COURT OF APPEAL [1998] QCA 306

de JERSEY CJ
McMURDO P
McPHERSON JA

Appeal No 8716 of 1997

AUSTRALIAN BROADCASTING CORPORATION Appellant (Defendant)

and

PAULINE HANSON Respondent (Plaintiff)

BRISBANE

..DATE 28/09/98

JUDGMENT

THE CHIEF JUSTICE: Prior to being restrained by an order of

the Chamber Judge on 1 September 1997, the appellant broadcast nationally a musical composition called "Back Door Man" featuring the voice of the respondent. The respondent is and was then a Member of the House of Representatives for the seat of Oxley.

The appellant broadcast the composition over its youth-oriented network Triple J commencing 21 August. It was produced by others, it seems, by a cut and paste exercise, taking bits of the respondent's speeches from here and there and piecing them together to suggest her actual participation in the final result. By the time of the broadcasts, the respondent had become well known nationally for her political views, and she was a controversial political figure.

The transcript of the broadcast put before the learned Judge read as follows:

"I'm a tory and indeed Pauline. I wonder what the end will be Pauline. Yes, there I am I find this very hard. I look at this way. I'm a backdoor man. I'm very proud of it. I'm a backdoor man. I'm homosexual I'm a backdoor man yes I am. I'm very proud of it. I'm a backdoor man. I'm homosexual (chuckling). Backdoor, clean up our own back door. We need to get behind and we'll do trade with you. Backdoor - all our fears will be realised. But I'm a happy person. Because I'm a backdoor man, yes I am (chuckling). Um, um, um, um, um, um - what I've called for is a homosexual government - yes - join us, be one of us. Come out be one of us. Yeh, I'm very proud that I'm not straight. I'm very proud that I'm not natural. Yeh, I'm not human. Someone hit me on the head one day, yeh. I'm not human. Someone hit me on the head one day. I don't know, I don't know, I don't know, I don't know. Poor Pauline, poor Pauline, poor Pauline. I like trees and I like shrubs and plants and trees and shrubs and plants but I've put the fence up now so that can't get in - yeh. Please explain me me, please me me, please explain. Poor Pauline Poor Pauline I'm a tory and indeed, Pauline and her family. I'm a backdoor man. I'm very proud of it. I'm a backdoor man. I'm homosexual and back here. This is a circular

driveway. I still work and I worked the other night. I'm rostered on I think for next week. Now a gentleman came up and told me he said that other people don't receive, they've got to accept it here inside. I'm saying that they up and leave. Yes it's a little bit country, it's a little bit country, it's a little bit rock n' roll if you ask me. Yes it's a little bit country of course, of course, of course. Of course, the man they named Pauline. I'm very proud that I'm not straight. I'm very proud that I'm not natural. I'm a backdoor man for the Klu Klux Klan with a very horrendous plan. I'm a very caring potato. We will never have the chance. I'm a backdoor man for the Klu Klux Klan with very horrendous plans. I'm a very caring potato. We will never have the chance. Please explain. Me. Please explain. Me. Please explain. Me. Please explain. Me. Me, me. Thank you. Please explain, please explain. Thank you."

The hearing before the Chamber Judge took place on 1 September 1997. On 28 August 1997, the respondent had issued a writ against the appellant claiming damages for defamation. Prior to the service of the writ, the broadcasts, which, as I have said, commenced a week earlier, had included these following additions:

"You must come out and be one of us.
As long as children come across,
I'm a happy person.
Yes.

This is a circular driveway.
I still work and I worked the other night.
I'm rostered on I think for next week.

Now a gentleman came up and told me,
He said that other people don't receive.
They've got to accept it here inside."

Before the Chamber Judge, the respondent contended that the broadcast material gave rise to imputations that she is a homosexual, a prostitute, involved in unnatural sexual practices, associated with the Ku Klux Klan, a man and/or a transvestite and involved in or party to sexual activities with children.

The appellant essentially contended that the material amounted merely to vulgar abuse and was not defamatory. The appellant partly relied in that regard on statements made by announcers preceding the playing of the material that "the song was satirical and was not to be taken seriously".

The learned Chamber Judge was referred to Shiel v. Transmedia Production Pty Ltd [1987] 1 Qd.R 199 where the Full Court followed the approach of Mr Justice Walsh in Stocker v. McElhinney (1961) 79 Weekly Notes NSW 541 at 543 with relation to the granting of interlocutory injunctions to restrain defamation particularly his propositions 2, 3 and 4 which read:

"2.In such cases the power is exercised with great caution and only in very clear cases.

3.If there is any room for debate as to whether the statements complained of are defamatory the injunction will be refused. Indeed, it is only where on this point the position is so clear that in the Judge's view a subsequent finding by a jury to the contrary would be set aside as unreasonable that the injunction will go.

4.If on the evidence before the Judge there is any real ground for supposing that the defendant may succeed upon any such ground as privilege or of truth and public benefit or even that the plaintiff if successful will recover nominal damages only the injunction will be refused."

