1978 *Present :* **Samarakoon, C. J., Weeraratne, J. and Sharvananda, J.**

THE INDEPENDENT NEWSPAPERS LIMITED, Defendant-Appellant

and

RONALD JOSEPH GODFREY DE MEL, Plaintiff-Respondent

S. C. 287/71 (F)—D. C. Colombo 69262/M

Defamation—Words per se defamatory of plaintiff—Presumption of animus injuriandi—Burden of negativing this on defence—How discharged—Defences to an action for defamation.

Retraction and apology made and pleaded—Whether absolute defence—Mitigation of damages.

Innuendo—Duty of trial Judge when innuendo pleaded—Award of damages—Circumstances when appellate Court will increase award of trial Judge.

Held: (1) That where in an action for defamation the plaintiff has established that the words are defamatory of him *per se* and/or by innuendo, *animus injuriandi* is presumed because a man is taken to intend the natural consequences of his act. Once presumed the burden is shifted to the defence and a defendant cannot discharge this burden by merely stating that in his own mind he had or could not have had an intention to injure. He can only do this by taking one of the specific defence known to Roman Dutch Law. The appellant in the present case, although he had in the District Court pleaded *bona fide* mistake as a defence, did not raise the issue nor make any attempt to establish it and he therefore failed to discharge the burden that the law cast upon him.

(2) That although there has been a retraction and apology by the newspaper concerned, an apology in itself is not an absolute defence nor a complete and sufficient recompense for the damage already caused. It may however be considered as a factor in mitigation.

(3) That in the circumstances of this case, the amount awarded against the two Sinhala newspapers of the appellant, namely the "Dawasa" and "Sawasa" was inadequate and should be increased.

Held further: That in the present case the learned trial Judge's answers of "not proved" to the issues based on the innuendo pleaded by the plaintiff could not stand as he had failed to consider whether these innuendoes were capable of being placed on the words complained of.

Cases referred to:

Fradd v. Jacquelin, (1882) 3 *Natal Law Reports* 144.

New Age Press Ltd. v. O'Keefe, (1947) 1 *S.A.L.R.* 311.

Cassidy v. Daily Mirror Newspaper Ltd., 141 *L.T.* 404; (1929) 2 *K.B.* 331; (1929) *All E.R. Rep.* 117; 45 *T.L.R.* 485.

Ramanathan v. Fernando, 6 *S.C.C.* 89.

Perera v. Pieris, 50 *N.L.R.* 145 (*P.C.*); 39 *C.L.W.* 42; (1949) *A.C.* 1; 64 *T.L.R.* 590.

Associated Newspapers of Ceylon Ltd. v. Gunasekera, 53 *N.L.R.* 481.

De Costa v. Times of Ceylon, 65 *N.L.R.* 217 (*P.C.*).

APPEAL from a judgment of the District Court, Colombo.

R. A. Kannangara, with *Varuna Basnayake* and *M. A. Bastiansz*, for the defendant-appellant.

C. Thiagalingam, Q.C. with *S. A. Parathalingam*, for the plaintiff-respondent.

Cur. adv. vult

March 9th, 1978. SAMARAKOON, C.J.

The defendant-appellant is the proprietor, printer and publisher of the newspapers—the "Sun" an English Daily, "Dawasa" and "Sawasa" two Sinhala publications. The "Sawasa" is published in the evening and the "Dawasa" in the morning. The plaintiff-respondent was at all relevant times a Member of Parliament, returned by the Devinuwara electorate in the deep South of the Island. After a brilliant academic career he was appointed to the Ceylon Civil Service in the year 1948, a service which, in the course of trial, was referred to as the Brahmin Caste of the Public Service and an exclusive group. As a member of this "Charmed circle" he held at various times responsible and high office in the Government Service. He resigned from the Civil Service even though he knew he would not get a pension by so resigning. He then took to politics. He stated that as he was by conviction a Socialist he joined the Sri Lanka Freedom Party which he claimed was at that time a Socialist Party working for the Common Man and the Working Class. He was first elected to the Parliament at a by-election in 1967 for the Devinuwara Electorate. He was re-elected from the same electorate at the General Election held in 1970.

