

Defences : Justification and Fair Comment

I. Justification

LIABILITY TO be sued or prosecuted for defamation, arising under the general rules applicable on the subject, may still not arise where the circumstances are such that there is a legally recognised defence to such a suit or prosecution. The three most important defences so arising are justification, fair comment, and privilege.

Justification, which really should be called a defence of "truth", has had a long history. For a long time, truth has been a defence to civil proceeding for defamation under the title "justification" in England. The defence that the words alleged to be defamatory are true, is a common law defence, the basis of which was stated by Littledale, J., as follows : "[T]he law will not permit a man to recover damages in respect of an injury to a character which he either does not or ought not, to possess."¹

In order to succeed in the defence of justification, the defendant must prove the truth of the words complained of, not only in their literal meaning, but also in their inferential meaning or innuendo. Of course, even at common law, it is not necessary to prove the truth of every detail of the words.²

In India also, truth is a complete defence to a civil action for libel.³ The burden of proof of the defence of justification lies on the defendant. All defamatory words are presumed to be false, but the defendant can rebut the presumption.⁴ Even if the defendant has given evidence in his own favour the burden of proving truth would still lie on the defendant and would not shift to the plaintiff.⁵ It follows that the benefit of any doubt as to the truth of any defamatory allegation must be given to the plaintiff.⁶ Mere honest belief in truth of the fact stated is not a defence.⁷

When a newspaper publishes a defamatory statement charging a person with conduct which would render the defamed person liable to a criminal prosecution, and subsequently attempts to justify such a charge, the facts of the

1. *M'Pherson v. Daniels*, 10B & C 263 at 272 (1929) : 109 E.R. 448, 451

2. *Sutherland v. Stopes*. (1925) A.C. 47, 79 (H.L.).

3. *Lachmi Narain v. Shambhu Nath*, A.I.R. 1931 All. 126.

4. *Mitha Rustomji v. Nusserwanji Nowroji*, A.I.R. 1941 Bom. 278; *Union Benefit Guarantee Co Ltd. v. Thakorlal*, A.I.R. 1936 Bom. 114.

5. *Bhaawan Singh v. Ujagir Singh*, A.I.R. 1940 Pat. 23; *Khair-Ud-Din v. Tara Singh*, A.I.R. 1927 Lah. 20, 23.

6. *Khair-Ud-Din*, *ibid*; see also *infra* p. 37.

7. See *infra*, ch 12.

charge must be proved with the same degree of precision as would be required in a prosecution on the basis of such a charge. If the allegations cannot be proved, the benefit of doubt goes to the defamed person.⁸ In order to succeed upon the plea of justification, the defendants in a libel action have to prove that the whole of the defamatory matter is substantially true. Thus, if a newspaper publishes an allegation that two persons were severely beaten by or with the complicity of a person in charge of a jail, it is not enough to prove that one person was in fact so beaten.⁹

In criminal prosecutions for defamation, mere truth is not a defence. It must further be proved that the publication was for the public good.¹⁰ In this context, a matter which requires consideration is whether, in civil cases, mere truth should be a defence. At present, so far as libel as an actionable wrong is concerned, truth is, in itself, a defence and a person who makes a "true" statement is *ipso facto* exempted from civil liability for defamation. The result is that however greatly a statement may injure the reputation of a person, he has no remedy if what is published is true. This hardly seems to be a satisfactory position. A man's reputation is his intangible wealth and others should not be the judges of the question whether he deserves that reputation or not. Notwithstanding what Littledale, J., has said,¹¹ it is not understood what social good is served by permitting character assassination merely because what is alleged is true. In principle, the mere fact that a certain statement is true, ought not to suffice to justify its publication, unless there is a counter-balancing element of public interest. At present, at common law—and, therefore, presumably in India also—*so far as civil liability is concerned*, mere truth is a defence. This position ought to be changed, and the law should require that publication of the statement must be proved to be for the public good if it is to be immune from liability. This is particularly desirable having regard to the tremendous power of modern media. As has been observed by one writer, modern news media "can obliterate a man's reputation within five minutes."¹²

Incidentally, it may be mentioned that in four Australian states, truth, in itself, is not a complete defence in a civil action, and the defendant must establish public good also.¹³

It is true that there is a shade of opinion to the contrary which would be opposed to any insistence on the requirement of "public good". But it is submitted that if the law seriously wants to protect reputation, truth in itself

8. *Khair-Ud-Din*, *supra* note 5 at 22.

9. *Id.* at 23.

