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Privy Council Appeal No. 35 of 2004

Basdeo Panday *Appellant*

v.

Kenneth Gordon *Respondent*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 5th October 2005

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Present at the hearing:-

Lord Nicholls of Birkenhead
Lord Hoffmann
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Baroness Hale of Richmond

*[Delivered by **Lord Nicholls of Birkenhead**]*

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1. This appeal concerns an unfortunate dispute between two leading citizens of Trinidad and Tobago. It goes back eight years. On 30 May 1997 a new national holiday was inaugurated in Trinidad and Tobago to mark the first arrival of indentured labourers from India in 1845. The Prime Minister, Mr Basdeo Panday, participated in the celebrations. He was the first Prime Minister of East Indian descent. At a public celebratory meeting held at Chandernagore Mr Panday made a speech to a large audience. In the evening the speech was carried on television. On the next day all four of the national daily newspapers carried reports.

2. This defamation action arises out of what Mr Panday said on that occasion. The plaintiff is Mr Kenneth Gordon. He is a well-known businessman. He was chairman of a large media house which operates several newspapers and a television station. The

defendant is Mr Panday, now the Leader of the Opposition in the House of Representatives. He is the political leader of the United National Congress party.

3. The action was tried in July 2000. On 11 October 2000 the trial judge, Jamadar J, delivered a comprehensive judgment. He found in favour of Mr Gordon and awarded him damages, including aggravated damages, of $600,000. Mr Panday appealed to the Court of Appeal. In October 2003 the Court of Appeal by a majority upheld the judge's conclusions on liability but reduced the damages to $300,000 (about £27,000). The majority comprised Hamel-Smith and Warner JJ A. Sharma CJ dissented. Sharma CJ would have allowed the appeal and dismissed the action. Mr Panday has now appealed to their Lordships' Board.

The words complained of

4. Mr Panday delivered his address at Chandernagore from a prepared text. The address lasted about ten minutes. The theme of the address was the need for national unity. The material part was as follows:

> "As you join me in this crusade for national unity you will meet many people who do not want national unity. They are the ones who in the past have benefited and thrived on maintaining division of our society. I call them the pseudo racists.
>
> I call them the pseudo racists because they are not real racists. Real racists are people who look after their race. These fellas use race only to look after they self. They are pseudo racists. So I say the pseudo racists who have divided the society to maintain the political power. And even now they are doing so in the hope of political survival. The Ken Gordons who want to maintain his monopolistic advantage over his competitors in the media.
>
> My brothers and sisters, they come in many shapes and sizes. They do not want change, they continue to resist national unity. We pass laws to deal with criminals, they condemn us. We sign an agreement with the Americans to deal with drug lords, they condemn us. ... We try to change URP, they accuse us of racism. If someone gets fired from a state enterprise because ... he is corrupt, they scream. They doh want change, they want to continue in their old ways."

The trial of the action

5. At the trial of the action Mr Gordon gave evidence along with two other witnesses. The judge found that all of them were truthful. Mr Panday gave no evidence and called no witnesses. Mr Panday did not raise a defence of justification, and he abandoned a *Reynolds* defence and a defence of honest comment on a matter of public interest. The judge held that the ordinary listener would have concluded that in his address the Prime Minister was calling Mr Gordon a pseudo-racist who used racism to maintain division in society and in order to maintain a commercial advantage over his competitors in the media business. The judge held this was defamatory and that these words were spoken of Mr Gordon in the conduct of his media business. So the slander was actionable without proof of special damage. The judge further held that Mr Panday intended and authorised that his slanderous remarks should be republished "throughout the length and breadth of Trinidad and Tobago and abroad". Accordingly he was liable for the damage caused by the republication of his defamatory remarks in four newspaper articles and in a television broadcast by Trinidad and Tobago Television.

