

MAGISTRATES COURT OF SOUTH AUSTRALIA

(General Civil)

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GARGAN SHARMA v PAYAL SACHDEVA, SARU RANA

[2022] SAMC 103

Judgment of Magistrate Fotheringham

5 August 2022

DEFAMATION - ACTIONS FOR DEFAMATION - PARTIES

DEFAMATION - STATEMENTS AMOUNTING TO DEFAMATION - PARTICULAR STATEMENTS - IMPUTATION - CRIMINAL

DEFAMATION - DAMAGES - GENERAL DAMAGES - ASSESSMENT - SPECIAL MATTERS TO BE CONSIDERED BY JURY - AGGRAVATION - WHETHER FACTS SHOWING MALICE

DEFAMATION - PUBLICATION - GENERALLY - MODES OF PUBLICATION

DEFAMATION - JUSTIFICATION - GENERALLY - WHETHER PLEA ESTABLISHED

DEFAMATION - JUSTIFICATION - TRUTH - SUBSTANTIAL TRUTH AND CONTEXTUAL TRUTH

Respondent: PAYAL SACHDEVA In Person via AVL

Respondent: SARU RANA In Person

Applicant: GAGAN SHARMA In Person Counsel: MR P QUINN - Solicitor: MR M QUAGLIA

Hearing Date/s: 13/12/2021 to 17/12/2021, 10/01/2021

File No/s: AMCCI-19-4624

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GARGAN SHARMA v PAYAL SACHDEVA, SARU RANA
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Introduction

1 The applicant Gagan Sharma (the Applicant) seeks damages from the Payal Sachdeva (the First Respondent) and Saru Rana (the Second Respondent) arising from the publication of an alleged defamatory video (the Video)¹ on WhatsApp on or about 20 November 2018.

2 The issues for determination are as follows:

1. Was there publication of the Video by either of the First and/or Second Respondent?
2. If there was publication, whether the First and Second Respondents are jointly liable for the publication.
3. Whether the imputations alleged by the Applicant were conveyed by the alleged publication.
4. Were the imputations conveyed defamatory of the Applicant?
5. Were the imputations substantially true, and
6. An assessment, if applicable, of any damages including aggravated damages.

Defamation

3 Defamation is the publication by a Respondent of material injurious to the reputation of the Applicant and is governed by the *Defamation Act 2005 (SA)* (the Act).

4 In *Duffey v Google Inc*² Blue J identified the elements of defamation as:

1. That the defendant published the relevant material.
2. That the material was of or concerning the plaintiff.
3. That the material carried the imputations pleaded.
4. That the material was defamatory of the plaintiff, in that it was injurious of his or her reputation.

¹ A transcript of the Video that was allegedly published was set out at Exhibit A4 tab 2 and Annexure A in this judgment.

² [2015] 125 SASR 437, 472 at [158].

5 The test for whether a published matter is capable of being defamatory is whether ordinary reasonable people would understand the matter complained of in the publication to be defamatory.³

Analysis and Conclusions

6 I have carefully considered all of the evidence even though I may have not expressly referred to all of the evidence in these reasons. I have also read and considered the written closing submissions filed by the parties.

7 The underlying facts relied upon by the Applicant to make out the tort of defamation are largely uncontested as they are contained in the Video.

8 Subject to one issue highlighted later in my judgment,⁴ whenever I speak of proof of a matter in issue, I mean proof on the balance of probabilities.

Overview

9 The matters set out in this overview were largely common ground between the parties. The Applicant is a well-known figure in the South Australian Indian community. He has been involved in several Indian based community groups and events.⁵ In 2017 he was nominated as the Liberal Party candidate for the seat of Florey.

10 The First Respondent came to know the Applicant through her husband Nitán Sachdeva (Mr Sachdeva) who was also involved in various Indian community groups. The Applicant, First Respondent, and their respective families became friends.

11 The Second Respondent is a teacher and advocate for women who have suffered domestic and/or sexual abuse. The Second Respondent was also involved in assisting the subject of domestic abuse. The Second Respondent has been the recipient of various awards including The Pride, Irene Bell, and Irene Krastev awards.

12 In May 2020, the Second Respondent launched a community support help line and in June 2020, she also launched a group known as SOS⁶ which seeks to combat domestic violence, abuse, and social isolation.

³ *Jones v Skelton* [1963] 1 WLR 1362 at 1370; *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460.

⁴ Dealing with the First Respondent's plea of justification.

⁵ These include but are not limited to the Hindu Social and Welfare Association, the Hindu Society of Australia, and the Indian Association of South Australia. He has held several executive positions within the Indian Australia Association of South Australia in 2016 and is currently the President of the Hindu Society of Australia.

⁶ Sending Out Strength.

13 On or about 19 May 2014, the First Respondent alleged that the Applicant
attended her home⁷ and sexually assaulted her (the Incident).

14 Mr Sachdeva confronted the Applicant, and the Applicant allegedly admitted
his conduct against the First Respondent to Mr Sachdeva. Mr Sachdeva taped the
conversation (the Recording).⁸

15 Notwithstanding the Incident, between June 2014 and December 2014, the
Applicant, First Respondent and their respective families maintained contact with
each other.

16 On or about the 16 November 2018, the First Respondent and her husband
Mr Sachdeva, attended the Applicant's home (the Attendance). At the time, the
Applicant was allegedly attending a funeral in India. The First Respondent gave
evidence that the alleged purpose of attending was to obtain an apology for the
Incident.⁹

17 During the Attendance, the First Respondent alleged she and her husband
were detained from leaving by the Applicant's father-in-law and mother-in-law,
who were blocking the door.¹⁰

18 During the Attendance, the First Respondent live streamed a video (the
Attendance Video). The Applicant's wife, Shelley Sharma (Mrs Sharma), stated
that the First Respondent demanded 'cash money' to 'stop this whole thing'.¹¹

19 In the next few days, the Applicant posted on his social media account a video
(the Applicant's post) with various comments about the Attendance and the First
Respondent's actions. There were a number of comments on the Applicant's social
media account, including threatening comments by alleged acquaintances of the
Applicant about the First Respondent's actions, including a person known as Shiv
Batla (Mr Batla). At some point, the Applicant took down the post after being
requested to by the police.¹²

20 On or about 17 November 2018, the First Respondent gave a statement to
police complaining about the Incident. The police initially took no action.

21 On or about 17 November 2018, the First Respondent rang the Second
Respondent. The First Respondent referred the Second Respondent to the
Attendance Video and advised that she had been the victim of 'victim blaming' by
the Applicant, his family and friends.

⁷ Whilst Mr Sachdeva was allegedly passed out due to alcohol.

⁸ Exhibit A4 Tab 16 and the First Respondent tendered a further transcript of the audio recording at trial.

⁹ T556, lines 31-33.

¹⁰ T353, lines 26-30.

¹¹ T393, lines 24-34.

¹² T167, lines 22-26.

22 On or about 18 November 2018, the First Respondent anonymously called the Second Respondent. During the discussion, the First Respondent disclosed the Incident but did not disclose the Applicant's identity.¹³

23 Accordingly, the First Respondent sought the Second Respondent's assistance to create a further video to request that the community let the legal process take its course and to leave her and her family alone.

24 Between 18 and 20 November 2018, the Respondents exchanged various messages on WhatsApp including the First Respondent requesting a script for the video.

25 The Second Respondent provided to the First Respondent a proposed wording for the Video.

26 On or about 20 November 2018, the Video became public.

27 On 5 December 2018, the Applicant's solicitor served the First Respondent with a Concerns Notice.¹⁴

28 On 8 December 2018, the First Respondent gave a further statement to police where she alleged for the first time that the Applicant raped her.

29 On 7 January 2019, the Applicant was charged with 1 count of rape and 4 counts of indecent assault.

30 On 10 July 2019, this Court summarily dismissed all charges against the Applicant for want of prosecution.

Procedural history

31 This matter has had a long procedural history. It is necessary to set out that history to understand certain submissions made by the Applicant.

32 The Applicant was represented by counsel. The First Respondent was, for a short period of time, represented by a solicitor. She then acted on her own behalf throughout the remaining pre-trial proceedings and at the trial itself.

33 The Second Respondent was self-represented throughout the matter.

34 The initial claim was filed on 20 November 2019. The Second Respondent was not a party to the initial claim. The First Respondent filed a defence on 9 December 2019 denying publication.

¹³ T442, lines 33-36.

¹⁴ Exhibit A4 Tab 30.

35 On 4 March 2020, the Applicant filed an application (the First Application)¹⁵
supported by an affidavit of Mark Quaglia dated 2 March 2020 (the First Quaglia
Affidavit) seeking that the First Respondent produce various evidentiary material
including data and information from her WhatsApp account, her WhatsApp chat
history, and further that the First Respondent produce her mobile phone to the
Applicant's forensic expert.

36 The application sought similar non-party discovery orders against the
Second Respondent, who was yet to be joined as a party to the matter, and a Mr
Deepak Bhardwaj (Mr Bhardwaj).

37 At the hearing on 18 March 2020, the Court made orders against the First
Respondent in terms sought in the First Application.

38 On 14 April 2020, the Court made orders for substituted service on the
Second Respondent and Mr Bhardwaj at their respective email addresses.

39 The Applicant filed a further application (the Second Application)¹⁶ seeking
urgent orders that the First Respondent comply with the orders made on 18 March
2020 concerning the production of her mobile phone to Applicant's expert,
namely, Mr David Caldwell (Mr Caldwell) of Forensics IT.

40 On 28 April 2020, orders were made requiring the First Respondent provide
her old mobile phone and current mobile phone to Mr Caldwell within seven days.

41 The affidavit of Mr Quaglia sworn on 11 May 2020 (the Third Quaglia
Affidavit) deposed that the First Respondent had only provided one mobile phone
to Mr Caldwell and that upon inspection, Mr Caldwell found that the contents of
the First Respondent's phone had been removed on 30 April 2020.¹⁷

42 On 13 May 2020, the Court made orders (the May Orders) for the Second
Respondent and Mr Bhardwaj to provide their WhatsApp information and provide
their mobile phones to the Applicant's forensic expert.

43 Neither the Second Respondent nor Mr Bhardwaj were present when the May
Orders were made by the Court.

44 On 11 June 2020, the Applicant filed an application (the Third Application)¹⁸
supported by the affidavit of Mark Quaglia deposed on the 11 June 2020 (the
Fourth Quaglia Affidavit) seeking indemnity costs from the First Respondent and
that the Second Respondent be joined to the proceedings.

¹⁵ Pursuant to the former Rule 71 of the *Magistrate Court (Civil) Rules 2013* (SA) and supported by an affidavit of Mark Quaglia deposed on 2 March 2020.

¹⁶ Supported by the affidavit of Mark Quaglia deposed on 16 April 2020 (the Second Quaglia Affidavit).

¹⁷ One day prior to the inspection on 1 May 2020.

¹⁸ FDN 11.

On 18 June 2020, the Second Respondent was joined to the proceedings.¹⁹ The statement of claim/revision 1 was filed on 23 June 2020 (the Amended Claim).²⁰

The Second Respondent filed her defence on 13 July 2020.²¹

The affidavit of Mr Quaglia, sworn on 3 August 2020 (the Fifth Quaglia Affidavit) stated that neither the Second Respondent nor Mr Bhardwaj had complied with the orders of 13 May 2020.

On 5 August 2020, the Court made orders²² extending the time for the Second Respondent to comply with the May Orders and requiring that Mr Bhardwaj appear at the next hearing (the August Orders).

Mr Quaglia's affidavit sworn on 28 August 2020²³ (the Sixth Quaglia Affidavit) stated that the First Respondent, Second Respondent and Mr Bhardwaj had failed and/or refused to comply with the May Orders and August Orders.

The Second Respondent filed an affidavit on 31 August 2020²⁴ which expressed her concerns with respect to the court orders to produce her mobile phone.

On 31 August 2020,²⁵ the Court varied the May Orders to protect the Second Respondent's personal information, however, still required the Second Respondent to provide her mobile phone to the Applicant's forensic expert Mr Jean-Pierre du Plessis (Mr du Plessis) (the Second August Orders). Mr Bhardwaj failed to appear at this hearing.

