



SHERIFF APPEAL COURT

**2021 SAC (Civ) 8
INV-A47-19**

Sheriff Principal C.D. Turnbull
Appeal Sheriff N.A. Ross
Appeal Sheriff T. McCartney

OPINION OF THE COURT

delivered by Appeal Sheriff Ross

in an appeal in the cause

ROBBIE GORDON MUNRO

Pursuer and Appellant

against

RONALD NORTON

Defender and Respondent

Defender and Appellant: Party

Pursuer and Respondent: Sandilands; Stronachs LLP

22 January 2021

[1] The pursuer and appellant (“the pursuer”) seeks damages for defamation of character, arising from a statement made by the respondent to police following an altercation between them in July 2015. The defender and respondent (“the defender”) accused the pursuer of assault. The pursuer was charged with, and in July 2016 was tried and convicted of, a different offence, arising out of the same incident. He was not charged

with, or convicted of, assault. He says that for the defender to have accused him of assault was therefore defamatory.

[2] The action was taken to debate, and the sheriff dismissed the action. The pursuer, who represented himself at appeal, seeks to overturn that decision and that a proof before answer be allowed.

Brief history of events

[3] There is a background of conflict between the parties. The pursuer formerly resided at a house in Inverness-shire which was next door to a garage. The pursuer narrates that there is a long history of abuse by the garage owner directed to him and his family, and which has involved criminal prosecution. The pursuer and his family obtained an interdict against harassment by the garage owner. The defender was formerly an employee of the garage business.

[4] On 13 July 2015 the pursuer avers that he saw the garage owner and the defender welding a gate across an access route to his property, in breach of the interdict. He approached them. He avers that the defender and garage owner assaulted him, and narrates the details, and that the defender and the garage owner were charged with assault.

[5] On or around that date the defender and the garage owner gave statements to the police which are the statements relied on in this action. The pursuer's averments on which this action hinges are:

“On or around 13th July 2015, the Defender and [garage owner] gave statements to the Police which were false defamatory and malicious (hereinafter “the defamatory statements”). The defamatory statements made by the Defender...were an attempt to hide their assault and to pervert the course of justice. The Defender gave statement (sic) for each Police and Procurator Fiscal files as hereinbefore averred. The Defender defamed the Pursuer by falsely claiming the Pursuer assaulted him with a gate on 13th July 2015. The statement made by the Defender used words used

(sic) included “Robbie hit me with a gate” or words substantially similar to same. The statement made was false and calumnious. They were made maliciously with an improper motive.”

[6] The consequences of that false statement are said to be:-

“The false statement given to Police Scotland resulted in the Pursuer being falsely accused of assault and charged for a breach of the peace. In consequence of the said defamatory statement, the Pursuer was wrongfully arrested and prosecuted...the Defender’s malicious defamatory statement has caused great distress to the Pursuer. The malicious defamatory statement...was repeated in court 7th July 2016, which are not actionable being protected by absolute privilege...the Pursuer was a well-respected member of his wider community, a public figure and a person of high standing. The allegations made by the Defender...led to criminal charges which were reported extensively in the mainstream media. The allegations concerning his purported conduct were reported in the national press”

[7] Significantly, the defender avers, and the pursuer accepts in his written note of argument, that he was in fact convicted at trial in July 2016. The pursuer states “The Pursuer was prosecuted for fighting was not convicted of an assault but rather fighting under s38 (1) of the Criminal Justice and Licensing (Scotland) Act 2010” (“the 2010 Act”). The defender avers that the pursuer was convicted of a breach of the peace (a similar but not identical charge) arising out of the same incident, and narrates the events at trial. This is met with a blanket denial in the pursuer’s pleadings. The admission in the note of argument, and orally in his appeal, indicate the pursuer’s pleadings ought to have been more informative on this point. Because the pursuer in his submissions at appeal expressly founded upon his conviction under section 38(1), because he accepted the truth of it both before this court and before the sheriff (albeit as a ‘breach of the peace’), because of an overall duty of candour on the parties, and because as a party litigant his pleadings may be read with a measure of latitude, we regard this fact as properly admitted by the pursuer.

