26th. April, 1948.

Judge:

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

Reginald Miller *versus* Joseph J. Scorey

Libel — Fair Comment.

The defence of fair comment must be based on facts truly stated; if the facts are not truly stated, a comment cannot be fair.

Nor it is enough that the writer honestly believed the facts to be as he alleged them: the defence of fair comment does not extend to cover mis-statements of facts, however bona fide;

Provided the comment is based on a particular allegation, it is immaterial whether the allegation concerns the complainant or not; because the fact remains that the comment is based on an allegation which has not been proved to be true.

Comment is any kind of criticism, observation, animadversion, censure, estimate, or other matter in the nature of an expression of judgment or opinion upon a subject of public interest.

As to the comment being "fair", it appears to be safe to adopt the test that the comment must not exceed the reasonable limits of fair criticism. The criticism is not "fair" if it is such as any fair man, however exaggerated or obstinate his views, would not have written that criticism.

This is an appeal entered by the defendant against a judgment given by the Criminal Court of Magistrates for the Island of Malta on the 20th. December, 1947;

Complainant brought an action for libel against the defendant in respect of an article which appeared in the newspaper "The Bulletin" on the 22nd. October, 1947, under the title "Trifling with Security". The Court below found defendant guilty "in terms of the charge" (the underlined words are those used in the judgment, but a clarification will be made presently), and sentenced him to a fine (multa) of £5. Defendant was also ordered to pay the costs of the proceedings;

This Court, after examining the record of the case....., considers as follows;

It is expedient, in approaching this appeal, to determine with precision the extent of the issue before this Court. In fact, the issue is not exactly what it was originally before the

Court below. In the proceedings before that Court the following words, contained in the article, that is, "Men who have tried, and failed, to introduce here mob law,.....", were certainly part of the alleged libel. Indeed, in addition to the wholesale reference to the article as libellous, in the written complaint at page 2, complainant, in giving evidence, stated thus:— "I do not consider myself as one who has tried to introduce mob law". Now, the learned Magistrate, in the course of his judgment, considered the article as severable, and in point of fact proceeded to deal with it as such, separating the allegedly defamatory statements. After examining a number of leading and other articles appearing in the newspaper "Torch", whereof the complainant is the editor, and to which defendant had made reference, the learned Magistrate came to the conclusion that the defence of fair comment was successful in regard to the statement "Men who have tried, but failed, to introduce mob law", and that no action for libel lay with regard to these words;

The position now, therefore, is that those words must, in judging the rest of the article, be taken to be a fair commen. Under Maltese Law the defendant's case cannot be worsened on an appeal by him (see sect. 440, subsec. 7). That part of the judgment which held those words to constitute a fair comment has now become a "res judicata", so far as defendant is concerned, and therefore, whatever the opinion of this Appellate Court may have been, they must irrevocably be deemed to be so;

The whole issue, therefore, really turns on the rest of the last two paragraphs, which the Lower Court considered to be libellous. The matter complained of reads as follows:— "Men who have tried, and failed, to introduce here mob law, should hide their heads before they condone and promise their solid support to misguided partisan policemen, who illegaly use force against innocent citizens, men, women, and children, of all ages and conditions. Behaviour of this sort, both by Police and G.W.U. officials, is trifling with public security..... the first step towards forfeiting yet another Constitution, when it suits someone to pull the appro-

priate string. It only requires a set of "Freeman" posters to glorify the event";

It should be noted that this article was suggested by an article which appeared in the "Torch" of the 17th. October, 1947 (page 8 of the record) under the title 'Fascism in Malta". Reference was made in this latter article to an electoral meeting of the Nationalist Party held at Qui-si-Sana, Sliema, on the 12th. October, 1947. Much controversy had arisen locally over this meeting, as the Police had broken up a demonstration after the meeting; but the Nationalists claimed that the Police had charged the party's supporters rather brutally and unnecessarily. In fact, Dr. Mizzi, the leader of the party, had asked for an enquiry into the matter (vide evidence of Dr. Mizzi and his protest in "The Bulletin" of the 18th. October, 1947, at page 15). In the article appearing in the "Torch", to which the incriminated article is obviously a reply, the following statement appears:— "The G.W.U. is solidly behind the authorities in any reasonable steps, however drastic, they may have to take to nip in the bud this execrable Fascist growth";

The words complained of, therefore, have to be considered also against the background of these other words which gave rise to them;

It is clear from page 7 of the record that defendant set up the plea of justification, as well as that of fair comment;