On the 1st March, 1968, the appellants published in the "Sun" "Dawasa" and "Sawasa" a report concerning the respondent which he claims was defamatory of him and caused him intense pain of mind and humiliation. I am reproducing them verbatim as counsel for the appellant has sought to distinguish them and to argue that two of them are not defamatory of the respondent. The report in the "Sun" (P1) was published on page 3 under banner headlines—

"M.P. ordered to Pay Compensation"

It reads as follows:—

> "The M.P. for Devinuwara, Mr. Ronnie de Mel, has been ordered by the Panadura District Judge, Mr. M. A. M. Hussain, to pay Rs. 45,000 as compensation to three persons who were employed at Geekiyanakanda Estate, Matugama.

In this case, Mr. Ronnie de Mel was charged with having not paid compensation to the three employees, A. Savarimuttu, Thangappa and Velupillai, as ordered by the Industrial Court.

The case for the prosecution was that the three men were employed by Mr. Ronnie de Mel, the owner of the Geekiyanakanda Estate, Neboda, Matugama as watchers for the past 15 years. When their visas expired they asked for emoluments from the owner to leave the estate and go to India. Instead, he discontinued them from the service.

COMPLAINT

Subsequently, on a complaint, the Labour Department, Kalutara, inquired into the case and charged him before the Labour Tribunal.

Mr. de Mel contested the case. At the conclusion of the trial, he was ordered to pay Rs. 45,000 as compensation to the three employees.

He was later charged before the Panadura District Court by the Labour Department for neglecting the Labour Tribunal's order.

Mr. Navaratnarajah, Q.C., with Mr. Thiagalingam and Mr. Nimal Senanayake instructed by Mr. Ranjith Deeraratna appeared for Mr. Ronnie de Mel.

Mr. Alles, Crown Counsel, with the Assistant Commissioner of Labour, conducted the case."

The report in the "Dawasa" (P2) appeared on the front page under the heading—

"Ronnie has to pay compensation"

and is as follows :—

"The District Judge of Panadura, Mr. M. A. M. Hussein, yesterday ordered Mr. Ronnie de Mel, Member of Parliament for Devinuwara to pay damages in a sum of Rs. 45,560 to three employees who had served under him as estate workers.

The said order was made by the District Judge in the course of his judgment given in a case filed against Mr. Ronnie de Mel for neglecting to pay a sum ordered to be paid to three employees who worked on the Geekiyanakanda Estate belonging to Mr. De Mel."

The report in the "Sawasa" (P4) appeared on page 12 under the heading—

"Ronnie pays Rs. 45,560 as compensation to 3 dismissed employees"

and is as follows:—

"The District Judge of Panadura, Mr. M. A. M. Hussein, yesterday ordered Mr. Ronnie de Mel, Member of Parliament for Devinuwara to pay damages in a sum of Rs. 45,560 to three employees who had served under him as estate workers. The said order was made by the District Judge in the course of his judgment given in a case filed against Mr. Ronnie de Mel for neglecting to pay a sum ordered to be paid to three employees who worked on the Geekiyanakanda Estate belonging to Mr. De Mel.

This case had been filed by the Assistant Commissioner, Kalutara.

It was stated in the plaint that Savarimuttu, Thangappa and Velupillai had served for 15 years on the Geekiyanakanda Estate, Neboda which belongs to Mr. Ronnie de Mel, Member of Parliament for Devinuwara and that, when they asked Mr. De Mel for money to go to India as the period allowed by the visas for their stay in Ceylon had expired, instead of giving money they were dismissed from service.

Later, the Labour Department held an inquiry into this matter and the Commissioner of Labour, Mr. Lincoln Abeyweera, ordered that the three employees be paid Rs. 45,560 but as the respondent Mr. De Mel had failed to comply with the said order this case had been filed against Mr. De Mel in the District Court of Panadura by the Assistant Commissioner of Labour, Kalutara.