On 1 September 2020, the Court made orders (the September Orders)²⁶ extending the time for the Second Respondent to comply with the Second August Orders and for Mr Bhardwaj to comply with the May Orders. The Court also ordered that the First Respondent provide further information concerning her mobile phone and WhatsApp chat history.

On 11 September 2020, the September Orders were extended by the Court.²⁷

At the hearing on 9 October 2020 (the October Orders),²⁸ the Court noted that Mr du Plessis had produced to the Court a USB containing the downloaded data

¹⁹ FDN 15.

²⁰ FDN 16.

²¹ FDN 17.

²² FDN 20.

²³ FDN 21.

²⁴ FDN 22.

²⁵ FDN 23.

²⁶ FDN 25.

²⁷ FDN 28.

²⁸ FDN 31.

from the Second Respondent's mobile phone and a report dated 24 September 2020 (the First du Plessis Report).²⁹

55 On 17 December 2020, the Court ordered (the December Orders)³⁰ that Mr
Bhardwaj attend Court on 25 February 2021 and that the Applicant have liberty to
seek orders for dismissal of the defence of either respondent should they fail to
comply with orders for disclosure.

56 At the 26 February 2021 hearing, Mr Bhardwaj failed to attend, however, Mr
Bhardwaj had not been personally served the December Orders.

57 At the hearing on 6 April 2021, the Court issued a warrant of arrest³¹ against
Mr Bhardwaj and adjourned the matter to 11 May 2021. Mr Bhardwaj attended the
Court on 8 April 2021 and the warrant was revoked.

58 On 11 May 2021,³² the matter was listed for trial for three days commencing
on 27 September 2021.

59 The First Respondent obtained legal advice and filed an application (the First
Respondent's Application)³³ to amend her defence and for the Applicant to produce
communications between both himself, the First Respondent and Mr Sachdeva.

60 On 1 July 2021,³⁴ the May Orders were discharged against Mr Bhardwaj.

61 The First Respondent filed a further amended defence on 31 August 2021³⁵
alleging the defences of justification and contextual truth pursuant to the Act.

62 The Applicant was also required to provide his phone to Mr du Plessis. Mr
du Plessis provided a second report dated 28 September 2021 (the Second du
Plessis Report) on the Applicant's phone.³⁶

63 The Applicant filed a reply: revision 2 on 6 September 2021.³⁷

64 As a consequence of the First Respondent's Application, the trial was vacated
and eventually relisted to commence on 13 December 2021 for five days.

65

66

²⁹ Exhibit A6.

³⁰ FDN 36.

³¹ FDN 45.

³² FDN 50.

³³ FDN 56.

³⁴ FDN 57.

³⁵ FDN 66.

³⁶ Exhibit A4, Tab 10.

³⁷ FDN 68.

The Trial

67 The Applicant gave evidence as did Mrs Sharma, Anju Vahist (Mr Vahist),
Puja Parekh (Ms Parekh), Nisha Sharma (Nisha) and Ekta Singh (Ms Singh). Mr
du Plessis also gave expert evidence.

68 The parties filed a joint Tender Book.³⁸

69 During the trial, the Applicant further tendered an email dated 18 August
2020 between Mr du Plessis and the Applicant's solicitors³⁹ and a bundle of
documents which contained two reports from Forensic IT dated 6 May 2020 and
26 May 2020.⁴⁰

70 The First Respondent gave evidence and did not call any other witnesses. She
tendered various documents which were added to the joint Tender Book. This
included an alleged discussion between the First Respondent's husband and the
Applicant in which the First Respondent alleged that the Applicant made
admissions concerning the Incident.⁴¹ The Applicant objected to the Court
receiving the transcript on the basis that the recording was illegally obtained by
the First Respondent's husband. This is dealt with later in my judgment.

71 The First Respondent also sought to tender an unsworn affidavit of Mr Parhan
(Parhan Affidavit). The tender of this document was not accepted.

72 The First Respondent sought to tender screen-shots of material on Facebook⁴²
concerning the Applicant. These were irrelevant and not accepted.

73 The Second Respondent gave evidence on her own behalf. She did not call
any other witnesses.

74 Both the First and Second Respondents did not always observe the distinction
between evidence and submissions in that they both sometimes sought to
supplement their evidence with assertions of fact in their respective oral evidence
and written submissions.

75 Whenever their supplementary narratives could be treated as submissions, I
have regarded them as such. I have otherwise observed the appropriate distinction.

³⁸ The Joint Tender Book included but was not limited to, a typed transcript of the Video, an alleged confession by the Applicant as to the Incident, the First du Plessis Report and the Second du Plessis Report, a transcript of the audio recording of the Second Respondent to the First Respondent using WhatsApp, the written exchange between the First and Second Respondents using WhatsApp, various screenshots of the Applicant's Facebook and details of the First Respondent's WhatsApp information, which include her contacts and groups.

³⁹ Exhibit A5.

⁴⁰ Exhibit A9.

⁴¹ Exhibit A4 Tab 12 and the First Respondent later provided a slightly amended version which was accepted into evidence, noting that the Applicant maintained his objection to the audio transcript.

⁴² Exhibit A4 Tab 17.

76 The Second Respondent sought to tender a number of documents relating to her phone.⁴³ The Applicant submitted that these were not relevant, however, I consider them relevant to the Second Respondent's case on publication and/or joint publication. I will deal with the documents later in my judgment.

77 The Second Respondent further sought to tender documents relating to communication she had with other alleged victims of domestic violence. This was on the basis that the Second Respondent allegedly stated that this was the type of wording given to the First Respondent by her. The Applicant objected to these documents on grounds of relevance.

78 Given the Second Respondents' evidence to which I have had regard, I consider them relevant to the issues. However, I have not given them substantial weight given there was no connection between the Applicant and the people in the communications tendered by the Second Respondent.

WhatsApp

79 It is appropriate to commence with a background as to the operation of WhatsApp. The relevant evidence came primarily through the evidence of Mr du Plessis and the First and Second du Plessis Reports.

80 Mr du Plessis is an information technology expert. Mr du Plessis' curriculum vitae was set out at Annexure 2 of the First du Plessis Report. Mr du Plessis is well qualified, by study and experience, to express his opinions on the operation of computers, devices, and information technology.

81 The WhatsApp application is a free messaging application that allows the user to make videos, voice calls, text messages and share pictures by using a data connector. WhatsApp is one of the world's largest messaging applications.

82 The user needs to download the application to either their smart phone or computer. Once installed, the user registers for an account by providing their name and phone number.

83 Once the user has installed and registered WhatsApp, the application will allow the user to send messages to one individual or multiple individuals. It will also allow the user to make phone calls and share their location, amongst other things. There is, however, a limit to the number of contacts a person can message at once namely, 256 contacts.⁴⁴

84 Mr du Plessis explained that WhatsApp does not store the user's information, only the user's name and number for ease of accessibility.

85 During his evidence, Mr du Plessis explained how WhatsApp users can readily share and forward messages containing, for example, video content, with

⁴³ See Exhibit A4 Tabs 18 to 26 inclusive.

⁴⁴ See p.84 of Tender Book.

all their WhatsApp contacts, and to do so with a few simple instructions, using the application on their mobile phone. Further, the sender of a WhatsApp message has the power to delete the content even after it has been sent. The recipient of a message has the ability to on-forward.

86 Further, as the messages get delivered, the messages will be deleted from the WhatsApp server and stored locally on the individual's own device.

The Video

87 During the trial, the Video was watched on a number of occasions.

88 I have reviewed the Video and transcript and I am satisfied that the transcript is an accurate record of what is said in the Video by the First Respondent.⁴⁵

89 The Video showed the First Respondent reading from a pre-prepared script; this script referred to the alleged conduct of the Applicant.

Overview of witnesses

90 There are credibility issues in this matter. The issue of creditability was made more difficult by the fact the First Respondent appeared by WebEx and further, due to the self-representation of the First and Second Respondent at trial.

91 I do not consider that the Applicant, Mrs Sharma, the First or Second Respondents gave entirely satisfactory and reliable evidence for various reasons. I therefore found it necessary to approach the oral evidence on contentious issues with caution.

92 I consider that the Applicant, Mrs Sharma, the First and Second Respondents all gave evidence in a self-interested way and were evasive in their responses.

93 In *Fox v Percy*⁴⁶ the High Court held that caution must be exercised before making credibility findings on demeanour alone and, as far as it is possible to do so, the Court should reason to its credibility conclusions on the basis of 'contemporary materials, objectively established facts and the apparent logic of events'.

94 I have proceeded on this basis.

95 In assessing the credibility of the Applicant, Mrs Sharma, the First and Second Respondents and the reliability of their evidence, I have had the benefit of some objective evidence such as the Video and contemporaneous documents.⁴⁷ Nonetheless, I was unable to resolve all inconsistencies.

⁴⁵ Annexure A to this judgment sets out the transcript of the Video.

⁴⁶ (2003) 214 CLR 118, 128–9 at [30] – [31] (Gleeson CJ, Gummow and Kirby JJ).

⁴⁷ For example the transcript exchange between the First and Second Respondents on WhatsApp. See Exhibit A4 Tab 4.

The Applicant

96 The Applicant's evidence was not entirely reliable or credible. I did not consider him to be an entirely truthful witness including in relation to the events of the Incident and the discussions between himself and his wife after the publication of the Video.

97 During examination-in-chief, I consider that the Applicant sought to evade answering questions put to him by his own counsel. For example, the Applicant stated that in reference to his discussion with his wife Mrs Sharma, the phone call lasted five or 6 hours.⁴⁸

98 Notwithstanding this five-hour discussion, the only evidence about the discussion was that they discussed the Video, however, the Applicant gave no detail of the discussion even when pressed in cross-examination. The response was simply 'It's husband/wife discussion, it's between husband-and-wife discussion'.⁴⁹

99 Similarly, in respect of the events prior to the Incident, I consider the Applicant gave inconsistent evidence. For example, in his evidence-in-chief, the Applicant acknowledged he attended a function on 19 May 2014 with Mr Sachdeva,⁵⁰ however, in cross-examination he did not recall attending any event.⁵¹

100 The First Respondent was also critical of the Applicant's evidence concerning who had sent him the Video. The Second Du Plessis Report stated, 'My understanding is that this video was allegedly received by Mr Sharma on or about 20 November 2018 from a contact by the name Mr Sunny Malhi (Mr Malhi)'. This contradicted the Applicant's evidence that Mrs Sharma had sent him the Video. Mr Mahli was not called to give evidence.

101 Moreover, Mr Du Plessis noted that after reviewing the Applicant's mobile phone, which contained some 69,128 messages ranging between April 2017 to 15 December 2021, there was a gap in communications, with no messages recorded between 25 September 2018 and 1 January 2019. There was no explanation given by the Applicant as to why there was a gap.⁵²

102 Further, Mr du Plessis was unable to find any WhatsApp messages between the Applicant and the First and/or Second Respondent. Nor could he locate the Video.

103 The Second Respondent's cross-examination focussed on the relationship between herself and the Applicant.

⁴⁸ T54, lines 35-38.

⁴⁹ T113, lines 34-37 and T114, lines 1-12.

⁵⁰ T48, lines 11-12.

⁵¹ T97, lines 23-31 and T98, lines 1-8.

⁵² T126, lines 4-6.

104 The Second Respondent took the Applicant to paragraph 12 of the First Quaglia Affidavit. It stated:

I say further that I am instructed that the plaintiff believes, based on information known to him, that two other persons, who are closely associated with the defendant, assisted with the creation of the video, including the wording of the prepared script and in the distribution of the video via WhatsApp messenger platform.

105 The Second Respondent cross-examined the Applicant concerning the above statement and the basis for such a statement. The Applicant was evasive on the topic and answered in generalities.

106 The First and Second Respondents sought to attack the Applicant's credibility on a number of other bases, including but not limited to, a dispute with a landlord, an alleged bankruptcy, a dispute with his brother-in-law and the Applicant's involvement in the unfortunate drowning of a girl at Glenelg.

