[2011] JMCA Civ 13

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 24/2008

BEFORE: THE HON. MR JUSTICE PANTON P
THE HON. MRS JUSTICE HARRIS JA
THE HON. MISS JUSTICE PHILLIPS JA

BETWEEN THE JAMAICA OBSERVER LIMITED APPELLANT

AND ORVILLE MATTIS RESPONDENT

Miss Annaliesa Lindsay instructed by John Graham & Co. for the appellant

Michael Howell instructed by Knight, Junior & Samuels for the respondent

15, 23 March and 15 April 2011

PANTON, P

[1] On 23 March 2011, we dismissed the appeal herein and ordered costs in favour of the respondent, such costs to be agreed or taxed. We promised to put our reasons in writing, and this we now do.

[2] On 21 January 2002, the Observer newspaper, the appellant in these proceedings, was adjudged to have libeled the respondent, a serving member of the Jamaica Constabulary Force, who had never had any disciplinary proceedings brought against him. After this adjudication, evidence was placed before Brooks J and a jury of

eight for damages to be assessed. On 11 February 2008, damages were assessed in the sum of $1,000,000.00 with costs to the respondent to be taxed if not agreed.

[3] The appellant, being apparently aggrieved by this award, challenged it on the basis that:

(a) it is excessive having regard to the evidence;

(b) the trial judge erred when he failed to withdraw from the jury the question of whether the officer was entitled to damages;

(c) if damages were to be awarded, the amount should have been no more than $50,000.00; and

(d) the respondent admitted as true all the facts in the offending article.

[4] In order to put this appeal in its proper context, it is appropriate to quote the libelous article as reproduced in paragraph [3] of the statement of claim on page 6 of the record:

> "3. On the front page of the Weekend Observer dated January 31, 1997 under the heading 'SHAKE-UP AT SPECIAL ANTI CRIME TASK FORCE', the Defendants falsely printed and published of the plaintiff and of him in the way of his occupation as a Constable of Police the following defamatory words:- 'THREE OFFICERS ATTACHED TO THE SPECIAL ANTI CRIME TASK FORCE WERE RECENTLY TRANSFERRED AFTER IT WAS ALLEGED THAT THEY TOOK AWAY COCAINE FROM A MAN WITHOUT TURNING IT OVER TO THE NARCOTICS POLICE. THE THREE OFFICERS ARE DETECTIVE SERGEANT DODRICK HENRY

> WHO WAS TRANSFERRED TO HANOVER; CONSTABLE O. A. MATTIS TO ST. ELIZABETH AND CONSTABLE A.H.BOBB WHO WAS SENT TO THE WESTMORELAND POLICE DIVISION,' the said words were published to the world at large."

[5] The respondent gave evidence at the assessment and called two witnesses. He joined the Jamaica Constabulary Force in 1980, at age 18 years and at the time of the publication of the offensive article, he was a constable. He was specially trained not only in the handling of dogs on narcotic missions, but also to work as an undercover agent. His duties involved watching for and reporting corrupt behavior of other police officers.

[6] The publication of the libel left the respondent in shock and disbelief. He became ill two days after, and sought medical attention. He was on sick leave for about eight months thereafter. At the time, he was in a common law relationship. The publication resulted, he said, in strange persons visiting their home, causing the lady to be "sick and tired of the situation". She ended the relationship, migrated and married someone else. However, the respondent has since settled in another relationship. He claimed also that he lost a lot of his friends, and his family members became withdrawn. He himself became withdrawn as he was afraid to face people. He said that he met with resentment by officers in charge who did not wish to work with, or to talk to him as they would have done previously. Some of them even called him "druggist".

[7] The evidence revealed that since the publication of the libel, the respondent has been promoted twice, and at the time of the trial he was a sergeant. He maintains that

he would have been an inspector by now, looking towards being a deputy superintendent, had it not been for the libel. He no longer enjoys being in the police force, and is looking towards an early retirement.

[8] While on sick leave, the respondent was apparently able to give some attention to the operation of a cable company in which he is a shareholder. That company grew during 1997.

[9] The learned judge gave the usual directions on the law to the jury. He also reminded the jury of the evidence. In terms of their decision making, he said:

> "The ultimate question which you are asked to decide in this case is 'what award of monetary compensation would be appropriate and necessary to compensate Sergeant Mattis and to re-establish his reputation?'
>
> In deciding that question you have to answer for yourself two other questions.
>
> (1) To what extent has his reputation as a police officer and a community member been affected?
>
> (2) To what extent has he personally been affected by the views of the police force and the community?
>
> The evidence which was placed before you was from three witnesses."

[10] Miss Annaliesa Lindsay, for the appellant, submitted that the jury's award was excessive considering the evidence that was presented. She pointed to what she said were deficiencies in the summation which may have led the jury into making the

excessive award. For example, she said, the learned judge did not highlight the fact that the allegations mentioned in the libelous article had been made prior to the publication and had been the subject of questioning of the respondent by one of his superior officers. There was also the fact that the respondent had indeed been transferred. Miss Lindsay was very critical of the fact that no medical evidence had been adduced to confirm the respondent's illness. In her view, the sum of $1,000,000.00 would have been appropriate if there had been aggravating circumstances, or proof of real damage to the respondent as a result of the publication. In the circumstances, an award of $300,000.00 would be more than adequate compensation.

[11] Miss Lindsay took issue with the judge's instruction as to the nature of the damages for their consideration. In her written submissions, she said this:

> "8.2 The learned Judge in his summation gave a detailed explanation of nominal as opposed to substantial damages. He then charged the jury that the award they make is to be moderate, without more. It is submitted that the use of the different terms, being nominal, substantial and moderate, may have led the jury into error. Such a direction by the learned Judge may have led the jury to believe that the Respondent was entitled to be compensated in more than nominal damages, which directly contradicted his earlier charge that it was for the jury to decide whether they would award nominal or substantial damages."