In order to come to a correct conclusion, it is necessary to look at the article as a whole, and to fix the main charge or gist of the libel;

It seems safe to assert that the gist of the article is this: "According to the writer, the Police had manhandled the crowd at the Qui-si-Sana Nationalist meeting. Complainant, in the article appearing in the "Torch", had pledged his support to the Authorities in any reasonable steps, however drastic, which they may have to take to stop similar demonstrations. Presumably, therefore, in the writer's view, he was pledging his support to similar illegal actions by the Police. As a man who had tried to introduce mob law, he should hide his head before condoning similar behaviour on the part of the Police. By doing that as an official of a

General Workers' Union, he was trifling with security..... a step which might endanger the Constitution";

It is obvious that the defence of fair comment does not fall to be considered (apart from the fairness or otherwise of the comment), unless the version of the Qui-si-Sana incident as accepted by the defendant has been proved. In fact, the words complained of constitute comments based on that version;

Now, the evidence produced by defendant has fallen short of proving the writer's assumption that the Police did not behaved properly on that occasion;

It is well-settled law that the defence of fair comment must be based on facts truly stated. The writer of the article assumed as true facts which have not been substantiated, and then proceeded to comment on the basis of those facts. As Mr. Justice Kennedy said in "Joynt vs. Cycle Trade Publishing Co." 1904, 2 K.B., at page 294, a "dictum" quoted with approval by Master of the Rolls Cozens Hardy, in Hunt vs. Star Newspaper Co. Ltd. 1908, 2 K.B. at pp. 317-320 — "the comment must not mis-state facts, because a comment cannot be fair, which is built upon facts which are not truly stated";

It may be objected that when the article in question was written, the version of the Qui-si-Sana incident given by Dr. Mizzi in "The Bulletin" of the 18th. October, 1947, had already appeared. But it is obvious that Dr. Mizzi's protest alone was not sufficient for the writer to assume as a fact the improper behaviour of the Police on that occasion. Even if, as a result of that protest, the writer honestly believed that version to be the true one, this would not be enough to exempt him from blame. Odgers, "On Libel and Slander", quotes, a propos, the dictum in Campbell vs. Spottiswoods, 3 B. & S. 769, to the effect that "it is not enough that the writer honestly believed the facts to be as he alleged". This appears to be a very sound doctrine, as otherwise it would be easy to state as a fact that which is not well known or admitted, or proved, and then to make a scathing comment thereon, which would be justified, but only if the facts on which the comment relies were true. The

defence of fair comment does not extend to cover mis-statements of facts, however "bona fide" (Thomas Bradbury vs. Agnew & Co. Ltd., 1906, 2 King's Bench, p. 688);

It is appreciated that, in the great majority of cases which were considered by the Courts, the unsubstantiated allegations of fact, to which the comments referred, concerned the complainant, whereas in this case the allegation of fact, on which the comments contained in this article turn, refer to the Police. Thus, for instance, in the much quoted case Davis & Sons vs. Shepstone 1886, 11 App. Case 187, the writer first made serious allegations of fact concerning the President Commissioner of Zululand (stating that he had assaulted a Zulu chief, that he had set on the native policemen to assault others, etc.), and then, upon the assumption that these statements were true, the writer commented upon the Commissioner's conduct in terms of great severity. As the allegations were not substantiated, the defence of fair comment was not considered. But it is clear that, provided the comment is based on that particular allegation, it is immaterial whether the allegation concerns the complainant or not, because the fact remains that the comment is based on an allegation which has not been proved to be true;

Had there been an official enquiry on the Qui-si-Sana incident and, "ex hypothesi", as a result of that enquiry, it appeared from the official report thereon that the Police acted brutally, then the defence of fair comment would, apart from its merits, have fallen to be considered; because the comment would have been based on an allegation made not by the writer of the article, but contained in a privileged document (see Mangena vs. Wright, 1909, 2 K.B. 958); but otherwise, it would be sufficient to exemplify the following case — A writer states that such and such a theatrical performance was immoral and obscene, and then, after making that allegation, goes on to say that it was discreditable on the part of X to attend the performance. It is obvious that only if and when the allegation that the performance was objectionable had been proved, would the defence of fair comment come to be considered. In the same way, in the present case, the writer in effect states that the Police

haved brutally at Qui-si-Sana, and then takes the complainant to task for condoning their conduct by pledging his support in the article which appeared in the "Torch". It is obvious that the question of the fairness or otherwise of the comment would only deserve to be considered at all, if and when the truth of the allegation of fact, to which the comment refers, be proved;