107 The Applicant objected to these matters based on the fact they were not pleaded and also on the basis of relevance. I accept the Applicant's submissions that the matters were not relevant and have not had regard to them in assessing the Applicant's evidence.

Evidence of Mrs Sharma

108 Mrs Sharma generally appeared to give evidence in an honest manner, but I consider that her evidence was not entirely reliable. Her evidence was self-serving and evasive in parts.

109 Mrs Sharma gave almost identical evidence to the Applicant concerning the lengthy phone call when the Applicant was returning from India, namely, that they discussed 'husband and wife issues'. Again, there was no specific evidence given concerning the actual details of the conversation.

110 A further example was when Mrs Sharma was asked about the alleged audio confession, she simply stated she was 'not involved in this'.⁵³ This evidence was given notwithstanding earlier evidence that Mrs Sharma and the Applicant discuss everything.

The First Respondent

111 The First Respondent clearly gave evidence in circumstances where she did not fully appreciate the elements of her pleaded case. She was argumentative, discursive and at times, simply failed to answer questions put to her.

112 Further, large parts of the First Respondent's evidence was simply unsatisfactory and irrelevant.

⁵³ T333, lines 9-10.

113 For example, the First Respondent gave evidence that the contents of her
phone the day before being examined by the Applicant's expert had been wiped
was likely due to her children.

114 At times, the First Respondent sought to verbally attack the Applicant's
counsel rather than answering the questions.⁵⁴

The Second Respondent

115 The Second Respondent was not a credible witness. She was astute about the
issues and as to matters that would help or harm her case and she tailored her
evidence accordingly, making subtle adjustments as the case progressed in a
manner which she judged was in her interest.

116 The Second Respondent was extremely argumentative⁵⁵ and non-responsive
during cross-examination. Her evidence on cross-examination was unreliable and,
on several occasions, she simply failed to answer the question.

117 My overall impression was that she was generally not truthful when she gave
evidence and gave evidence based on her perceived self-interest.

118 For example the Second Respondent stated she did not have any mobile
device and as such she was not communicating with the First Respondent. When
cross-examined about an emoji that was sent on 21 November 2018 at 7:57:20pm,
the Second Respondent sought to avoid questions on the topic by arguing with the
Applicant's counsel about whether a thumbs up symbol is an emoji or not.⁵⁶

Did the Respondents withhold and/or destroy evidence?

119 The Applicant submitted that both Respondents destroyed evidence that
would directly establish dissemination of the Video using WhatsApp.

120 The Applicant, throughout the course of this matter sought to obtain:

1. Any copy of the Video stored on one or other of the Respondents' mobile
phones or other devices; and
2. Any responses by recipients of the WhatsApp message attaching the
defamatory Video replying to that message or the content of the Video.

121 The Applicant read into evidence each of the Quaglia affidavits.

⁵⁴ T611, lines 12-14 and exchange between counsel and the First Respondent concerning the police charge
against the Applicant being dismissed (see T612, lines 4-33).

⁵⁵ For example when the Second Respondent was cross-examined about attending the First Respondent's
home, she argued with the Applicant's counsel about whether a discussion or conversation occurred.
See T522.

⁵⁶ T514.

122 The First Respondent discovered her WhatsApp information, the WhatsApp chat history between herself and the Second Respondent which included, an audio recording of the Second Respondent discussing the production and posting of the Video.

123 On 1 May 2020, the First Respondent produced her 'old phone' to Mr Caldwell but did not produce her current mobile phone.

124 An email from Mr Caldwell noted that the First Respondent's mobile phone had been reset the previous day, namely, 30 April 2020 at 12.27 p.m. and consequently the phone had no content.

125 The Applicant tendered the report of Mr Andrew Le (Mr Le) of Forensic IT dated 6 May 2020.⁵⁷ The report detailed the steps required to reset the mobile phone and stated that the result of resetting the phone was that all its content was erased.

126 Mr Le noted that it was possible that the First Respondent's current mobile phone may have synced to her iCloud and therefore carried a copy of the First Respondent's WhatsApp history.

127 Upon inspection of the First Respondent's current phone, Mr Le in his second report dated 26 May 2020 noted that:

1. The current mobile phone did not contain any WhatsApp content and the deleted WhatsApp messages could not be recovered;
2. The WhatsApp application had been restored on the mobile phone on 18 May 2020;
3. The WhatsApp application had existed on the mobile phone prior to 18 May 2020 and that the application was deleted and then reinstalled;
4. By deleting the WhatsApp application and re-installing, 'all its database containing content such as messages and calls were deleted from the phone';
5. At the point of reinstalling the WhatsApp application, the user 'can restore their WhatsApp chat history from the latest available backup'; and,
6. There was a backup that occurred after WhatsApp had been restored to the phone on 18 May 2020 but this 'Chat Backup would have overwritten any previous backup stored in iCloud as WhatsApp only retains the latest backup'.

⁵⁷ Exhibit A9.

128 The Applicant submitted that the First Respondent's conduct with respect to
her old and current mobile phones was deliberate conduct which constituted both
an abuse of the Court process and breaches of Court orders.

129 The First Respondent denied any abuse and maintained she was unaware of
why there was nothing on the phone and that in fact maybe her children may have
deleted everything on the phone.⁵⁸

130 I accept the submissions of the Applicant and find that the First Respondent
deliberately sought to delete her WhatsApp details to avoid the Applicant
establishing: that she published the Video; the extent of the publication; and the
identity of the persons who received the Video.

131 The Applicant submitted that due to the conduct of the First Respondent, the
Applicant is entitled to have the First Respondent's defence struck out or uplifted
pursuant to the *Uniform Civil Rules 2020* (SA) rr 34.1 (1)(b), 70.3(1)(b) and (c).

132 Alternatively, the Applicant submitted that the First Respondent should not
be entitled to rely on those parts of her defence alleging that she did not send the
Video using WhatsApp.

133 Notwithstanding that I have found that the First Respondent deliberately
deleted her phone, on balance and in the interest of justice, I find that the First
Respondent is entitled to maintain her defence that she did not disseminate the
Video.

134 The Second Respondent was ordered to produce all her mobile phones and
other devices on which WhatsApp was installed.

135 Mr du Plessis identified that between 27 November 2018 and 15 September
2020, there were 1,389 video files created or modified and between 22 November
2018 and 17 September 2020, 46,314 WhatsApp messages. He also identified 47
messages that were deleted. Four of the deleted messages are in the period from 1
October 2018 to 31 December 2018.

136 The Applicant contended that the Second Respondent had not produced her
WhatsApp account information, nor had she produced her WhatsApp chat history.

137 On 17 August 2020, the Second Respondent attended Mr du Plessis' office
to comply with the Court orders dated 5 August 2020 and 13 May 2020 (the du
Plessis Meeting), namely, for the purpose of obtaining a copy or an extraction of
her mobile phone device and for Mr du Plessis to provide her with assistance with
discovering relevant documents.

⁵⁸ T631, lines 17-34.

138 Mr du Plessis gave evidence that the Second Respondent raised concerns about confidentiality.⁵⁹ As a consequence, Mr du Plessis stated that the Second Respondent had two options, namely, that he could take the mobile phone extraction and then the parties argue about access, or the parties could return to Court to argue the issue of extraction.⁶⁰

139 By email dated 18 August 2020,⁶¹ Mr du Plessis stated to the Applicant's solicitor that the Second Respondent had refused to allow Mr du Plessis to extract any data from her current mobile phone and in particular, her WhatsApp conversations and further that the Second Respondent had advised Mr du Plessis that she 'deleted some [WhatsApp] messages between herself and a party of interest'.⁶²

140 Notwithstanding that email, the Second Respondent, in cross-examination, denied using the word 'delete' and maintained that she used the word 'lost' to Mr du Plessis.⁶³

141 Further, Mr du Plessis stated that in terms of deleting items on a mobile phone, it required some specific acts to delete a message out of a chain of many messages and that a specific message would have to be targeted.⁶⁴

142 In other words, Mr du Plessis opined that the individual was not deleting a block of data, but rather selectively deleting messages or videos.⁶⁵

143 The Second Respondent denied that she deliberately erased messages between her and the First Respondent.⁶⁶ The Second Respondent maintained that the 47 messages were lost and not deleted.

144 Mr du Plessis conceded in cross-examination that if two different devices existed with different phone numbers, a message sent to one device will not go to the second device even though both devices are owned by the same person.⁶⁷

145 Accordingly, the Second Respondent submitted that on or about 22 November 2018, she entered into a new mobile plan with a new number⁶⁸ and that at the time, she was communicating with the First Respondent, she had a different mobile phone and a different sim card.

⁵⁹ T224, lines 27-29.

⁶⁰ T224, lines 29-34.

⁶¹ Exhibit A5.

⁶² Sixth Quaglia Affidavit dated 28 August 2020 (FDN 21) and T225, lines 9-11.

⁶³ See for example T534, lines 13-26; T535, line 34 and T536, lines 1-34.

⁶⁴ T227, lines 36-38 and T228, lines 1-4.

⁶⁵ T228, lines 5-9.

⁶⁶ T537, lines 1-16.

⁶⁷ T282, lines 12-32.

⁶⁸ As set out at Exhibit A1 Tab 20.

146 Mr du Plessis indicated that both the devices he reviewed and the device referred to in the new plan had the identical IMEI number 359441098486890⁶⁹ and confirmed that this was the device he had reviewed in accordance with the Court orders. He noted, however, he was not made aware of an earlier alleged device owned by the Second Respondent.

147 The Second Respondent maintained that there was no possibility of deleted messages on the new handset and further that all conversation with the First Respondent occurred with the old handset.⁷⁰

148 I find that the Second Respondent deliberately deleted the WhatsApp messages between her and the First Respondent and was in breach of both her general discovery obligations and the specific orders made by this Court.⁷¹

149 Accordingly, the Applicant contended that the Second Respondent should not be entitled to rely upon any part of her defence which asserted:

1. That she did not send the Video using WhatsApp; or
2. That she did not receive the Video from the First Respondent; or
3. That the First Respondent did not send the Video using WhatsApp to all persons whose mobile numbers appear in the First Respondent's contacts list.⁷²

150 Having regard to the matters and notwithstanding my finding that the Second Respondent deliberately deleted the WhatsApp messages, I consider that in the interests of justice that the Second Respondent should still be entitled to rely upon parts of her defence that she did not publish the Video.

151 Given my findings that the First and Second Respondent deleted relevant and probative evidence on their mobile phones, I accept the Applicant's submission that I can draw a strong inference that the documents or information would not have assisted the Respondents.⁷³

Was there publication of the Video by either of the First and/or Second Respondents

152 The First Respondent does not deny that she was the author of the Video.

⁶⁹ T284, line 13 and Exhibit A1 Tab 9 p.6.

⁷⁰ T438, lines 1-28.

⁷¹ As set annexed to Mr du Plessis report at Exhibit A6.

⁷² Tender Book Tab 7.

⁷³ *Research in Motion Ltd v Samsung Electronics Australia Pty Ltd* (2009) 176 FCR 66.

153 The First Respondent said she made the Video for self-healing
purposes. The First Respondent, however, denied that she and/or the Second
Respondent published the Video.

154 The Applicant bears the onus of proving publication.⁷⁴

155 The High Court held in *Dow Jones & Co v Gutnik*⁷⁵ that an action for
damages can be pursued in defamation if there is a publication to a person in
Australia.

156 The WhatsApp information of the First Respondent obtained by Mr du
Plessis⁷⁶ included the First Respondent's contacts and a number of contacts with
the prefix +61 which are mobile numbers in Australia and groups.

157 Mr du Plessis' First Report noted that there were 751 Australian mobile
phone numbers contained within the First Respondent's mobile phone.

158 Mr du Plessis acknowledged that when examining the Applicant's
mobile phone, he could not locate the Video and accepted that he had no evidence
or proof that the Video was in fact sent or by whom.⁷⁷

159 The Applicant led evidence from a number of witnesses who had either
seen the Video shortly after it was allegedly published, or received the Video from
third parties.

