SHERIFF APPEAL COURT

[2019] SAC (CIV) 14

DUN-SG732-17

OPINION OF THE COURT

delivered by APPEAL SHERIFF ANDREW M CUBIE

in an appeal in the cause

MICHAEL DAWSON

Claimant and Appellant

against

D. C. THOMSON & CO LTD, t/a DUNDEE EVENING TELEGRAPH

Respondents

Claimant and Appellant: Party
Respondents: Corr, solicitor; Thorntons, Dundee

2 April 2019

Introduction

Background

[1] The appellant had raised proceedings for defamation at Dundee Sheriff Court arising out of a newspaper article which appeared on 27 October 2016 in the Evening Telegraph. The article reported on a successful court action which the appellant had raised for payment due from his employers because of restrictions on his ability to take a break whilst working as a

carer. He claimed that the article was false and defamatory. The respondents denied any defamatory meaning.

[2] After a hearing at which evidence was led, the sheriff dismissed the claim finding that the article was an honest account based on the claimant's version of events as given to the journalist, and the court judgment in relation to the unpaid work claim.

The appeal

[3] The issues of law which the appellant raised in his Appeal Form were

> "1. The judge failed to recognise or acknowledge that being disturbed on a break does not equate to eating with someone.
> 2. The judge failed to recognise the prejudice and maliciousness of the article. Does a sex offender or someone with paranoid schizophrenia not deserve to be eaten with?
> 3. The journalist had 2 conflicting pieces of information regarding a break being taken. He failed to find out which one was correct."

Appellant's Submissions

[4] The appellant represented himself as he had done in the simple procedure claim. He submitted that there was nothing in the material which the sheriff had which would justify the headline of the article "Worker had to eat with sex offender". The sheriff had been biased and had made numerous mistakes.

[5] He submitted that the sheriff failed to distinguish between being on a break and having to eat with a sex offender. He did not "have to eat" with the sex offender; he chose to do so; he chose to stay in the service user's home; he chose to eat there; he chose to do so in the company of the service user who was a sex offender. The article should have been about unlawful deductions from wages.

[6] He complained that once the journalist found out that the service user was a sex offender, the journalist changed the emphasis of the article to support a false headline. The appellant was not averse to eating with his service user. It was a false story with a false headline.

[7] He submitted that the article was defamatory because it lowered him in the opinion of right thinking people. He supported vulnerable adults; it was not a problem to him to eat with vulnerable adults. He had had to write a letter of apology to his manager and the service user. He reiterated that the sheriff had failed to distinguish between the situation of him being unable to take a break, which was the case, and the "need" to eat with the service user. If the sheriff had properly recognised the distinction he would have found the article to be defamatory.

[8] In general the service user would follow him; he felt it inappropriate to take a break; he had a choice to take a break but did not do so. The journalist had taken what happened in general terms and elevated it into a misleading and false headline.

[9] The appeal was not just about tone of the article, but the tone supported the false headline.

[10] It was defamatory; his employers and the service user asked about him, "why would he do that?". The term "paranoid schizophrenic sex offender", although it was literally true, was unfair and unacceptable professional journalism. The tone was supporting a falsehood. The journalist had decided to create a story; the appellant chose to eat with the service user; he did not "have" to eat with him. Everything which flowed from that falsehood was defamatory.

Respondents' Submissions

[11] The respondents' provided a written note of submissions; Mr Corr submitted that the powers of this court to intervene were limited. The sheriff had made it clear that he did not regard the appellant as credible or reliable.

[12] I was referred to the cases of *McGraddie* v *McGraddie* 2014 SC (UKSC) 12, *Henderson* v *Foxworth Investments* 2014 SC (UKSC) 203 and *Royal Bank of Scotland* v *Carlyle* 2015 SC (UKSC) 93 in relation to the limitations on appeal courts. Reference was also made to Macphail*; Sheriff Court Practice* chapter 18, again expressing the role and function of the appeal court.