The Assistant Commissioner of Labour with Mr. Alles, Crown Counsel preferred the plaint while Mr. P. Navaratnarajah, Queen's Counsel with Messrs. Pogalingam, Ranjit Deeraratne and Nimal Senanayake, Advocates appeared for the respondent Mr. Ronnie de Mel."

Soon thereafter the appellant realised that the publications were false, had no factual basis whatsoever, and that no proceedings had been instituted against the respondent in any Court in the Island. On the 4th March, 1968, the appellant published in each of the three newspapers a correction, stating *inter alia* that each of the reports was "totally false", there was "no truth whatsoever" in the news report, and there never was any charge framed against the appellant in any Court. The "Sun" apologised to the appellant "for any embarrassment, inconvenience or pain of mind caused to him". The "Dawasa" apologised "for the insult, embarrassment and pain of mind caused to him" and the "Sawasa" apologised "if any inconvenience, embarrassment or pain of mind have been caused to him". Nevertheless the respondent instituted action against the appellant pleading that the said three reports were defamatory of him *per se* and by innuendo. He claimed a total sum of Rs. 100,000 as damages. The appellant filed answer admitting the publications but stated that the words complained of in each of them were "published by error, in the ordinary course of business, in the mistaken, but *bona fide* belief that they were a true and accurate report of proceedings had in the District Court of Panadura". The appellants also pleaded the above-mentioned retractions and apologies which were reiterated on 8th April, 1968. After a lengthy trial the learned District Judge held that each of the reports was *per se* defamatory and awarded a total sum of Rs. 25,000 as damages. The appellant appeals against this finding and award; and the respondent has filed a cross-appeal complaining that the sum awarded is woefully inadequate. These are the salient facts of the case.

I should like to deal first with the learned Judge's answers to issues 5, 10 and 15 as "Not proved" although he has answered issue 17 in the affirmative. They raised by way of issue the

insinuation set out in paragraphs 6, 10 and 14 respectively. Each of the paragraphs raises the identical innuendos as follows :—

" (*a*) That the plaintiff does not pay the legitimate dues of his employees.

(*b*) That the plaintiff who is a Member of Parliament himself violates the laws of the land.

(*c*) That the plaintiff who is a Member of Parliament does not carry out the lawful orders of the Labour Courts and other Labour Authorities.

(*d*) That the plaintiff discontinues his employees merely because they ask for their emoluments.

(*e*) That the plaintiff does not pay the emoluments of his employees.

(*f*) That the plaintiff was charged before the Labour Tribunal inasmuch as he had violated the Labour Laws of the country.

(*g*) That the plaintiff unjustifiably contested the claims of his employees.

(*h*) That the plaintiff was charged before the District Court for violating lawful orders.

(*i*) That in all the circumstances the plaintiff who is a Member of Parliament is not honest and straightforward in his dealings with his employees and with the Labour Authorities. "

When a plaintiff relies on words which he pleads are defamatory *per se* it seems unnecessary to plead an innuendo. But it is usual to plead innuendos in such cases " to bring out the full significance of the words " in order to point the sting of the imputation and also to show the full extent of the damage caused —*New Age Press Ltd. v. O'Keefe* (1947) 1 S.A.L.R. 311. An innuendo is a particular construction which the plaintiff places on the words complained of to show that they could be understood

in that particular sense. The first question then is: Are the words reasonably capable of the meaning attached to them, with or without the allegation of special circumstances? This is a question of law to be decided by the Judge. *Ramanathan v. Ferguson,* 6 S.C.C. 89 at 90. "As a matter of law, then, the question is whether the words complained of, together with the facts set out in the summons or declaration, are reasonably susceptible of the innuendo placed on them. In other words the innuendo must be justified, i.e. made out by the words used." *The Law of Defamation in South Africa by Nathan,* page 41. It was then primarily the duty of the learned Judge to consider whether the innuendos pleaded in paragraphs 6, 10 and 14 were capable of being placed on the respective libels pleaded in the plaint. This he has not done. I hold that all the innuendos, except innuendo (*e*), are capable of being placed on the words used in P1, P2 and P4. Innuendo (*e*) is *prima facie* applicable only to P1. Issue 17 (*a*) and must be answered accordingly.