160 Mr Vasihsht gave evidence that he saw the Video through a WhatsApp
group channel and that the Video quickly 'went viral'. He said that a number of
people were discussing the Video. Mr Vasihsht accepted that he had not received
the Video from either the First and/or Second Respondents.

161 I accept Mr Vasihsht's evidence as truthful and honest.

162 Ms Parekh stated that in or about November 2018, she received the
Video from her friend and that although she did not share the Video, she was aware
that the Video had 'gone viral'.

163 Ms Parekh stated that people were gossiping about the Video. Ms
Parekh accepted that she had not directly received the Video from either the First
and/or Second Respondents.

164 I accept Ms Parekh's evidence as truthful and honest.

⁷⁴ Gatley on Libel and Slander (Sweet & Maxwell 11th ed, 2008) at [6.1].

⁷⁵ (2002) 210 CLR 575 at [26], [124].

⁷⁶ Exhibit A4 Tab 7.

⁷⁷ See Exhibit A1 Tab 10 and T277, lines 21-23.

165 Nisha gave evidence that an acquaintance of her named Priya showed
her the Video. Priya had shown Nisha the Video as she was aware that Nisha had
previously worked for the Applicant's family. She accepted that she did not receive
the Video from either the First and/or Second Respondents.

166 I accept Nisha's evidence as truthful and honest.

167 Ms Singh saw the Video at work because a group of people were
discussing the Video. Consequently, Ms Singh called the Applicant to see if he
was aware of the Video.

168 After the Applicant's return from India, Ms Singh also attended the
Applicant's house to see how he was coping after the dissemination of the Video.

169 Ms Singh conceded that she had not received the Video from either the
First and/or Second Respondents.

170 I accept Ms Singh's evidence as truthful and honest.

171 Mrs Sharma gave evidence that she first heard about the Video from a
friend who was at a hair salon. Her friend sent her the Video on WhatsApp, the
day after it was published. As a consequence, she immediately called the
Applicant.

172 She accepted that she did not receive the Video from either the First
and/or Second Respondents.

173 The First Respondent submitted that the Applicant's witnesses were
either lying about receiving the alleged Video or were creating a story to assist the
Applicant.

174 Given my findings about the credibility of the Applicant's witnesses
and the matters set out below, I reject that submission and find that the Applicant's
witnesses viewed the video on or around 20 November 2018.

175 In the First Respondent's original defence she states:

I'm denying all the charges because I did not post this video to anyone. It's not even in my
phone. Somebody stole it from my phone and posted it.

176 Similarly, in an email dated 8 April 2020 between the First Respondent
and the Applicant's solicitor she states:

I only have Saru Rana's chat history related to this matter. I believe she stole the video
using my home's wifi and made it viral. She asked my home wifi's password as soon as
she walked in. I saw in her car parked at the front of my home from my home's camera
screen after she gone.

177 During her evidence, the First Respondent conceded that she had lied
about the Second Respondent stealing and publishing the Video.

178 At paragraph 3 of the First Respondent's further amended defence, the
First Respondent states that:

.... But did not publish it and that the Second Respondent (Rana) had no involvement in
any of this at all.

179 The Applicant submitted that the above plea is inconsistent with both
the evidence and the Second Respondent's defence.

180 The Applicant submitted that the only inference available was that the
Video was recorded by the First Respondent, it was on her mobile phone and
uploaded to her WhatsApp account which was under her control.

181 I accept the Applicant's submission, particularly because, at paragraph
3 of the First Respondent's further amended defence, the First Respondent pleaded
that *'she prepared and recorded the video'*.

182 I find that the First Respondent created the Video and had control of the
Video.

183 It is inconceivable that the Video was seen by third parties unless it had
been disseminated.

184 Given the First Respondent was the only person in control of the Video,
it can be inferred that the First Respondent disseminated the Video.

185 No other person other than the First Respondent could have
disseminated the Video.

186 I have found that the First Respondent reset her phone. It is likely that
she did so in order to destroy evidence of her dissemination of the Video. Based
on the evidence of Mr Vasihsht, Ms Parekh, Nisha, Ms Singh and Mrs Sharma, it
is also likely that the First Respondent's dissemination of the Video was to more
than one person.

187 I find that based on the Second du Plessis Report,⁷⁸ it is likely the First
Respondent disseminated the video to her WhatsApp contacts list and groups.

188 At paragraph 8 of the Second Respondent's defence, the Second
Respondent pleaded that at no time did she upload or cause to be uploaded, the
Video. The Second Respondent also denied assisting the First Respondent with the
wording of the Video.

⁷⁸ Exhibit A4 Tab 10 at [2.4.2].

189 The Second Respondent alleged that she assisted with the wording on a
different issue, namely, about victim blaming and that the Indian Community
should leave the First Respondent alone until the legal proceedings had taken their
course.

190 The extent of the Second Respondent's involvement in the proposed
wording and the amount of the Second Respondent's input into the Video was
subject to significant dispute between the parties.⁷⁹ I will return to this issue later
in my judgment.

191 There is no evidence that the Second Respondent was ever in possession
or control of the Video. Although I have found that she deliberately deleted certain
WhatsApp messages from her phone, I cannot be satisfied, on the balance of
probabilities, that the Second Respondent disseminated the Video.

Joint Publication

192 The Applicant's case was that the Second Respondent could still be a
publisher of the Video, even if I found (as I have) that she did not disseminate the
Video.

193 The Applicant submitted that the Second Respondent was involved in
the creation and production of the Video, and encouraged its dissemination,
thereby making her a publisher at law.

194 The Applicant submitted that, based on the principles established in the
High Court decision of *Webb v Bloch*⁸⁰, the Second Respondent was an accessory
to the publication.

195 *Webb v Bloch* is the authority for the purpose of defining the concepts
of publication and liability for publication at common law.⁸¹

196 In *Webb v Bloch*, Isaacs J cites *Parkes v Prescott*,⁸² a citation from
Starkie on Evidence, in the following terms:

All who are in any degree accessory to the publication of a libel, and by any means
whatever conduce to the publication, are to be considered as principals in the act of
publication: thus if one suggests illegal matter in order that another may write or print it,
and that a third may publish it, all are equally amenable for the act of publication when it
has been so effected.⁸³

⁷⁹ T526, lines 18-21.

⁸⁰ (1928) 41 CLR 331.

⁸¹ See e.g., *Fairfax Media Publications Pty Ltd v Voller* [2021] HCA 27 at [62]-[66] (Gageler and Gordon JJ) and *Sands v State of South Australia* [2013] SASC 44 at [133].

⁸² [1869] L.R., 4 Ex. 169 at 173.

⁸³ *Webb v Bloch* at 364 (original emphasis omitted).

197

Further, Isaacs J referred to the following passage in *R v Paine*:⁸⁴

If one repeat and another write a libel, and a third approve what is wrote, they are all makers of it; *for all persons who concur, and show their assent or approbation to do an unlawful act, are guilty*: so that murdering a man's reputation by a scandalous libel may be compared to murdering his person; for if several are assisting and encouraging a man in the act, though the stroke was given by one, yet all are guilty of homicide.

198

In *Thiess v TCN Channel 9 Pty Ltd (No 5)*,⁸⁵ the Full Court of the Supreme Court of Queensland held that caution is needed in applying general statements of the kind made in *Webb v Bloch*, and that consideration should be given to the extent to which a person has control over the 'final form' of the publication.

It was and is admitted that TCN 9 published all the defamatory imputations contained in the television programmes broadcast on the four occasions specified. The question to be decided is whether the evidence was such as to require the jury, acting reasonably, to find that Woodham was a co-publisher with TCN 9 of the same matter, and so make him liable at law for the consequences of doing so. 'Liability for a publication', says *Gatley on Libel*, (8th ed, 1981), para 236, at 108, 'arises from participation or authorisation. Thus, where a libel is published in a newspaper or book, everyone who has taken part in publishing it, or in procuring its publication, or has submitted material published in it, is prima facie liable'. The correct rule is, it was submitted, that adopted by Isaacs J in *Webb v Bloch* (1928) 41 CLR 331, 364, which is that 'all who are in any degree accessory to the publication of a libel, and by any means whatever conduce to the publication, are to be considered as principals in the act of publication'. According to his Honour *arguendo* in the same case, the liability is joint and several: see *Webb v Bloch* (1928) 41 CLR 331, 345. Knox CJ spoke of such persons as joint tortfeasors (*ibid*, at 359).

So much must be accepted. **It is necessary, however, to use care in applying general statements of this kind. Those who made them were directing attention to identifiable defamatory statements, to the publication of which in the completed form the defendant in question was held to have given his authority or approval or to the final form of which he had contributed.** *Webb v Bloch* was an instance of that kind. The defamatory circular in that action was drafted by the solicitor Norman on instructions from the defendant Bloch. Bloch received the draft on 10 February 1926 although none of the other defendants saw it then. On 16 February 1926 Bloch instructed Norman to issue the circulars and his action in doing so was confirmed on 22 February by the Victorian committee, of which all the defendants were members. Starke J (41 CLR 331, 340) regarded this act of confirmation as rendering all the defendants responsible in law for the issue of the circular. His honour considered Norman not as the author of the circular 'but rather as the amanuensis of the defendants' (41 CLR 331, 342). On appeal, Knox CJ agreed with Starke J in thinking that all defendants were responsible in law for the publication of the circular (*ibid*, at 347). Gavan Duffy J would have dismissed the appeal from the judgment given by Starke J in favour of the defendants (*ibid*, at 375). Only Isaacs J found it necessary to examine the authorities in order to discover what may have been a wider basis of liability.⁸⁶ (emphasis added)

⁸⁴ *Ibid* (emphasis in original).

⁸⁵ [1994] 1 Qd R 156 *Thiess*.

⁸⁶ *Ibid*, 194-195.

199 The Court considered that the principle in *Webb v Bloch* may possibly
 apply to make Woodham jointly liable if he had seen the script or viewed the
 programmes before publication, but he did not do so.⁸⁷

200 Accordingly, Woodham was not shown to have exercised control over
 the final form of the programmes.

201 The Court found that:

At most [Woodham] played a subsidiary and intermediate, if important, part in the creation of the product that in its finished state ultimately went to air. It is true that Woodham himself, or the visual image of Woodham, appeared in one or more of the programmes (principally the first ACA programme) broadcast by TCN 9, and that he was visible and audible to viewers as saying words that may have formed part of 'the matter supporting the imputations or any of them'. **However, as we have seen, and despite the form of question 1, what the jury were asked to do was not to say whether Woodham published some, but whether he published all, of the matter supporting the defamatory imputations.** Unless he was a co-publisher of all, the jury were, having regard to the way in which that question was left to them, entitled and indeed bound to find that he was not a co-publisher 'with' TCN 9. **As to that, the evidence is that there were some matters published about which Woodham knew little or nothing.**⁸⁸ ... (emphasis added)

202 In *Dank v Whittaker (No 1)*⁸⁹ the New South Wales Supreme Court considered the applicable test for joint liability. McCallum J noted that the authorities establish that, where a person merely contributes material to an article but has no control over the publishing process, liability as publisher will not ordinarily be established unless he or she has assented to its final form.

203 After considering the relevant principles in *Webb v Bloch* and *Thiess*,⁹⁰ McCallum J accepted the proposition that:

where a person merely contributes material to an article but has no control over the publishing process, liability as a publisher will not ordinarily be established unless he or she has assented to its final form.⁹¹

⁸⁷ Ibid 195.

⁸⁸ Ibid.

⁸⁹ [2013] NSWSC 1062.

⁹⁰ As well as statements to like effect in *Palace Films Pty Ltd & Ors v Fairfax Media Publications Pty Ltd & Ors* [2010] NSWSC 415 at [24]-[25], *Craftsman Homes Australia Pty Ltd v Nine Network Australia Pty Ltd* [2002] NSWSC 555 at [7], and *Searcy v Molomby* (unreported, Supreme Court of New South Wales, 23 August 1999) at [20]-[25]. See a summary of this consideration in *Dank v Cronulla Sutherland District Rugby League Football Club Ltd* [2014] NSWCA 288 ('*Dank v Cronulla*') at [127]-[146].