[13] The respondent submitted that the sheriff had been entitled to make the findings in fact which he did and to reach the conclusion which he did. In particular finding in fact 8 (d) was fatal to the appeal. The sheriff had properly considered the evidence and the correct legal test and had determined that the article was not defamatory. That could not be challenged. He submitted that the questions in law should all be answered in the negative. He sought the expenses of the appeal.

Appellant's Response

[14] The appellant reiterated his position that the proof had not been conducted fairly and the sheriff had no material to justify his acceptance of the headline and story, both of which distorted what the application had been about. The article was malicious. He agreed that expenses of the appeal should follow success.

Basis for Decision

[15] The appellant faces two formidable hurdles; in the first place, in a simple procedure claim, there is no record of evidence. The court cannot look behind the sheriff's findings. See Macphail *Sheriff Court Practice* 3rd edition at para 18.109

> "If the evidence has not been recorded, the judge's findings in fact are not open to review: they are binding on the appellate court which cannot make different, or further, findings in fact".

The authority is *Allardice* v *Wallace*, 1957 SLT 225, in which it was held on appeal to the Court of Session that since there was no record of the evidence it was incompetent for the sheriff (then an appellate court) to alter the findings in fact of the sheriff substitute (the first instance court). The Sheriff Appeal Court is accordingly prohibited from making different or further findings in fact in the absence of a record of evidence.

[16] Even if there is a record of the evidence, the appeal court must defer to the findings in fact of the first instance judge unless satisfied that the first instance judge was plainly wrong. (*Royal Bank of Scotland* v *Carlyle* 2015 SC (UKSC) 93 at paragraph [21]-[22]). This court does not decide the case as if at first instance.

[17] The sheriff has made salient findings in fact as follows:-

- The service user suffered from paranoid schizophrenia, anxiety, depression and was subject to a sexual offences prevention order.
- Mr Lyon, the journalist involved, had accurately noted the information given by the appellant in his shorthand notebook which were accurately extended.
- The appellant told Mr Lyon that "he had to eat with the service user".

[18] That last finding of itself is determinative, and can be traced to the sheriff's finding that the journalist's original shorthand notes, recording his conversation with the appellant in their extended form, include the following sentence: "I ended up just having to eat with

the guy". The sheriff accepts that the appellant said that to Mr Lyon (page 5 of the sheriff's report paragraph 1); the record of the extended notes is found at process number 7, item 4 being an email from Mr Lyon to Mr Corr, solicitor, dated 16 August 2017 giving the extended version of the shorthand notes taken. The sheriff accepts the accuracy and reliability of these notes, which support his finding in fact.

[19] Accordingly the sheriff was entitled from the material before him to have made that finding.

[20] The appellant considered that the headline meant, and only meant, that he was forced against his will to share his mealtime with the service user. I think that it also bears the meaning that the combination of circumstances reduced his options. Not "had to" in the sense of being forced against his will but "had to" in the sense of selecting one option in the face of various choices, none of which were ideal. Effectively, if he wanted a meal break, he ate in the company of the client. Equally, although it may have seemed to the appellant to be "unprofessional" or tasteless for the service user to be described as a sex offender, that was correct. While the headline may from the appellant's point of view have put an undesirable spin on the facts, neither the headline nor the article are untrue and, inevitably, they are not defamatory. He may not have liked the juxtaposition of the two established facts, but that cannot found a claim for defamation.

[21] The appellant cannot succeed in establishing that there was any error in the sheriff's approach to the facts.

[22] So far as the nature of the article, the appellant argues that it was malicious and defamatory. In my view, on the facts found, there was no error in the sheriff's approach. He had regard to the tests in both *Sim* v *Stretch [1936] 2 All ER 1237* and *Steele* v *Scottish Daily*

Record and Sunday Mail Ltd 1970 SLT 53 finding neither satisfied; the article was not untrue; there is no basis for finding that it was defamatory.

[23] I answer all five questions posed in the negative, refuse the appeal and find the appellant liable to the respondents in the expenses of the appeal.