[8] The sheriff dismissed the action on the grounds that the pursuer had not pled a relevant case, due to lack of averment of absence of probable cause, and that there was no

averred link between the statement and subsequent press reporting. Various supporting averments were refused probation as irrelevant. The appeal centres on want of probable cause and the effect of the conviction.

Probable cause

[9] The pursuer has not averred want of probable cause. An action of defamation, based on this type of facts, requires that averment. The action as pled is accordingly irrelevant.

[10] The leading authority on want of probable cause is *Notman v Commercial Bank of Scotland* 1938 SC 522, a decision of seven judges. It was not cited or referred to in argument, so we do not embark on a discussion of probable cause, but note simply that there is a public interest in shielding prosecutors or witnesses in the course of detection or suppression of crime, and this extends to an informer not being answerable in damages for an unfounded accusation, provided that there was a reasonable cause for making it. In a case such as the present, which is based on a witness statement given during an investigation, it is necessary to plead both malice and want of probable cause (Gloag and Henderson: *Introduction to the Law of Scotland* (14th ed at para 29.14)).

[11] The omission of an averment of absence of probable cause is not a minor detail, and is not easily mended by insertion of a sentence to that effect. For the pursuer to show want of probable cause, he would require to undertake a much more careful, analytical exercise than he has. Such an analysis would have revealed a fundamental flaw in the logic of his position.

[12] The pursuer, on his own submission, was involved in an altercation between himself and the defender and a third party. That event led directly to his conviction of either a breach of the peace or under section 38(1) of the 2010 Act, the distinction between those

offences not being material for present purposes. The facts, on the pursuer's submission, involved "fighting", which is not a legal term of art, and in customary use of language would normally be understood to involve a series of mutual assaults. If that is a wrong understanding in this case, the pursuer has not said so in his pleadings. Indeed, he has said almost nothing about the charge of which he was convicted, and the supporting evidence heard during the trial. He has given a partial, in every sense, account of what occurred.

[13] The pursuer requires to aver that the defender did not have probable cause to make an allegation of assault to the police. Probable cause requires no more than a reasonable basis in fact for making the allegation. In practical terms, the pursuer would require carefully to aver why the defender had, on one hand, probable cause to allege that the pursuer was fighting with him (as must be the case, because the pursuer was convicted of breach of the peace, or a section 38(1) offence, by fighting with the defender), but, on the other hand, did not have probable cause to allege the pursuer assaulted him. It is not obvious that he could ever do so, because the defender, as a non-lawyer, might foreseeably use a common term such as 'assault' when a fight was involved. Whether a series of events is properly in law described as an assault is a matter of law for a court, the result of which a witness could not possibly know at the time he gave a statement to the police. That tends to demonstrate why a witness to fact, such as the defender, only requires to have a reasonable basis, or probable cause, for making a statement to the police. It is not even clear that he used the word "assault", because the pursuer's pleadings are vague, and the only quote about hitting with a gate lacks the essential *mens rea* for assault. The burden is on the pursuer to explain the case he would set out at proof. He does not do so. It is not obvious how a witness statement might correctly describe a fight, but not amount to probable cause for an allegation of assault. There is certainly no fair notice of such an argument.

[14] The matter goes beyond the absence of pleading about absence of averments about want of probable cause. It is not even evident that there was any defamatory statement. Determination as to whether words used are capable of amounting to defamation is a matter of law for a court to decide. On the present pleadings, neither the sheriff nor this court are able to say that the words used by the defender (whatever they were) are capable of amounting to a defamatory statement.

[15] The appeal falls to be refused. We note that the pursuer aspires, in other proceedings, to overturn his conviction dated 7 July 2016. As explained to him, this court must treat that conviction as determinative, unless and until it is overturned.

Causation

[16] There is another profound flaw in the pursuer's case, which is the lack of causal connection between the defamatory statement and any loss suffered. He alleges that the defamatory statement, as so defined, was given to the police. The pursuer pleads no relevant case in causation thereafter. There are at least three major gaps.

