IN THE COURT OF APPEAL OF BELIZE A.D., 2023

CIVIL APPEAL NO. 11 of 2019

OSCAR SELGADO	APPELLANT
v	
EDWARD BROASTER	RESPONDENT

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BEFORE

The Hon Madam Justice Woodstock-Riley	-	Justice of Appeal
The Hon Mr. Justice Peter Foster	-	Justice of Appeal
The Hon Mr. Justice Arif Bulkan	-	Justice of Appeal

Mr. Anthony Sylvestre for the appellant.
Mr. Mikhail Arguelles for the respondent.

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Date of hearing: 20 June 2022
Date of Promulgation: 17 April 2023

JUDGMENT

WOODSTOCK-RILEY, JA

[1] I have read the draft judgment of Foster JA and agree with his decision.

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WOODSTOCK-RILEY, JA

FOSTER, JA

[2] This appeal arises from the decision of the learned trial judge made on 27th February 2019, in which she awarded damages in the sum of $30,000.00 to the respondent together with costs of $12,500.00 on a claim for defamation. The appellant primarily seeks to challenge

certain findings of fact by the learned judge as well as her rejection of his defence of justification.

Facts

[3] The background facts are undisputed and have been helpfully set out by the judge below in her written judgment. I shall take the liberty of reproducing those facts that are related to the present appeal.

[4] The appellant is an attorney-at-law. At the time of filing the claim in the court below, the respondent had been a police officer in the Belize Police Department for over 28 years and held the rank of Senior Superintendent. He is the Deputy Officer Commanding Eastern Division in Belize and has direct command over approximately 800 officers. On 6th May 2015, the appellant conducted an interview with the media house, Channel 5 which was later aired and broadcasted on the nightly news twice that evening (one at 6:30 p.m. and another repeat at 10:00 p.m.) and over the internet via the website: www.channel5belize.com to the public in Belize and the world at large. During the appellant's interview, the appellant described an incident where his client, Luis Campos, was allegedly beaten by the Police. He uttered the following words which form the basis of the claim:

> "*... However, a younger brother was seen in the house and Mr. Broaster made the comment to Moses Campos that if that was Luis Campos, I would have shot him in your presence and you would not have been able to do anything about it because he is a murderer and he is wanted by the police for murder."*
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> *My client, Luis Campos, was eventually found by Mr. Broaster and his team and he was taken to an area north of San Pedro where he was severely beaten by the Police. I am informed that the police took a sponge, a foam, what we call a mattress, and a piece of a mattress and they wrapped it around him, and they beat him on his hands, his chest, his back. He was kicked on his face several times, he wore braces and the braces cut the internal part of his mouth, all under his lips. His eyes were bloodshot red because he was pepper sprayed. His face was severely swollen.*

As a junior officer Mr. Broaster worked under my command on several operations in the past and never in the past have I condoned this type of beating, use of excessive force while on surgical strikes."

[5] The respondent alleged that the words uttered are defamatory and calculated to disparage him in his office as Deputy Officer Commanding Eastern Division in the Belize Police Department, in his profession as a police officer and, generally, as a law-abiding citizen. The respondent sought an apology from the appellant; however, the appellant refused.

[6] Consequently, the respondent instituted proceedings against the appellant for slander and sought damages, including aggravated damages. The appellant asserted the defence of justification and stated that the words which were spoken by him consist of statements of facts and are true in substance.

[7] The singular issue before the court below was whether the words complained of are defamatory of the respondent, and whether those words consist of statements of facts and are true in substance, as alleged by the appellant which would have afforded the appellant a complete defence. The learned judge concluded that the words spoken by the appellant were indeed defamatory and rejected the appellant's defence of justification. She found that the description given by the appellant on the news cast would lead right thinking people to believe that the respondent (a police officer sworn to uphold the laws of Belize) committed several crimes in contravention of the Criminal Code. She further found that the comments made by the appellant were designed to ridicule and disparage the respondent in his profession or calling as a police officer.

[8] Specifically in relation to the appellant's defence of justification, the judge found that the appellant was required to provide particulars as to which of the words complained of are statements of facts and the facts and matters relied on in support of the allegation that the words are true. The learned judge concluded that the appellant's failure to do so was fatal to his defence and in breach of ***Rule 68.3 of the*** **Supreme Court (Civil Procedure) Rules, 2005**.

