SINHA RATNATUNGA

v.

THE STATE

COURT OF APPEAL
HECTOR YAPA, J. (P/CA)
KULATILAKA,, J.
C.A. 80/97
HC COLOMBO 7397/95
FEBRUARY 8, 9, 14, 28, 2000
MARCH 1, 9, 22, 2000
MAY 4, 5, 9, 10, 15, 16, 24, 29, 31, 2000
JUNE 6, 22, 2000
JULY 19, 20, 2000

Criminal Defamation - Publication - Defamatory Statements - Intention or knowledge to defame - Liability of the Editor - Penal Code S. 479, S. 480, Sri Lanka Press Council Law No. 5 of 1973 - S. 14, S. 15, Purpose of Construing Words - Relevant Factor - Burden of proof - Privilege of disclosing source - Tests of probability and improbabuility - Testimonial trustworthiness - Verdict/reasons not given forthwith - Criminal Procedure Code S. 200, - S. 203, S. 278 - Evidence Ordinance S. 114/ (g)

The accused-appellant Editor of the Sunday Times Newspaper was indicted on two counts under S. 480 Penal Code and under S. 479 Penal Code, read with S. 15 of the Sri Lanka Press Council Law. The party defamed was Her Excellency the President of Sri Lanka. The accused-appellant was found guilty on both counts. On appeal it was contended that :

(i) the Trial Judge has misdirected himself with regard to the contents of the alleged publication;

(ii) that the trial Judge failed to consider the article in question with an open mind from the point of view of the reasonable reader;

(iii) that, the trial Judge failed to consider the article as it appeared in the publication, by paraphrasing the article and omitting the word "party" and thereby sought to examine a different article;

(iv) that the trial Judge has prejudged the issue.

Held :

(i) It is settled law that a statement may be defamatory even though the readers do not believe it to be true.

(ii) At the first glance of the article it could be said without any measure of doubt that the article in question is certainly not complimentary of H.E The President of this country.

(iii) In evaluating defamatory material law does not apply rules of construction which are used for the interpretation of a contract or a will.

"If we take the ordinary man as our guide then we must accept a certain amount of loose thinking. The ordinary man does not formulate reasons in his own mind. He gets a general impression. The publishers of newspapers must know the habits of mind of their readers and there is no injustice in holding them liable if readers, behaving as they normally do, honestly reach conclusions which they might be expected to reach."

(iv) The meaning intended by the writer or the publisher may not be very relevant for the purpose of construing the words in any article. The relevant factor is how would a reasonable man may have understood such words.

(v) The Penal Code makes the requisite criminal intention or knowledge an additional ingredient of the offence of defamation and the burden of proving it is on the prosecution.

(vi) What is necessary to be considered is whether the words in the article has the potential to convey a defamatory meaning to an average reader. Therefore it is unnecessary to show that the reputation of H.E. the President has infact been injuriously affected.

(vii) The trial Judge has sought to pinpoint to the main contents in the article, even if the word "party" was included in paraphrasing it would not have made any difference since no other guests were mentioned in the article.

(viii) A free press must be a responsible press. The power of the press is great. It must not abuse its power. If a news paper should act irresponsibly, then it forfeits its claim to protect its source of information. In this case it would appear that the accused - appellant did not have the privilege even to refuse to disclose

the source of information for the reason that the contents of the article was false. Further it would appear that S. 114(g) of the Evidence Ordinance would apply.

Held further :

(1) The accused- appellant's position that he had written three paragraphs only in the gossip column without bothering to read the contents of this article, that appeared before and after the three paragraphs he wrote in the gossip column is unacceptable. This is not the conduct of a reasonable person, when applying the much hallowed test of probability and improbability.

(2) Tale-bearers are as bad as tale-makers. There is clear evidence from the accused-appelant that he being the Editor of the Newspaper he had the authority to refuse the publication of any Article in the newspaper.

(3) Generally the intention of a person is something that is in his mind and therefore it has to be inferred from the words used, for there being no other criteria. Therefore when words and phrases used are prima facie or per se defamatory as in this case, the intention has to be presumed on the face of the principle 'that a man intends the natural and probable consequences of his act.'

(4) When it is established that the defamatory material has been published in the newspaper, where the accused appellant is the Editor, he is deemed guilty of the offence 'unless he could bring himself under anyone of the two defences available i.e. by proving that the offence in question was committed without his knowledge or that he exercised all due diligence to prevent the committing of the offence.

(5) Despite the large volume of evidence to be considered, the trial Judge with commendable speed has delivered, his verdict giving reasons. Provisions of S. 203 CPC are directory and not mandatory. This is a procedural objection that has been imposed on the court and its non compliance would not affect the individuals rights unless such compliance occasions a failure of justice.

Held further :

(1) In terms of the proviso to Section 14 Press Council Law which says that "No such person shall be guilty of the offence..... if

he proves that the offence was committed without his knowledge on a balance of probability." The submission that the accused-appellant did not have the necessary knowledge cannot hold good for the reason that the Editor of a newspaper will be guilty of an offence under S. 14 read with S. 15. What the accused-appellant intended is not material, but what matters is whether in the eyes of the right thinking members of the society the material published by the accused-appellant has the capacity to defame H.E The President.

2. In order to get relief under the provisions of the Press Council Law the accused-appellant has to prove on a balance of probability that the publication was without his knowledge, since there would not have been the commission of any offence had there been no publication in the newspaper.

Per Yapa J., (P/CA)

"What the press must do is to make us wiser, fuller, surer, and sweeter than we are. The press should not think they are free to invade the privacy of individuals in the exercise of the constitutional right to freedom of speech and expression merely because the right to privacy is not declared a fundamental right of the individual."

Per Yapa J., (P/CA)

"The law of defamation both civil and criminal is also geared to uphold the human beings rights to human dignity by placing controls on the freedom of speech and expression. The press should not seek under the cover of exercising its freedom or speech and expression make unwarranted incursions into the private domain of individuals and thereby destroy his right to privacy.

Public figures are no exceptions. Even a public figure is entitled for a reasonable measure of privacy."

Per Yapa J., (P/CA)

"In this instance it is really irresponsible conduct on the part of the press misusing its freedom of speech and expession to injure anothers reputation or indulge in what is called, character assassination.

APPEAL from the Judgment of the High Court of Colombo.