His Honour referred to some departure from the rigidity of that approach evident through recent New South Wales cases.
In Chappell v. TCN Channel 9 Pty Ltd (1988) 14 NSW Law Reports 153 Mr Justice Hunt emphasised the importance of free and general discussion of public matters which founds the need for caution in the granting of interlocutory injunctions in alleged defamation cases but he would reduce those previously rigid rules of practice to the level of important guidelines. His Honour's approach found some apparent favour with the New South Wales Court of Appeal in Marsden v. Amalgamated Television Services Pty Ltd unreported 40229/96, judgment given 2 May 1996 page 15. Aware of that trend of authority His Honour said in his reasons for judgment that it was unnecessary to decide whether this material was defamatory but rather whether it was capable of being defamatory. He concluded that it was capable of being defamatory. He acknowledged awareness of the exceptional nature of the remedy in these circumstances. He implicitly rejected the suggestion that the caveat about the materials being merely satirical excluded an at least strongly arguable liability in the appellant. His concluding finding was as follows:

"In my view the injury that will be done to the plaintiff and indeed to members of her family if the publication of this material by the defendant continues unabated cannot be adequately compensated for by an award of damages should she succeed in establishing that the material is defamatory as asserted in her solicitor's letter of 27 August 1997. In my view, the plaintiff's case is sufficiently arguable that the balance of convenience favours the granting of an injunction restraining the continued publication of the material and counsel for the plaintiff has already indicated that he has instructions to give the usual undertaking as to damages."

The appellant contends that His Honour applied the wrong test in confining himself to whether the material was capable of being defamatory rather than actually defamatory and that had he addressed the correct question consistently with Shiel he would have refused the injunction. That is because - and I quote from the appellant's written outline:

"Reasonable persons of ordinary intelligence `drawing on their own knowledge and experience of human affairs and perhaps reading between the lines in light of their general knowledge and experience' (Copley v. Queensland Newspapers Pty Ltd unreported Court of Appeal 179/93, judgment delivered 22 February 1993) would not necessarily conclude that the publication conveyed the imputations relied upon. When the words complained of are taken as a whole and in the context of an introduction to the effect that the words were not to be treated seriously it is at least arguable that such persons would understand the Ku Klux Klan and sexual references

in the publication as alluding in a satirical or ironic sense to the respondent's conservative political views."

The appellant also submitted that the learned Judge failed to consider the availability of defences.

There is no need to revisit the current applicability of the approach endorsed in Shiel. While there is much to commend the slight relaxation suggested in Chappell v. Marsden, Shiel states the law in Queensland. But in the end, while the learned Judge expressed himself in his judgment as dealing with whether the publication was capable of being defamatory his other observations during argument indicate his view that they clearly were defamatory and as much is conceded by
Mr Mulholland QC who appeared for the appellant. In particular, I refer to His Honour's statement at page 16:
"There's a political overtone to the whole exercise which seems to denigrate her personally by making assertions as to her sexual preference and her abnormal sexual attraction with respect to children and so on."

At page 29:

"I can't imagine anybody listening to that production would not conclude that the assertion was that Pauline Hanson was a paedophile in the first one or that she was a homosexual and rejoiced in the fact."

And as to the prefatory caveat the learned Judge said at

page 30:

"I can't imagine that one can avoid liability for injury to reputation to the extent that it is injured by simply prefacing it by saying, `Well, this is satirical, don't take this seriously,' and then playing it over and over and over again."

If His Honour's actual approach when determining the matter, although consistent with the more recent New South Wales decisions, departed from Shiel then it lacks any present consequence. His Honour clearly believed the material in terms of Shiel to be patently defamatory and so do I.

There is no real room for debate but an ordinary sensible listener not avid for scandal would conclude that at least one or more of these imputations arose. If a jury were to find the opposite I am satisfied that this Court would on appeal set aside its verdict as unreasonable. One or more of these imputations do arise and they are plainly defamatory for exposing the respondent to ridicule and contempt.

The appellant separately complains that the learned Judge failed to address the availability of

defences (although this was but faintly argued orally). That is not so. He did discuss the availability of the suggested defence at some length. The defence was based in section 16(1)(h) of the Defamation Act (1889), qualified privilege on the ground of publication made in good faith in the course of discussion of a subject of public interest where public discussion is for the public benefit and provided the comment is fair.

His Honour referred to the appellant's critical difficulty, which related to the identity of the relevant subject. The major subject truly emerging from this publication is, as His Honour put it, the respondent's sexual preferences or orientation. How could that seriously be urged as giving rise to such qualified protection, while on the other hand the appellant urged that the whole exercise should be dismissed as a piece of derisory fun or nonsense not to be taken in any degree seriously? In any event, I accept Mr Rofe's submission for the respondent that the question of such a defence does not really arise for lack of any evidence going to the threshold.

There was no room for debate about the defamatory nature of this material. It is facile to suggest that the appellant could avoid liability by prefacing the song with its disclaimer. Other matters apart, what if the listener heard the song but not the disclaimer? But more fundamentally, a broadcaster cannot convert grossly defamatory into acceptable material simply by pleading that it should not be "taken seriously". Certainly, that was not achieved here.

Enjoining the broadcast of this material could not possibly be said to infringe against the need for "free and general discussion of public matters" fundamental to our democratic society. These were grossly offensive imputations relating to the sexual orientation and preference of a Member of Parliament and her performance which the appellant in no degree supports as accurate and which were paraded as part of an apparently fairly mindless effort at cheap denigration.

The learned Judge was perfectly correct to grant the interlocutory injunction and the appeal is without merit. I would dismiss the appeal.

THE PRESIDENT: I agree with the order proposed by the Chief Justice and with his reasons.

McPHERSON JA: I too agree with the proposed order and the reasons which the Chief Justice has delivered.

THE CHIEF JUSTICE: The appeal is dismissed.

MR ROFE: Seek an order for costs, if Your Honours please.
MR MULHOLLAND: Nothing to say, Your Honour.

THE CHIEF JUSTICE: The appeal is dismissed with costs to be taxed.