It is true that, as it appears from page 53 of the record, defendant has requested leave to reproduce before this Court as witnesses the Honourable Dr. Enrico Mizzi, Silvio Spiteri and Joseph Sciclana, in order to prove facts relating to the conduct of the Police at the Qui-si-Sana meeting, that is, whether, in their opinion, the Police used active force at that meeting and, in the affirmative, whether such violence was justified. This request was objected to by counsel for complainant;

This Court is not of the opinion that this request should be granted. These witnesses have already given their evidence before the Court below, and the notes of their evidence are at pages 5 back and 6 back of the record. Moreover, the defendant was granted several adjournments by the Magistrate, and, therefore, had the opportunity to reproduce these witnesses in subsequent sittings. In fact, these three witnesses gave their evidence in the Court below in the sitting of the 29th. November, 1947. The case was then adjourned to the 4th. December, 1947. It was then put off to the 9th. December, 1947, and again left over to the 20th. December, 1947. On this latter day the Court delivered an order whereby a further adjournment was granted to defendant in order to enable him to produce evidence in support of his twofold plea of justification and fair comment, and the case was adjourned for that purpose to the 30th. December, 1947. Subsequently, and in that sitting (vide page 30 of the record) defendant declared that he had no further evidence to submit in his defence;

Now it is clear that the indulgence asked for should not be granted. There was absolutely nothing to prevent defendant from reproducing the afore mentioned three witnesses before the First Court. In view of the several ad-

journments granted to him, it certainly cannot be said that the leave should be granted on what, technically, is termed "surprise". The importance of proving the facts with regard to the Qui-si-Sana meeting, so that at least the defence of fair comment could be examined, was evident since the very inception of the case. That the defendant could have shaped his case better in the Court below is no reason for granting the leave asked for. It is not a case of "res noviter ad notitiam perventa";

The basic rule was laid down by Lord Chelmsford in the House of Lords in Shedden vs. Patrick and the Attorney General (1869, 22 L.T. Rep. 631—pp. 634, 545). "It is an invariable rule", the judgment runs, "in all courts, and one founded upon the clearest principles of reason and justice, that if evidence was in the possession of the parties at the time of the trial..... and the case is decided adversely to the side to which the evidence was available, no opportunity for producing the evidence ought to be given....." As Judge (now Sir) Philip Pullicino remarked in the course of his judgment in the case "La Polizia vs. Carmelo Camilleri", disposed of by this Court on the 14th. December, 1929, "in questo stadio (that is, on appeal) si deve esaminare se il primo giudicante abbia fatto bene o male sulle prove che vi erano dinanzi a lui" — a remark which appears to be parallel to that made by the English Court in the case Nash vs. Rochford Rural District Council, 116 L.T. Rep. 129, App. Ct., to the effect that, if similar requests be unduly granted, then "the Court" — meaning the Appeal Court — "would not be in the same position in regard to the case as the Court below.....";

It might be objected that any evidence bearing on the Qui-si-Sana meeting may be conclusive, and therefore the reproduction of those three witnesses should be allowed on this ground (Powell, On Evidence, p. 702);

Even if this test were to be admitted, it does not seem that the indulgence should be granted. In fact, that evidence would, if successful, have been conclusive only in the sense that the Court would have proceeded to examine whether the comment was fair comment or not. Without the proof that

the behaviour of the Police at Qui-si-Sana was reprehensible, the defence of fair comment does not even fall to be considered; because, as afore-explained, the substantiation of the fact on which the comment is based is an essential prerequisite to that defence. But even assuming, simply for the sake of argument, that the conduct of the Police at that meeting was brutal, is it true to say that, as a consequence, the comment was a fair comment, and that, therefore, those three witnesses should be re-heard in order to prove what may be conclusive? *That is now the point*;

Now this Court is of opinion that, even if it were to be hypothetically assumed that the Police ill-treated people at the Qui-si-Sana meeting, and if, therefore, the fact being substantiated, this Court were to proceed to examine the merits of the plea of fair comment, the conclusion would be still adverse to defendant;

What is fair comment? Comment, "in subjecta materia", means any kind of criticism, observation, animadversion, censure, estimate, or other matter in the nature of an expression of judgment or opinion upon a subject of public interest;