Cases referred to :

1. *Rubber Improvement Ltd. vs. Daily Telegraph Ltd.*, 1964 AC at 234, 258.
2. *Morgan vs. Odhams Press Ltd.*, 1971 2 ALL ER 1156, 1163.
3. *Cassidy vs. Daily Mirror Newspaper Ltd.*, 1929 2 KB 331 at 354.
4. *Vaikunthavasan vs. The Queen* - 56 NLR 102.
5. *Hough vs. London Express Newspaper Ltd.*, 1940 2 KB 507 at 516.
6. *British Steel Corporation vs. Granada Television Ltd.*, 1980 3 WLR 774 at 805.
7. *Hird vs. Wood.*
8. *Byrne vs. Deane* - 1937 1 KB 818 at 835.
9. *R vs. Lucas* - 1981 2 All ER 1008 at 1011.
10. *Dayaratne vs. Bowie* - 65 NLR 499 at 500.
11. *Anura Shantha alias Priyantha and another vs. A.G.* 1999 - 1 SLR 299.

Tilak Marapana, P.C., with S.L. Gunasekera, D. Weerasuriya, Nalin Ladduwahetti, Ronald Perera, D. Jayanetti for Accused Appellant.

Rienzi Arsekularatne P.C., Addl. S.G., B. Aluvihare, S.S.C., Ransiri Fernando, S.S.C., Gihan Kulatunga, S.C. for Attorney General.

R.I. Obeysekera, P.C. with W. Wickremaratne, P.C., Ashley Herath, A.W. Yusuf, U. Senanayake and D. Pathiraja for the aggrieved party.

Cur. adv. vult.

May 12, 2000.

HECTOR YAPA, J., PCA.

The accused-appellant who is the Editor of the Sunday Times Newspaper was indicted before the High Court of Colombo, under two counts namely:-

(1) That you did by a publication in the Sunday Times Newspaper of 19th February 1995, containing the words that were intended to be read, namely, the following words that appeared in the said newapaper under the heading "Anura: Sootin says courting days are here":-

"Therefore, lets start at the top, about a party graced by none other than Her Excellency the President, Chandrika Kumaratunga. The occasion was the birthday party of Liberal Party National List M.P. Asitha Perera (Well Mudliyar Chanaka - how?). The place was Mr. Perera's permanent suite at the 5-star Lanka Oberoi. But this time, the President was more circumspect about her appearance and used the rear entrance of the hotel, watched by a phalanx of security guards, and myself."

"She spent about 90 minutes at the party, from about 12.30 in the heat of the silent night until 2.00 a.m. and, as for what she ate, we assure you; it was not food from the Hilton. The reading public now has a fair idea of it's first citizen's epicurean tastes. But what of her estranged brother?",

Published such imputation regarding Her Excellency the President of the Democratic Socialist Republic of Sri Lanka, Chandrika Bandaranaike Kumaratunga, with intent to harm her reputation or while knowing or having reason to believe that such imputation would harm her reputation and that you have thereby committed an offence punishable under Section 480 of the Penal Code.

(2) In the alternative to the first count that the said imputation referred to above (count 1) concerning Her Excellency the President Chandrika Bandaranaike Kumaratunga was published by a person in the Sunday Times Newspaper of 19th February, 1995, and that the person who published the said imputation with the intent to harm her reputation or while knowing or having reason to believe that such imputation would harm her reputation and thereby committed an offence punishable under Section 479 of the Penal Code read with Section 15 of the Sri Lanka Press Council Law No. 5 of 1973 and that you being the Editor of the said newspaper has therefore committed an offence punishable under Section 15 read with Section 14 of the Press Council Law.

After trial the learned High Court Judge found the accused-appellant guilty on both counts in the indictment and thereafter he imposed the following sentences. On the 1st count the accused-appellant was sentenced to a term of 12 months simple imprisonment which was suspended for a period of 7 years and to a fine of Rs. 7,500/= with a default term of 4 months simple imprisonment. On the 2nd count he was sentenced to a term of 6 months simple imprisonment which was suspended for a period of 7 years and to a fine of Rs. 2,500/= with a default term of 3 months simple imprisonment. The present appeal is against the said conviction and sentence.

At the trial the prosecution led the evidence of Ranjith Wijewardana, Asitha Perera, Simon Perera, Davin Wimalaratne and Sub Inspector Waidyasekara. According to Ranjith Wijewardana the proprietor of the Sunday Times Newspaper, the accused-appellant was the editor of this paper since 1990. In terms of the declaration made by him under the Sri Lanka Press Council Law No. 5 of 1973, for the year 1995, produced marked P1 he had given the name and address of the accused-appellant as the editor of the Sunday Times Newspaper. He stated that the accused-appellant was responsible for the news that were published in the said newspaper and admitted that in the Sunday Times Newspaper dated 19.02.1995 at Page 9, an article under the caption "Anura: Sootin says courting days are here" had appeared. He was unable to say as to who wrote this article but the accused-appellant as the editor of the Sunday Times Newspaper was responsible for this article. A copy of the document in which information was furnished by him under Section 2 of the Newspapers Ordinance to the Department of National Archives was produced marked P2, and the Sunday Times Newspaper dated 19.02.1995 was produced marked P3. The relevant article appearing in the said paper (Provincial Edition) was produced marked P3(a) (Later in the proceedings the said article which appeared in the city edition

was marked P4 (a)). This witness testified that the material referred to in P3(a) - P4(a) was false and if he knew that it was so, he would not have permitted this article to be published. At the domestic inquiry that was conducted in relation to this matter it was found that Her Excellency the President had not attended the said birthday party. He further said that even though it is the normal practice for his newspaper to express regret when any error of this nature was committed by his Newspaper, in this instance this practice had not been followed by the editor. Witness admitted that the material contained in the article in question was disrespectful of the President. Finally when the Court questioned the witness as to whether the accused-appellant did not know about the said article (P3(a) - P4(a)) that was published in his paper (P3) he said that it was difficult for him to answer this question.

Asitha Perera in his evidence stated that a Japanese friend permitted him the use of his private suite at Oberoi Hotel for his birthday party held on 05.02.1995. He had about six guests and the party started roughly at about 8.30 p.m. and was over by about 11.30 p.m. or 12.00 mid night. Thereafter he also left the hotel and spent the night at his residence No. 11, Police Park, Colombo 5. The witness said that Her Excellency the President did not attend the party as she was not invited and therefore if someone said that Her Excellency attended this party, it was a diabolical lie. According to him the party held on 05.02.1995 was the only instance he ever had a party at Oberoi Hotel. Subsequently when he read in the Sunday Times Newspaper (P3) this article (P3(a) - P4(a)) which carried the story that Her Excellency the President had been present at his birthday party, he got the impression that it was an attempt to sling mud at the President. Simon Perera, Assistant Commissioner Sri Lanka Press Council, testified that under the Press Council law, No. 5 of 1973 there is a requirement to furnish information relating to a Newspaper. According to him the document marked P1, related to the Wijaya Newspaper where the printer of the Newspaper is referred to as the Wijaya

