[HIGH COURT OF AUSTRALIA.]

DAVID SYME & CO. AND ANOTHER . . APPELLANTS;
DEFENDANTS,

AND

CANAVAN . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Defamation—Libel—Statement as to class of persons—Necessary reference to plaintiff—Evidence.

H. C. OF A. 1918.

MELBOURNE, *Sept.* 9, 13.

Barton, Isaacs and Rich JJ.

On the hearing of an action for libel in respect of a statement in a newspaper report of a public meeting, that one of the speakers had said of an association of returned soldiers opposed to conscription that it "was only about 100 strong, and these individuals had been sent back to Australia as undesirables," evidence had been given to the effect that the association had about 1,000 members of whom the plaintiff was one. The jury having found that the words complained of were defamatory but that they did not refer to the plaintiff, a new trial had been granted on the ground that the words were not capable of any other meaning than that they referred to the plaintiff.

Held, that, on the evidence, the words were reasonably capable of meaning that about 100 men, whom the speaker believed to be all the members who composed the association, were undesirables; that with such a meaning they did not necessarily refer to the plaintiff, and, therefore, that the verdict of the jury should stand.

Decision of the Supreme Court of Victoria reversed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by James Richard Canavan against David Syme & Co. and Thomas Prosser, the

proprietors and printer respectively of the *Age* newspaper, claiming damages for libel. The material words complained of as being a libel appeared in the issue of the *Age* of 12th December 1917, in a report of the proceedings at a public meeting, and were as follows:— "Sergeant Wallish, D.C.M., on rising to speak was loudly cheered. He said that the Returned Soldiers' No-Conscription League was only about 100 strong, and these individuals had been sent back to Australia as undesirables (Cheers)." The action was remitted for hearing to the County Court, and was heard in the County Court at Melbourne before a jury. At the hearing evidence was given for the plaintiff that the Returned Soldiers' No-Conscription League had been formed on 19th November 1917, and that there were about 1,000 members, of whom the plaintiff was one. The jury found that the words were defamatory, but that they did not refer to the plaintiff. A verdict was thereupon entered for the defendants. The plaintiff applied for a new trial to the learned Judge of the County Court before whom the hearing took place, and he made an order for a new trial, holding that the words complained of were not capable of any other meaning than that they referred to the plaintiff. On an appeal by the defendants to the Supreme Court from that decision, the Full Court, by a majority (*Hood* and *Cussen* JJ., *Irvine* C.J. dissenting), dismissed the appeal.

From that decision the defendants now, by leave, appealed to the High Court.

The other material facts are stated in the judgments hereunder.

Williams and *Starke*, for the appellants. The meaning of the words complained of is a question of fact for the jury, and the Court cannot interfere with their finding unless it is clear that they must bear a meaning defamatory of the plaintiff. The test is: Could the jury, as reasonable men, find the verdict which they did find? (See *Australian Newspaper Co.* v. *Bennett* (1).) The words do not necessarily apply to the plaintiff. The jury might reasonably find that the words referred to about a hundred men other than the plaintiff whom the speaker believed to be all the members of the League.

(1) (1894) A.C., 284.

H. C. OF A. 1918.

DAVID SYME & CO. v. CANAVAN.

There was no evidence which compelled the jury to find that the plaintiff was a member of the League. Although in his charge to the jury the learned Judge told the jury that it was not disputed that the plaintiff was a member, that was only his view of the evidence. The question of whether he was a member was raised, and upon the evidence the jury might properly have found that he was not a member.

Mann (with him *Foster*), for the respondent. As a matter of the ordinary meaning of language the words necessarily referred to the plaintiff in the minds of everyone who knew him and believed him to be a member of the League. The words amount to a statement that the members of the League were undesirables, and that they were about 100 in number. The question whether the plaintiff was in law a member of the League is irrelevant. What is material is whether those who knew him believed him to be a member. In view of the fact that the learned Judge told the jury that it was not disputed that the plaintiff was a member and of the fact that no objection was taken to the charge, the appellants are not entitled now to dispute it.

Starke, in reply.

BARTON J. In this case the alleged libel is contained in a report in the *Age* newspaper of a statement made by Sergeant Wallish, at a meeting at Aspendale, that the Returned Soldiers' No-Conscription League "was only about 100 strong, and these individuals had been sent back to Australia as undesirables." A paragraph in another report was also sued on, but one need not consider it now, because the jury found that it was not defamatory. As to the first mentioned statement the jury found that it was defamatory, but that it did not refer to the plaintiff. The learned Judge of the County Court who heard the case granted a new trial. From his order there was an appeal to the Supreme Court, and the Full Court (the learned Chief Justice dissenting) held that the appeal must be dismissed. Now there is an appeal to this Court, and it becomes material, indeed vital, to consider this: Was the

verdict such as reasonable men could find; that is to say, did the jury proceed upon any view of the facts which could be accounted for as being not without reason? There are various interpretations which can be put upon the statement reported as being the effect of what Sergeant Wallish said; several interpretations were put to us, and no doubt they were put before the Full Court. There is, however, an interpretation which the jury might reasonably have put upon the words used. It is this: that the sergeant was thinking of a number of men who had been sent back to Australia as undesirables; that he was saying that there were about 100 of them, and that they were members of the so-called League, whatever that body, which seems to have been vaguely described in the evidence, might be. If that were so, then the question would be at large, which were the hundred men that had been sent back? The plaintiff himself had said in evidence that there were about 1,000 members. If that were so, then it would be impossible to say that the jury took an unreasonable view if they found that they were unable to affirm that the plaintiff was one of the persons referred to. Upon the facts before the jury it would be most difficult to say which hundred were referred to in Sergeant Wallish's statement, and still more difficult to say that the hundred who were referred to included the plaintiff.