The Appeal

[9] By notice of appeal filed on 8th April 2019, the appellant, advanced seven grounds of appeal challenging both the learned judge's conclusions of fact and law. The appellant abandoned two of the grounds in his written submissions and the remaining five grounds can be crystalised into the following two issues:

i. Whether the learned judge erred in her perception and evaluation of the evidence; and

ii. Whether the learned judge erred in concluding that the appellant was required to particularise his defence of justification.

Perception and Evaluation of evidence

[10] The main thrust of the appellant's complaint is that the learned judge erred in placing too great weight on the fact that the appellant did not give evidence at the trial of this case and made adverse conclusions therefrom. Counsel for the appellant, Mr. Sylvestre, submitted that the appellant could not have given evidence as to whether the matters described were true. He said that the appellant was repeating what was conveyed to him by his client, Luis Campos, and by his client's parents who would have seen him before and after he was taken away by the police. He submitted that Luis Campos and his parents could credibly give evidence of what had transpired, and that the appellant could not. In a word, Mr. Sylvestre said that the learned judge could not properly draw any adverse inferences against the appellant where he did not give evidence himself as any evidence given by him would have been hearsay.

[11] Counsel for the appellant also contended that the judge erred in placing too great weight on the tangential issue of whether the respondent did in fact work under the appellant's command. He stated that this could not assist the learned judge in determining whether the words spoken were in substance true or the gist of the words were substantially true.

[12] Mr. Sylvestre further argued that the learned judge failed to undertake a proper assessment of the evidence of three witnesses – Zayne Palacio, PC Munnings and Dr. Hotchandani which was critical to the issue of whether Luis Campos was unjustifiably beaten.

Counsel admits that the learned judge rejected the evidence of PC Munnings and that the learned judge accurately set out the evidence of Dr. Hotchandani in paragraph 36. However, he maintained that the learned judge failed to conduct a thorough assessment of the medical evidence of Dr. Hotchandani regarding the injuries sustained by Luis Campos and the evidence of Zayne Palacio.

[13] Counsel for the respondent, Mr. Mikhail Arguelles, on the other hand, argued several points which support the learned judge's conclusion. The crux of the argument led by Mr. Arguelles was that the learned judge placed the appropriate weight on all the witnesses, having had the advantage of seeing and assessing them. He relied on the case of ***Joyce v Yeomans***[1] in support of this submission. Further, he stated that this Court ought not to disturb the judge's findings of fact unless the appellant can demonstrate that the findings are plainly wrong. Mr. Arguelles also sought to rely on ***Watt (or Thomas) v Thomas***.[2] He submitted that the appellant has failed to offer or point out any inferences that are erroneous and has not indicated or given any reason to consider why the judge's rejection of the defence was plainly wrong.

[14] Further, Mr. Arguelles submitted that it would have been useful to hear directly from the appellant on the issue of when and where the respondent had worked under his command. This, he said, went to the credibility of the witness. Further, Mr. Arguelles submitted that the judge's comment on the appellant's failure to testify does not detract from the opinions formed of the appellant's witnesses.

[15] It is apparent that the arguments of the appellant taken together mount a challenge against the learned judge's findings of fact and necessarily engage the well-settled principles governing appellate interference with a judge's findings of fact. Indeed, there is a strong stream of jurisprudence which establishes that an appellate court is reluctant to interfere with the findings of primary fact of a trial judge which are based on the credibility or reliability of witnesses and the evaluation of those facts and inferences drawn from them by the trial judge. This principle, having been first laid down in ***Watt (or Thomas) v Thomas***, has been

[1] [1981] 1 W.I.R 549.
[2] [1947] 1 All ER 582.

consistently applied in decisions of this Court in ***Madrid Cruz v Jose Alvarenga et al***,[3] ***Chester Mc Laren v Allison Pow***[4] and **A*&N Construction (a firm) v Heritage Bank Limited***.[5]

[16] In ***Watt (or Thomas) v Thomas***, the principle was expressed in this way:

> *"(i) Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.*
>
> *(ii) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.*
>
> *(iii) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."*[6]

[17] The general approach of an appellate court to appeals on questions of fact was also considered by the Eastern Caribbean Court of Appeal in ***Rawle Hannibal v the BVI Health Services***.[7] At paragraph 23 the Court stated:

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[3] Belize Civil Appeal Number 15 of 2011.
[4] BVIHCVAP2017/0002.
[5] Belize Civil Appeal No. 9 of 2006.
[6] *ibid* at p. 587.
[7] BVIHCVAP2017/0002. See also Yates Associates Construction Company Ltd v Blue Sand Investments LimitedBVIHCVAP2012/0028.