⁹¹ *Dank v Whittaker* (n 89) at [26]. McCallum J refers to the principle again in *Glanville v TCN Channel Nine Pty Ltd* [2013] NSWSC 1143 at [9], noting 'a person who consents to be interviewed by a journalist for the purpose of a broadcast will not ordinarily be taken to have had control over the preparation of the programme or indeed to have been given the opportunity to approve its final form'.

204 In relation to the notion of ‘control over the publishing process’, her Honour stated:⁹²

... The notion of control is comprehended within the role of a person such as the proprietor of a newspaper, an editor who determines what is published and, ordinarily, the author of the defamatory matter (although it is well recognised that a journalist, whilst responsible for the words written by him or her, is not necessarily liable for headlines or images added during the editorial process). Absent participation in a publication at that level of control, a person who merely contributes part of what is published will not be jointly liable as an original publisher of the whole unless he or she assents to its final form.

205 McCallum J found that there was no joint liability established for Dr Larkins and stated that the pleadings:

... are incapable of sustaining the allegation that Dr Larkins had control of the final version of the matters complained of or assented to them. ... [The particulars] say no more than that he made statements which were likely to be republished.⁹³

206 Accordingly, it is relevant to distinguish between ‘control’ over final form and ‘awareness’ or ‘knowledge’ over final form. For example, while the Second Respondent may have assisted with translating a final script for the First Respondent to use in the Video, McCallum J’s explanation of the meaning of ‘control’ in the case of *Dank* suggests that something more would be needed to establish joint liability.⁹⁴

207 Relevant considerations may be whether the Second Respondent contributed to the meaning of the text or had any influence over what was included or excluded from the final script.

208 In support of the proposition that the Second Respondent is a joint publisher, the Applicant stated that:

- An inference can be drawn that the Second Respondent assisted the First Respondent with wording used in the Video by preparing a script for the First Respondent to read;⁹⁵
- The Second Respondent encouraged the First Respondent to publish the Video on WhatsApp to a wide audience;⁹⁶
- Paragraphs 1.14-1.28, 6, 10 and 11 in the Second Respondent’s defence point to the Second Respondent’s involvement in publishing; and

⁹² *Dank v Whittaker* (n 89) at [22].

⁹³ *Ibid* [31].

⁹⁴ See quote in footnote 35 (*Dank v Whittaker* (n 89) at [22]).

⁹⁵ FDN 68 ‘Reply by applicant to defence of first respondent: revision 2’ (‘FDN 68’), para.4.2.

⁹⁶ FDN 68, para 4.3.

- Her evidence in cross-examination constituted admissions as to joint publication.

209 The First Respondent stated that the Second Respondent was not involved in the making and publishing of the Video.⁹⁷

210 The Second Respondent maintained that:

- The First Respondent approached the Second Respondent for help with making a video to inform the wider community that the matter⁹⁸ was now a legal affair and should not be discussed;⁹⁹
- Exhibit 27 is an example of the type of wording that the Second Respondent would have suggested to the First Respondent;¹⁰⁰
- The First Respondent requested that the Second Respondent provide wording for the video to address the wider community;¹⁰¹
- The First Respondent asked for assistance with wording as she and her husband did not feel competent reading or writing in English;¹⁰²
- The wording provided by the Second Respondent is commonly used by victims from multicultural backgrounds to stop victim blaming;¹⁰³
- The Second Respondent gave a transcript with the suggestion that the First Respondent add other facts as the Second Respondent was not aware of details;¹⁰⁴
- The Second Respondent told the First Respondent that it was entirely the First Respondent's decision as to whether to post the Video;¹⁰⁵ and
- The Second Respondent assisted in translating the wording from Hindi to English.¹⁰⁶

211 The Applicant submitted that when one considered the evidence, the Second Respondent was directly involved in the creation of the Video and encouraged the dissemination of that Video.

⁹⁷ See FDN 66 'Further amended defence of the First Respondent' ('FDN 66').

⁹⁸ Context suggests 'the matter' refers to the First Respondent's claims of sexual assault etc. against the Applicant.

⁹⁹ FDN 17, para 1.27.

¹⁰⁰ T427, lines 14-28.

¹⁰¹ FDN 17, para 6.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid, para 10.

¹⁰⁶ Ibid, para 11.1.

212 The Applicant referred to the WhatsApp chat history¹⁰⁷ between the First and Second Respondent as evidence that the Second Respondent actively encouraged the First Respondent to create and publish the Video.

213 On the WhatsApp chat, the First Respondent stated:¹⁰⁸

Hello dear, plz send me the wording[.]

214 Later, there was a further exchange between the First and Second Respondent:¹⁰⁹

Payal: Should I just post statement or make a video as well

215 On 18 November 2018, at 7.35 a.m., there is an audio message¹¹⁰ (the Audio Message) which forms part of the WhatsApp chat between the First and Second Respondent:

Good morning Payal! This is what I feel that suppose we prepare a statement and make a recording of it today, alright! By evening, let's see what he does all day today, what he is posting, what his activities are, who are the people who are supporting him. If we don't put anything today, he will think that we are scared...that now we are not saying anything. Suddenly, in the evening...in fact at night before going to bed, we will post that video. What will happen is that if they are thinking that now they are not doing anything...we have scared and threatened them, then all of a sudden when the video appears, then people will start questioning him. If we keep posting videos one after the other, they will get into an offensive-defensive mode. Somebody has written on his wall that, 'hey friend, if they were not civilized, they would have come to create a racket. You see how they are being quiet and relaxed...just wanting to talk something.' So, you and Mr Nitin have to maintain that attitude throughout – that we were just wanting to talk. Can we not even talk? On the basis of that attitude, just stay calm all day. Let him think that you are scared. Let everybody think that you are scared. Post that video in the evening or late in the night and let me know what you think about it.

216 On 19 November 2018 at 8.45 a.m., the First Respondent in a WhatsApp exchange with the Second Respondent stated:

If I don't raise my voice now, I will blame myself for any miss happening with any women in Adelaide by Gagan Sharma[.]

217 The Second Respondent's evidence was that upon visiting the First Respondent's home, she assisted her with some generic proposed wording¹¹¹ which she alleges she commonly used for victims from multicultural background(s) to put a halt to victim blaming.¹¹²

¹⁰⁷ Exhibit A4 Tab 6 at p.11-16.

¹⁰⁸ On 18/11/18 at 7:08:38 am.

¹⁰⁹ On 18/11/18 at 7:32:47 am.

¹¹⁰ Exhibit A4 Tab 4 is a transcript of the audio message.

¹¹¹ For example Exhibit 27.

¹¹² See paragraph 6 of the Second Respondent's defence.

218 The Second Respondent stated a similar wording was provided to the
First Respondent, namely:¹¹³

To all my family and friends. As some of you may know, or noticed I am going through a personal turmoil. When a community [sic] trust breaks down, you hope things be amicable. However, in my case I am being victimised and defamed simultaneously on social media and in person. The beauty of living in Australia is that there is rule of law and the legal system protect women. I respect the justice system and will not further comment, as these matters will be before the police soon. I would request all to respect my privacy and not cause any inconvenience to myself or my family. Thank you.

219 At paragraph 11 of the Second Respondent's defence, the Second
Respondent referred to the WhatsApp audio exchange between herself and the
First Respondent.

220 The Second Respondent submitted that nowhere in the WhatsApp
transcript¹¹⁴ did it mention that she would publish the Video.

221 The Second Respondent further explained that she had no connection
with the Applicant and limited connection with the First Respondent. That
connection was limited to providing support to the First Respondent arising from
the Incident due to the lack of community support for the First Respondent.

222 Accordingly, the Second Respondent submitted that she had no reason
to defame the Applicant. She was simply assisting the First Respondent to stop
victim blaming.

223 Further, the Second Respondent in her evidence maintained that the
majority of the WhatsApp exchanges between herself and the First Respondent
arose in respect of the comments of Mr Batla made on the Applicant's post and in
particular, the Audio Message¹¹⁵ and did not relate to the Applicant.¹¹⁶

224 Similarly, the First Respondent maintained that the person she was
referring to in the WhatsApp message above was, in fact, Mr Batla and not the
Applicant. I reject this evidence.

225 It is implausible that the First and Second Respondents were referring
to anyone other than the Applicant and the production of the Video in the
WhatsApp chat history and the Audio Message.¹¹⁷

¹¹³ It appears from FDN 17 that this is the only transcript of wording provided by the Second Respondent, however whether or not this is the case is not expressly stated.

¹¹⁴ Exhibit A4 Tab 5.

¹¹⁵ Exhibit A1 Tab 4.

¹¹⁶ See Second Respondent's opening T414, lines 23-34 and also at T470, lines 21-38 and T471, lines 1-9.

¹¹⁷ T511, lines 11-22.

226 I find that based on the evidence, the Second Respondent was a joint
publisher of the Video. The Second Respondent had some editorial control and
was clearly encouraging the First Respondent to publish the Video.

227 For the reason stated above I find that the Video was a joint publication
by the Respondents.

Defamatory imputations: Principles

228 Did the Video carry the pleaded imputations and were they defamatory?

229 The question for this Court is not whether the material in question can
carry the imputations pleaded, it is whether it did in fact convey them.¹¹⁸

230 The meaning of the published words is to be determined by how fair-
minded, ordinary reasonable persons in the general community would understand
them.¹¹⁹

231 The ordinary reasonable person is of average intelligence. The ordinary
reasonable person does not interpret the publication in a precise manner and does
not formulate reasons for the meaning, which is understood, but rather forms a
general impression of the meaning from the words used, and consequently may
interpret quite freely and will be prone to do so when the publication is
derogatory.¹²⁰ The interpretation is not approached in the same way that a lawyer
might interpret the words, which would be in a logical, precise or analytical
manner, drawing implications only if they are both necessary and reasonable.¹²¹

232 A publication is defamatory of a person if it tends, in the minds of
ordinary reasonable people to injure his or her reputation by disparaging, causing
others to shun or avoid him, or subjecting him to hatred, ridicule or contempt.

233 That is, words are defamatory if they convey a meaning by asserting or
attributing an act or condition (an imputation)¹²² to a person which would be likely
to cause ordinary reasonable people to think less of the person about whom the
words are published.¹²³

234 In determining whether the meaning or imputation conveyed by each
post is defamatory, the court will look at the ‘sting’ of the libel. As outlined by the
High Court in *Chakravarti v Advertiser Newspapers Limited*.¹²⁴

¹¹⁸ *Sands v Channel Seven Adelaide Pty Ltd & Anor* [2010] SASC 202, at [105].

¹¹⁹ *John Fairfax Publications Pty Ltd v Rivkin* ; [2003] HCA 50 at [24]

¹²⁰ *John Fairfax Pty Ltd v Rivkin* (2003) HCA 50 at [25]-[26].

¹²¹ *Cornes v The Ten Group Pty Ltd* [2012] SASCFC 99 at [51], referring to George, *Defamation Law in Australia* (Butterworths, 2006) at 131.

¹²² *Sungravure Pty Ltd v Middle East Airlines Airliban S.A.L.* (1975) 134 CLR 1, 10.

¹²³ *Poniatowska v Channel Seven Sydney Pty Ltd (No. 4)* [2016] SASC 137 at [426].

¹²⁴ (1998) 193 CLR 519, 546 [60].

As a general rule, there will be no disadvantage in allowing a plaintiff to rely on meanings which are comprehended in, or are less injurious than the meaning pleaded in his or her statement of claim. So, too, there will generally be no disadvantage in permitting reliance on a meaning which is simply a variant of the meaning pleaded. On the other hand, there may be disadvantage if a plaintiff is allowed to rely on a substantially different meaning, or, even, a meaning which focuses on some different factual basis. Particularly is that so if the defendant has pleaded justification or, as in this case, justification of an alternative meaning. However, the question whether disadvantage will or may result is one to be answered having regard to all the circumstances of the case, including the material which is said to be defamatory and the issues in the trial, and not simply by reference to the pleadings

235 Finally, the publication needs to be considered as a whole in
determining the imputations.

Pleaded Imputations

236 It was not disputed that the First Respondent was referring to the
Applicant. The Applicant was referred to by his name sixteen times in the Video.