Newspapers (Pvt) Ltd. and the editor's name is given as Sinha Ratnatunga. Further there is a requirement for the printer of this paper to send the Newspaper published by the printer within 24 hours after publication to the Press Commissioner and accordingly he had received the Sunday Times Newspaper dated 19.02.1995 (P3) on 20.02.1995. He admitted that the C.I.D. questioned him about the article marked P3(a) - P4(a) which appeared in the Sunday Times Newspaper marked P3. Davin Wimalaratne, Director National Archives stated in his evidence that in terms of the Newspapers Ordinance there is a requirement for a Newspaper Company to send a certified copy of the newspaper with an additional copy on the day after the publication of the Newspaper to the Archives. According to the information set out in the document marked P2, Sunday Times Newspaper has been registered and this declaration was received by him on 13.06.1995. He also received a certified copy of the Sunday Times Newspaper dated 19.02.1995 with another copy. This paper had carried the article marked P3(a) - P4(a) concerning a birthday party attended by Her Excellency the President. He further said that he made a statement to the C.I.D. regard to this matter. Sub Inspector Waidyasekera of the C.I.D. said that, consequent to a complaint made by Her Excellency the President on 21.02.1995, concerning an article which had appeared in the Sunday Times Newspaper of 19.02.1995, he proceeded to the office of the Wijaya Newspapers Limited with A.S.P. Guruge on 22.02.1995, in order to trace the printing plate relating to the article in question. In this office he was able to trace the printing plate which was produced marked P7, relating to page 9 which carried the said article in the Sunday Times Newspaper of 19.02.1995. He further said that they met the accused-appellant and his statement was later recorded at the C.I.D. office. According to this witness he was unable to trace the manuscript of the said article and also failed to get at the person who wrote the article in question even though he had questioned the accused-appellant. After his evidence the prosecution case was closed leading in evidence the documents marked P1 to P7.

After the close of the prosecution case learned Senior Counsel for the defence made an application to Court in terms of Section 200(1) of the Code of Criminal Procedure Act, No. 15 of 1979, and moved for an acquittal of the accused-appellant on the basis that the charges in the indictment had not been established. Learned High Court Judge however by his order dated 23.05.1996 decided that there were grounds for proceeding with the trial and called upon the accused-appellant for his defence. Thereafter the accused-appellant had sought to canvass the said order of the learned High Court Judge dated 23.05.1996 by way of revision in the Court of Appeal. The accused-appellant was unsuccessful in the Court of Appeal, in that the Court refused to issue notice stating that the accused-appellant had not made out a case. Thereafter the accused-appellant sought to challenge the said order of the Court of Appeal refusing notice, in the Supreme Court by way of special leave to appeal. However the Supreme Court by order dated 22.07.1996 refused his application for special leave to appeal.

Thereafter the accused-appellant gave evidence in his defence and called several witnesses on his behalf. However he did not invoke anyone of the ten (10) defences available to him under Section 479 of the Penal Code. Accused-appellant took up two main positions in his defence. Firstly, that the article in question P3 (a) - P4 (a) was not defamatory in that the words were harmless and did not in any way reflect on the character of Her Excellency the President. Secondly, that he was not the writer of the article in question. Nevertheless he refused to divulge the name of the writer. With regard to the publication of the article, even though he took up various contradictory and inconsistent positions, it would appear that he had virtually admitted having seen the article before the publication. The other witnesses were called by the accused-appellant to show that the article in question was not defamatory in their view. However in cross - examination some of these witness admitted the possibility that some reasonable right thinking persons would have considered the article in question to bear defamatory

meaning. It was also the evidence of some of these witnesses that those who considered the article to be defamatory of the President could not be treated as being reasonable or fair minded persons. It is to be observed that opinion evidence is irrelevant in these proceedings. Hence at one stage, the Court had to make an order refusing the defence from calling any more witnesses to testify to the question whether the article in question (P3(a) - P4 (a)) was defamatory or not.

At the hearing of this appeal it was submitted by learned Counsel for the accused-appellant that the learned trial Judge has misdirected himself with regard to the contents of the alleged publication and thereby arrived at a wrong conclusion against the accused-appellant namely, that the article in question was defamatory. Learned Counsel further contended that there was a failure on the part of the trial Judge to consider the article in question with an open mind from the point of view of the reasonable reader. Counsel submitted that meanings of the phrases such as "more circumspect", "rear entrance", "in the heat of the silent night" and "epicurean tastes" were over exaggerated by the High Court Judge to give a sinister meaning. Further learned trial Judge has failed to consider the article as it appeared in the publication by paraphrasing the article and omitting the word "party", and thereby sought to examine a different article. He contended that by paraphrasing the article the trial Judge has given a distorted version to the article and has concluded that the President has gone to the hotel for an immoral purpose. It was also suggested by Counsel that the trial Judge has prejudged the issue by holding that the article in question was defamatory in his preliminary order dated 23.05.1996 and that when he decided the article to be defamatory in his final judgment dated 01.07.1997 he has considered additional material to hold that the article in question was defamatory.

One important question to be decided in this case, is whether the article in question is defamatory or not, in terms of the Penal Code. A defamatory statement may be referred to as

one which has a tendency to injure the reputation of a person. In other words as a result of the defamatory statement the ordinary, reasonable or right thinking members of public would regard the person to whom the defamatory statement is referred to, with feelings of hatred, contempt, ridicule or disrespect. The test is objective and therefore the person responsible for the defamatory statement cannot be heard to say that he did not intend the statement to be defamatory or that it was uttered in jest. Intention to harm has to be gathered from the words used applying the reasonable man's test. Further the tendency to injure or lower the reputation of the person to whom the defamatory statement is directed at, would be sufficient, even though the persons who read the defamatory statement may not believe it or may even consider it to be untrue. Therefore it is settled law that a statement may be defamatory even though the readers do not believe it to be true.

The article that appeared in the relevant issues of the Sunday Times Newspaper carried the following words under the heading "Anura : Sootin says courting days are here." "Therefore, lets start at the top, about a party graced by none other than Her Excellency the President, Chandrika Kumaratunga. The occasion was the birthday party of Liberal Party National List M.P. Asitha Perera (Well Muttiyar Chanaka - how?). The place was Mr. Perera's permanent suite at the 5-star Lanka Oberoi. But this time, the President was more circumspect about her appearance and used the rear entrance of the hotel, watched by a phalanx of security guards, and myself. She spent about 90 minutes at the party, from about 12.30 in the heat of the silent night until 2.00 a.m. and, as for what she ate, we assure you; it was not food from the Hilton. The reading public now has a fair idea of its first citizen's epicurean tastes. But what of her estranged brother?"