[12] It should be mentioned that Miss Lindsay readily conceded that the sum of $50,000.00 would be in the category of nominal damages, and as said, earlier she submitted that an award of $300,000.00 would have been fitting compensation for the respondent in the circumstances.

[13] In response, Mr Michael Howell for the respondent said that the appellant's submissions would have been more appropriate if a defence had been filed. He submitted that the respondent's witness Linden Taylor had given evidence as to how sick the respondent was in 1997. Mr Howell said that the award was a moderate one, and that it reflected the fact that there had already been a discount to take care of all the reasons that had been advanced by the appellant. It was Mr Howell's position that there was no good reason to interfere with the assessment that had been done by the jury.

[14] At the commencement of the hearing before us, Miss Lindsay referred us to paragraph [38] of the judgment of the Privy Council in the case ***The Gleaner Company Limited and Stokes v Eric Anthony Abrahams*** [P.C. App. 86/2001 delivered 14 July 2003]. The relevant portion of the paragraph reads thus:

> "The Jamaican Court of Appeal does not have the power conferred upon the English Court of Appeal by section 8(2) of the Courts and Legal Services Act 1990 and the Civil Procedure Rules to substitute an award of damages for a sum awarded by the jury which it considers to be excessive. Except by consent, it can only order a new trial. In the present case, however, the parties had agreed that the Court of Appeal should be at liberty to substitute what they considered to be

> an appropriate sum. So the Court substituted an award of J$35 million."

In that regard, Miss Lindsay indicated that she and Mr Howell had agreed that the court could substitute an award if it considered it appropriate.

[15] It would be erroneous however, I feel, to interpret this part of the Privy Council's judgment as saying that the Court of Appeal may only review a jury's award if the parties consent. For a proper understanding of the position, one has to look at the judgment of the Court of Appeal in the said case delivered on 31 July 2000. At pages 29 and 30 thereof, Forte P referred to the judgment of the English Court of Appeal in ***Rantzen v Mirror Group Newspaper Ltd and Others*** [1994] QBD 670 wherein Neil LJ relied on the dicta of Lord Goff in ***Attorney-General v Guardian Newspaper Ltd*** (No 2) [1990] 1 AC 109, 283-284. Neil LJ concluded that "the common law if properly understood requires the courts to subject large awards of damages to a more searching scrutiny than has been customary in the past. It follows that what has been regarded as the barrier against intervention should be lowered". Forte P stated that this dicta seemed to have ended the restriction in the English Court of Appeal to interfere with excessive awards of juries only if they were so high that no sensible persons would have given such an award. He then unequivocally stated that he was in agreement with the approach adopted by the English Court of Appeal.

[16] In the instant case, I am not convinced that the award of the jury is excessive. It has long been settled in this jurisdiction that the size of an award of damages may only be interfered with if it is either inordinately high or inordinately low. The jury in this

case would have been expected to bear in mind that the publication was to the effect that the respondent was being accused of having committed a very serious criminal offence. Instead of detecting and apprehending offenders, he was involved in wrongdoing that compromised his role as a police officer, according to the publication. The jury would have also borne in mind that the appellant, in the face of its apparent inability to defend the suit, had not offered an apology to the respondent. Persons who publish libelous statements would do well to publish an appropriate apology in an equally prominent manner so soon as they become aware of their tortuous conduct. They should not await the prompting of the injured party.

[17] It takes years to build a good name and reputation. On the other hand, it takes only a few reckless lines in a newspaper to destroy or seriously damage that name or reputation. The damage usually remains for a good while. Section 22 of the c

Constitution gives a right to free speech, but it does not permit defamation of one's good character. When such damage has been proven, adequate compensation should follow. By no stretch of the imagination, can it be said that one million dollars ($1,000,000.00) is excessive or inordinately high to compensate the respondent for the harm done to him.

[18] The learned judge, in my view, dealt adequately with all the issues in this case in his summation to the jury. A judge is not expected in a summation to repeat every word of evidence. The important thing is whether there has been fairness in the giving of the instructions as to how the jury should approach their task. In the instant case,

the learned judge was thorough in his handling of the case, and the jury, in my view, gave an award which may be properly described as moderate.

[19] For the foregoing reasons, I agreed with the dismissal of the appeal with costs to the respondent to be agreed or taxed.

HARRIS JA

[20] The respondent's claim against the appellant was for the recovery of damages for libel. The facts giving rise to the appeal have been outlined by the learned president. It will not be necessary to repeat them.

[21] Leave was obtained to argue the following amended grounds of appeal:

> "(a) With the consent of the Respondent, that the Court of Appeal be at liberty to substitute what they consider to be an appropriate sum being Three Hundred Thousand Dollars ($300,000.00)
>
> (b) In the alternative that trial of the quantum of damages to be awarded be re-tried before a single judge of the Supreme Court."

The critical question is whether the award of $1,000,000.00 is inordinately high.

[22] Miss Lindsay's assault on the excessiveness of the award was, primarily, in relation to the extent of the damage which could have been caused to the respondent's reputation, there being no aggravating circumstances or proof of any damage done to

justify the award made. She argued that the respondent admitted that he was questioned by a superior officer about the allegations contained in the published article yet the learned trial judge failed to direct the jury's attention to this aspect of the evidence. It was also her complaint that the learned judge gave detailed directions with respect to nominal as opposed to substantial damages, thereafter, he instructed them to make a moderate award. This she argued, may have led them into the erroneous belief that the respondent would have been entitled to a sum in excess of nominal damages. His failure to fully distinguish ***The Gleaner Company Limited*** **and** ***Stokes v Abrahams*** P.C.A. No 86/2001 delivered 14 July 2003, may have also caused the jury to have made the excessive award, she argued.