[17] First, the pursuer avers that the defamatory statement was made to "Police Scotland". He does not say which individuals were involved, or whether the statement ever saw the light of day thereafter. The pleadings are silent on what happened to the statement. It is not possible on the pleadings to learn whether the statement was ever transmitted by "Police Scotland" to anyone else. The only linking averment is that "The false statement given to Police Scotland resulted in the Pursuer being falsely accused of assault and charged for a breach of the peace." That averment is unspecified and contradictory. Who accused him of assault is not clear, and not capable of inference, as there is no averment he was ever charged with assault, by the police or by a prosecutor. He was

charged with breach of the peace / section 38(1) of which he was duly convicted. The pursuer's averments are consistent with the defamatory statement (about assault) being written down by the police and never being repeated. At most, there is an averment about disclosure provided to him by the Crown prior to the trial, but that trial did not relate to an assault. The case against the pursuer was based on fighting. Even if the statement was repeated in the disclosed statement, the disclosure is not said to have gone beyond the pursuer and his lawyer.

[18] Secondly, a link is made with national reporting of the trial which is not explained, and appears explicable by events independent of any defamatory statement. The pursuer avers "The allegations made by the Defender in his defamatory statement...led to criminal charges which were reported extensively in the mainstream media. The allegations concerning his purported conduct were reported in the national press." What is missing is any reference to a charge of assault. The essence of the defamatory statement, according to the pursuer's case, is a wrongful allegation of assault. There is no averment that he was ever charged by the police with assault, or by the prosecution, or that the alleged assault was reported by the national press. The pursuer did, however, fight with the defender, as the trial found proved, and that was sufficient for a conviction of breach of the peace / section 38(1). The national press reporting cannot be described as defamatory if it referred to the pursuer fighting, because he was convicted. It is not explained what defamatory statement was made or repeated in the national press. The media reporting cannot be described as defamatory if it was vindicated by successful prosecution. If the national press misreported the case, then an action may lie against them, not the defender. All of these averments would require to be refused probation, as not relevantly linked with the original defamatory statement.

[19] Thirdly, no loss has been averred which is specific to the defamatory statement. The pursuer's starting point is that he "was a well-respected member of his wider community, a public figure and a person of high standing". It is, however, difficult to see (and no pleadings have been attempted) how the reputational damage caused by national reporting of a successful conviction for fighting would be materially less than the damage caused by similar reporting of an assault. This action could only have proceeded to proof if the pursuer had devoted careful thought, and given a written explanation in the pleadings, about how these two events could be conceptually separated, sufficient to lead to a claim for damages. He would require to aver and prove that the defamatory statement caused additional loss and damage to that which was inevitably, and justifiably, already caused by the correct reporting of the conviction.

[20] At the appeal hearing, the pursuer's position was to repeat the averment on record that "The Pursuer could not have been prosecuted without the defamatory statement given by, *inter alia*, the Defender". Leaving aside the '*inter alia*', the pursuer's true complaint appears to be that the statement caused the prosecution. On the admitted fact that the prosecution was successful, and the pursuer found guilty of a similar charge, this statement cannot found an action of defamation. The defamation alleged is an accusation of assault. The pursuer was not charged with assault. He was not prosecuted for assault. He was not convicted of assault. There is therefore no causal link between the defamatory statement and the result. If the true complaint is that the defender described the pursuer as fighting, then the subsequent conviction for fighting shows the statement to be justified and correct. As the pursuer accepted at the hearing, he cannot say that the defamatory statement resulted in his being convicted.

[21] Accordingly, had this action been proceeding, which it cannot, we would require to refuse probation to all but the initial statement made to the police officer. If that were the sole remaining case, it would be so lacking in specification as to whom it was made, and the content, and the context, so as to fail to give fair notice to the defender, and the action would have been dismissed on these grounds also.

[22] We notice also a further point on which we were not addressed. There are occasions in which statements given to the authorities attract absolute privilege (*B v Burns* 1994 SLT 250). It is not possible on the present pleadings to identify whether the statement given by the defender, in the circumstances, might attract such privilege. That tends to illustrate that the provision of full and detailed pleadings is not simply a formality, but is required to form a solid factual basis upon which legal principles can be identified and decided. As the matter was not argued, we do not pursue this discussion, but it represents another reason to refuse to allow probation to the pursuer's case as presented.

[23] While it is evident there is a lengthy and acrimonious history between the parties, and legal action has included interdict, personal injury and criminal proceedings, it is not presently evident that those remedies include this action for defamation.

Disposal

[24] For these reasons, we will refuse the appeal. The pursuer will be found liable to the defender in the expenses occasioned thereby.