At the first glance of this article, it could be said without any measure of doubt that the article in question is certainly not complimentary of Her Excellency the President of this

country. The place to which the President had gone was Mr. Asitha Perera's permanent suite at Lanka Oberoi. The manner of entering the Hotel, the article suggests that it was done cautiously or watchfully or in a manner to screen herself from being observed by using the rear entrance of the Hotel. The time she had spent at the party was 90 minutes, from about 12.30 in the heat of the silent night until 2.00 a.m. Readers are assured as to what the President ate, it was not food from Hilton. Finally the writer mischievously invites the reading public to have a fair idea of the President's epicurean tastes, and pauses the question, what of her estranged brother? The article mentions of no guests, no food and on the other hand impliedly the readers are told that what the President ate was not food. The phrase "it was not food from the Hilton" does not convey any sense other than to exclude food. Finally the reading public are told that they will have a fair idea of the President's epicurean tastes. Therefore since food has been excluded the phrase "epicurean tastes" would convey to the reader the impression of sensual enjoyment.

This article conveys to the reader that the President was on her guard of being observed and therefore she used the back door to gain entrance to the Hotel. Time given in the article suggests that it was the dead of night, an ungodly hour and Her Excellency spent about 90 minutes in the heat of the silent night. It is pertinent to emphasize the fact that according to the unimpugned and unassailed evidence of Asitha Perera by 11.30 p.m. or 12 midnight the party which he had on 05.02.1995 was over. Therefore it is manifestly clear that the writer of the article deliberately maliciously and wrongfully endeavoured to impress upon the reader's mind the idea of Her Excellency indulging in sensuous enjoyment as opposed to enjoying food. Further in the absence of any other guests being mentioned (unlike in the other parties referred to in this column) the readers will get the impression that the only guest was Her Excellency the President and the host was Asitha Perera. In this perspective

the heading of the article courting days are here is not without any significance. Therefore as learned Additional Solicitor General submitted this article is suggestive of romance.

In evaluating defamatory material law does not apply rules of construction which are used for the interpretation of a contract or a will. Such interpretations are not appropriate for determining natural or ordinary meanings of words in an action for libel or defamation. The correct method of approach to the question of construction was considered at length in the House of Lords in the case of *Rubber Improvement Ltd. vs. Daily Telegraph Ltd*[1], where Lord Reid remarked thus :

"There is no doubt that in actions for libel the question is what the words would convey to the ordinary man: it is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs..... What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But that expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves, as where the plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them, and that is also regarded as part of their natural and ordinary meaning."

Further when the Court is called upon to decide how a reasonable man would understand the words alleged to be defamatory in an article, Lord Reid in the case of *Morgan vs. Odhams Press Ltd.*[2] at 1162 - 1163 observed as follows:

"If we..... take the ordinary man as our guide then we must accept a certain amount of loose thinking. The ordinary man does not formulate reasons in his own mind: he gets a general impression and one can expect him to look again before

coming to a conclusion and acting on it. But formulated reasons are very often an afterthought. The publishers of newspapers must know the habits of mind of their readers and I see no injustice in holding them liable if readers, behaving as they normally do, honestly reach conclusions which they might be expected to reach. If one were to adopt a stricter standard it would be too easy for purveyors of gossip to disguise their defamatory matter so that the judge would have to say that there is insufficient to entitle the plaintiff to go to trial....."

From what has been conveyed in this article can anyone blame any reader in coming to the conclusion that Her Excellency the President had entered the hotel from the back door, in a way she would not be noticed to gain entry to the permanent suite of Asitha Perera, in the dead of night and she had spent about 90 minutes with Asitha Perera, in the heat of the silent night. The picture conveyed to the reader being sensuous enjoyment, since there is a reference in the article to the epicurean tastes and mischievously the writer assured the reader that what the President ate, it was not food. Therefore it is a calculated attempt by the writer to injure the reputation of the President by exposing her to hatred, contempt or ridicule in the eyes of the ordinary, right thinking members of the society who have read the article. Furthermore the eminence or the stature of the person concerned as in this case, the democratically elected President of this country or the first citizen of the country would make the defamatory statement more injurious. Besides in this instance since the material in the article being false, it would strengthen the proposition that the writer or the publisher wanted to defame the President. Cumulative effect would be that the article in question will have the capacity to impute dishonorable conduct to the President.

The meaning intended by the writer or the publisher may not be very relevant for the purpose of construing the words in an article. The relevant factor is how would a reasonable man may have understood such words. The position in

English Law is now settled. As Russell LJ in the case of *Cassidy vs. Daily Mirror Newspapers Ltd.*[3] at 354 put it shortly. "Liability for libel does not depend on the intention of the defamer; but on the fact of defamation." In our law, Penal Code makes the requisite criminal intention or knowledge an additional ingredient of the offence of defamation and the burden of proving it is on the prosecution. Vide *Vaikunthavasan vs. The Queen*[4] Further the meaning in which the words were infact understood is irrelevant for the purpose of deciding the natural and ordinary meaning of the words. As the law of defamation is concerned with the effect of the words on ordinary people it might have been supposed that the evidence of the sense in which the words were infact understood by the readers would be admissible. However, it is clear that no such evidence can be admitted. This long standing rule as stated by Goddard LJ in *Hough vs. London Express Newspaper Ltd.*[5] at 515 reads as follows: "In the case of words defamatory in their ordinary sense the plaintiff has to prove no more than that they were published; he cannot call witnesses to prove what they understood by the words;.... the only question is, might reasonable people understand them in a defamatory sense?" In other words what is necessary to be considered is whether the words in the article has the potential to convey a defamatory meaning to an average reader. Therefore it is unnecessary to show that the reputation of Her Excellency the President has infact been injuriously affected.

Now we give our mind to the complaint made by learned President's Counsel that the learned trial Judge has attempted to paraphrase the article in a defamatory sense omitting the word "party" and thereby has reached a wrong conclusion regarding the article. He contended that the writer of the article did not say anything in the manner the trial Judge has attempted to paraphrase the article in question. Paraphrased version according to Counsel was an edited or distorted version. It would appear from the examination of the judgment, what the trial Judge has done was to pinpoint to the main contents

in the article under the caption "Anura Sootin says courting days are here" and to consider the sense in which the excerpt concerning Her Excellency the President had been used to wit, "Her Excellency spent 90 minutes in Mr. Asitha Perera's permanent suite in the heat of the silent night and indulged in epicurean tastes." This is what the writer wanted to convey to the reader. Even if the word "party" was included when paraphrasing, in our mind it would not have made any difference, since no other guests were mentioned in the article. Therefore the use of the word "party" by the writer seems to our mind an attempt to disguise the defamatory meaning in the article. Learned Additional Solicitor General suggested at the hearing that the use of the word "party" was a "sham" on the part of the writer, since it carried no meaning to the reader's mind. Hence in our view the learned trial Judge has attempted to paraphrase the article for the purpose of clarity and clear understanding of the contents in the article. No prejudice has been done to the accused-appellant. We cannot agree with the allegation that the trial Judge has attempted to over exaggerate the meanings of some of the phrases in the article and to give them a sinister meaning. As stated above the article is clearly defamatory of Her Excellency the President.