[23] A further attack was launched by her in respect of the evidentiary material which was before the court. Further, she contended, that although the respondent claimed that he proceeded on eight months sick leave immediately following the publication, no medical evidence was adduced to corroborate this assertion. Despite his reported illness, in 1997, she argued, he was the chief executive officer of a successful business co-owned by him, he was promoted twice since the time of the publication and notwithstanding that he declared that he became withdrawn, he had fathered three children subsequent to the publication. In these circumstances, she submitted, an award, not exceeding $300,000.00, would have been adequate to compensate the respondent.

[24] As a matter of law, an action for libel is actionable per se. Proof of damage is not a requisite element of this tort. The violation of the claimant's interest is enough to afford him a right to be compensated. The infringement of such right presumes a wrongful interference with his legal right giving rise to damages. Generally, the damages are at large - see ***Wheeler v Somerfield & Others*** [1966] 2 All ER 305.

[25] The award made to the respondent is one for compensatory damages. The purpose for such an award is threefold, to console him for personal distress and hurt, to provide reparation for the harm done to his reputation and vindication of his reputation - see ***Carson v John Fairfax & Sons Ltd*** [1993] 178 C.L.R 44. The learned judge informed the jury as to the purport and intent of the award by specifically informing them of the foregoing.

[26] In a claim for libel, a claimant is only required to put before the jury the impugned written words upon which he relies and it resides with them to decide the extent of the compensation to which the claimant is entitled - see ***English and Scottish Co-operative Properties v Odhams Press Limited*** [1940] K.B 440; ***Dingle v Associate Newspapers Ltd & Others*** [1961] 2 Q.B 162, C.A; [1964] AC 371**;** ***H L Rookes v Barnard & Others*** [1964] A.C 1129.

[27] The failure of the appellant to file a defence is an admission on its part that the publication was defamatory. Although the respondent is, per se, entitled to damages by virtue of the fact that injury may flow from defamatory words published, he is at liberty to bolster his case by showing that injury had in fact resulted. There is evidence from

him and his witnesses in this regard. The question is whether the evidence adduced was sufficient to warrant the sum awarded.

[28] The severity of the libel is a highly significant criterion in the making of an appropriate award for injury to one's reputation. In ***John v MGN Ltd*** [1997] Q.B. 586 at page 607, Sir Thomas Bingham MR said:

> "In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be."

In keeping with the foregoing tenets, the learned judge did not fail to instruct the jury as to the effect of defamatory words which are considered to be grave. In so doing, he informed them that:

> "Very serious defamations are those that go to the core attributes of the victim's personality matters such as integrity, honour, courage, loyalty and achievement**."**

[29] In ***Sutcliffe v Pressdram Ltd*** [1991] 1 Q.B 153 C.A. and ***John v MGN***, it was recommended that a trial judge should remind a jury of the purchasing power of money. The learned judge informed the jury that they should take into account the purchasing power of their award. He said:

> "You would look at the value of the Jamaican Dollar versus for instance the US$. Examine what sum would buy somebody a car or buy a vacation, a house, or what income a lump sum could produce if invested."

[30] The current practice in England is that juries are told that they should have regard to comparable awards of general damages in personal injury cases in assessing an award for libel: ***John v MGN*** and ***Kiam v MGN Ltd*** [2002] 3 WLR 1036 (CA). However, there is some controversy as to whether a personal injury award for general damages should be used in the assessment of general damages for defamation. The learned judge gave the jury no directions in this regard. I am of the opinion that it would not have aided them. For my part, I am of the view that no assistance could have been logically secured from referring to general damages in personal injury awards. As I see it, where the allegations are grave, in assessing general damages in an action for libel, the applicable test ought to be that which was propounded by Forte P, in ***Gleaner Company Ltd and Anor v Abrahams,*** which he put in this way:

> "Could a reasonable jury have thought that this award was one which was reasonable to compensate the plaintiff and to re-establish his reputation?"

[31] In ***The Gleaner Company Ltd and Anor v Abrahams***, Lord Hoffman, carried out an analytical and comparative review of a number of cases and issues arising in the award of general damages in personal injuries cases and general damages in defamation cases and in the process, noted certain distinctions between these damages. At paragraph [55], speaking to damages in an action for defamation, particularly to the sufficiency of damages, he said:

> "….. damages must be sufficient to demonstrate to the public that the plaintiff's reputation has been vindicated. Particularly if the defendant has not apologized and withdrawn the defamatory allegations, the award must show that they have been publicly

> proclaimed to have inflicted a serious injury. As Lord Hailsham of St Marylebone LC said in Broome v Cassel & Co Ltd [1972] AC 1027, 1071, the plaintiff "must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge**"."**

[32] In deciding this case, I am not unmindful that the role of an appellate court is a paramount consideration. This court is a court of review. Its function being one of review, it ought not to embark upon a re-trial of a case. It is not within its province to say that if it were making an award it would have awarded a certain sum or that the approach of the jury should be on the same level as a trial judge in assessing damages. It is a settled rule that this court will not disturb an award of damages unless the amount awarded is inordinately high or very small so as to render it an erroneous estimate of the damage to which a claimant is entitled.

[33] To set aside an award it must be shown that it was unreasonable and merits being disturbed. An award made by a jury could only be set aside if the award was unreasonable and no reasonable jury, properly directed, could have arrived at such an award - see ***Sutcliffe v Pressdram***. The question therefore, is whether a reasonable jury could have considered the sum of $1,000,000.00 a reasonably necessary compensatory award for the respondent and to restore his reputation.

