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applied was as set out in *Toogood -v- Spyring* (1834) 149 ER 1044. That is, whether the defamatory matter was published in "discharge of some public or private duty, whether legal or moral, or in the conduct of the publisher's own affairs, in matters where his interest is concerned". Whether privilege is available will depend on the subject and circumstances of the publication and not the state of mind of the defendant.

An assessment of the facts led Mildren J to the conclusion that the defendants had not established facts upon which he could find as a matter of law that the occasion was privileged. He found in particular that the defendants had not established sufficient facts to meet three criteria that (a) the subject matter of the defamatory statement is a matter of relevant public interest, (b) the report is fair and accurate and (c) there is an opportunity for a reasonable response by the defamed party.

The second defendant had concentrated the broadcast on the private conduct of the plaintiff and not the exercise of his functions and powers as a public officer, nor on whether the police inquiry would be fairly conducted. It was stressed that *Theophanous* and *Stephens* aside, the courts have only rarely concluded that members of the mass media have any general duty to its audience to communicate matters of public interest. The recent decision of *Toyne -v- Everingham* (1993) 3 NTLR was cited and distinguished as an exceptional case where the privilege existed. If the defendants had not said anything to the general public it could not have been said that they breached a legal, social or moral duty.

Reasons for Rulings made on 9 December 1994:

In a preliminary ruling arising from applications by both plaintiff and defendants, Mildren J ordered that the defence of "contextual truth" pleaded in both defences was not available as a matter of law in the Northern Territory and ordered that part of the defences be struck out. A number of other rulings were made but turn on the facts of the case so will not be dealt with in this note.

The Defence of Contextual Truth:

The defendants pleaded justification by virtue of truth in the meanings in relation to 9 of the 15 allegedly defamatory imputations and contextual truth to the remaining 6.

Mildren J found that the law of defamation in the Northern Territory is primarily common law apart from the exceptions in the Defamation Act (NT). It follows that truth or justification is a complete defence in the NT. Well established authorities such as *Sutherland and Others -v- Stopes* [1925] 47; *Plato Films Ltd and Others -v- Speidel* [1961] AC 1090; *Polly Peck (Holdings) PLC and Others -v- Trelford and Others* [1986] 1 QB 1000; and *Khashoggi -v- IPC Magazines Ltd and Anor.* [1986] 3 All ER 577 set out the common law rule and exceptions.

In New South Wales the common law is substantially altered by s 16 of the *Defamation Act* (NSW) which provides for the defence of "contextual truth". The defendants asserted that this statutory defence has now been recognised by the common law and is therefore available in the Northern Territory. This submission was based on two decisions of the ACT Supreme Court: *TWT Ltd -v- Moore* (Unrep 31/10/1991) and *Woodger -v- Federal Capital Press of Australia Pty Ltd* (1992) 107 ACTR 1. Mildren J rejected the submission for a number of reasons concluding that it is inappropriate "to develop the common law, which is supposed to be uniform throughout Australia, by reference to legislative changes or matters of practice and procedure, where those changes or matters are of a purely local character".

Reeves — Senior Counsel, Sylvester — Junior Counsel instructed by Mildrens for the plaintiff.

1st defendant appeared in person.

Lynch — Senior Counsel, Southwood — Junior Counsel instructed by Waters James McCormack for the 2nd defendant.

CP

Supreme Court Notes

SENTENCING

Tiger Marshall v David John Llewellyn

No JA3 of 1995

Judgment of Kearney J delivered on 3 May 1995.

The appellant was convicted of two offences: driving a motor vehicle whilst having a blood alcohol concentration exceeding 0.08 (0.286) and driving at a time whilst disqualified from holding a driver's licence. He was sentenced to 3 months for the former offence and 6 months for the latter, the trial judge ordering that the second sentence be served cumulatively upon the first, an effective sentence of 9 months. He appealed on the grounds that the trial judge gave undue weight to his prior criminal record (two previous convictions for "drive disqualified" coupled with driving under the influence); that the trial judge erred in accumulating the sentences; and that the effective sentence was manifestly excessive.

These convictions were the appellant's third convictions for the same offences. After considering the law in *Veen (No 2) v The Queen*, His Honour agreed with Counsel for the appellant that the trial judge gave undue weight to the previous convictions and that the effective sentence of 9 months was manifestly excessive. In His Honour's opinion a proper construction of the trial judge's sentencing remarks showed that the admitted fact that these were the appellant's third convictions for these combined offences had been erroneously treated as by itself rendering the present offences a "worst case".

His Honour did not consider the respective sentences to be manifestly excessive and did not consider that the accumulation of sentences itself amounted to error, because the appellant's offending was properly characterised as a single criminal episode and the objective in sentencing is to ensure that the totality of the sentences imposed properly reflects the totality of the offending in that episode.

His Honour affirmed the respective sentences of 3 and 6 months but concluded that the appropriate effective sentences was 7 months (2 months of the 3 month sentence served concurrently with the 6 month sentence and 1 month served cumulatively upon it).

D Bamber of CAALAS for the appellant.

C Roberts of DPP for the respondent.

DW

CASE NOTES

Trevor Robert Burslem v Patti Lou Roberts

Judgment of Kearney J delivered on

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New name for Department of Law

On the 1 August 1995 the name of the Department of Law will be changed to the "Northern Territory Attorney-General's Department".

The change of name is designed to better reflect the Department's role in providing both legal services and community services to the people of the Northern Territory in areas for which the Attorney-General is the responsible Minister.

Meredith Harrison
Secretary
Dept of Law