237 Paragraph 17 of the Statement of Claim: Revision 1 (the Claim) pleaded
that the natural and ordinary meaning of the Video publication is that the Applicant
is guilty of the offence of sexual assault which he committed with inhuman
contempt for his helpless and vulnerable victim, namely, the First Respondent (the
First Imputation).

238 I have considered the Video itself and the transcript¹²⁵ in determining
whether the Applicant has established each imputation and if so, whether they are
defamatory.

239 The Applicant submitted that each of the imputations set out at
paragraph 17 was conveyed, as a matter of fact, by the Video and that each and
every one of those imputations is seriously defamatory of the Applicant.

240 At no stage during the trial did the First or Second Respondents seek to
challenge the meaning of the imputations as pleaded by the Applicant.

First Imputation

241 I find that the Video conveyed the First Imputation.

242 An ordinary person watching and listening to the Video would consider
that the Applicant was guilty of the offence of sexual assault which he committed
against the First Respondent.

243 The allegation that the Applicant committed a sexual assault is an
extremely serious direct attack on his moral character. It was defamatory in nature.

¹²⁵ Set out at Exhibit A4 Tab 2.

Second Imputation

244 The Second Imputation alleged is that the Applicant is a cruel,
malicious sexual predator who, after sexually assaulting the First Respondent,
bullied and threatened her with physical harm to prevent her from complaining
about his criminal conduct (the Second Imputation).

245 An ordinary person watching the Video would conclude that the
Applicant was such a predator and had bullied and threatened the First Respondent.
The Second Imputation is conveyed by the publication of the Video.

246 This is a serious imputation reflecting on the character of the Applicant
and would lead an ordinary reader to think less of him.

247 I find that the Second Imputation was defamatory.

Third Imputation

248 The Third Imputation was that the Applicant knowingly participated in
the unlawful detention of the First Respondent and Mr Sachdeva and threatened
and intimidated the First Respondent into dropping her claim that the Applicant
had sexually assaulted her (the Third Imputation).

249 The Video clearly and unambiguously makes this claim which carries
the imputation that the Applicant is threatening, intimidating and prepared to act
unlawfully to achieve his objective.

250 This imputation is of a serious nature and would lead an ordinary person
to think less of the Applicant.

251 The Third Imputation was therefore defamatory.

Fourth Imputation

252 The Fourth Imputation is that the Applicant is a womanising, sexual
predator who is a threat to women and girls of any age (the Fourth Imputation).

253 The Fourth Imputation was in my view a further sting to the First
Imputation. It would convey to an ordinary reader that not only did the Applicant
sexually assault the First Respondent, but he would act in a sexually predatory
manner with other women, regardless of age.

254 I find that the Fourth Imputation was conveyed in the Video.

255 I am satisfied that the Fourth Imputation seriously attacked the
character of the Applicant and was therefore defamatory.

Fifth Imputation

256 The Fifth Imputation is that the Applicant conspired with his hooligan
friends to plan a violent attack on the First Respondent and her family to frighten
and intimidate her into dropping her claim that the Applicant had sexually
assaulted her (the Fifth Imputation).

257 I find that the Video conveyed the Fifth Imputation.

258 I am satisfied that the Fifth Imputation was a further serious attack on
the Applicant's character and was defamatory.

Sixth Imputation

259 The Sixth Imputation was that the Applicant lied about the First
Respondent attacking the Applicant's family.

260 Whilst this is less serious than the Fifth Imputation, I consider that an
ordinary reader would be likely to conclude that the Applicant was a liar and
consequently think less of the Applicant.

261 I am satisfied that the Sixth Imputation was defamatory.

Conclusion

262 I am satisfied in each case that the Video conveys the imputation
pleaded by the Applicant.

263 The Applicant has an actionable claim in defamation unless the First
Respondent makes out a defence to the publication.

Defences

264 The First Respondent pleads that the matters raised in the Video are
substantially true in that the Applicant sexually assaulted her on 19 March 2014.

265 Accordingly, she says that she is entitled to rely on sections 23 and 24
of the Act, namely, justification and/or alternatively the defence of contextual
truth.

266 As part of her defence of justification, the First Respondent sought to
rely on an alleged audio admission by the Applicant to Mr Sachdeva.

Illegal recording by Mr Sachdeva

267 After the Incident, Mr Sachdeva allegedly confronted the Applicant and
made the Recording of the discussion. At the time, the Recording was made by Mr
Sachdeva without the consent of the Applicant.

268 I accept the Applicant's submission that the Recording was an illegal recording and in breach of the *Listening and Surveillance Devices Act 1972* (Cth) (the LDA).

269 In *Southern Equities Corporation Ltd (In Liq) v Bond (No 2)*¹²⁶ Lander J held that the 'public policy discretion' in *Bunning v Cross*¹²⁷ to exclude evidence which has been improperly or illegally obtained in criminal proceedings applies equally in civil proceedings, such that the Court is entitled to exclude evidence obtained by a party's improper or illegal conduct.¹²⁸

270 The criteria for weighing the desirability and undesirability of admitting the evidence include but are not limited to, the probative value of the evidence, its importance to the proceedings, the nature of the matter, the gravity of the impropriety or illegality, the prejudice to any party if the evidence is admitted or rejected and whether it was deliberate or reckless.¹²⁹ These factors are not non-exhaustive.

271 The Applicant submitted that given the evidence had little or no probative weight and the evidence was obtained through a serious criminal offence, there can be little prejudice to the First Respondent by excluding the Recording.

272 Accordingly, the Applicant submitted that the Court should exercise its discretion to exclude from evidence the recording of his conversation with Mr Sachdeva and any transcription thereof.

273 During his evidence, the Applicant conceded that it was his and Mr Sachdeva's voice on the recording.¹³⁰

274 The First Respondent gave hearsay evidence as to the circumstances of the recording.¹³¹

275 Mr Sachdeva was not called by the First Respondent to give evidence despite the Court's warning about not calling him to support the transcript evidence as to the alleged admission by the Applicant.

276 The Applicant submitted that in the absence of Mr Sachdeva as a witness, the Court should reject the Recording or at best, it had little to no weight.

277 On balance, I admit into evidence the Recording between Mr Sachdeva and the Applicant,¹³² however I accept the Applicant's submission that it has little

¹²⁶ (2001) 78 SASR 554.

¹²⁷ (1978) 141 CLR 54.

¹²⁸ *Southern Equities Corporation Ltd (in liq) v Bond (No 2)* (n 126) at [75]-[76], [89]-[94] and [109]-[113].

¹²⁹ *R v Swaffield* (1998) 192 CLR 159, 212-13 [135] (Kirby J).

¹³⁰ T95, lines 25-38.

¹³¹ T563, lines 13-33.

¹³² Including the transcription.

weight on the basis that there was no specific discussion of any sexual assault and no evidence as to what it is that the Applicant is alleged to have admitted to.

Justification

278 Section 23 of the Act provides:

It is a defence to the publication of defamatory matter if the defendant proves that the defamatory imputations carried by the matter of which the plaintiff complains are substantially true.

279 Section 4 of the Act defines ‘substantially true’ as ‘true in substance and not materially different from the truth’.

280 The First Respondent bears the onus of proof with respect to the defence of truth.¹³³

281 The Applicant submitted that for justification to arise, the First Respondent must meet, in the proper language, the imputations that arose and show that the imputation are substantially true.

282 I accept this submission and have considered the defence of justification on this basis.

283 In *Fleming v Advertiser-News Weekend Publishing Co P/L & Anor (No 2)*,¹³⁴ Gray AJ held that whilst the imputation involves an allegation of criminal conduct, the standard of proof is on the balance of probabilities.

284 Gray AJ further stated:

In applying the civil standard of proof both parties accept that I should apply what they refer to as the *Briginshaw* principle. That principle is derived from the following well-known passage from the judgment of Dixon J (as he then was) in *Briginshaw v Briginshaw*¹³⁵ (*Briginshaw*). In discussing proof in civil cases, he said:

The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty: and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitively developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been

¹³³ *Singleton v Ffrench* (1986) 5 NSWLR 425.

¹³⁴ [2016] SASC 26.

¹³⁵ [1938] 60 CLR 336, 361-362.

proved to the reasonable satisfaction of the tribunal. In such matters “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony or indirect inferences.’¹³⁶

(Gray AJ’s emphasis added)

285 In *Rejtek v McElroy*¹³⁷ the Court observed:

... the ‘clarity’ of the proof required, where so serious a matter as fraud is to be found, is acknowledgment that the degree of satisfaction for which the civil standard of proof calls may vary according to the gravity of the facts to be proved: see *Briginshaw v Briginshaw* per Dixon J, *Helton v Allen* per Starke J, *Smith Bros v Madden* per Dixon J.

286 (footnotes omitted)

287 In pleading a defence of substantial truth, the First Respondent alleges that the Applicant sexually assaulted her. This is a very serious allegation. Therefore, I consider that the First Respondent must satisfy the Court of justification on the standard of proof established by the *Briginshaw* test.¹³⁸

288 As such, I consider I must look for clear and cogent evidence before finding the allegations of the First Respondent to be proved to my satisfaction.

289 The First Respondent stated that the criminal charges were withdrawn because the prosecution was not prepared to proceed with the case and that this could be distinguished from any finding of guilt or innocence. Moreover, she relied on the Applicant’s pleading wherein he did not deny sexually assaulting the First Respondent.

290 The First Respondent in her evidence and written closing submissions stated that the sexual assault comprised acts of the Applicant forcefully hugging and kissing her without her consent:

A. Yes, yes, your Honour, thank you so much. Your Honour,
my husband was dropped home by one of our friends at around
11 p.m. He was highly intoxicated. He could hardly
walk and talk. He straightaway went to sleep, being so
drunk. Shortly after that I started to get text
messages from Mr Sharma, inquiring about my husband's
condition or whether he had gone to sleep. He kept on

¹³⁶ *Fleming v Advertiser-News Weekend Publishing Co* (n 134) [180] quoting *Briginshaw* (n 135) 361–3.

¹³⁷ [1965] 112 CLR 517, 521.

¹³⁸ *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361-362.

talking about his influence ... and in between sentences he was repeatedly asking me if my husband had gone to sleep, and after I inquired as to why he was asking the same question over and over again, Mr Sharma replied because he wanted to see me. This came to me as a big shock and I could only reply 'What?'. To this he replied back by saying 'Yes, I want to meet you right now'. I politely replied to him, saying that 'You are really drunk and probably don't even know what you are writing, better going home and sleep'. He replied by saying that he knows what he is talking about and insisted that he comes to my house because he wanted to hug me. He kept on asking me to say yes or no, to which I said 'No', many times and he would reply back by saying that 'If you don't say "yes", then I will cut you off, cut you off, cut you off, and start ...'. I was very scared of continued threats from Mr Sharma and the fact that I was a ... in Australia, I did not want him to cause any sort of trouble for myself or my family. I had heard of rumours where he had caused some trouble in the recent past for an immigrant family. So I was hesitantly agreed and said 'Yes' and I was hoping that he would drive, only drive to the place where we lived and not come upstairs to our unit as all the neighbours were Indians ... at that time.

Okay. So ... balcony assuming that he would see and go back. Mr Sharma parked his car and started to walk up

the stairs and I got scared and ran inside, locking the door. He stood outside the locked door for a few minutes with creepy grin on his face. He could hardly stand up straight as he was so drunk. As some of the neighbours were finishing their taxi shifts and returning home. He got uncomfortable and instead of going back home, he started to bash the door, asking me to let him inside ... scared as to what my neighbours may think, I unlock the door and let him inside our house. As soon as I unlock the door, he pushed himself over me and started to hug and grope me. I went 'No' and started to cry and see me crying, he left our house and drove away.¹³⁹

291 The Applicant contended that the First Respondent's evidence as to the sexual assault was incoherent, inconsistent, and implausible.