6. At a very late stage in the trial counsel then appearing for Mr Panday sought to raise a defence to the effect that in his address the Prime Minister was responding to Mr Gordon's earlier attack on the government's green paper on the reform of media law "Towards a Free and Responsible Media" and that, accordingly, the occasion was one of qualified privilege. This green paper was published early in 1997, and on 7 May 1977 Mr Gordon had made a speech which was, in the judge's words, "a biting criticism both of the green paper itself and the UNC government that proposed it". The judge held that this defence was not pleaded. But he went on to reject this defence on its merits: there was no evidence to show that the Prime Minister's address was a reply as suggested, that in any event it went beyond anything necessary to refute Mr Gordon's criticism of the government's green paper, and that in his attack on Mr Gordon Mr Panday was actuated by malice. The judge said it was clear that on the evidence the Prime Minister did not honestly believe Mr Gordon was a pseudo-racist. The judge said:

> "In my opinion the Prime Minister when he defamed the Plaintiff did so with express malice intending to injure the Plaintiff, in furtherance of a mind-set of the Prime Minister later revealed in his own words, that 'no one who attacked his Government would remain unscathed'."

The judge held that this malicious intention arose only after Mr Gordon had criticised the government's green paper and because of the national support that criticism had received. The Prime Minister's allegations, the judge said, were made with the oppressive intention of silencing Mr Gordon and other would-be critics of the UNC government.

The Court of Appeal

7. In the Court of Appeal the majority upheld the judge's conclusions on liability. Mr Panday sought to resurrect a defence based on the constitutional recognition and declaration of the right to express political views. On a generous interpretation of the pleadings this defence was pleaded but at the trial, so it seems, counsel then appearing for Mr Panday did not mention this defence at any stage in any of his submissions. Hamel-Smith JA considered that Mr Panday should not be permitted to raise this issue at such a late stage. But he and Warner JA rejected this defence in any event: the right to express political views is not an absolute right.

8. Sharma CJ disagreed with his colleagues and the trial judge on almost all the points on which he expressed an opinion. The Chief Justice's view was that the words of which Mr Gordon complained were not defamatory. The ordinary reader would not think Mr Gordon fell within the Prime Minister's definition of pseudo-racist. Even if he did that would not lower Mr Gordon in the eyes of right-thinking members of society in Trinidad and Tobago where "racial slurs are accepted as commonplace". Further, section 4(e) of the Constitution afforded a defence. In section 4(e) the right to express political views was identified separately from freedom of expression so as to ensure the former "were not to be subject to the same strictures as they would be if subsumed under the freedom of expression". The right is not absolute, but the bar in section 4(e) will defeat a defamation action where the published material of which complaint is made constitutes a political view relating to a public figure and that view was honestly held or not uttered with reckless disregard to its truth or falsity. Those conditions were satisfied in this case.

The appeal on liability

9. Before the Board Mr Panday's appeal against liability was based on three grounds: (1) no action could be brought in respect of the words complained of because of the bar provided by section 4(e) of the Constitution; (2) the words were not defamatory; and (3)

the words were not spoken of Mr Gordon in relation to his profession.

10. It will be convenient to consider grounds (2) and (3) first. They can be dealt with in very short order. The submission made on behalf of Mr Panday was that on these points the Chief Justice's approach was to be preferred. Their Lordships are unable to agree. On ground (2) the trial judge's view of how the words would have been understood by an ordinary listener, set out above, was not challenged before their Lordships, and rightly so. Whether words bearing that meaning, and uttered in the context in which they were said, would tend to lower Mr Gordon in the estimation of right-thinking members of society is a question of fact. On that question of fact there are concurrent findings of the trial judge and the majority of the Court of Appeal in favour of Mr Gordon. Warner JA recognised that "in this society there is a tendency to exaggerate", but she held that the attack on Mr Gordon "went far beyond that which is acceptable in any contemporary society". Hamel-Smith JA said that a racist "will in the eyes of the public be condemned for his practice of racism". The Chief Justice took a more robust approach. But that is not a sufficient reason for their Lordships' Board to depart from the views of the majority and the trial judge. How words of this character would be understood, and what effect such words would have on those who heard them, are matters on which local courts are far better placed than their Lordships.

11. Nor is there any substance in ground (3). The trial judge said:

> "To allege that the Plaintiff used ('misused') racism to maintain a monopolistic advantage over competitors in the media business is to convey an imputation of misconduct and impropriety on the Plaintiff in his calling in the media business."

That is unanswerable.