10. S. 499, I.P.C., 1st Exception, see *infra*, Appendix 3

11. *M'Pherson v. Daniels*, *supra* note 1 at 273

12. Jerome Lawrence Merin, Libel and the Supreme Court, in Kenneth S. Devoil (ed.), *Mass Media and the Supreme Court* 242 at 248 (1979, Reprint).

13. Geoffrey Palmer, Defamation and Privacy Down Under, 64 *Iowa Law Rev.* 1209 at 1239 (1979).

should not be a defence to a civil action for defamation. The fact that A, a woman, is unchaste does not, for example, morally justify B in publicising A's unchastity. No *social interest* is served by allowing B to circulate such statements. In the absence of any social interest (public good), A's legal interest in her own reputation ought to continue to receive legal protection. As between A's right to reputation and B's supposed 'liberty' of expression, the balance ought to tilt in A's favour, in the absence of any element of public good. A has everything to gain by getting legal protection for her reputation. B has nothing to lose, if A receives such legal protection. He gets nothing except a malicious self satisfaction in making others unhappy. Society also gains nothing by statements publicising A's unchastity.

On the vexed question of truth as a defence to a civil action for defamation, the Second Press Commission in India expressed itself as under :

It has been represented to us that truth should not be a complete defence unless it is accompanied by public interest. This question engaged the attention of the Australian Law Reform Commission and it was of the view that truth, by itself, should be a complete defence in civil actions, as 'public benefit' is a vague term and publishers are entitled to a clear guidance as to the rules binding them. The requirement of public benefit would be adding too much of a burden on journalists ..

We see no reason for any departure from the present position. Truth alone should continue to be a complete defence.

We endorse the following recommendation of the Australian Law Reform Commission in this regard :

The Commission believed that it should be a defence to the publication of defamatory matter that the matter complained of is true. Matter should be regarded as being true if the matter, and any imputation in the matter relied upon in the action by the plaintiff was in substance true or in substance was not materially different from the truth. In determining the effect of the publication for the purpose of assessing damages, the court should have regard to the whole of the publication and the extent to which the defendant proves the truth of the matter concerning the plaintiff in the publication.¹⁴

With respect, it may be submitted that this is a matter on which a different view can be taken. It is wrong to assume that "public good" is a vague concept. The concept is well known in other areas of law and even in the sphere of defamation.¹⁵ Constitutional adjudication in India under article 19 has yielded abundant case law on "public interest" and allied concepts. It is, difficult to understand why the process of balancing, which is implicit in such concepts, cannot be employed without difficulty in determining civil liability for defamatory statements.

14. *Second Press Commission Report*, vol. 1, pp. 46-47, paras 77, 78 (1982).

15. S. 499, I.P.C.

In this context, it should be pointed out that no value is absolute in itself, and truth is no exception to this general proposition. In a recent judgment¹⁶ relating to defamation though the issue there related to the question of privilege, the High Court of Kerala made the following observations which are pertinent to the point under discussion:^{16a}

Although the law protects pursuit of truth, it must be pursued with a sense of fairness, propriety and proportion. As observed by Knight Bruce, V.C. in *De G & S*, 28 (quoted by Lord Macnaghten in *Macintosh v. Dun*):¹⁷

The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. . . Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much.

While dealing with the concept of "public good", which is relevant in criminal law, it is relevant to refer to a judgment of the Supreme Court¹⁸ in which the defence under the ninth exception to section 499 of the Indian Penal Code had been raised. A weekly magazine had published a report to the effect that a female detenu had got pregnant during her detention in the Bhopal central jail. The report contained aspersions that there was a mixing of male and female detenues in the central jail and that the woman had become pregnant through one S, the appellant (a politician). The husband of the woman was not a detenu. *Prima facie*, the statement was defamatory and the question to be decided was whether the ninth exception to section 499 of the Penal Code which, *inter alia*, exempts statements made in good faith for the public good, applied to the case. It appears that the High Court of Madhya Pradesh had quashed the proceedings in the trial court, mainly on the basis of a confidential inquiry report. It was in this context that the Supreme Court, setting aside the order of the High Court, pointed out that good faith and public good were questions that needed evidence for their decision and the inquiry report could not be made use of, there must be evidence *aliunde*.