An appellate court is constrained when called upon to interfere with factual findings. Compelling reasons are needed to interfere with factual findings, the evaluation of those facts and inferences to be drawn from them. The general approach of an appellate court to appeals on questions of fact was summarised by Lewison LJ in Fage UK Limited and Anor v Chobani UK Ltd and Anor, he said:

> *'Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them.'*

Where a trial judge has reached a conclusion on the primary facts, it is only in rare cases that an appellate tribunal will interfere with it. Circumstances warranting interference include (i) where there was no evidence to support the conclusion; (ii) where the conclusion was based on a misunderstanding of the evidence; or (iii) where the conclusion was one which no reasonable judge could have reached: Re B (A Child), 12 per Lord Neuberger at paragraph 53. In Henderson v Foxworth Investments Ltd, 13 Lord Reed said at para 67:

> *'... in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot be reasonably explained or justified.'*

[18] The above authorities emphasize the reluctance of appellate courts to interfere with a judge's findings of primary fact, particularly when these findings depend largely upon the trial judge's assessment of witnesses he or she has seen and heard give evidence. With this principle firmly in mind, I shall now examine the parties' submissions on the first issue.

[19] The learned judge's comments at paragraph 36 form the essence of the appellant's argument. She observed that:

"I also found it disturbing that the Defendant himself did not testify; that is his right, but I would think that as a trained attorney at law, Mr. Oscar Selgado would have welcomed the opportunity to let the court hear from him directly in answer to this serious claim of libel and slander brought against him, and to have his evidence tested by cross examination. One important question which could have been determined is when and where did ACP Broaster work under Mr. Selgado's command. This question goes to credibility. Mr. Broaster says he was never under Mr. Selgado's command. However, he chose to remain silent and that is his right, so I say no more on that."

[20] The operative question is whether the learned judge's comments are justified and whether the judge drew any inferences from the appellant's decision not to give evidence at the trial of this matter. The appellant's defence of justification can only succeed if it is proven that the words complained of are true in substance.[8] It is the law that where justification is raised as a defence in a defamation claim, the claimant (in this appeal the respondent) does not have to prove that it is false, for the law presumes this in his favour.[9] In ***Lois Young Barrow v Andrew Steinhauer***,[10] the court explained that the rationale for the presumption of falsity existed because of the importance accorded to reputation under the law. The presumption could only be rebutted by a defendant pleading that the statement is true.[11] The defendant must discharge this evidentiary burden on a balance of probabilities. Moreover, where the defendant repeats a defamatory statement originally made by someone else, he must prove that the statement was true and not merely that it was made. It is no defence for the defendant to show that he was merely repeating what he was told by another person, however reliable. The defamatory meaning conveyed by the repetition of an imputation of fact is usually the same as that conveyed by the imputation itself.[12]

[21] It is therefore logical to assume that the appellant, having adopted the statement as his own and having stated that the respondent worked under his command, would opt to give evidence which could have been tested through cross examination in an attempt to prove that

[8] Libel Justification Duncan & Neil, para. 12.09.
[9] Myrna Liburd v Lorna Hunkins SKBHCVAP2014/0023
[10] Belize Claim No. 561nof 2006.
[11] Iris Myrtle Palacio v Alfonso Noble et al Belize Claim No. 207 of 2015; Lois Young Barrow v Andrew Steinhauer Belize Claim No. 561n of 2006.
[12] Duncan and Neill on Defamation and other media and communications claims,5th edn, LexisNexis [2020], para 12.16.

the words uttered were true. It is also logical to assume that the appellant, having relied on the defence of justification, would have given evidence to support his contention that the respondent had sanctioned the force or violence against Luis Campos. In the circumstances, I therefore do not regard the learned judge's comments as inappropriate. In my view, it is quite difficult to discern weight attributed to the appellant's decision not to give evidence in circumstances where the learned judge made a passing comment having examined the evidence and having rejected the respondent's defence. It is therefore an unfair criticism to say that the learned judge placed great weight on the fact that the appellant gave no evidence. Whether or not the appellant had given evidence, provided it was the same or similar in effect to the evidence of Luis Campos, would not have made any difference to the outcome of this appeal.