[34] It is true that the learned judge had not brought to the jury's attention that the respondent had admitted that he was questioned by his superior officer about the allegations contained in the article published by the appellant or that no medical

evidence was tendered substantiating his illness, but surely, they would have been aware of his admission as also the absence of medical evidence. The learned judge was not under a duty to carry out a microscopic recounting of the evidence so as to include all that had been adduced.

[35] There was evidence from the respondent that he became ill as a result of the publication which caused him to be absent from work for eight months; he having said he submitted medical certificates every two weeks. So far as the respondent's business is concerned, contrary to Miss Lindsay's submissions that it flourished in 1997, the evidence of Mr Taylor, the respondent's business partner, shows, otherwise. He stated that in 1997 there was no significant increase in the operation of the business and that in 1998, he, Mr Taylor, became the chief executive officer of the business. It was for the jury to have given such weight to the evidence as they deemed fit. The jury had seen and heard the witnesses. They were pre-eminently the arbiters of the facts. It was for them to decide what facts they accepted or what facts they rejected. The failure of the learned judge to instruct the jury on these matters complained of by Miss Lindsay, would not be of such significance to have materially affected his directions to them so as to render their verdict in awarding $1,000,000.00 unsafe.

[36] The learned judge informed the jury of the types of damages which could have been awarded. He said:

> "The amount you will award will depend on whether you decide nominal damages are in order or substantial damages are required.

> If you decide nominal damages are in order you will award a sum which show,that you recognize that a wrong has been done but you are not satisfied on a balance of probabilities that Mr Mattis' reputation has been greatly affected.
>
> On the other hand, in considering substantial damages you would consider what it is, the award that you make, could purchase, bearing in mind at al times you are awarding a figure which is necessary to provide him with adequate compensation and to re-establish his reputation."

[37] It is clear from the foregoing extract that the learned judge, having directed the jury on the classes of damages which could have been awarded, they would have bourne that in mind. I am not of the view that the jury, comprising eight intelligent persons (noting from their professions) would not have appreciated the difference between nominal and substantial damages, nor would they not have understood what the learned judge meant, in informing them that the award should be moderate. The instructions to them to make a moderate award, undoubtedly, demonstrates that their award should not be very low nor inordinately high. In dealing with damages "… juries are not expected to make mathematical calculations, so they can only deal with this matter on broad lines" per Lord Reid in ***Lewis v Daily Telegraph Ltd*** [1964] A.C 234 at 262. Further, in referring to the ***Gleaner Company & Anor v Abrahams,*** which was cited by Mr. Kitchen for the respondent, the learned judge need not say more than he had. He drew their attention to the fact that Mr Abrahams was a former Minister of Government who was well known locally and internationally and that there were three publications in the newspapers attributing dishonesty on his part. He informed them of the effect which the articles

would have had on Mr Abrahams' reputation, reminding them that they should be mindful of the evidence led in the case at bar. I am satisfied that the learned judge had satisfactorily guided the jury as to the law and material aspects of the evidence.

[38] The allegations in the article amount to a criminal offence and its publication is an imputation that the respondent had committed such an offence. There can be little doubt that the allegations are very serious and indeed the publication, having been made in popular national newspaper, would have caused severe damage to his reputation. It would have affected his rectitude, his professional reputation, his honour and the "core attributes of his personality". He was ridiculed by other policemen, who referred to him as "druggist". Mr Taylor stated that after the publication the respondent "looked withdrawn and downtrodden" and had never been the same person he was as before. Inspector Brown stated that he became withdrawn. He lost his common law partner and some of his friends and although promoted twice, he had a reasonable expectation that he would have been promoted to an Inspector but this did not materialize. Importantly, no apology had been tendered by the appellant. Additionally, there is nothing to show that he did not enjoy an unblemished reputation prior to the publication. It is reasonable to infer that the jury had taken into account all relevant considerations and had reasonably thought that an award of $1,000,000.00 was appropriate for the damage to the respondent's character caused by the appellant. In all the circumstances, it cannot be said that this award is disproportionate to the injury suffered by him.

[39] I would dismiss the appeal with costs to the respondent to be agreed or taxed.

PHILLIPS, J A

[40] This is an appeal from the judgment of Brooks J sitting with a panel of jurors whereby damages were assessed against the appellant in the sum of $1,000,000.00 with costs limited to two days to be taxed if not agreed. The appellant challenged this award on the grounds that the sum in which damages were assessed by the jury was excessive having regard to the evidence; that the learned trial judge erred when he failed to withdraw from the jury the question of whether the respondent was entitled to damages; or alternatively that if damages were to be awarded then the judge should have directed the jury that damages of no more than $50,000.00 should have been awarded; and that all the facts in the offending article were admitted by the respondent to be true in his evidence. The appellant therefore sought an order that the damages awarded be reduced to not more than $50,000.00. On 15 March 2011, we heard arguments on this appeal and on 23rd March 2011, we dismissed it, affirmed the award and ordered costs to the respondent. These are my reasons for concurring with that decision.

[41] The respondent in this matter is a constable of the Jamaica Constabulary Force (JCF), and at all material times was attached to the Anti-Crime Task Force. The appellant is the proprietor, printer and publisher of "The Week-end Observer" newspaper which has wide circulation throughout the island.