It was submitted by learned Counsel that the learned trial Judge had prejudged the case by holding that the article in question was defamatory in his preliminary order dated 23.05.1996. At the close of the prosecution case the defence made application to Court in terms of Section 200 (1) of the Code of Criminal Procedure Act, moving for an acquittal of the accused-appellant on the basis that the charges had not been established by the prosecution. In this situation the Court had to make a determination with regard to the adequacy of evidence to call for a defence. At the stage of the close of the prosecution case, the Court had to be satisfied that the publication in question was defamatory within the meaning of Section 479 of the Penal Code, so as to call for a defence from the accused-appellant in relation to the two counts in

the indictment. Therefore at that stage the prosecution should have established or proved the ingredients which constitute the offence of defamation under the Penal Code, so that there was a prima facie case before the Court to warrant calling for a defence. This had to be so at the stage of the close of the prosecution case, even without the defence making the submission of no case to answer. In this case however defence at the close of the prosecution case took up the position that there was no case to answer. Therefore the Court had to be satisfied that there was a prima facie case, so that the submission of no case to answer could be rejected. A prima facie case necessarily means a case beyond reasonable doubt - at first sight i.e. on the evidence available on record as at the close of the prosecution case. In order to establish a prima facie case in an action for defamation there must be proof that the words complained of were infact published. The words were defamatory of the President and the words were published by the accused-appellant with the intention or knowledge to defame the President or the circumstances in which the accused-appellant was responsible for the publication. S.N. Saha in his book Law of Evidence 1991 Edition Page 495 (cited by learned High Court Judge) the term "prima facie case" has been explained as follows. "The prosecution must discharge the initial or general burden of establishing a prima facie case of guilt of accused beyond a reasonable doubt. Then and then only the question of burden of proof on accused relating to general exception to criminal liability arises." Therefore when the defence submitted that at the end of the prosecution case that there was no case to answer, the Court necessarily had to dicide whether the ingredients of the offence of defamation had been established under the penal Code. In doing so Court had to consider whether the article in question was defamatory, so as to decide the question whether there was a prima facie case established by the prosecution. This was not a case of prejudging of any issue but judging as required by law or in conformity with the law. However if the defence did not submit that there was no case to answer, then, the trial Judge would have merely called for a defence

without making an order with regard to the sufficiency of the evidence to call for a defence. Hence after having created a situation where the Court had to make the said order dated 23.05.1996, there is no justification in making the complaint that the Court had prejudged the case by deciding that the article in question was defamatory. It is to be remembered that whether there was no contest regard to the sufficiency of evidence to call for a defence or not, the trial Judge had to consider the question whether there was a prima facie case or not. The only difference being that in the situation where the defence did not contest the sufficiency of evidence to call for a defence, the Court could have merely called for a defence from the accused-appellant without taking the trouble to evaluate the evidence by making an order such as the order dated 23.05. 1996. In the circumstances there is no merit in the submission of the learned Counsel that the trial judge has prejudged the case, by holding that the article in question was defamatory.

Learned Counsel for the accused-appellant made the submission that there was a difference in the treatment of the article in question to be defamatory in the initial order made by the High Court Judge on 23.05.1996 when called for a defence from the accused-appellant and in his final judgement when he decided to convict the accused-appellant. Counsel contended that when the article was considered to be defamatory at the stage after the prosecution case was concluded and thereafter when the article was considered to be defamatory at the end of the defence case, to convict the accused-appellant, additional material or grounds were considered for the purpose of deciding the article in question to be defamatory. With regard to this submission it is to be noted that when the Court initially decided the article to be defamatory, it did so after considering evidence led by the prosecution in order to see whether there was a prima facie case. However when the Court decided the article in question finally to be defamatory, it did so after considering the evidence presented by the defence and the submissions of Counsel as well, or in other words after considering the

evidence in its totality. Further when the Court considered the article initially to be defamatory, it did so in order to see whether there was a prima facie case, in terms of Section 200 of the Code of Criminal Procedure Act whereas, when the court considered the article in question to be defamatory finally, it did so for the purpose of convicting the accused-appellant in terms of Section 203 of the said Act. Therefore the object or the purpose of evaluating evidence available in the two situations were different. Thus if the Court had considered additional material to conclude that the article in question to be defamatory, one cannot find fault with the trial Judge because he had to comply with the law. Besides when the trial Judge considered the article to be defamatory for the purpose of convicting the accused-appellant, he had additional material to be considered namely the defence evidence and the submissions of Counsel. The responsibility of the trial Judge was heavier in this situation, when he passed judgment in terms of Section 203 of the Code of Criminal Procedure Act. Hence we see no merit in this submission of learned Counsel and it has to fail.

It was submitted by learned Counsel for the accused-appellant that an essential ingredient in the 1st count of the indictment, namely, the requirement of proving beyond reasonable doubt that it was the accused-appellant who made or published the article in question (P3(a) - P4(a)) has not been established by the prosecution. Counsel's contention was that the prosecution did not lead evidence to show that it was the accused-appellant who wrote the article in question but the learned trial Judge has convicted the accused-appellant on the basis that he wrote the article in question basing his findings on the evidence of the accused-appellant. It was the Counsel's submission that even on the evidence of the accused-appellant there was no unqualified admission that he was the writer of the article, but the trial Judge has come to the conclusion that the accused-appellant was the writer of the article on the footing that he had failed to disclose the name of the writer, that he had written three paragraphs (stories) in the gossip column, that

the gossip column had been written by one writer or one person, that there was some similarity in the words that appeared in this article and the words that appeared in a previous editorial, that the reluctance of Mr. Wijewardana the proprietor of the press to disclose the name of the writer and finally in view of the phrase in the article (P3(a) - P4(a)) .... "watched by myself"....