[22] I would add that the learned judge properly considered the tangential issue of whether the respondent had ever worked under the command of the appellant. The appellant, during the interview, asserted that the respondent had worked under his command on several operations in the past and that the appellant never condoned this type of beating. In relying on justification, the appellant had to prove that this was substantially true. No evidence was produced to show that the respondent had worked under the appellant's command and that he had admonished or warned his subordinates against the use of beatings of the type presented in this case. It necessarily meant and was understood to mean that the respondent was under his command in the past and that this issue of this type of beating had indeed surfaced then. I find that the learned judge was correct in placing some weight on the appellant's failure to produce evidence to show that he had worked under his command. However, the weight placed by the learned judge was not in my view significant and did not impact upon her ultimate findings.

[23] Turning next to the assessment of the witnesses, I am guided by the principles to which I have referred earlier regarding appellate interference with findings of fact of a trial judge. The appellant has provided no compelling reason for this Court to interfere with the learned judge's decision. There is simply nothing to support the appellant's bald statement that the learned judge erred in undertaking a proper assessment of the evidence of Zayne Palacio and PC Munnings and did not fail to attach sufficient weight to the evidence of Dr. Hotchandani. This much is apparent from a close examination of the learned judge's analysis of the evidence which I set out below.

[24] The learned judge set out the evidence of PC Munnings in paragraph 6 of the judgment. The evidence of Zayne Palacio is set out at paragraph 7. At paragraph 25 the learned judge stated that :

> *"Looking at the evidence of the next witness Zayne Palacio is similar to that of PC Munnings. He says he accompanied the Claimant to Moses Campos and to the house where Luis Campos was arrested. PC Munnings says that he did not hear Broaster use the words complained of. In relation to the beatings, PC Munnings states that 'necessary force' was used to subdue Luis Campos as is set out in the medico-legal form."*

[25] At paragraph 36 of the judgment, the learned judge concluded that:

> *"Having reviewed all the evidence in this case, and considered legal submissions from both counsel, I am of the view that the Claimant succeeds in his claim. I find on a balance of probabilities that I believe that the witnesses for the Claimant (with the exception of PC Cashman Munnings) were witnesses of the truth. Having found the witnesses for the Claimant to be truthful, I go on to state that I am in full agreement with the legal submissions made by counsel for the Claimant."*

[26] Regarding the evidence Dr. Hotchandani, the learned judge thoroughly examined the medical evidence at paragraph 26 of the judgment. At paragraph 36, she stated:

> *"Let me also state that I, on a balance of probabilities find that the injuries observed by the medical practitioner as detailed on the medico-legal form were in my view consistent with the justifiable force meted out by the police in subduing Mr. Campos, and not due to any beating alleged by him".*

[27] In my view, the appellant's argument is founded entirely on the fact that the judge took a favourable view of the evidence of Palacio, rejected that of PC Munnings and that her analysis of the medical evidence of Dr. Hotchandani did not lead to the conclusion urged by the appellant. In essence, the appellant seeks to impugn findings of the learned judge which turn on her assessment of the credibility of witnesses. The difficulty that the appellant faces is that he has not demonstrated precisely how the learned judge erred in her assessment of this

evidence. The appellant has failed to highlight to this Court how the learned judge was plainly wrong and reached a conclusion which on the evidence she was not entitled to reach.

[28] As I have stated above, it is rare for an appellate court to overturn a judge's findings as to a person's credibility. Having closely examined the judgment of the learned judge, I see no discernable error on the part of the learned judge which warrants appellate interference. I therefore find the appellants' submissions regarding the perception and evaluation of the evidence by the learned judge to be without merit.

The plea of justification

[29] Before addressing the second issue raised, I observe that the claim in the court below wrongly proceeded on the basis of slander. At this juncture, it is appropriate to distinguish between libel and slander as at the time of the hearing of the claim, the law in Belize recognized the distinction in the two legal concepts. In ***Duncan and Neill on Defamation and other media and communications claims***,[13] libel and slander were distinguished in the following way:

> *"In general terms, the action for libel is concerned with the publication of defamatory matter which is in writing or some other permanent form, whereas the action for slander is concerned with the publication of defamatory matter by word of mouth."*

[30] The Eastern Caribbean Court of Appeal in ***Lennox Linton et al v Kieron Pinard-Byrne*** explained the distinction as follows:[14]

> "[47] *The law as I understand it is that defamation is a tort, as is slander or libel, and a person can institute civil proceedings against another person for defamation, which is provable by evidence of either slander or libel; or for slander, requiring proof of defamation by the spoken word or other transient form of communication; or for libel, requiring proof of defamation by the written word or other permanent form of communication.*

[13] 5th edn, LexisNexis [2020], para 3.01.