The Supreme Court pointed out that public good was a question of fact like any other relevant fact in issue. This aspect was emphasised by A.P. Sen, and Chinnappa Reddy, JJ. Incidentally, the judgment also emphasised that journalists are in no better position than any other person. Chinnappa Reddy, J., in his concurring judgment, dealt with the ingredients of good faith and public good at great length. Discussing the matter from the perspective

16. *Dr. P.H. Daniel v. Krishna Iyer*, (1982) K.L.T. 1.

16a. *Id.* at 8, para 18.

17. (1908) A.C. 390, 400, 401.

18. *Sewakram Sobhani v. R.K. Karanjia*, A.I.R. 1981 S.C. 1514.

of the facts of the case before him, he pointed out that several questions arose for consideration where the ninth exception to section 499 was invoked. Good faith and public good, he pointed out, were questions of fact and matters of evidence. After narrating some of the facts relevant to the question of good faith, he said that the evidence would also have to be taken on the following issues :

Was the article merely intended to malign and scandalise the complainant or the party to which he belonged? Was the article intended to expose the rottenness of a jail administration which permitted free sexual approaches between male and female detenus? Was the article intended to expose the despicable character of persons who were passing off as saintly leaders? Was the article merely intended to provide salacious reading material for readers who had a peculiar taste for scandals? These and several other questions may arise for consideration, depending on the stand taken by the accused at the trial and how the complainant proposes to demolish the defence.¹⁹

Since the High Court had quashed the proceedings in the trial court (under its revisional powers) without allowing a trial of the case on the above matters which needed evidence, the Supreme Court set aside the order of the High Court.

At common law, the defence of justification suffered from one drawback, in that, a person taking this defence had to prove the truth of the *whole libel*, i.e., of every defamatory statement contained in the words complained of. Inaccuracy in mere details did not matter, in the sense that it is enough if the allegation is true in material particulars²⁰ but the main gravamen of the charge had to be substantiated.

Where the words complained of contained more than one charge or are otherwise severable, the defendant may justify only part of the words (partial justification). He remains liable to pay damages in respect of the part not justified, if it is defamatory and materially injures the plaintiff's reputation, if no other defence is established.²¹

The Porter Committee recommended that the defendant should be entitled to succeed in a defence of justification, if he proved that so substantial a portion of the defamatory allegations was true as to lead the court to the view that any remaining allegations which had not been proved to be true did not add appreciably to the injury to the plaintiff's reputation.²²

After the Porter Committee Report in the United Kingdom, the defence of

19. *Id.* at 1520.

20. *Alexander v. N.E. Ry. Co.*, (1856) 6B & S 340; 122 E.R. 1221.

21. *Clarke v Taylor*, (1836) B Riug. NjC. 654, 664, 665; 132 E.R. 252; *Halsbury's Laws of England* 44-45, para 87 (4th ed.)

22. *Porter Committee Report*, Summary of Recommendations, No. 5, paragraphs 74-82.

partial justification has been extended by statute. In certain circumstances, a partial justification now provides a complete defence.²³ Section 5 of the Defamation Act provides :

Justification—In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation, having regard to the truth of the remaining charges.

The provision to this effect should be incorporated in India also.

Justification must be expressly pleaded as a defence in the written statement. Merely offering evidence of truth of the defamatory statement in cross-examination is not enough.²⁴ In cases of criminal libel, the accused who takes the defence of justification has not only (i) to prove the *whole of the libel*, but also (ii) to prove it as strictly as if the complainant were being prosecuted for the crime.²⁵ The first proposition is true of civil cases also, as is illustrated by a well known English case²⁶ in which the defendant wrote that the plaintiff was a "libellous journalist", but could prove only one single instance of a successful libel action against the plaintiff. The defence of truth was held to be not established.

Similarly, in a Rangoon case,²⁷ the words used of the plaintiff were that he was "topsyturvy". The defendant, who had pleaded justification, could give only one instance of the plaintiff's inconsistency. It was held that the defence had not been proved.

II. Fair Comment

One may now turn to the defence of "fair comment" which can be availed of where the defendant has merely offered a fair comment on a matter submitted by the plaintiff to the judgment of the public. Nothing is defamatory which is a fair comment on a matter of public interest.²⁸ The defence is of peculiar use to journalists. Expressions of opinion contained in editorials, critical articles, letters to the editor and news items of an analytical nature are covered chiefly by the defence²⁹ of the right of fair comment as applied to a defamatory publication.

23. S. 5, Defamation Act, 1952.

24. *Ajit Singh v. Radha Kishan*, A.I.R. 1931 Lah. 246.

25. *Harbhajan Singh v. State of Punjab*, A.I.R. 1961 Punj : 215.