The constitutional issue

12. The constitutional issue calls for more extended consideration. On this some brief general observations are pertinent before turning to the Constitution itself. The purpose of the law of defamation is to hold a balance between freedom of speech and the right to reputation. The basic position at which the common law holds this balance is to impose strict liability for defamatory statements in the absence of justification. The common law departs from this position where the words complained of are an expression of

honest comment, as distinct from a statement of fact, on matters of public interest. This defence of honest comment is available even if the comment was made with intent to injure, as where a politician seeks to damage his political opponent: see *Cheng v Tse Wai Chun* [2000] 3 HKLRD 418 and *Branson v Bower* [2002] QB 737. With regard to statements of fact the common law departs from strict liability where there is a need in the public interest for a particular recipient or recipients to receive frank and uninhibited communication of particular information from a particular source. These occasions attract privilege, sometimes absolute, more often qualified. In the latter case the privilege is circumscribed by the need for the maker of the defamatory statement to have a positive belief in the accuracy of what he says. If he acts dishonestly or recklessly or for an improper purpose, as set out in Lord Diplock's classic explanation of malice in *Horrocks v Lowe* [1975] AC 135, 150, he misuses the privilege.

13. In recent years it has become apparent that in today's conditions this traditional approach of the common law to statements of fact is not wholly satisfactory in respect of the widespread dissemination of political views and other matters of public concern. For some time there has been an increasing awareness that the strict common law rule can have an undue "chilling" effect. At the same time there has been an increasing awareness that to accord qualified privilege, as traditionally understood, to every occasion when matters of public concern are published to the world at large would be to go too far. In today's conditions publication of a defamatory statement at large can cause immense and lasting damage, much more so than with publications to one person, such as a prospective employer, or a limited group of people.

14. In common law countries courts have therefore sought to adapt the common law so as best to accommodate these conflicting considerations which have emerged in recent years. What is needed, in the interests of freedom of expression on matters of public interest, is some relaxation of the strict common law rule. Publication on these occasions should be regarded as privileged. But on these occasions the interests of those whose reputations are being impugned call for more protection than that traditionally afforded by the subjective *Horrocks v Lowe* malice limitation. What is needed is that the area of privilege should be extended but, as a counter-balance, those who make statements at large on matters of public concern and seek to avail themselves of this extended area of privilege, in addition to acting honestly, should exercise a degree of care. This objective requirement should be

elastic, enabling a court to have due regard to all the circumstances, including the importance of the subject matter of the statement, the gravity of the allegation, and the context in which it is made.

15. Thus, in Australia the High Court has propounded a test of reasonableness of conduct in respect of the publication of political information. Generally publication will not be reasonable unless the maker of the statement had reasonable grounds for believing the defamatory imputation was true: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 574. In the United Kingdom the House of Lords has held, in the context of media publication, that where the public is entitled to know the particular information the standard required of the maker of a defamatory statement is that of responsible journalism: *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 197, 202. In Canada the law is still developing. In *Botiuk v Toronto Free Press Publications Ltd* [1995] 3 SCR 3 the Supreme Court of Canada seems to have extended the reach of the concept of malice beyond Lord Diplock's exposition in *Horrocks v Lowe* [1975] AC 135. As used in *Horrocks v Lowe* recklessness betokens a state of mind. Now recklessness is being extended to include irresponsibility as objectively assessed by the court. In *Botiuk's* case the Supreme Court held, at paras 98 and 103, that the defendant lawyers were 'duty-bound' to undertake a reasonable investigation into the correctness of the document they were signing and that their failure to do so was reckless: 'actions which might be characterized as careless behaviour in a lay person could well become reckless behaviour in a lawyer'. A somewhat similar approach has been adopted in New Zealand. In *Lange v Atkinson* [2000] 3 NZLR 385 the Court of Appeal has, in terms, rejected a specific requirement of reasonableness. But the court has given recklessness a meaning which 'may in some circumstances come close to a need for the taking of reasonable care': para 48.

16. Against that background their Lordships turn to the Constitution of Trinidad and Tobago. The Constitution is the supreme law of Trinidad and Tobago. Any other law inconsistent with the Constitution is void to the extent of the inconsistency: section 2. At its forefront the Constitution enshrines, in chapter I, the recognition and protection of fundamental human rights and freedoms. Section 4 provides:

> "It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour,

religion or sex, the following fundamental human rights and freedoms, namely –

...

