainants.

In point of fact, no member said anything in defence of the complainants;

It is important to note that the intent to which the proof of malice falls to be admissible must necessarily vary according to the different wording of each paragraph. In para. (c), the relevant expression is "in the exercise of his functions". That expression is sufficiently wide to let in, in a general way, the proof of malice in order that the Court may ascertain whether defendant Abela, in uttering the words complained of, was using the privileged occasion honestly, or whether he was abusing it for some indirect purpose or under the influence of some indirect motive. In para. (d), however the relevant wording is such that the proof of malice is only let in within certain clearly defined limits; that is, there would be malice if the report is not fair and accurate, or if the relevant part of the debate is not published, or if the defence of any person is suppressed or is maliciously or negligently curtailed or altered. In the present instance, the broadcast was a report of the whole speech, and no defence of the person charged was made. Consequently, malice as specified in and limited by para. (d) cannot arise; and as no further enquiry as to malice is warranted by the paragraph, defendants Hamilton Hill and Slater must succeed, and the case as far as they are concerned is closed by proof of the privilege;

This Court is, however, anxious that the conclusion which it has now reached with regard to defendants Hamilton Hill and Slater should not be misconstrued, particularly in view of the concluding paragraph of the note of submissions filed at page 147 by counsel for those defendants, which runs as follows:— "It is quite incorrect to state simply that Rediffusion do not even take the elementary precaution of verifying what kind of statements are broadcast during Government time, when, according to witness Pellegrini, Rediffusion have insisted that scripts of broadcasts be submitted, but such requests have met

with a refusal on the part of the Government, who, in terms of the Company's licence, are entitled to time on the air";

The Court deems it necessary to point out. lest it may appear that this judgment is sanctioning any irregular procedure, that the aforesaid conclusion was reached with regard to defendants Hamilton Hill and Slater because it so happened that, in this particular case, nothing was said in defence of complainants in Parliament in the same sitting in which the speech was made by the other defendant Abela. Had anything been said, its ommission from the broadcast might well amount to such a malicious or negligent curtailment of a "report" under section 36(d) as to defeat the privilege. The procedure of broadcasting, immediately after actual delivery, a parliamentary speech, recorded prior to its being delivered, with no opportunity of the inclusion therein of anything that might be said in defence, is, as the Maltese Law stands at present, a perilous adventure for anyone who wishes to claim the privilege under para. (d) afore-quoted; and certainly the fact of not reading the script might in itself, saving due consideration of the Company's position vis-a-vis the Government, amount to culpable negligence;

There is one further point which falls to be mentioned. Respondents, at the opening of the hearing before this Court, set up the plea of the inadmissibility of the appeal. They have now withdrawn that plea. It may be remarked that this case falls under the Press Law — Ch. 117; and in terms of that Law, since the time when section 63 was amended by Ord. XIV of 1947, a complainant — differently from the general law — may enter an appeal in all cases;

This Court, therefore, adjudges as follows: —

With regard to defendant Abela, disallows the plea in bar in so far as the privilege envisaged in para. (d) of section 36 is concerned; allows the plea in so far as the

privilege in para. (c) is concerned, in the sense that the Court declares the occasion of the broadcast to have been an occasion of "qualified" privilege; and consequently allows the request of complainants to produce evidence of malice to displace that privilege;

With regard to defendants Hamilton Hill and Slater, allows the plea of privilege under para. (d) of section 36, and consequently acquits both those defendants, and orders that they be discharged. In view of the circumstances of the case, the costs of first and second instance are not to be taxed between complainants and these two defendants, registry fee to be at the charge of complainants. Fees for counsel as noted hereunder;

Costs as between complainants and defendant Abela reserved;

Adjourns the case, with regard to defendant Abela, to the 22nd June, 1957, at 9 a.m., for the production of evidence "hinc inde" on the question of malice and for the conclusion of the hearing;

The judgment of the First Court is thus affirmed and varied respectively in the sense of the foregoing considerations;

Twelve shillings for each sitting.