At the end of the prosecution case, when the Judge called upon the accused-appellant for his defence Court was satisfied that the prosecution has established that the article in question published in the Sunday Times Newspaper of 19.02.1995, was defamatory of her Excellency the President. Further the article in question was published in circumstances in which the accused-appellant was responsible for the publication, since he was the editor of the said newspaper. On this matter there was the evidence of Ranjith Wijewardana the proprietor of the Sunday Times Newspaper that the accused-appellant has been the editor of this newspaper since 1990 and he was responsible for the news that were published in the said newspaper. In relation to the 2nd count in the indictment under the Press Council Law, the editor of a newspaper is deemed guilty of the offence of defamation unless there is proof that the offence was committed without the knowledge of the editor or that he exercised all due diligence to prevent the commission of the offence and in this case the offence of defamation. The prosecution has established in this case that the accused-appellant was the editor of the Sunday Times Newspaper at the time when the article in question was published in the newspaper. At the end of the case on the totality of the evidence the Court has convicted the accused-appellant on both counts. In respect of the 1st count the accused-appellant has been convicted since there was evidence to show that as editor he had seen the article in question before the publication. On the other hand there was material before the Court to conclude that the accused-appellant was the writer of the article as well. In respect of the 2nd count the accused-appellant was convicted since he

failed to bring himself under the proviso to Section 14 of the Press Council Law by proving that the offence of defamation was committed without his knowledge or that he exercised all due diligence to prevent the commission of the offence. As stated above the effect of the accused-appellant's evidence was that he provided material for the court to draw the conclusion, that he had not only published the defamatory article in question but also to draw inferentially that he himself was the writer of the said article. Therefore it is seen that the learned trial Judge has considered the totality of the evidence in the case before he came to the conclusion that the accused appellant was guilty of the 1st count.

However it must be stated here that for the purpose of convicting the accused-appellant on the first count it is not necessary to establish that he is the writer of the defamatory article in question. It is sufficient, if there is material to hold that he published the defamatory article, for Section 479 of the Penal Code states whoever ..... makes or publishes any imputation ..... However in this case the learned trial Judge has reasonably and justifiably come to the conclusion that the accused-appellant who being the editor not only published the defamatory article in question but he infact was the writer of the said article as well and he was the writer he could not have written it other than for the purpose of publishing it - he being the editor. In order to reach the conclusion that the accused-appellant was the writer of the article the trial Judge has used the following material. Firstly that the accused-appellant is the writer of the defamatory article in question because of his failure to disclose the name of the writer. Accused-appellant had refused to disclose the name of the writer on a very vague basis that, the disclosure of the writer's name goes to the root of press freedom. However there is no such privilege to refuse to disclose the name of the writer of a defamatory article. There is the privilege not to disclose the source of information but in the present case he was not asked to disclose the source of information but only asked to disclose the name of the writer of the article in

question and there is no such privilege to refuse to disclose the name of the writer. In this instance it is to be remembered that the contents of the article in question being false even the privilege of refusing to disclose the source of information is not available to the accused-appellant. This is because accurate and clear reporting is the responsibility of the press. Therefore if the press has abused that responsibility, the press does not deserve such privilege. This point was highlighted by Lord Denning in the case of *British Steel Corporation vs. Granada Television Ltd.*[6] at 805 when he said "in order to be deserving of freedom, the press must show itself worthy of it. A free press must be a responsible press. The power of the press is great. It must not abuse its power. If a newspaper should act irresponsibly, then it forfeits its claim to protect its source of information." Therefore in this case it would appear that the accused-appellant did not have the privilege even to refuse to disclose the source of information for the reason that the contents of the article was false. Otherwise no man would be safe from an irresponsible press as evident from the facts of this case. Further he could have given the name of the writer, if he was not the writer, an act which would have been done by any sensible person. If he did so, it would have to some extent reduced his liability on the 1st count and even on the 2nd count, since it was easier to show that the publication was without his knowledge as stated in the proviso, if he was not the writer. Further in this instance it would appear that Section 114 (G) of the Evidence Ordinance would apply for the reason that if he answered this question it would have been unfavourable to him. Therefore since the accused-appellant did not disclose the name of the writer the learned trial Judge considered it as a circumstance which was very suggestive of the accused-appellant being the writer of the article in question.

Another ground considered by the trial Judge to hold that the accused-appellant was the writer of the article in question is the fact that in his evidence he has admitted having

written three paragraphs in the entire gossip column. This fact as the trial Judge commented has been admitted by the accused-appellant despite the fact that earlier, he had refused to disclose the name of the writer of the article as it goes to the root of press freedom. It is to be noted that the accused-appellant had volunteered to come out with this fact of having written three paragraphs in the gossip column after a lapse of about one year at the trial and had omitted to state this fact in his statement to the C.I.D. A contradiction was marked as P10, from the accused-appellant's statement to the C.I.D. where he had stated that the "column is written by one writer." It was marked as a contradiction, when the accused-appellant in his evidence took up the position that the gossip column was written by several writers. At the hearing of this appeal a submission was made by the learned Counsel for the accused-appellant that the contradiction marked P10, was used by the trial Judge as substantive evidence to hold that the column was written by one writer. However there is no justification in this allegation since it would appear that the trial Judge has only used this contradiction (P10) to demolish the evidence of the accused-appellant in Court, that the gossip column was written by several writers. This contradiction P10, infact seriously affected the testimonial trustworthiness of his evidence. Learned trial Judge has also observed that the accused-appellant in his evidence had taken up the position that the gossip column was written by several writers to overcome the position he had taken earlier in his statement to the C.I.D. that column was written by one writer. It would appear that accused-appellant's position that he had written three paragraphs only in this gossip column without bothering to read the contents of this article (gossip column) that appeared before and after the three paragraphs he wrote in the gossip column is unacceptable. This is not the conduct of a reasonable person, when applying the much hallowed test of probability and improbability. Further when one examines the first paragraph written by the accused-appellant as

admitted by him in his evidence, which has been referred to by the trial Judge reads as follows:- "Now enough about parties. Let's get down to more serious things for instance this week's mixed-up between ministers for an official residence, caused by a third ministry" what is implied from this paragraph is that the writer had knowledge of all the parties referred to in the gossip column. This is one indication that the gossip column is the work of one writer.

Learned trial Judge has also considered the 1st paragraph in the gossip column which reads as follows: "For the high and mighty in all of Sri Lanka, be they blue or green, purple or whatever colour of the political rainbow this appears to be party time and we feel if our readers want it; we shall deliver..... Therefore, let's start at the top, about a party graced by none other then Her Excellency the President, Chandrika Kumaratunga..... . The trial Judge has come to the conclusion that the writer who wrote or composed the 1st paragraph of the gossip column referred to above knew of all the parties seven in number. Therefore the learned trial Judge has reasonably drawn the inference that the gossip column was the work of one writer. Further it would appear that the accused-appellant after he was confronted with all these situations, despite having said earlier that the gossip column was the work of several writers, he willingly or unwillingly had admitted that the gossip column was the work of one person or one writer. To use his own words he had said that "one writer puts together such news items and makes one composition." There is also the other factor noted by the trial Judge namely, on the face of the relevant gossip column itself the words "by our gossip columnist" are printed which is also an indication that the gossip column is the work of one writer or one person. If that be the case it would be difficult for one to accept the position taken up by the accused-appellant at the trial, that he wrote only three paragraphs out of the entire gossip column which had over 35 paragraphs.