292 Further, the Applicant submitted that the First Respondent was unreliable in that she had given various accounts of what occurred on 19 May 2014. For example, the First Respondent's pleaded case stated the sexual assault involved the Applicant coming into her home and forcefully hugging and kissing her. The charges by the police, however, related to one count of rape. This was not pleaded.

293 The Applicant maintained that the pleading referred to the Applicant coming into the First Respondent's home and forcefully hugging and kissing her. The Applicant submitted that this fell short of the grave and most serious imputation concerning a sexual assault.

294 Whilst I accept that forceful hugging and kissing is well short of rape, the unwelcome violation of a person attempting to force themselves on another person may still be considered a sexual assault. As such, I reject the Applicant's submission.

295 Section 56 of the Criminal Law Consolidation Act 1935 (SA) states:

¹³⁹ T561-3.

56—Indecent assault

- (1) A person who indecently assaults another is guilty of an offence.

Maximum penalty:

- (a) for a basic offence—imprisonment for 8 years;
- (b) for an aggravated offence—imprisonment for 10 years.

- (2) If the victim of the offence was at the time of the offence under the age of 14 years, the offence is an aggravated offence and it is unnecessary for the prosecution to establish that the defendant knew of, or was reckless as to, the aggravating factor.

296 The Applicant contended that the First Respondent's conduct after the alleged sexual assault is inconsistent with someone who had been sexually assaulted.

297 The Applicant's counsel took the First Respondent to a number of the Applicant's Facebook screen grabs¹⁴⁰ made shortly after the alleged sexual assault, in which the First Respondent made a number of positive statements.

298 Similarly, in September 2014 Mr Sachdeva utilised the First Respondent's mobile phone, contacted the Applicant via text message stating 'Hello, I need some help setting up the modem. If you have time, call me. Thanks'.

299 The Applicant submitted that a person who had been sexually assaulted would not continue to make such positive comments for approximately six months after the alleged sexual assault. The First Respondent conceded that she remained in contact with the Applicant until December 2014.¹⁴¹

300 Finally, the Applicant submitted that the earliest anything was done about the sexual assault was 17 November 2018 when the First Respondent reported the Incident to the police and on that occasion, there was no mention of rape.

301 The Applicant stated that when the proposition of rape was put to the First Respondent, her evidence was that there was 'no evidence to support the rape allegation'.¹⁴²

302 The Applicant submitted that this admission in open Court of having 'no evidence' should be viewed in circumstances where the First Respondent had made accusations of that nature, formalised it by reporting it to the police whereby charges were laid and the Applicant was taken into custody.

¹⁴⁰ See Exhibit A1 Tab 8.

¹⁴¹ T596, lines 1-2.

¹⁴² T615, lines 29-30.

303 Accordingly, the Applicant maintains that these are all matters that are
inconsistent with someone who has been sexually assaulted. As such the Court
should reject the First Respondent's plea of justification.

304 The First Respondent put a number of propositions to Mrs Sharma
about previous incidences of sexual assault involving the Applicant and other
women. These were not directly put to the Applicant in cross-examination and
therefore I do not give this evidence any weight.

305 The Second Respondent gave evidence about what occurred when she
attended the First Respondent's home on or about 18 November 2018.¹⁴³

306 The Second Respondent stated the First Respondent enacted the sexual
assault which gave rise to her suffering trauma by reliving the Incident such that
the First Respondent fell and blacked-out.¹⁴⁴

307 I consider that the Applicant's evidence on the topic of the Incident was
extremely vague and that he contradicted himself, particularly, with respect to
attending the party and drinking with Mr Sachdeva.

308 Whilst I accept that the Recording has little probative value, I do
consider that it is evidence that something happened on 19 May 2014 between the
Applicant and the First Respondent.

309 Having said that, I do not consider the First Respondent has discharged
the *Briginshaw* onus of proof to prove that the Incident occurred as pleaded. This
is on the basis of:

1. The inconsistent evidence of the First Respondent on the topic of
the Incident;
2. Having regard to the objective evidence after the Incident such as
the Facebook posts between the Applicant and the First Respondent
and the contact with Applicant to fix the modem; and
3. The inconsistency between the pleadings and the fact of the
accusation of rape made to the police.

310 Accordingly, I am not satisfied that the First Respondent has proven, to
the *Briginshaw* standard of proof on the balance of probabilities, the defence of
justification.

¹⁴³ T431, lines 10-38; T432, lines 1-38 and T433, lines 1-33.

¹⁴⁴ T432, lines 12-13.

Contextual Truth

311 Section 24 of the Act provides:¹⁴⁵

It is a defence to the publication of defamatory matter if the defendant proves that:

- (a) the matter carried, in addition to the defamatory imputations of which the plaintiff complains, one or more other imputations (*contextual imputations*) that are substantially true; and
- (b) the defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations.

312 In *Blake v John Fairfax Publications Pty Ltd*,¹⁴⁶ Levine J described the effect of the defence of contextual truth. His Honour said:¹⁴⁷

... It is to operate in circumstances where a publication conveys various imputations, substantially different from the other, but in respect of which the plaintiff elects to sue on one or some only. It entitles the defendant properly to defend the action by pleading the other imputations not sued upon, and justifying them to bring about a just result that otherwise an undeserving plaintiff, by reason of what was in fact published of that plaintiff, should not succeed.

313 For a plea of contextual truth, the First Respondent must establish that:

1. The separate and distinct contextual imputation or imputations conveyed in addition to the imputations pleaded and relied upon by the Applicant are substantially true; and
2. Because the contextual imputations are substantially true, the defamatory imputations pleaded and relied upon by the Applicant did not further harm his or her reputation.

314 The Applicant submitted that the First Respondent's plea of contextual truth must fail on the basis that the First Respondent had not identified any 'contextual imputation' alleged by the Video that was substantially true.

315 Accordingly, the Applicant submitted that the First Respondent had failed to establish the truth of any of the Applicant's pleaded imputations, nor had she established¹⁴⁸ the truth of any contextual imputation conveyed in the Video, which would preclude further harm being caused by the imputations.

316 The Applicant stated that even if the Court accepted the facts pleaded in paragraphs 4 to 13 and 19 of the First Respondent's Defence-Revision 1 to be the premise for a 'contextual imputation', those facts did not meet any of the

¹⁴⁵ Section 24 of the Act was significantly amended on 1 July 2021. However, it is the previous enactment which operates from 1 September 2013 to 30 June 2021 that applies and the terms of section 24 of the Act prior to its amendment that applies in this case.

¹⁴⁶ [2001] NSWSC 885.

¹⁴⁷ Ibid [12].

¹⁴⁸ To the requisite *Briginshaw* standard.

imputations pleaded in paragraph 17 of the Claim. Therefore, it cannot be said that the ‘truth’ of any such contextual imputation precludes further harm being caused by the defamatory imputations pleaded and relied upon by the Applicant.

317 I accept the Applicant’s submission that the First Respondent has failed to establish the truth of any of the Applicant’s pleaded imputations, nor has the First Respondent established to the *Briginshaw* onus of proof the truth of any contextual imputation conveyed by the Video that would preclude further harm being caused by the imputation pleaded at paragraph 17 of the Claim.

318 As such, the First Respondent’s defence of contextual truth is dismissed.

Damages

319 Damages are presumed to flow from a defamatory publication.¹⁴⁹

320 In determining the amount of damages to be awarded in any defamation proceedings the Court is to ensure that there is an appropriate and rational relationship between the harm sustained by the Applicant and the amount of damages awarded.¹⁵⁰ The damages are subject to the cap contained in s.33 of the Act, but the cap has no practical application in the present case.

321 Damages for non-economic loss are limited to an indexed maximum damages amount, although the Court can award more than the figure if the publication warrants an award of aggravated damages as set out in s.33 of the Act.

322 It is well-established that an assessment of damages for defamation serves three purposes; first to compensate the applicant for harm (whether as presumed or as demonstrated) to their reputation; second, to compensate for hurt to the applicant’s feelings; and third, to vindicate their reputation by showing the falsity of the allegations made against them.¹⁵¹

323 Lord Radcliffe observed in *Associated Newspapers Ltd v Dingle*:¹⁵²

A libel action is fundamentally an action to vindicate a man’s reputation on some point as to which he has been falsely defamed, and the damages awarded have to be regarded as demonstrative mark of vindication.¹⁵³

324 The Applicant does not claim damages for economic loss.

¹⁴⁹ *Ratcliffe v Evans* [1892] 2 QB 524, 528-30. *Readers Digest Services v Lamb* (1982) 150 CLR 500, 507.

¹⁵⁰ See s.32 of the Act.

¹⁵¹ *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 60.

¹⁵² [1964] AC 371.

¹⁵³ *Ibid* 396.

Extent of Publication

325 The quantum of damages will be affected by the gravity of the imputations, the extent of publication (including re-publications for which the Respondents are liable),¹⁵⁴ the damage to the Applicant's reputation and the injury or hurt suffered by the Applicant.

326 Whether an imputation is defamatory is ascertained by reference to general community standards albeit the defamatory imputation may have an especially adverse impact on the Applicant's reputation in the eyes of some group or class in the community that will increase the award of damages.¹⁵⁵

327 I have found that the publication was made to a very large audience. Based on the witness evidence, it is very likely that the audience was expanded by the ease with which a video published on an online messaging forum can be reproduced and further disseminated by others.

328 The extent of the publication was made more difficult to determine by the deliberate deleting of the First Respondent's WhatsApp. For the purpose of assessing damages, I find that the Video had been widely disseminated by the First Respondent.

329 I have found that the First Respondent sent the Video using WhatsApp to all the mobile numbers in her contacts list. This is a substantial publication.

330 I further accept the Applicant's submission that the Court should only have regard to the publications which occurred in Australia.¹⁵⁶ The Second du Plessis Report identified 751 Australian mobile numbers in the First Respondent's WhatsApp contact lists.¹⁵⁷

Gravity

331 The gravity of the imputations held to be conveyed and the extent of publication are the relevant factors in assessing damages related to harm to reputation.¹⁵⁸

332 The first imputation is a most serious imputation.

Damage to the Applicant's reputation

333 I have earlier in my judgment set out the Applicant's personal and professional reputation.

334 The Applicant is presumed to have a good reputation.

¹⁵⁴ *Toomey v Mirror Newspapers Ltd* (1985) 1 NSWLR 173, 183, *Belbin v McLean* [2004] QCA 181.

¹⁵⁵ *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500, 506-7.

¹⁵⁶ See *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575.

¹⁵⁷ Exhibit A4 Tab 10 at [2.4.2].

¹⁵⁸ *John Fairfax & Sons Ltd v Kelly* (1987) 8 NSWLR 131 at 141-2 McHugh JA.

335 The audience to whom the publication was made undoubtedly included
a number of people who had previous contact with the Applicant both
professionally and personally.

Extent and effect on the Applicant

336 The Applicant gave evidence as to his prior reputation and as the effect
that the publication of the Video had on him. The effect of the publication was that
he became emotional and depressed; particularly because of the number of people
who have approached him about it.¹⁵⁹

337 Consequently, the Applicant sought to withdraw from his
telecommunications business and disengaged from employees and clients. This
course of conduct was escalated by the fact that his employees had seen and were
talking about the Video. None of the Applicant's employees were called to give
evidence.

338 The Applicant's evidence was that prior to publication, he was a happy
man and actively social in his community. After publication however, he withdrew
from social and community events.

339 Mrs Sharma stated that the publication had a devastating effect on the
Applicant's demeanour and attitude to life. This extended to an immediate impact
on his business.

340 Mrs Sharma's evidence was that prior to the publication of the Video
the Applicant was a cheerful, funny, generous, and an emotionally stable man. This
all changed after the Video was circulated and the Applicant became depressed,
lost weight, and withdrew from the community. The publication of the Video
turned their lives to 'hell'.

341 The Applicant called a number of other witnesses to give evidence
about the effect of the Video on the Applicant's personality and disposition.

342 Mr Vasihst gave evidence that he saw the video and thought highly of
the Applicant. Prior to publication, he considered the Applicant a social, friendly
man. Mr Vasihst considered that after publication he observed the Applicant to
be upset. Further, he was aware that the Applicant had stopped socialising and was
depressed because everyone was saying negative things about him. In conclusion,
he stated that the Applicant was totally different after the Video.