[14] DOMHCVAP2011/0017.

[48] Over time, the classification of defamatory words into the categories of libel and slander was adjusted, from the starting point of slander referring to defamation by the spoken word and libel referring to defamation by the written word, with the category of libel expanding at the expense of its more ephemeral sibling. So that the spoken word captured in some permanent form, like a recording of a speech or song for instance, came to be classified as libel and not slander. In due course, the classification of words into the categories of libel and slander increasingly came to be determined not by the mode of their communication (referring to the spoken or written word) but by their probable life span in the medium through which they were communicated. So that the more enduring are the words in the medium through which they were communicated, the more likely it is that they would be classified as libel, even if they were communicated in the mode of speech rather than text."

[31] Simply put, libel is a defamatory statement in a permanent form, most usually consisting of written words in a newspaper, book, pamphlet, printed notice or letter. Slander is a defamatory statement in a transient form, principally by means of spoken words or gestures.

[32] Categorising a publication as a slander rather than a libel may have important consequences for a claimant, who, in those circumstances, will have to establish that they have suffered special damage, or that the publication falls into one of the limited classes of slander which are regarded as actionable *per se*.[15] Libel is always actionable *per se*.

[33] The present case concerns an interview which aired twice on the nightly news over Channel 5 news and was later published over the internet via the website. This constitutes libel and this claim which was brought prior to 2016, ought properly to have been brought as a claim for libel and not slander. However, it is important to note the law in Belize has since changed with the passage of the ***Defamation Act, 2022***.[16] By virtue of section 4 of the ***Defamation Act*** the distinction between slander and libel has been abolished.

[15] Duncan and Neill on Defamation and other media and communications claims, 5th edn, LexisNexis [2020], para.3.01.
[16] Belize Laws Act No. 15 of 2022.

[34] That aside, the thrust of the appellant's contention was that the learned judge erred in confusing the issue of the requirement of particulars for the defence of fair comment as distinct from the defence of justification. Counsel for the appellant stated that the learned judge erred in holding that the appellant's defence required him to "provide particulars as to which words complained of, he alleges [were] statements of facts and the facts and matters relied on in support of the allegation that the words [were] true." Further, he submitted that the learned judge erred in concluding that rule 68.3 of the ***Supreme Court (Civil Procedure Rules) 2000*** was applicable and that the appellant was required to comply with this rule. According to Mr. Sylvestre, rule 68.3 only requires particulars of the words complained that are statements of facts and the facts and matters relied on in support of the allegations that the words are true, if the defence is a combined defence of justification and fair comment. He relied on the case of ***Said Musa v Ann Marie Williams et al***[17] in support of his contention. Further, he argued that in the instant case, the appellant was not relying on a combined defence of justification and fair comment as the matters stated did not include any opinion.

[35] In a nutshell, Mr. Arguelles' response was that rule 68.3 applied to the appellant's case and the learned judge was right in holding that the appellant failed to give particulars required by rule 68.3(c)(i) and (ii) of the ***Supreme Court (Civil Procedure) Rules 2005*** and was therefore non-compliant with a rule which is mandatory in defamation claims. Mr. Arguelles submitted that the appellant has misread ***Said Musa***. He said that this case involved two defences of fair comment and justification and that nothing in the judgment states that particulars are required only when the defences are pleaded together. Mr. Arguelles stated that in fact, the case implies the opposite and treats the need for particulars of each separately.

[36] Rule 68.3 of the ***Supreme Court (Civil Procedure Rules), 2005*** provides that:

> *"A defendant (or in the case of a counterclaim, the claimant) who alleges that,*
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> *a) in so far as the words complained of consist of statements of facts, they are true in substance and in fact; and*
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> *b) in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest; or*

[17] Belize Claim No. 276 of 2005.

c) pleads to like effect,

must give particulars stating

(i) which of the words complained of he alleges are statements of fact; and

(ii) the facts and matters relied on in support of the allegation that the words are true.