26. *Wakeley v. Cook & Healey*, 4 E.R. 511, 516 (1849).

27. *U.Po Hnyin v. U. Tun Than*, A.I.R. 1940 Rang 21.

28. *London Artists v. Littler*, (1969) 2 All E.R. 193, 198.

29. Hohenberg, *Professional Journalist* 376 (1980, Indian Reprint)

The defence is based on public policy—the right of all persons and publications to comment and criticise without malicious intent the work of those who draw public attention. Among those who invite such criticism by the nature of their activities are holders and seekers of public office, authors and playwrights, public performers—such as actors, actresses and sports participants and critics as well as others whose careers similarly are based on public attention. An honest and fair expression of opinion on a matter of public interest is not actionable, even though the opinion be untrue. It is not necessary that the court must agree with the comment.³⁰

The following ingredients must be satisfied for successfully raising the defence of fair comment :

- (i) [T]he matter commented upon must be one of public interest or concern. Matters of government and politics are of public interest; so is anything which the general public is invited to purchase, to listen to or to attend.³¹
- (ii) The comment must be based on facts.
- (iii) The comment must be fair, i.e., it must be made in the *bona fide* belief that it is a true assessment and not made maliciously.³²

Certain propositions are well established in the United Kingdom relating to the defence of fair comment, and in general, the position in India is substantially the same.³³ It is a defence to an action for defamation for the defendant to prove that the words complained of were published by him as fair comment on a matter of public interest. But the defence can be defeated by proof that the defendant was actuated by express malice.³⁴

The main principles relating to the defence of fair comment have been stated by Duncan and Neill as follows :

- (a) the comment must be on a matter of public interest;
- (b) the comment must be based on fact;
- (c) the comment, though it can include inferences of fact, must be recognisable as comment;
- (d) the comment must satisfy the following objective test ; could any man honestly express that opinion on the proved facts ;
- (e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was actuated by

30. *Broadway Approvals Ltd. v. Odhams Press Ltd. (No. 2)*, (1960) 1 W.L.R. 805, 817.

31. J.S. Colyer, *Modern View of the Law of Torts* 144 (1906).

32. *Showerings Ltd. v. Postgrade*, 'The Times' dated 3 Nov. 1965 [the "*Babycham* case, referred to by Colyer, *Ibid.*]

33. See *infra*, pp. 43, 44, 45.

34. Duncan & Neill, *Defamation* 62, para 12.01 (1978).

express malice.³⁵

The defence of fair comment has been recognised and much utilised in litigation in India also.³⁶

The first condition of the defence is that the comment must be on a matter of public interest. Both in the United Kingdom and in India, no definition has been given of "public interest". As Lord Denning said, whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on, or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make a fair comment.³⁷

In India also, the same approach has been adopted. Generally, a matter or subject which invites public attention or is open to public discussion or criticism is a matter of public interest³⁸ which is not the same thing as a matter of general interest.³¹ In this context, newspapers do not stand in any special position.⁴⁰

The second condition is that the comment itself must be based on fact. This is an aspect not often appreciated by laymen, but it is well established in law that the comment must be based on a fact which either the person commenting states or which is indicated by him with sufficient clarity to enable the reader or listener to ascertain the matter on which the comment is being made. Thus, if the person defaming states that some public man has really done something and then asserts that such conduct is disgraceful, then it is a comment on the conduct of the plaintiff. Or, he may identify the conduct by a clear reference, so that he enables the reader to judge whether the opinion is well founded. But if he asserts that the plaintiff has been guilty of disgraceful conduct and does not state what that conduct was, this is an allegation of fact for which the defence of fair comment does not apply though the defence of truth can be taken if the facts alleged can be proved.⁴¹ In a case where the facts are fully set out in the alleged libel, each fact must be justified and if the defendant fails to justify one, even if it be comparatively unimportant, he fails in his defence.

More or less the same principle has been followed in India. Where the facts supporting the comment are not stated at least with substantial correctness, the defence is not available. The leading case on the subject dealing with

35. *Id.* at para 12.02.

36. *Mitha Rustamji*, *supra* note 4; *Vishan Sarup v. Nardeo Shastri*, A.I.R. 1965 All. 439; *W.S. Irwin v. D.J. Reid*, A.I.R. 1921 Cal. 282.

37. *London Artists v. Littler*, *supra* note 28.

38. *Union Benefit Guarantee Co. v. Thakorlal*, *supra* note 4.