The trial Judge has also considered the sameness in the expression viz. "in the heat of the silent night" in the article in question and the expression that contained in an editorial which appeared in the Sunday Times Newspaper of 16.10.1994 which read as follows:- "slipping out the country in the heat of the night without telling a soul." The said editorial was marked at the trial as P5 (a) and it would appear that this editorial had been written in relation to Her Excellency the President. Even though the learned President's Counsel at the hearing remarked that no one has the monopoly of the words, one cannot blame the trial Judge for considering this fact along with many other substantial grounds for reaching the conclusion he arrived at to the effect that the accused-appellant was the writer of the gossip column and more specifically the defamatory article in question i.e. P3 (a) - P4 (a). The sameness in the choice of words which is so prominent can be persuasive in certain circumstances to draw the conclusion that both expressions are the work of one writer. Besides in this case it is to be observed from the evidence of the accused-appellant that he had attempted to dissociate himself from writing the said editorial P5 (a) by saying that sometimes he had got the sub editor to write the editorial by sending his notes on which the editorial had to be based. However when the accused-appellant was specifically questioned whether the words "heat of the night" that appeared in the said editorial P5 (a) were his words, he had answered it by stating that he was unable to recall or recollect it. Later he had also stated that those words "in the heat of the night" can be my words but they are not my words." Therefore from his answers it would appear that he has not denied it altogether. One should also examine this matter in the background of the fact that the editorials are normally written by editors even though it may not be a conclusive factor. Besides at some point of time accused-appellant had admitted the position that the editorial is written by him and at the same time he sought to retract his position by stating that the editorial is written either by him or directly on his instructions. Accused-appellant also preferred not to disclose the name of the writer of the said editorial P5 (a) dated 16.10.1995 without any

justifiable reason or privilege. Therefore the only possible reason one could think of for his refusal to disclose the name of the writer of this editorial P5 (a) is that, he himself was the writer of this editorial and if that be the case the sameness of the two expressions "in the heat of the silent night" and "in the heat of the night" have some relevance and worth consideration as the trial Judge has done.

Another matter considered by the trial Judge to hold that accused-appellant was the writer of the defamatory article in question was the failure of Mr. Wijewardana, the proprietor or Chairman of the Sunday Times newspaper to mention the name of the writer of the defamatory article in question. What he told Court when he was questioned on this matter was that he did not know as to who wrote this article in question. Further when he was questioned as to whether the said article P3(a) - P4(a) had been published without the knowledge of the accused-appellant his position was that it was a difficult question to answer. For Mr. Wijewardana to say that he did not know the writer of this defamatory article in question, it is something unbelievable. It is more so for the reason that an inquiry was held on his directions regard to this matter after the President had complained to him, and thereafter it is in evidence that the reporter who had furnished that information had been dismissed from service. Hence the position taken up by Mr. Wijewardana that he did not know the name of the writer has to be rejected. A conclusion that could be drawn from the backwardness on the part of Mr. Wijewardana to mention the name of the writer of the article in question is that the accused-appellant himself was the writer. On the other hand if someone else was the writer of the defamatory article, Mr. Wijewardana may well have disclosed the name of the writer for the reason that such disclosure may well have helped the accused-appellant to disown liability. In this instance it would appear that it was also in the interest of Mr. Wijewardana to plead ignorance regard to the name of the writer, since there was some responsibility on his part as the proprietor of the press for this publication. In the law of defamation every person who takes part in the

publication of defamatory matter is prima facie liable in respect of that publication. In the case of the publication of defamatory matter in a newspaper, the writer of the article, the proprietor, the editor and the printer of the newspaper can be held liable subject however to the defences that are available to them. Section 14 of the Press Council Law says that when any offence is committed through the means of a newspaper, the proprietor, publisher, printer, editor and journalist of such newspaper is deemed guilty of the offence unless he brings himself under the proviso.

The last point on which the trial Judge has concluded that the accused-appellant was the writer of the defamatory article in question was the effort made by the accused-appellant to verify whether Her Excellency the President had infact attended Mr. Asitha Perera's birthday party from Mr. Navin Gunaratne, without asking the writer himself. In the article it is stated that the writer himself was a witness to the President's entry to the Hotel by the rear entrance. The relevant portion of the said article states as follows:- "..... but this time, the President was more circumspect about her appearance and used the rear entrance of the Hotel, watched by phalanx of security guards, and myself." (Emphasis is by Court). Therefore the writer has given a clear impression to the reader that he himself was a witness to the President's entering the Hotel from the rear entrance in order to give more credence to the story. However it was the evidence of the accused-appellant that no sooner the President complained regard to the article, he contacted Mr. Navin Gunaratne to find out whether Her Excellency the President in fact attended the birthday party of Mr. Asitha Perera. It was his evidence that he did not ask the writer whether he was there, even though the accused-appellant had stated that he believed what the writer had stated in the article concerning the President. It seems irrational conduct on the part of the accused-appellant to ask Mr. Navin Gunaratne who he thought would have attended the birthday party of Asitha Perera to find out whether Her Excellency

the President had attended the birthday party, without asking the writer himself unless otherwise the accused-appellant himself was the writer. This seems to be the reasoning of the learned trial Judge. Therefore it is on a consideration of all these items of circumstantial evidence referred to above, that the learned trial Judge has come to the conclusion that the accused-appellant himself was the writer of the defamatory article. Therefore in our view the conclusion arrived at by the trial Judge that the accused-appellant is the writer of the defamatory article on the material referred to above, is irresistible and logically compelling. Thus this fact has been established beyond reasonable doubt.