Background

The pleadings

[42] The respondent filed a claim on 31 August 2001 against the appellant claiming compensatory damages for the publication of an article on the front page of the Weekend Observer dated 31 January 1997 under the heading "Shake Up At Special Anti Crime Task Force". The respondent pleaded that the following words falsely printed and published of him were defamatory in the way of his occupation as a constable of police:

> "THREE OFFICERS ATTACHED TO THE SPECIAL ANTI CRIME TASK FORCE WERE RECENTLY TRANSFERRED AFTER IT WAS ALLEGED THAT THEY TOOK AWAY COCAINE FROM A MAN WITHOUT TURNING IT OVER TO THE NARCOTICS POLICE. THE THREE OFFICERS ARE DETECTIVE SERGEANT DODRICK HENRY WHO WAS TRANSFERRED TO HANOVER, CONSTABLE O.A MATTIS TO ST. ELIZABETH AND CONSTABLE A.H BOBB WHO WAS SENT TO THE WESTMORELAND POLICE DIVISION."

These words, he stated, were published to the world at large, were referred to, and were understood to refer to him, as one of the police officers. The particulars of the libel are set out below:

> "A) The Plaintiff was a Constable of Police in the Jamaica Constabulary Force and attached to the Special Anti Crime Task Force from the 16th day of June, 1995 to 5th January, 1997.
>
> B) No other officer by the name of Orville Mattis was attached to the Special Anti-Crime Task Force between the 16th day of June, 1995 to the 5th day of January, 1997 the time at which the publication referred to the Plaintiff's transfer to St Elizabeth."

[43] The respondent claimed that the said words in their natural and ordinary meaning meant or were reasonably understood to mean that he had committed criminal offences contrary to the Corruption Prevention Act and the Dangerous Drugs Act.

[44] The respondent claimed that by so doing the appellant was indicating that he was not a fit and proper person to be a member of the JCF. The respondent therefore claimed that by reason of the publication of the said defamatory words, he had been gravely injured in his character, credit and reputation as a police officer and had been brought into public scandal, odium and contempt.

[45] An appearance was entered on behalf of the appellant on 14 September 2001. However no defence was filed within the time limited by the rules and judgment was entered in default thereof on 21 January 2002. On 6 May 2005, an order was made by Dukharan J (as he then was) for the matter to be heard before a judge sitting with a panel of jurors. On 11 February 2008, the matter was heard and final judgment given on that day at the completion of the assessment.

The assessment

[46] At the hearing, three witnesses gave evidence for the respondent, while the appellant called no witnesses. Due to, as the learned judge put it, "the hybrid pre and post Civil Procedure Rule situation", the court heard viva voce evidence in the absence of witness statements and allowed cross examination without any admission of liability or defence as to quantum, made or filed by the respondent.

[47] The respondent gave evidence that he had joined the force as a constable in 1980 at 18 years old, and that it was his first and only job. He had been specially trained at the canine division in narcotic dog handling and, when Colonel McMillan was at the helm, he was given special training as an undercover agent. He gave evidence that he had been living with his common law spouse and young daughter at the time of the publication, but that subsequent to the publication, unknown persons began visiting his home, forcing him into hiding and ultimately to remove his family from his home. Eventually, his common law spouse became 'sick and tired' of the situation and ended the relationship. He claimed too, that he not having been able to be around as a father figure to his daughter, "something sad happened to her". The respondent maintained that he had not taken any cocaine from any man without turning it over. He had not been charged, but he had been asked about taking narcotics by Superintendent Daley of the Special Anti-Crime Task Force before the publication of the article.

[48] He told the court that when he read the article he was, "shocked and in disbelief". He said that he had lost a lot of friends and people accused him of being a "druggist". His family were also in shock and disbelief and became withdrawn. Although he had been a regular attendant at his church, he went through a period of absenteeism, due to people speaking to him on the subject. He became afraid to face people, so he stayed at home most of the time and then went on protracted sick leave for eight months. He said: "I was met with resentment by officers in charge. They didn't want to work with me or talk to me as they used to. I didn't drink. Some of them called me druggist at times as a nickname. I didn't take kindly to the name. I did not take any

other leave apart from sick leave". In spite of all this, he said, he did not stop being a policeman.

[49] The respondent testified further that before the publication, he would go out and play dominoes, go to the football field for exercise and go out with his family. But after the publication of the article, he seldom went out. He withdrew himself, "because of what they were saying; what people would say". He was very embarrassed and had experienced problems when travelling on four occasions to New York, Atlanta, London and Miami. He had been taken from the immigration lines, questioned about drug activities and strip searched. He said that because of the publication and the humiliation that he had experienced at the airports in the above states he had not travelled since 2002, although, he did state that when he asked the immigration officers why he was being treated in that way he had been told that it was "routine". In his view, he was no longer the person that he used to be before the publication, as he was now a "homely" and "withdrawn" person, whereas before he was "always bold and brave". He said he always had more trust in himself knowing that people had trust in him, but things had changed and people now looked at him in a different light. He told the court that he had reported sick from the Sunday after the publication, and then thereafter, he had sent in sick certificates every 14 days for the period of eight months. He also stated that he had never received an apology from the appellants.

[50] The respondent did tell the court, though, that he was at the time of trial living with a lady, and had been doing so for about five years (since 1997); that his mother had started going back to church, and more importantly, that he had been promoted to

the rank of corporal on 1 June 2000 and to the rank of sergeant, 1 February 2002. However, he was not enjoying his work as a police officer. The general state of the system and the "bad" things being said about police officers seemed to indicate to him that it was time to go. He had made enquiries about early retirement and discovered that he could do so at age 50 with 30 years in the service which would occur in two years. Had the publication not been made however, he said that he would have been "looking on now to Inspector and in another couple years Deputy Superintendent". He indicated to the court that he had fathered six children in all, three since the publication. Only one of them lived with him. He accepted that in his work he could be transferred at any time without any reason being given for the reassignment, and that his job was a stressful one. He also recognized that his current position where he was stationed in Black River in St Elizabeth, was a supervisory one, and was a responsible position.