(c) the right of the individual to respect for his private and family life;

...

(e) the right to join political parties and to express political views; …

(i) freedom of thought and expression;

(j) freedom of association and assembly; and

(k) freedom of the press."

Section 5(1) provides that, except as otherwise expressly provided in the Constitution, no law may abrogate, abridge or infringe any of these rights and freedoms. Section 6 sets out a savings provision in respect of existing law: nothing in sections 4 and 5 is to invalidate an existing law, that is, a law having effect as part of the law of Trinidad and Tobago immediately before the commencement of the Constitution. 'Existing law' includes any unwritten rule of law, that is, the common law: section 3(1).

17. Mr Beloff QC submitted that the effect of section 4(e) of the Constitution is to recognise that all citizens of Trinidad and Tobago have an absolute, unqualified right to express political views. The discrete recognition of an unqualified 'right to express political views' in section 4(e) is unique in constitutional law. This right therefore requires discrete interpretation. Section 4(e) should be given a wider interpretation than it would have were it subsumed in section 4(i) as one aspect of the freedom of expression. Mr Panday's speech was within the protection of section 4(e) because it was an expression by him of a political view.

18. Their Lordships are unable to accept this submission on the effect of section 4(e) of the Constitution. Their Lordships consider this contention may be advanced to the Board despite not having been presented at the trial because the issue is solely one of interpretation of the Constitution, and failure to raise this issue of law did not affect the conduct of the trial. That said, their Lordships consider the submission is untenable.

19. The right to express political views is a right of fundamental importance in all democracies. That goes without saying. Clearly, the statement of this right as a separate right in the Constitution of

Trinidad and Tobago underlines the special importance attached to it by those who framed the Constitution. This is self-evident.

20. This is confirmed by the drafting history. Unlike the constitutions of other Caribbean countries, this part of the Constitution of Trinidad and Tobago was modelled on the Canadian Bill of Rights 1960. The Canadian Bill of Rights did not contain any provision corresponding to section 4(e) of the Constitution of Trinidad and Tobago. Section 4(e), together with some other rights listed in section 4, was added to the draft constitution at an advanced stage in the course of the Trinidad independence conference held in London in May and June 1962, immediately before Trinidad and Tobago became independent on 1 August 1962. No doubt those who successfully sought to have the right to express political views included specifically in the Constitution thought this would provide added reassurance.

21. These factors, important though they are, do not point to the conclusion for which Mr Beloff contended. They do not suggest that the right to express political views was to have no bounds. They do not suggest this fundamental right was to be capable of being misused, and debased, by permitting a politician's reputation to be destroyed at will: as would be the position if the gravest of factual allegations known by the maker to be false could be made with impunity and without the politician having any redress or means of establishing the truth.

22. Nor is this repellent conclusion supported by the apparently unqualified nature of the right as set out in section 4. The general format of section 4 is to list rights, such as 'freedom of the press', briefly and without elaboration. Plainly the intention was that the courts should work out the practical detail. The content of the rights was a matter for the judges. Necessarily so, not least because some of the listed rights may sometimes be in conflict with each other. As noted by Cory J in the Supreme Court of Canada, publication of defamatory statements 'constitutes an invasion of the individual's personal privacy and is an affront to that person's dignity': *Hill v Church of Scientology of Toronto* (1995) 126 DLR (4th) 129, 164, para 121. Thus freedom of expression and the right to respect for private life, both of which are listed without qualification in section 4, may sometimes collide. The Constitution does not attempt to resolve problems of this kind. These are matters left to the judges. It is for the courts to decide, in a principled and rational way, how the fundamental rights and freedoms listed in the Constitution are to be applied in the multitude of different sets of circumstances which arise in practice.

It is for the courts to decide what is the extent of the protection afforded by these constitutional guarantees.

23. A further pointer in the same direction should be noted. An absolute right to express political views as suggested would be in conflict with and, so it is said, would override the common law of defamation existing at the commencement of the Constitution. Indeed, Mr Beloff's written submission was that section 5(1) of the Constitution establishes that the constitutional right to express political views 'trumps' the common law of defamation. But this analysis is inconsistent with the very terms of section 4. Section 4 of the Constitution proceeds on the basis that the rights and freedoms recognised in that section already exist. Section 4 declares that the listed rights and freedoms 'have existed' in Trinidad and Tobago and that this shall continue. The Constitution assumes that the existing laws in Trinidad and Tobago are constitution-compliant. For good measure section 6 precludes section 4 from having the effect of invalidating existing law: *Matthew v State of Trinidad and Tobago* [2005] 1 AC 433.