[37] It behooves a defendant to plead its case with sufficient precision and clarity so as to enable the claimants to know what they will be obliged to prove and what case they must meet.[18] The need for precision in particulars where the defences of justification and fair comment are sought to be relied on was discussed in ***Control Risks Ltd. And Others v New English Library Ltd and Another***,[19] where the court stated that:

> "A plaintiff is entitled to know what case he has to meet under a defence of fair comment just as much as he is entitled to know what case he has to meet when faced with a defence of justification. Where justification is pleaded, a defendant is now required to spell out in his pleading the meaning of the words, which if it is their true meaning, he will seek to justify. These are the so-called "*Lucas-Box*" particulars: see *Lucas-Box v. News Group Newspapers Ltd.* [1986] 1 W.L.R. 147, 153, and the observations of Mustill L.J. in *Viscount De L'Isle v. Times Newspapers Ltd.* [1988] 1 W.L.R. 49, 60. In my view by parity of reasoning, when fair comment is pleaded the defendant must spell out, with sufficient precision to enable the plaintiff to know what case he has to meet, what is the comment which the defendant will seek to say attracts the fair comment defence."

[38] In ***Said Musa***, it was noted that although ***Control Risks Ltd*** was decided before the 1999 Civil Procedure Rules in England, and well before Belize's Supreme Court (Civil Procedure) Rules 2005, the law and rationale find reaffirmation and reinforcement in the provisions of rule 68.3. In ***Said Musa***, the defendant sought to rely on the defences of fair comment and justification. The court found that the particulars pleaded by the defendant were "generalized particulars devoid of any indication or statement as to which of the words

[18] Gatley on Libel and Slander, 9th edn., Sweet & Maxwell [1998] Paras 27.1-27.2.
[19] [1990] 1 WLR 183.

complained of they allege are statements of fact; nor any indication of any fact or matter they rely on in support of their allegation that the words are true." I do not consider this case to be authority for the principle, as submitted by Mr. Sylvestre, that it is only where both defences are pleaded that there is a need for sufficient precision in the particulars of the defence.

[39] A plea of justification is separate and distinct from that of fair comment. The particulars of justification must show that the words complained of are substantially true. The learning in ***Gatley on Libel and Slander***[20] is particularly instructive on how the Court is to treat justification. Paragraph 11.9 states as follows:

> *"Some leeway for exaggeration and error is given by the defences of fair comment and qualified privilege. However, for the purposes of justification, if the defendant proves that 'the main charge, or gist, of the libel' is true, he need not justify statements or comments which do not add to the sting of the charge or introduce any matter by itself actionable. 'It is sufficient if the substance of the libellous statement be justified; it is unnecessary to repeat every word which might have been the subject of the original comment. As much must be justified as meets the sting of the charge, and if anything be contained in a charge which does not add to the sting of it, that need not be justified."*

[40] The fact that the defendant is not required to plead that the comments complained of are completely true in every respect does not absolve him of the need to particularize his defence. In my view, it would be passing strange for the need for sufficient particularization to be dispensed with where the defendant only avers one defence, in this case justification. The rationale for the particularization holds true whether there is a combined defence or a single defence – the defence must be supported by details of the matters relied upon so that the claimant can know the precise nature of the case against them and the claimant is given sufficient detail so that he they can meet the case. I am therefore unable to accept the interpretation of rule 68.3 afforded by counsel for the appellant. Mr. Sylvestre appears to have misconceived rule 68.3.

[41] If a defendant pleads fair comment, it incumbent on that defendant to set out which of the words he published are statements of fact upon which he has given his opinion and to then

[20] Gatley on Libel and Slander, 10th edn., Sweet & Maxwell 2004) para. 11.9.

set out the particulars of the facts and matters which he says existed at the time of the publication and to further particularize the facts and matters he wishes to rely on in support of the comments he has made. Likewise, in a plea of justification, a defendant must set out the words he states are true or substantially true and then set out the facts and matters he relies on to support the allegation that words he published are true. Accordingly, the learned judge was correct in holding that it was imperative that the appellant provide particulars as to which of the words complained of he alleges are statements of facts and the facts and matters relied on in support of the allegation that the words are true. The failure to do so amounted to a breach of rule 68.3.

Conclusion

[42] Quite apart from what I have set out above in relation to the distinction between libel and slander, I can find no fault with the learned judge's reasoning. In the circumstances, the judge rightly found that the words were defamatory of the respondent. The appellant claims that the words he spoke of the respondent were his instructions from his client. Once he published those words, they became his and it was his responsibility to prove, having relied solely on the defence of justification. The trial judge preferred the evidence overall of the respondent and as I have intimated above, I see no reason to interfere with those findings.

[43] I would dismiss this appeal, with costs to the respondent to be assessed, if not agreed, within 21 days of this judgment.

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FOSTER, JA

BULKAN, JA

[44] I have read the draft judgment of Foster JA and agree that the appeal must be dismissed for the reasons articulated by him.

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BULKAN, JA