With regard to the word "fair", Bower, in his textbook "A Code of the Law of Actionable Defamation", examines in detail the numerous judgments in which the adjective "fair" has been used; and although he recognises that the word has been continually used in case after case, and in treatise after treatise, still he considers it unnecessary, harmless, and even misleading (*note (t) page 119, and p. 388*);

This is, perhaps, going too far, although it is true to say that it is not possible to find in any decided case, in the English Courts, an exact and rigid definition of the word "fair"; probably because the judges have always preferred to leave the question on what is "fair" to the Jury;

But it appears to be safe to adopt the test laid down by Lord Esher, Master of the Rolls, in Merivale vs. Carson, 20 Q.B.D., pp. 280-281, that is:— "Would any fair man, however exaggerated or obstinate his views, have written this criticism?" In the same case Lord Bower said that the

comment must not exceed the reasonable limits of fair criticism;

In Wason vs. Walter, L.R. 4 Q.B. at p. 96, the Court approved a direction to the jury which stated, "inter alia", that it was not enough that the writer made the comments with an honest belief in their justice; that belief might originate in the blindness of party zeal, or in personal or political aversion; the person taking upon himself publicly to criticise and to condemn the conduct or motives of another must bring to the task not only an honest sense of justice, but also a reasonable degree of judgment and moderation. The word "legitimate" was also used by the Courts in this connection;

Kennedy J., in Joynt vs. Cycle Trade Publishing Co. 1904, 2 K.B. at page 294, in the course of the summing up, approved by the Court of Appeal, said:— "The comment must be such that a fair mind would use under the circumstances.....";

There is no doubt that these "dicta" are helpful in judging whether — even if one were to consider, "ex hypothesi", as proven that which has not been proven, i.e. that the Police used needless violence at the Qui-si-Sana meeting — the comment contained in the article under review was just or not;

This Court is of opinion that it was not. The sitting Judge is aware that great latitude must be given to articles of a political nature. He is equally aware of the very sound recommendations contained in the address to the jury made by Mr. Justice Fitzgerald in R. v. Sullivan, Irish St. Tr. 1868, 11 Cox, C.C. 53, when he advised them not to be carried away by mere strong language, and to look at the article in a fair, free and liberal spirit. They should recollect — the learned judge continued — that they were dealing with political articles, for which a great latitude must be given; they were dealing with a class of articles which, if written in a fair spirit, might be productive of great public good, and were often necessary for public protection. They should deal with such articles — he concluded — in a broad spirit, allowing a wide and fair margin, looking upon the whole, not on

isolated words (See Folkard, Law of Slander and Libel, pag. 618). But, even keeping these memorable words in view, in the present case one cannot come to the conclusion that the comment was a legitimae one;

In the article which appeared in the "Torch", what was said was this: "The G.W.U. is solidly behind the authorities in any reasonable steps, however drastic, they may have to take to nip in the bud this execrable Fascist growth";

Any fair-minded man will agree that it is a long way from saying simply this to interpreting it as a promise of "solid support" — in the words of the incriminated article —"to misguided partisan policemen who illegally use force against innocent citizens, men, women and children, of all ages", and to saying that "behaviour of this sort, by Police and G.W.U. officials, is trifling with public security". It cannot certainly be stated that the writer of the article brought to task, in making that criticism, a reasonable degree of judgment and moderation. Nor can it be said that a fair-minded man might, upon the words of the afore mentioned article in the "Torch", "bona fide" hold the opinion expressed in the article complained of. It is clear that the remarks, to which complainant took exception, exceed the reasonable limits of fair criticism, even taking into consideration the political nature of the article. No fair-minded man would say that the animadversions contained in the latter article — indeed the imputations it contains — arise fairly and legitimately out of the "Torch" article;

It follows, therefore, that the request for the re-hearing of the three witnesses afore mentioned is not even supported by the argument that their evidence may be conclusive, because the whole point really comes to this: so long as the Qui-si-Sana incident, in so far as it is claimed by defendant that the Police acted brutally, is unsubstantiated, the defence of fair comment does not even fall to be considered, because any such defence is barred if the facts, on which the comment is made, are not proved. If the facts, "ex hypothesi", are taken to be proved, then the comment is not

just, and defendant is still not entitled to the immunity of fair comment;

For these reasons;

This Court dismisses the appeal and affirms the judgment of the Court below. The costs are to be paid by defendant. The fees due to Counsel are taxed as follows: 10s. for the sitting of the 8th. March, 1948, and that of today, and 12s. for that of the 2nd. April, 1948.