[51] Inspector Louis Brown gave evidence that he was stationed in the same parish as the respondent, had joined the Jamaica Constabulary Force in 1975, and had thus been a member for over 33 years. He said that the respondent was a friend and colleague. When he read the article he "was really shocked and amazed". Why? Because he had worked on assignments with him and that was not the person that he had known and worked with. He had met him in 1982 or 1984, when he, Inspector Brown, was stationed at Central Police Station. He indicated that the respondent was held in high esteem by the team at "Central", and because of that he was given undercover and covert work to do, which might not be dangerous work, but was highly

confidential work, and he was a trusted police officer. They had faith in him. He said that they also used to socialize. Inspector Brown said that having read the article his view of the respondent had not changed, in fact, it may have strengthened with regard to whether he would have done any of the things alleged. But he said some of the colleagues in the JCF held his view, and others did not, as they felt that the appellant was a responsible newspaper, held in high regard, and would not publish information which could be so damaging without doing the proper research. But he accepted, and felt that his colleagues did too, that mistakes do occur. Inspector Brown indicated that the respondent had changed significantly since the article, he had become a totally different person. He was now withdrawn. The respondent had told him that he could not "face the world." He said that the respondent's name had come up in meetings as to why he had not been promoted. He maintained that the respondent was still a friend of his. He made however, the rather unusual statements that he could not confirm or deny whether there were any "Bad cops"; that a police officer who caused exhibits to be diverted, he would not call a bad cop; that he would call a police officer who takes an exhibit to a place other than where it was to go, a good cop!

[52] Linden Antonio Taylor gave evidence that he was a businessman. He knew the respondent for several years as they had both attended Linstead All Age School. They had been partners in a cable service company, Mattview Cable and Electronics Limited. Mr Taylor was the chief executive officer, and the respondent was the technical officer in charge of making decisions relating to extending the lines to customers in respect of cables and amplifiers. He told the court about the difficulties that they had experienced

in funding the operation. He said that he saw the article the day that it came out and he was surprised, and subsequent to the publication, the respondent looked withdrawn and downtrodden, and was not his usual self, had never been the same, which remained so until the day that he gave evidence. He gave further details with regard to the company in which they were shareholders. He said that the respondent was the CEO in 1997 and then he (Taylor) became the CEO in 1998. He said that the company grew in 1997. They both spearheaded that expansion. He knew that the respondent was on leave in 1997, but he said that he did not know the nature of his illness. He said quite clearly though, that he did not believe that the respondent was involved in any drugs. That was a view he held from in 1997 up until he was giving evidence, even though he knew that people were calling him "drug dealer".

[53] Counsel for the appellant said that the respondent had not been lowered in the eyes of right thinking members of the society. His witnesses had said that they had not been negatively affected by what they had read. The respondent, he said, was only entitled to a nominal sum in damages which he suggested should not exceed $50,000.00.

The summation

[54] In his summation the learned trial judge told the jury that the ultimate question which they were asked to decide was "what award of monetary compensation would be appropriate and necessary to compensate Sergeant Mattis and to re-establish his

reputation," and that, in deciding that question they were to answer for themselves two other questions:

> "(1) To what extent has his reputation as a police officer and a community member been affected?
>
> (2) To what extent has he personally been affected by the views of the police force and the community?"

[55] The learned judge accurately recounted the evidence to the jurors. He pointed out certain matters in respect of the evidence which he correctly left to the jury as issues of fact to be determined by them. For instance, was the respondent who fathered six, present in the lives of his children, although one lived with him while others would be adults by now; what course had his life taken since he has had three children and formed a live-in relationship since 1997, he could obviously still attract a mate. He informed the jury that it was not really relevant what effect the article had on members of his family as they had not been defamed. Additionally, although the fortunes of the business were also not relevant, nor the inability to obtain funding from the bank (the latter evidence did not show any connection to the case) he told the jury that they should consider whether the young business would have expanded, if the respondent had not shown up, and they should consider how the evidence in relation to the company may show the effect the article had in respect of this aspect of his life. The jury should also consider, when deciding how his professional life was affected, the fact that he had been promoted twice since the publication of the article, yet he had stated that he wanted to retire from the JCF. The judge commented on the evidence

that the searches at the airport were said to be routine and could not therefore be attributed to the article. He stated also that they should consider the evidence given by the inspector when he described a policeman taking the exhibit to another place than where it should go as a good cop, in order to decide whether he was a candid witness, whose word one could rely on, or whether he was a patently biased person, (although the jury were reminded that one could accept some aspect of a witness' evidence and reject other aspects). The judge directed the jury on the law of defamation and commented on the cases submitted. Finally, he told the jury that the award of damages was to be moderate.

The Appeal

The appellant's submissions

[56] On appeal, counsel for the appellant submitted that the appeal turned on a very narrow point, and that was that the sum awarded for damages was excessive. She abandoned the earlier submissions filed on behalf of the appellant suggesting a sum of $50,000.00 as damages, and the ground that the judge had erred when he failed to withdraw from the jury, the question as to whether the respondent was entitled to damages. She brought to the attention of the court paragraph 38 of the Privy Council decision of ***The Gleaner Company Limited and Dudley Stokes v Eric Anthony Abrahams***, Privy Council Appeal No. 86/2001 delivered 14 July 2003, to wit:

> "The Jamaican Court of Appeal does not have the power conferred upon the English Court of Appeal by section 8(2) of the Courts and Legal Services Act 1990 and the Civil Procedure Rules to substitute an award of damages for a

sum awarded by the jury which it considers to be excessive. Except by consent it can only order a new trial."

After consultation with counsel for the respondent, the appellant applied to amend its notice and grounds of appeal so that the order sought was:

> "(a) With the consent of the Respondent, that the Court of Appeal be at liberty to substitute what they consider to be an appropriate sum, such appropriate sum being Three Hundred Thousand Dollars (J$300,000.00)
>
> (b) In the alternative that trial of the quantum of damages to be awarded be re-tried before a single judge of the Supreme Court."