39. *R.K. Karanjia v. K.M.D. Thackersey*, A I R. 1970 Bom. 424, 429.

40. See *sup ra*, ch. 1.

41. *Kemsley v. Foot*, (1952) 1 All E.R. 501, 505 (Lord Porter).

this particular aspect is a Calcutta case.⁴² In that case, the allegation was that the plaintiff was a member of a terrorist organisation. The following passage from the judgment is material :

If the conclusion recommended to his readers that the plaintiff is guilty of this charge, he is in the position of a person who has publicly charged another with a crime, and, apart from a defence of privilege, he must either justify or pay. It is no defence whatever to say that he honestly believed in his accusation, or that he had a certain amount of reason for making it; or that Lord Lytton had said it before; or that he was concerned to support a policy of Government.⁴³

The third condition is that the comment, though it can include inferences of fact, must be recognizable as comment. Comment may, on the one hand, sometimes consist in a statement of fact and such statement of fact can be held to be a comment if the fact so stated appears to be a deduction or conclusion come to by the speaker from the facts stated or referred to by him or in the common knowledge of the person speaking and those to whom the words are addressed and from which his conclusions may reasonably be inferred.⁴⁴ What is meant by "comment" is described by Cussen, J., in an Australian case.⁴⁵

The position in India in this respect does not seem to differ although the point does not seem to have been clinched so vividly as in the United Kingdom except in the Calcutta case.⁴⁶ It is recognised that the defence of fair comment protects only statements of opinion and not defamatory allegations of facts.⁴⁷

The fourth condition is that the comment must be fair, that is to say, the comment is such that it must pass the following objective test, namely, "Could any man honestly express that opinion on the proved facts." The above formulation is based on the summing up of Lord Hewart, C.J., in *Stopes v. Sutherland*⁴⁸ where he said, "The question which the jury must consider is this would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said."⁴⁹

The above statement was itself based on the observations of Lord Esher, M.R., in an earlier case,⁵⁰ which was adopted by Lord Porter in the House of Lords in 1950.⁵¹

42. *Subhash Chandra Bose v. R. Knight & Sons*, A.I.R. 1929 Cal. 69.

43. *Id.*, at 73.

44. *O'Brien v. Marquis of Salisbury*, 54 J.P. 215, 216 (1889).

45. *Alarke v. Norton*, (1910) V L.R. 494, 499, cited in *Duncan & Neill*, *supra* note 34, para 12.11, f. 4.

46. *Supra* note 42

47. *T.G. Goswami v. The State*, A.I.R. 1952 Pepsu 165.

48. 39 T.L.R. 677 (1923).

49. See *Duncan & Neill*, *supra* note 34 at 69, para 12.15.

50. *Merivale v. Carson*, 20 Q.B.D. 275, 280 (1887).

51. *Turner v. Metro-Goldwyn-Mayer*, (1950) 1 All E.R. 449, 461.

In general, these principles have been followed in India, as would be obvious from a few Indian decisions.⁵² Exaggeration does not make a comment unfair.⁵³ Comment may be "fair" even though it is wrong or is expressed with violence and heat.⁵⁴

There seems to be some uncertainty in the United Kingdom as to the comments which impute dishonesty or other dishonourable conduct or motive to the plaintiff. It has been pointed out⁵⁵ that there are three possible views where the comment contains imputations to the effect that the plaintiff has acted dishonestly or dishonourably or has been inspired by some base motive.

The three possible views on the subject are :

(a) The defence of fair comment does not apply at all to suggestions, even though in the form of comment, that the plaintiff has acted dishonestly or dishonourably or been prompted by some base motive. Such suggestions must be defended, if at all, by showing that they are correct inferences from the primary facts, that is, by a defence of justification.

(b) The defence of fair comment can apply to such suggestions (suggestions of dishonesty) but the defendant has to satisfy the jury that the comment was a reasonable inference from the facts commented on.

(c) The general test of fair comment applies and the question is : would any man honestly express that opinion on the proved facts ?

It is not clear whether Indian courts would follow any of these tests, since the point does not appear to have been clinched so far in India.

A fairly recent Australian case⁵⁶ seems to take the widest view, namely, that the general test of fair comment applies and the question is: would any man honestly express that opinion on the proved facts ? In that case decided by the High Court of Australia, the alleged libel (review of a theatrical production) contained statements that the producer dishonestly suppressed the role of another player to highlight his own role. The High Court was ordering a new trial on the ground that the judge had wrongly withdrawn from the jury the issue of fact or comment. The following observations of the High Court of Australia are pertinent :

52. *U.B. Guarantee Co. v. Thakorlal*, *supra* note 4 at 124; *Mitha Rustomji*, *supra* note 4 at 283.