24. Mr Beloff's fall-back position was that, if not conferring an absolute right, section 4(e) was qualified only to the extent that the views expressed must be held in good faith. Here, he submitted, malice was not proved.

25. The basic flaw in this alternative submission is that it seeks to fix an overall rigid boundary as implicit within section 4(e) when in truth section 4(e) deliberately eschews any such rigidity. If well founded, this submission would mean that section 4(e) would preclude the common law in Trinidad and Tobago developing along the lines mentioned above in respect of political discussion. It would preclude any limitation which requires the exercise of a degree of care when making defamatory statements of fact to the world at large. It would preclude a *Reynolds* "responsible journalism" type of limitation. That cannot be right. Whether any such limitation on the right to express political views does, or should, exist in the common law of Trinidad and Tobago was not a matter argued on this appeal. Mr Beloff expressly disclaimed any attempt to pursue such a line of argument. When this question comes to be decided the courts will have in mind the constitutional guarantee of freedom to express political views. But what matters for present purposes is that section 4(e) cannot be read as pre-empting the decision of the courts on this question. It is not inherent in section 4(e) that the only limitation on the freedom to express political views is that of honesty. Mr Beloff's alternative

case, based on a contrary interpretation of section 4(e), must therefore fail.

26. It should be noted that even if this argument on interpretation had succeeded Mr Panday's appeal on this point faced insuperable factual difficulties. In his judgment Jamadar J noted that senior counsel then appearing for Mr Panday had conceded that on the evidence Mr Panday could never have honestly or reasonably believed that Mr Gordon was a pseudo-racist.

27. For these reasons Mr Panday's appeal on liability fails. The statements were defamatory statements of fact. Justification was not pleaded and a defence of privilege was not pursued. In these circumstances Mr Panday is liable to Mr Gordon accordingly.

Damages

28. Dr Ramsahoye SC submitted that the damages, even as reduced by the Court of Appeal, were excessive. Even as reduced this was one of the highest awards of damages ever made in Trinidad and Tobago in a libel action. But, he asked rhetorically, for what was such a large award made? There was no allegation of bribery or corruption. There was no evidence of pecuniary loss. There was no evidence of psychiatric injury. There was no claim for special damage. Hamel-Smith JA observed that the evidence does not reveal that Mr Gordon remained anything other than a successful businessman, highly respected throughout the Caribbean in the media field.

29. Attractively though these submissions were presented and elaborated their Lordships are not persuaded. The seriousness of a libel and the quantification of an award are matters where judges with knowledge of local conditions are much better placed than their Lordships' Board. Thus Hamel-Smith JA noted that awards in Trinidad and Tobago have tended to be on the conservative side over the years, probably because defamation actions have not been as prolific as in other jurisdictions. However times have changed. The press, he noted, no longer exhibit the restraint normally associated with responsible journalism. So, he said, it is of little surprise that in 1989 in *Frank Solomon v Trinidad Publishing Co Ltd* (unreported) Civ App 125 of 1987 the Court of Appeal of Trinidad and Tobago decided to "raise the bar".

30. For their part their Lordships can detect no indication that when reducing the trial judge's award in the present case and substituting the amount of $300,000 the majority of the Court of

Appeal misdirected themselves. Hamel-Smith JA said he had "no doubt whatsoever that [Mr Gordon's] feelings were seriously injured and his reputation tarnished to some extent". He noted that whatever loss Mr Gordon may have experienced "would have been cushioned by the outpouring of support he received from the media,... [in Trinidad and Tobago] and abroad". The injury to his reputation was not irreparable. The trial judge's award was at the higher end of the scale. An award of $300,000 was more appropriate and fair to compensate Mr Gordon and vindicate his reputation, bearing in mind that the latter objective had already largely been achieved. Their Lordships consider this was a balanced summary of the position.

31. For these reasons their Lordships will dismiss this appeal, with costs.