[57] Counsel for the appellant submitted in support of the claim that the damages awarded were inordinately high and that the learned trial judge did not mention certain aspects of the evidence to the jury in his summation namely:

> (i) that the allegations in the article had been made and the respondent had been questioned by a superior officer about them prior to the article having been published which could have affected the extent of the damage to his reputation;
>
> (ii) the learned judge indicated to the jury that the damages should be moderate when that decision should have been theirs, and his charge to whether the damages should have taken between substantial, moderate and nominal could have been confusing;
>
> (iii) he failed to outline in detail the distinctions between the instant case and the Abrahams case which could have led the jury into error in their award.

[58] The appellant also argued that there were other items of evidence which when considered in totality would lead to the conclusion that the damages awarded were excessive. These were:

(i) while the respondent was on sick leave his company flourished. It was reasonable to assume that during that period he took the time to "grow his private business";

(ii) there was no medical evidence to substantiate that the time he took away from work was connected to the publication;

(iii) in spite of his evidence of becoming withdrawn and his then personal relationship coming to an end, he was able to father three children and to form a further relationship since 1997;

(iv) prior to the publication, the respondent had been a constable in the Jamaica Constabulary Force for 17 years, yet since the publication he had been promoted twice; his earning capacity had clearly therefore not been affected. It was his said superiors in the organization who had questioned him who yet saw it fit to promote him; and

(v) although the appellant had not submitted an apology, this must be considered in the light of the fact that they had not put forward a defence, and so had not attempted to delay the matter, and the respondent had agreed the content of the publication.

The award, she submitted, was therefore excessive, and the court should award $300,000.00 in lieu thereof.

The respondent's submissions

[59] In response, the respondent made the following points:

(i) Although the respondent had been promoted twice the jury still had to consider that he no longer enjoyed his job and before the publication he had been looking forward to becoming an inspector and later a superintendent. Instead he was now looking for an early retirement.

(ii) Although the evidence was that there was success in the business it had not necessarily increased. Any success could have resulted from the efforts of Mr Taylor when he became CEO or from the efforts of the respondent before the publication of the article. There was evidence to suggest that the respondent may not have contributed to the work of the company in 1997. In any event both witnesses supported the respondent to say that he was sick and that would have to be accepted as there was no defence filed.

(iii) The evidence was very clear from all the witnesses of the effect the article had on the respondent and that must be accepted. He had been outspoken and brave. He had become withdrawn and nothing like his former self. He had been separated from his daughter.

(iv) The award was very modest in all the circumstances and all that had been argued on behalf of the appellant had already been taken into consideration by the jury. The award was not inordinately high, in fact it was inordinately low, and had already been seriously discounted.

(v) The court should be guided by the principles in ***Watt v Thomas*** [1947] AC, 484 ***Roy Green v Vivia Green*** (Privy Council Appeal No 4 of 2002) and ***Willis Reynolds v Derron Lewis*** SCCA 74/2001 (judgment delivered 7 November 2002).

Analysis

[60] Scrutton LJ in ***Youssouf v Metro- Goldwyn-Meyer*** (1934) 50 T.L.R. 584, gave the definition of a defamatory statement as "a false statement about a man to his discredit". The learned trial judge told the jury that "the defamatory imputation has been defined in various ways but the most common definitions used are that it is an imputation which would (1) tend to lower the victim in the estimation of right thinking members of society generally, (2) cause others to shun or avoid the victim or (3) tend to expose the victim to hatred, contempt or ridicule". I agree with this statement of the law. In this case the defamation is a libel as it is in written form. The learned judge indicated that damages are presumed to flow from the wrongful act, and in keeping with the authorities he set out the three main functions that damages as compensation are supposed to achieve, with which I also agree viz:

> "a. to act as consolation to the victim for the distress he has suffered because of the wrongful statement;
>
> b. to repair the harm to his reputation, and
>
> c. as a vindication for his reputation

Indeed, Forte P (as he then was) in ***Margaret Morris & The Gleaner Co. Ltd et al v Hugh Bonnick*** SCCA No 21/1998 delivered 14 April 2000 (unreported) in dealing with the question of damages, said at page 22:

> "In determining the quantum of damages to be awarded in a libel action such as this, the primary consideration must be the vindication of the plaintiff for the damage to his reputation which is man's most cherished asset. Consequently, consideration as to how serious the libel is,

> the degree of damages done to the plaintiff's reputation, the magnitude of the publication, any genuine apology offered including a declaration of the falsehood of the publication, and in some cases any injury to his mental health which is directly connected to the libel are some of the factors to be taken into account, this of course not being an exhaustive list, as each case has to be considered on its own facts."

[61] The learned judge directed the jury to consider whether the libel was serious and therefore required substantial damages or not so serious and so nominal damages would suffice. He pointed out to the panel, quoting from the dictum of Sir Thomas Bingham, in ***John v MGN Limited,*** [1997] Q.B 593; 546 [1998] 2 All ER 35 that "Very serious defamations are those that go to the core attributes of the victim's personality, matters such as integrity, honour, courage, loyalty, and achievement". He ultimately directed the jury that the award was to be moderate. In my view this was correct.

[62] The case of ***Abrahams*** had been submitted by the respondent, for comparative purposes, and the learned judge was careful to point out the differences in the factual situation between the two cases. He indicated that Mr Abrahams was a former Minister of Government, well known locally and internationally, and that he had been libeled in three notable newspapers, which libel had had a devastating effect on him personally and on his reputation.