343 I accept the evidence of Mr Vasihst as honest and truthful.

344 Ms Parekh noted she was aware people in the Indian community were
'gossiping' about the Applicant. She had known the Applicant for several years
and knew him as a good man who was happy, cheerful and had a high profile in

¹⁵⁹ T163, line 34.

the Indian community. After publication she gave evidence that the Video had a devastating and shattering effect on the Applicant. The Applicant was withdrawn and did not engage with the Indian community.

345 I accept the evidence of Ms Parekh as honest and truthful.

346 Mrs Sharma gave evidence of a significant amount of gossip about the Applicant after the publication of the Video. She had known the Applicant as someone highly regarded in the Indian community and was shocked to hear the gossip about the Applicant. She stated that the Applicant was a different person; he was depressed and sad most of the time because of the gossip and the taint to his reputation.

347 Ms Singh gave evidence that the Applicant, after the video, changed in the way he socialised and how he presented himself. Further Ms Singh stated the Applicant did withdraw from social functions.

348 The evidence of the lay witnesses was not substantially challenged by the First or Second Respondent. However, they noted that the Applicant was extremely selective in the witnesses he called to give evidence, namely, witnesses who would say what the Applicant wanted them to say.

349 In conclusion, I accepted each of the witnesses as to injury to the Applicant's feelings and damage to his reputation.

350 Whilst I have accepted the evidence of the witnesses as to the effect on the Applicant, I note that none of the witnesses make any statement to the effect that his/her own views of the Applicant, or the views of those whom they associate, have changed since the Video. It seems that none of the witnesses' opinions of the Applicant changed due to the Video.

Grapevine Effect

351 At paragraph 22 of his claim, the Applicant refers to the 'grapevine effect'.

352 In *Mickle v Farley*¹⁶⁰ Elkaim DCJ held that:

When defamatory publications are made on social media it is common knowledge that they spread....[t]heir evil lies in the grapevine effect that stems from the use of this type of communication.

353 In *Palmer Bruyn & Parker v Parsons*,¹⁶¹ Gummow J observed the grapevine effect did not operate in all cases without evidence in a particular case. He said:

¹⁶⁰ [2013] NSWDC 295 at [21].

¹⁶¹ (2001) 208 CLR 388, 416 [88].

The expression “grapevine effect” has been used as a metaphor to help explain the basis on which general damages may be recovered in defamation actions; the idea sought to be conveyed by the metaphor was expressed by Lord Atkin in *Ley v Hamilton* as follows:

It is precisely because the ‘real’ damage cannot be ascertained and established that the damages are at large. It is impossible to track the scandal, to know what quarters the poison may reach: it is impossible to weigh at all closely the compensation which will recompense a man or a woman for the insult offered or the pain of a false accusation.

The “grapevine effect” may provide the means by which a court may conclude that a given result was “natural and probable”. However, this will depend upon a variety of factors, such as the nature of the false statement and the circumstances in which it was published. The “grapevine effect” does not operate in all cases so as to establish that any republication is the “natural and probable” result of the original publication. This was what was meant by Heydon JA, when his Honour referred to the appellant’s submissions being put “as though the grapevine effect was some doctrine of the law, or phenomenon of life, operating independently of evidence”. As Heydon JA correctly identified, the appellant can point to no evidence that the “grapevine effect” operated in this case.

354 (citations omitted)

355 I accept the Applicant’s submission that the Court is entitled to consider the ‘grapevine effect’ in this case which increased the extent of publication.

356 I accept the lay witnesses’ evidence, particularly having regard to the tight-knit Indian community. The Applicant has therefore established that the extent of publication of the Video would have been impacted by the grapevine effect.

357 In *Smith v Dahlenburg*¹⁶² the Court awarded damages of \$210,000, which was inclusive of aggravated damages of \$10,000, for two letters sent to a relatively limited audience. However, it was recognised that the publication of both letters was impacted by the grapevine effect.

358 I have taken into account the potential for the grapevine effect in my assessment of damages.

Aggravated Damages

359 The power to award aggravated damages is not limited by s.33 of the Act if an award of aggravated damages is warranted in the circumstances.

360 Aggravated damages are compensatory and not punitive and are awarded to reflect conduct by the Respondents which aggravates the injury and increases the harm done to the Applicant. They may be awarded when the Respondents’ conduct of the defences (or other conduct at or after publication) is

¹⁶² [2008] VSC 557.

lacking in bona fides, improper or unjustifiable. This may include a failure to apologise where that is improper or unjustifiable.¹⁶³

361 In order to justify an award of aggravated damages, there must be a lack
of bona fides in the Respondent's conduct or it be improper or unjustifiable.¹⁶⁴

362 The Applicant and the First Respondent have a long personal history.
The evidence of the Applicant and Second Respondent is that they knew of each
other through the Indian Community and certain political activities but on a very
limited basis.

363 Accordingly, the Second Respondent submitted that she had no reason
to defame the Applicant and/or it was certainly not done with any malice.

364 The Applicant submitted that aggravated damages are appropriate
against the Second Respondent in that the Second Respondent did not attempt to
prove any of the imputations were true, or at best was recklessly indifferent as to
its truth or falsehood at the time the Video was published by the First
Respondent.¹⁶⁵ Further, given the deliberate destruction of evidence by the Second
Respondent, the Applicant is entitled to an award of aggravated damages.

365 The Applicant submitted that the First Respondent was liable for
aggravated damages on the basis that her defence of justification did not prove the
range of seriously defamatory imputations in her Video.

366 Further, her knowledge of the falsity of her defence established that her
conduct in publishing the video was improper, unjustified and lacking in bona
fides. This is further supported by the First Respondent's failure to comply with
Court Orders and efforts to destroy evidence.

367 Finally, the Applicant submitted that the First Respondent's case
included but was not limited to allegations of fraud which were not pleaded and a
number of other matters (such as rape) that were not put to the Applicant.

368 I am satisfied on balance that the actions of the First Respondent were
motivated by malice.

369 I am not satisfied on balance that the actions of the Second Respondent
were motivated by malice. The Second Respondent did not personally know the
Applicant (other than in political circles) and she is an advocate for women and in
particular, domestic and sexual violence. I find the Second Respondent did not act
with malice and was merely attempting to assist the First Respondent.

¹⁶³ *Duffy v Google Inc (No. 2)* [2015] SASC 206 at [81]-[83].

¹⁶⁴ *Triggell v Pheene* (1951) 82 CLR 497, 514.

¹⁶⁵ Patrick George, *Defamation Law in Australia* (3rd ed, Butterworths 2017) at [34.2] and [34.4].

370 The First and/or Second Respondent have not tendered any apology in
this matter.

371 Further, I do not consider any of the factors in mitigation of damages as
set out in s.36 of the Act to be relevant in this matter.

Conclusion as to damages

372 I regard the following matters as being particularly relevant to the
assessment.

373 First, the imputations in the Video are of a particularly grave kind. In
the present climate, the allegation of sexual assault, sexual predation and planning
a violent attack to frighten and intimidate the First Respondent into dropping her
claim are particularly serious. They are capable of causing great damage to the
Applicant's reputation and suggest that a significant award is warranted in order
to provide a public vindication of his reputation.

374 In *Cornes v The Ten Group Pty Ltd*,¹⁶⁶ Mrs Cornes, a married woman,
was awarded \$85,000 for a publication that she had sexual intercourse with another
person to whom she was not married. The Full Court upheld the award of damages.
The statement was made on a national network television show and to a large
audience.

375 In *Tassone v Kirkham*¹⁶⁷ the defendant sent an email from the plaintiff's
computer to a large number of people within the plaintiff's workplace, which
suggested that he was promiscuous and was prepared to act unprofessionally by
using his work email to solicit sexual relationships. The plaintiff was awarded
\$75,000 for non-economic loss includes aggravated damages.

376 I note that s.37 of the Act permits me to assess damages in a single sum
on findings several causes of action proved. I would therefore make an award to
cover all the imputations pleaded in this matter.

377 Finally, taking all relevant matters into account, including of course, the
necessity for any award of damages to also vindicate the Applicant and his
reputation, I assess general damages in the sum of \$50,000 against the First
Respondent and the Second Respondent and further aggravated damages against
the First Respondent in the sum of \$25,000.

Conclusion

378 For the foregoing reasons, the Applicant has established the imputations
and the First Respondent has not, on the *Briginshaw* onus of proof, proved the
defences of justification and contextual truth.

¹⁶⁶ [2011] SASC 104.

¹⁶⁷ [2014] SADC 134.

Orders

1. Judgment for the Applicant against the First and Second Respondents in the joint sum of \$50,000.
2. Judgment for the Applicant against the First Respondent for aggravated damages in the sum of \$25,000.
3. I will hear the parties as to interest and costs.

Annexure A

PAYAL: I have written down what I wanted to say. I haven't said anything so far, and because I'm busy fighting for justice today, but today, all of you have encouraged me, motivated me to come forward and say it all again. First of all, I don't owe anyone any explanation. I have said what I wanted to, but for everyone's ears, I'll say it again. I have been sexually assaulted by Gagan Sharma. I have been asked this question again and again, but why did I not raise this issue in last four years? My family and I were on student visa, and were not financially, socially, and mentally strong enough to speak up, and Gagan Sharma was dominating us, and few other family through his political contacts, and photos on Facebook. He made us feel vulnerable, and helpless, and threatened us that he will harm us and have his hooligan friends to attack us.

Since this sexual assault, my life have been badly impacted and has stopped. This has affected not only me, me and my personal relationship with my husband, but also, I have seen my children suffer. Being a mother of three, it has taken me all these years to gain strength to speak up. I just wanted to find comfort and peace by addressing this to Gargan Sharma and his wife so he can at least apologise for his inhuman act.

Being a civilised citizen, a formal phone call was made to Gargan Sharma's wife about us visiting them in person to discuss my grievance, so she invited us for an open conversation to her house. If she or any other family members of Gagan Sharma would have had an issue, they could have said, "No". Once we reached there, and the whole family had strange expressions, and were whispering something to each other. I openly mentioned the sexual assault incident on me from Gagan Sharma and said, "We have solid proof". The body language of Gagan Sharma's family changed all of a sudden. We were told I'm not the only woman saying this against Gagan Sharma, but we know how to deal with it.

Before we could say anything else, they detained us in the house and counter-attacked us by saying that they will call the police on us, letting us – letting you all know that being welcomed and being served water by the host is not considered trespassing. If you all think that we trespassed, get your facts right, please.

Now, the allegation of us entering the house and attacking them is false, as I was live streaming on Facebook, in fact. I have the right to file a complaint against Gagan Sharma's father-in-law and mother-in-law for detaining us in the house against our will. This action of theirs made me believe the fear and threaten that Gagan Sharma put in my whole family. Sitting there with my husband feeling kidnapped by Gagan Sharma's whole family, my heart of mother was very worried about my three kids back home.

Gagan Sharma's in-laws started making phone calls to have more people there. At one stage, I though Gagan Sharma has already taken me – my and my family's peace of mind. Now will his family kill us? For my protection, I had to go live on Facebook so that they will know the reality. I feel sad and disturbed by this typical victim blaming from my community. This is nothing new that you all are doing that, to support my culprit instead of getting into the reality, and understanding how much courage it takes for a woman to come forward and confirm the culprit, you all have ... commented and have taken sides.

I strongly condemn your actions, Facebook comments, your dummy Facebook profiles, and overreactions, without knowing the truth. Our intention was just a personal apology from Gagan Sharma so that I and my family can move on with our lives. I have strong support of my husband and children, and ... community members that understand about this between being a gentleman and a womaniser. I pray to God everyday that if Gagan Sharma have ever entered your house as a friend, hope your wife, your sister, and your daughter are safe. Your ... cannot break my courage and support. I will keep praying for

the safety of any female in your house, even if you are determined to defame me. Gagan Sharma has always threatened us by his political contacts with the Liberal party. Now I, the victim of sexual assault, call for my support and safety from the ... , especially