Counsel for tthe appellants whilst conceding that the report in the "Sun" P1 was defamatory, *per se* because of the use of the word "emoluments" argued that the reports in the "Dawasa" (P2) and "Sawasa" (P4) were not defamatory *per se* because they each used the word (මුදල්) "money". One must however look at the entire reports and take the word "money" (මුදල්) in its context. It is stated that the Commissioner of Labour ordered payment of this money, and that order being ignored, action was instituted in the District Court of Panadura and the Judge of that Court ordered the payment. This clearly indicates that the "money" was legally due to the labourers, and the non-payment of such dues was sought to be enforced through the District Court of Panadura. These facts clearly make the reports P2 and P4 defamatory *per se.*

The learned District Judge in rejecting the defence stated that the respondent made no "attempt to remove, or displace the presumption of *animus injuriandi* by any of the accepted defences in actions of this nature". Counsel for the appellant demurred stating that this was a concept of the English Law alien to the Roman Dutch Law "as under the latter", he stated, "the

presumption of *animus injuriandi* could be displaced by any evidence which on (*sic*) probability showed that the intention to injure was absent." Asked to clarify, he contended that proof of absence of *animus injuriandi* simpliciter absolved the defendant from liability. This being the Roman Dutch Law he stated the learned Judge could have found absence of *animus* if he directed his mind to the following facts :—

I quote him :—

" (*a*) The news item was a complete false account of a non-existent Court case. It is inconceivable that any newspaper would have concocted a non-existent Court case. The falsity of the report would be exposed in a matter of days, leading to the complete discomfiture embarrassment and culpability of the paper."

"(*b*) It is the only unchallenged evidence in this case that the news item appeared in the 'Observer' of the 29th February and was copied from it into the 1st March editions of the 'Sun', 'Davasa' and 'Savasa'. Abeywickreme was called for purpose of producing D4. During his cross-examination it was elicited by Court that one of the reporters had copied the articles from the 'Ceylon Observer' and sent it to the News Desk. Had it been anything but the report of a Court case there would be inadvertence. But if a prominent legal luminary of Hulftsdorp was fooled by the apparent authenticity of the report how could one blame a reporter."

" (*c*) When the matter was brought to the notice of the defendant a full and complete retraction and an apology was published in banner headlines on page 1 of the papers of the 4th March."

" (*d*) The defendant further offered to publish anything the plaintiff wanted but the offer was ignored. This must be regarded as an admission that the Plaintiff knew

that the harm done to his good name had been undone without any further publicity."

I cannot agree with this contention. All injurious words are presumed to be false and newspapers have been known to concoct non-existent facts. Unfortunately too many readers are inclined to accept newspaper reports without question. It is wrong to say that evidence of copy from the "Observer" was unchallenged. Abeywickreme, the sole witness for the defence stated that "it had been copied from a report which appeared in the "Ceylon Observer", but there was no proof of this fact. The "Observer" was not produced. The learned Judge's affirmative answer to issues 2, 7 and 12 that these reports were fabricated by the appellant means that the evidence of Abeywickreme has been rejected. Retraction and offer to publish further, as set out in (*d*) above, is the normal conduct of a newspaper when it finds that what it believed to be true has turned out to be false. In any event how does one prove the absence of *animus injuriandi* simpliciter ? It is a mental element and cannot be proved subjectively. The Roman Dutch Law therefore looks at it objectively. When the plaintiff has established that the words are defamatory of him *per se* and/or by innuendo *animus injuriandi* is presumed because a man is taken to intend the natural consequences of his act. "*Animus injuriandi* being a state of mind has in the generality of cases to be inferred from the words and the occasion on which and the context and circumstances in which they are used." *De Costa v. Times of Ceylon,* 65 N.L.R. 217 P.C. at 224. *Fradd v. Jacquelin,* (1882) 3 Natal Reports 144, *Perera v. Peiris,* 50 N.L.R. 145, *Associated Newspapers of Ceylon Ltd. v. Gunasekera,* 53 N.L.R. 481. Once presumed the burden of rebutting the presumption is shifted to the defence. He cannot do this by merely stating that in his own mind he had or could not have had in intention to injure. *Cassidy v. Daily Mirror Newspapers Ltd.* 141 L.T. 404 at 410. He can only do this by one of the specific defences known to the Roman Dutch Law. (Law of Defamation in South Africa by Nathan, page 87). "In Roman Dutch Law *animus injuriandi* is an essential element in proceedings for defamation. Where the words used are defama-