As it is desirable that the verdicts of juries upon facts which it is their constitutional right, and not ours, to determine should not be lightly set aside, but as far as is possible in reason should be upheld, and remembering that they, and not we, have heard the evidence given and seen the witnesses, and that the witnesses before them were presumably subjected to the tests which best enable one to form a correct judgment as to their reliability while we have before us only the printed record, it would be going too far, I think, if we were to set aside this verdict, whatever view we ourselves might have taken of the facts. There is no interpretation which seems to me to be the necessary and only interpretation of the words used, nor can I say that the jury arrived at a necessarily erroneous interpretation of them in favour of the defendants. Under those circumstances the appeal must be allowed with costs.

H. C. OF A. 1918.

DAVID SYME & Co. v. CANAVAN.

Isaacs J.

ISAACS J. I agree that the appeal should be allowed. The words complained of were found by the jury to be defamatory, that is to say, they tended to create a bad opinion of any person to whom they could be shown to refer. But the jury also found that they did not refer to the plaintiff. The plaintiff was not specifically named. The test of whether words that do not specifically name the plaintiff refer to him or not is this: Are they such as reasonably in the circumstances would lead persons acquainted with the plaintiff to believe that he was the person referred to? That does not assume that those persons who read the words know all the circumstances or all the relevant facts. But although the plaintiff is not named in words, he may, nevertheless, be described so as to be recognized; and whether that description takes the form of a word picture of an individual or the form of a reference to a class of persons of which he is or is believed to be a member, or any other form, if in the circumstances the description is such that a person hearing or reading the alleged libel would reasonably believe that the plaintiff was referred to, that is a sufficient reference to him. But that is a fact, and it is a fact the burden of proving which to the satisfaction of the jury is upon the plaintiff. That is established by cases of the highest authority, such as *Le Fanu* v. *Malcomson* (1) and *E. Hulton & Co.* v. *Jones* (2).

In this case the jury found this essential fact against the plaintiff, but he succeeded on an application to the County Court Judge in convincing him that the verdict could not be sustained because, as that learned Judge held, the words necessarily referred to the plaintiff inasmuch as he was a member of the League. On appeal to the Supreme Court two learned Judges out of three agreed with that view, that the finding could not be supported, and held that the words necessarily referred to the plaintiff. We have now to consider whether the verdict can be supported.

The words complained of are that "the Returned Soldiers' No-Conscription League was only about 100 strong, and these individuals had been sent back to Australia as undesirables." The jury were entitled to consider all those words as they appeared in conjunction with the circumstances which were shown

(1) 1 H.L.C., 637. (2) (1910) A.C., 20.

to exist with reference to them. One question the jury would have to ask themselves is: What was meant by "these individuals"? Did they mean the whole League, however extensive it might be, whether consisting of 100 or 1,000 members, or did they mean 100 men who as the speaker believed constituted the whole League? The words complained of appeared in the *Age* newspaper on 12th December 1917. Now, it is very material to remember that it was only readers of that newspaper that could be affected by the statement. In the issue of the same newspaper of 4th December 1917 there was a report of a speech of the plaintiff himself in which he said that the League was 1,000 strong. So that eight days before the alleged libel appeared, the public had been told, and had been told by the plaintiff himself, that the League consisted of 1,000 members. To my mind it was perfectly competent for the jury, representing the general sense of the community, to say that persons who read the issue of 12th December would have in their minds the statement in the issue of 4th December, and, having that statement in their minds, would understand that there were 1,000 members according to that statement. Therefore, when they were considering what the words "these individuals" in the libel meant, it was certainly open to the jury to say that, putting all the circumstances together, the public would believe that what was intended by the words was "about 100" persons. It will be observed that the words complained of were said by Sergeant Wallish, and it would not be irrational for the jury to conclude that when he, being in the military service, said that about 100 men had been sent back as undesirables, he was more likely to know of 100 being so sent back than to know the number of members of the League. The jury might conclude that Sergeant Wallish was wrong in thinking that 100 members constituted the whole League, and therefore that he did not mean by the words "these individuals" to include any but about 100. The League is shown to be, not only in actuality but in the public mind, a very indefinite creation, and that is an additional fact which the jury might take into consideration. I am not saying anything now with reference to the plaintiff's membership of the League but with regard to

H. C. OF A. 1918.

DAVID SYME & Co. v. CANAVAN.

Isaacs J.

the effect which the statement as a whole would have on the public mind.

For these reasons I think that, having regard to the various circumstances I have mentioned, it certainly was open to the jury to find that the words complained of did not, in the public mind represented by readers of the *Age*, refer to the plaintiff, and would not be understood to apply to him. I do not see how in the circumstances it is open to the Court to say that the jury were wrong. It was a question of fact, and they are the constitutional tribunal to decide it. I therefore agree that the appeal should be allowed.

RICH J. I agree.

Appeal allowed. Order appealed from and order of the Judge of the County Court discharged with costs, and verdict and judgment for the defendants restored. Respondent to pay the costs of this appeal.

Solicitors for the appellants, *Gillott, Moir & Ahern.*
Solicitors for the respondent, *Strongman & Crouch.*

B. L.