53. *Murlidhar v. Narayendas*, A.I.R. 1914 Sind 85; *Purushottam Vijay v. The State* A.I.R. 1961 M.P. 205.

54. *Raghunath Singh v. Mukandi Lal*, A.I.R.- 1936 All. 780, citing *Fraser, Law of Libel & Slander* 161, 163, 165 (6th ed.)

55. *Duncan & Neill*, *supra* note 34 at 71-72, para 12.19.

56. *O'Shaughnessy v. Mirror Newspapers Ltd.*, 45 A.L.J.R. 59 (1970).

It is not that the writer merely failed to preface what she had to say about the production with some formula such as "it seemed to me"; it is rather that the jury could have found that an imputation of dishonesty was levelled against the plaintiff as the writer's explanation of what she asserted to be a waste of talent. If what was written had been no more than comment it only had to be fair, but, if it were fact, it had to be correct to defeat the plaintiff's claim. It was, we think, for the jury to decide whether there were any statements of defamatory facts and because the issue was withdrawn from them we consider that the trial miscarried.

To safeguard ourselves from too broad a generalization we would add that it is not our view that an imputation of dishonesty is always an assertion of fact. It is part of the freedom allowed by the common law to those who comment on matters of public interest that facts truly stated can be used as the basis of an imputation of corruption or dishonesty on the part of the person involved.⁵⁷

A criticism generally made in the United Kingdom of the defence of fair comment was that the defence was unduly technical. The defence was available only in respect of expressions of opinion, and the portions of the statements that were in the nature of "assertions of facts" had to be proved strictly. In other words, the law envisaged a strict compartmentalisation between "facts" and "opinions". Now, normally, defamatory matter would not consist *solely* of expressions of opinion. Facts and expressions of opinions would be mixed up. Hence a strict adherence to the rule would cause injustice. The Porter Committee noted this defect,⁵⁸ and recommended⁵⁹ that the basis of the defence of fair comment should be broadened in a manner similar to that recommended by that committee in relation to the defence of justification.

This recommendation of the Porter Committee has been substantially carried out by section 6 of the Defamation Act of 1952. (There is, however, some controversy as to how far the Act has carried out the *precise* recommendations of the committee). This section appears to be worth adopting in India also.⁶⁰

The Bombay High Court⁶¹ has held that a statement made before an officer who was not acting in a judicial capacity and who was not exercising the attributes of a court cannot be said to be absolutely privileged. Hence defamatory statements made before a police officer in the course of investigation are not absolutely privileged; only a qualified privilege attaches to them.

57. *Id.* at 60-61.

58. *Supra* note 22, para 83-91.

59. *Id.*, Summary of Recommendations No. 6.

60. Point for law reform.

61. *Maroti Sadashiv v. Godubai Narayanrao*, A.I.R. 1959 Bom. 443.

Proof of malice destroys a qualified privilege. Where untrue statements were made with full knowledge that those statements were untrue, that fact is a conclusive proof of malice.⁶² The judgment dissents from decisions of Calcutta⁶³ and Madras⁶⁴ to the contrary, which had held that such statements enjoyed absolute privilege. In fact, another Calcutta case decides that the privilege is a qualified one in such circumstances.⁶⁵

Justification appears to exclude apology. The following observations made in an English case⁶⁶ were cited in a judgment of the Orissa High Court:⁶⁷

Indeed, the fact that the defendants attempted to justify them was the antithesis of recantation. The partial apology in a pleading which attempted to justify a large amount of defamatory untruths was no apology at all. It is inevitably, in such a context, mere *faux bonhomie*.⁶⁸

62. *Id* at 446-47, para 15-16.

63. *Madhab Chandra v. Nirodchandra*, A.I.R. 1939 Cal. 447.

64. *Sanjivi Reddi v. Koneri Reddi*, A.I.R. 1926 Mad 521.

65. *Joseph Mayr v. Charles*, 47, C.W.N. 627 (1943); 1.L.R. (1943) 1 Cal. 250.

66. *Dingle v. Associated Newspaper Ltd.*, (1961) 2 Q.B. 160, 165 (Holroyd Pearce, L.J.).

67. *State of Orissa v. N.R. Swamy*, I.L.R. (1970) Cutt. 1264.

68. Quoted in *id*, at 1306.