tory of the complainant, the burden of negativing *animus injuriandi* rests upon the defendant. The course of development of Roman Dutch Law in Ceylon has, put broadly, been to recognise as defences those matters which under the inapt name of privilege and the apt name of fair comment have in the course of the history of the common law come to be recognised as affording defences to proceedings for defamation. But it must be emphasised that those defences or, more accurately, the principles which underlie them, find their technical setting in Roman Dutch Law as matters relevant to negativing *animus injuriandi*. In that setting they are perhaps capable of a wider scope than that accorded to them by the common law." per Lord Uthwatt in *Perera v. Pieris*, 50 N.L.R. 145 at 158. Counsel for the appellant stated that the Roman Dutch Law does not restrict the defendant to the four defences referred to by the Privy Council in this case. There are others. Nathan refers also to insanity, minority, jest, rixa and mistake. Absence of *animus injuriandi* simpliciter is not one of the defences mentioned. It is interesting to note that the appellant, although it pleaded *bona fide* mistake as its defence, made no attempt to establish it. In fact no issue was raised in the District Court by the appellant on this plea. In appeal counsel contended that the newspapers were victims of a hoax but there was no evidence led to support this. The appellant has failed to discharge the burden that the law cast upon it.

The learned Judge in awarding damages has assessed Rs. 10,000 for the "Sun", Rs. 10,000 for the "Dawasa" and Rs. 5,000 for the "Sawasa". The appellant states that there was a prompt and complete retraction. Such there was. But it is quite a different thing to say that no damages could be awarded. An apology is not in itself an absolute defence nor is it a complete and sufficient recompense for damage already caused. It may however be considered as a factor in mitigation. The "Sun" and "Dawasa" carried unqualified apologies but the "Sawasa" qualified its apology by prefacing it with the word "if". The learned Judge has agreed with Dr. Colvin R. de Silva "that some mud would stick." Neither the witness nor the Judge adduced reasons for

this opinion which must necessarily be based on a rejection of the unqualified apology. It would be more correct to state that some hurt and pain of mind would linger even after the retraction. The respondent is a public man and a member of the country's legislature. He has sacrificed a promising career in the State Service to serve the people in the way he thought best. The learned Judge has characterised him as a person of integrity and high principles. Such a man has been defamed by fabrications. The "Sun" being an English newspaper reaches a small but influential section of the public. The respondent's uncontradicted evidence was that the "Dawasa" was popular in his electorate, Devinuwara, and that it was extremely popular in the South. The publications in the "Dawasa and "Sawasa" therefore succeeded in reaching a reader and an area which would hurt the respondent most. The respondent has filed cross-objections against the quantum of damages awarded to him. In my view the amount awarded is inadequate. While not interfering with the award of Rs. 10,000 in respect of the "Sun" I would increase the award in respect of the "Dawasa" to Rs 25,000 and the "Sawasa" to Rs. 20,000. In the result I award the respondent a total sum of Rs. 55,000 without costs of appeal. The defendant-appellant's appeal is dismissed with costs.

WEERARATNE, J.—I agree.

SHARVANANDA, J.—I agree.

Appeal dismissed.

Award of damages enhanced on cross-appeal of plaintiff-respondent.