[63] Counsel for the appellant submitted that, in defamatory matters, each case turns on its own peculiar facts, and so precedents, save and except for the principles applicable to the assessment of damages, are in the main, of little assistance. I also

agree with this submission. Indeed, in the ***Abrahams*** case, Lord Hoffmann referred to Forte P's judgment in the Court of Appeal, in which he expressed the view that he was unwilling for juries to be addressed about first instance awards in other defamation cases, as the variables were too many "to be conducive to making worthwhile comparisons". Forte P was also hesitant to adopt the English practice to allow reference to Court of Appeal awards, as these awards were made pursuant to the corpus of authority which has developed under the Courts and Legal Services Act, 1990, in the UK, (referred to in para [16]) which we do not have in Jamaica. Since 2003 however, by and with the consent of the parties, some awards have been made by this court to substitute awards made by juries, but the number is still small.

[64] In this case, as I have already indicated, pursuant to the consent of the parties, the court was invited to substitute such sum that it considered appropriate. In the ***Abrahams*** case Lord Hoffmann under the heading of "The quest for uniformity and moderation" indicated that there are three ways to give the jury guidance on the amount to be awarded as damages in libel cases which he indicated have been canvassed in recent authorities. These were (i) the purchasing power of money, (ii) the awards in other libel cases (which would be restricted in this jurisdiction as set out above), and (iii) general damages in personal injury cases. There are serious difficulties which will be encountered in the use of all three, but in this case on appeal, suffice it to say none was submitted for consideration in support of the reduction of the award, and the burden of proof would be with the appellant.

[65] The respondent relied on the judgment of Forte P in ***Willis Reynolds v Deron Lewis*** which is instructive. The court was there dealing with an appeal from an order made by Anderson J in an assessment of damages arising out of a claim in negligence, (thus not with a jury). The appeal only related to the award made for pain and suffering and loss of amenities. The learned president reiterated what he described as the general principle applied by this court before disturbing an award made by a trial judge. The principle he said was originally stated in ***Flint v Lovell*** [1934] All ER (Reprint) and subsequently applied in this court in several other cases: "The Court will not reverse an award of damages in respect of its quantum unless the Court is convinced either that the trial judge acted on some wrong principle of law or that the amount awarded is so inordinately high or so very small as to make the judgment of the Court, an entirely erroneous estimate of the damages to which the Plaintiff is entitled". The analogy is readily drawn when the judge is sitting with a jury and this court is even more hesitant to interfere unless it can be shown that no reasonable tribunal when properly directed on the law and the evidence would have arrived at such a sum.

[66] In **Gatley on Libel and Slander** (9th edition at para 36.25 entitled Excessive or Inadequate Damages) the author said this:

> "**Province of the jury**. The jury is entrusted with the task of assessing damages and the appellate court is slow to interfere with an award on the ground that it is either too great or too small. The mere fact that the verdict is for a larger sum than the judges of the Court of Appeal would have given is not of itself a sufficient reason for upsetting the award. Similarly, the Court of Appeal is very reluctant to overturn an award on the ground of inadequacy of damages,

> and will not do so merely because they think that 'a more complete measure of justice would have been attained if the jury had given higher damages'. 'It is not because a judge thinks that the jury would have done fuller justice by awarding higher damages that he is entitled to disturb their verdict, and order a new trial, when the action is entirely for the consideration of the jury acting as reasonable men'."

[67] In the instant case the learned judge gave a balanced summing up to the jury. He told them of their responsibilities as the sole judges of facts, to assess only the evidence before them without sympathy, to observe the demeanor of the witnesses, how to deal with inconsistencies and discrepancies and also the burden of proof and what it means in civil cases. The summing up could not be faulted, in that regard. He certainly, in the main, drew to the attention of the jury the various issues mentioned by counsel for the appellant in para [58] above. It was a matter for them to decide based on the evidence as it unfolded. And in relation to the matters that counsel submitted that the trial judge did not specifically raise (see para [57]), in my view, generally he had recounted the evidence accurately. I found that although he may not have emphasized to the jury that no medical evidence had been adduced, nor the fact that the appellant had not filed a defence and so had not attempted to delay the matter, he did give directions in relation to the award of substantial as opposed to nominal damages, and he did set out the similarities and differences between the facts of the ***Abrahams*** case and the instant case, sufficiently so that they could "decide how to position their award". I found that the jury could not have been misled.

[68] This was a case in which the respondent was a police officer who before this article was proud of his occupation, and no doubt had a sterling reputation. He considered himself brave. He had the trust of his superiors. He was given covert work to do which required one to be highly confidential. He enjoyed being a part of the JCF and although he may not have been recognized for promotion before the publication, he obviously thought it was within his reach to obtain the status of inspector and deputy superintendent. The fact that he was promoted in spite of the cloud hanging over him can only be to his credit. The inspector who gave evidence on his behalf, and whom the jury probably believed, believed in him. The article affected him badly. It was an attack on his integrity in the police force. He was shunned or made to feel dishonest. He was afraid to face people. He even left his church for a while. He lost his common law wife and access to his daughter. Sad things happened to her. Even if he was able to attract a mate again and to have children too, he suffered for a period. Even if the company Mattview Cable and Electronics Limited had improved, as he was not so focused on his police work, that does not take away from the fact that he was uncomfortable at work with his peers, who called him "druggist" as a nickname, which he did not appreciate. There is no doubt that he had obtained repeated sick leave certificates to be away from work, and his absence from work began immediately after the article was published. It was therefore a matter for the jury. The sum that the jury awarded for the damages for compensation for the injury to his reputation, in the circumstances of this case, appeared moderate and reasonable to me. I could see no reason to disturb the award of the jury. There were no exceptional circumstances.

[69] I therefore was of the view that there was no merit in this appeal, and that it should be dismissed with costs to the respondent. The award of the jury was affirmed.