As stated before to convict the accused-appellant on the 1st count it is not necessary to establish the fact that he was the writer of the defamatory article even though that fact has been established in this case. It is sufficient that there is proof beyond reasonable doubt that the accused-appellant published or caused the publication of the said article and therefore he be held criminally liable or convicted on the 1st count. In other words there should be material to show that the accused-appellant who had complete control or right to remove the offending article (P3(a) - P4(a)) did not prevent it being published or failed to remove it and caused or sanctioned the publication. Regard to this matter learned High Court Judge had referred to two cases to show that a person can be held liable for mere publication or the failure to remove the defamatory article without proof of the fact that he is the writer of the defamatory article concerned. One such case was the case of *Hird Vs. Wood*[7] referred to in the judgment of Slesser L.J. in the case of *Byrne Vs. Deane*[8] at 835. In that case some unknown person had suspended a placard containing defamatory matter between two poles on the road way near a gate leading into certain grounds. There was no evidence as to who wrote the words on the placard or who put it up on the road way. But another person remained there for a long time, sitting on a stool and smoking a pipe, and continually pointed at the placard with his finger and thereby

attracted to it the attention of all who passed by. The Court of Appeal consisting of Lord Esher M.R., Lopes and Davey L.J.J., held that the conduct of the person who was pointing at the placard constituted evidence of publication. In the case of Byrne Vs. Deane, (Supra) referred to above, where the facts were that some unknown person had put up on the wall of a club a placard containing defamatory material. It was held that since the defendants who had complete control of the walls of the club had not removed the placard or the paper after they had seen it - the publication had been made with their approval. In this case Greer L.J. observed that "the words were defamatory of the plaintiff, and that the two defendants by allowing the defamatory statement to remain on the wall of the club were taking part in the publication of it." (Vide page 818 - 819). Therefore it is well settled that the failure to remove the defamatory matter, provided the person concerned had control over it, constitutes publication.

In the present case the accused-appellant being the editor of the Sunday Times Newspaper, he had full control over the selection of the material to be published in the paper. On one occasion when the accused-appellant was questioned with regard to the publication of the defamatory article, he admitted the position that he saw the said article just before publication. However later he retracted from this position by stating that he saw the relevant article after the publication of the provincial edition (P3(a) which was the earlier edition) but before the publication of the city edition (P4(a)). He further said that he could distinctly remember that a photo copy of the page containing the gossip column was sent to him and that he read it prior to the publication of the city edition of the Sunday Times. The city edition being the later edition, if the gossip column was sent to the accused-appellant for his approval prior to the publication of the city edition, then there is no reason as to why the gossip column was not sent for his approval prior to the publication of the provincial edition which was anterior in point

of time to the city edition. However it was the accused-appellant's evidence at one stage, that he saw the article in question i.e. the gossip column just before the publication without making any qualification as to whether it was the city edition or the provincial edition. Further he had also admitted in cross examination that the answer he had given earlier namely that, he had read the defamatory article just before the publication is correct, that it had been correctly recorded and that it was his full answer to the question as to when he saw the said article. Thus the effect of this answer that he read the article in question just before publication means that it was published with his knowledge and authority.

It may be mentioned here that, even if one were to accept for the sake of argument, the position taken up by the accused-appellant namely, that he read the defamatory article in question before it was published in the city edition only, that fact would not absolve the accused-appellant from liability, since every fresh repetition of a defamatory matter is a publication and constitutes the offence of defamation. Thus in the law of defamation, tale-bearers are as bad as tale-makers. Therefore in this case there is clear evidence from the accused-appellant that he being the editor of the newspaper he had the authority to refuse the publication of any article or permit the publication of any article in the newspaper. In this instance the accused-appellant had certainly sanctioned or authorized the publication of the said defamatory article in the city edition. He further said that he read the article in question and according to him there was nothing defamatory in the said article. However if there was anything defamatory in it, he would have either altered it or removed the said article. In any event if he did not approve the said article for publication, it would not have been published. Thus it is very clear that since the accused-appellant had sanctioned the publication of the defamatory article in question, it had received publicity and the essence of the offence of defamation is publication. Therefore the failure of the accused-appellant to remove the defamatory material referred to in the indictment, he has consented to the publication. It is this aspect

of having control over the removal of the article in question and then without removing it, permitting it to be published in the newspaper, what matters in this case, for the liability of the accused-appellant, at the trial that he was not the writer but some one else. In fact it was the evidence of the accused-appellant, even if he could have removed the article in question (P4(a)) from the city edition if he thought that it was defamatory, but in this instance, his position was that he thought it was not so, and therefore there was no need for him to remove it. This conduct clearly amounts to publication of defamatory matter by the accused-appellant. Even though the case against the accused-appellant has been considered in a limited manner on the basis that he was only responsible for the publication of the city edition (P4(a)) which contained the defamatory matter, it must not be forgotten that trial Judge has drawn the conclusion on a rational basis that the accused appellant had approved the publication of the defamatory article not only in the city edition but in the provincial edition as well. Besides learned trial Judge on very substantial grounds has come to the firm conclusion that the accused-appellant was infact the writer of the defamatory article as well as the entire gossip column which appeared in the Sunday Times Newspaper of 19.02.1995. Therefore in the light of all these circumstances referred to above, we are unable to agree with the submission of learned President's Counsel that the ingredient of the offence of defamation namely that it was the accused-appellant who made or published the article in question (P3(a) - P4(a)) has not been established beyond reasonable doubt. It was a decision that the learned trial Judge has made after evaluating the totality of the evidence adduced before him and in our view he has very correctly decided this matter.

Learned Counsel for the accused-appellant further argued that the requisite intention or knowledge on the part of the accused-appellant to defame the President has also to be established beyond reasonable doubt in order to convict him

on the first count i.e. the offence of defamation. Counsel contended that since the article in question is not per se defamatory or that it is so ambiguous to be considered as defamatory, this ingredient of the offence has not been established by the prosecution. Besides the accused-appellant did not think or consider the article in question to be defamatory. It was further submitted that since the accused-appellant had given evidence referring to the close association the proprietor of the press Mr. Ranjith Wijewardana and he had with Her Excellency the President and the fact that several editorials and other articles (D4 - D22) had been written by him praising Her Excellency the President, and her government there was no intention on his part to defame the President. Thus the point was made by Counsel that the learned trial Judge has failed to take into account any of these matters that were in favour of the accused-appellant before he presumed that the required intention to defame the President has been established against the accused-appellant.

As stated earlier in this judgment in defamation the test is objective and therefore the person responsible for the defamatory article cannot be heard to say that he did not think or intend the article to be defamatory. The liability for defamation does not depend purely on what was intended by the defamer but the tendency to injure the reputation of the President in the eyes of the right thinking members of the public. The fact that the accused-appellant on earlier occasions had said good things about the President and her government does not absolve him from liability with regard to a defamatory statement subsequently made or published against the President. The vital issue is whether the particular statement or article in question is defamatory or not. Generally the intention of a person is something that is in his mind and therefore it has to be inferred from the words used, for there being no other criteria. Therefore when words and phrases used are prima facie or per se defamatory as in this case, the intention has to be presumed on the basis of the principle that a man intends the natural and

probable consequences of his act. It may also be noted that in a prosecution for criminal defamation as defined in Section 479 of the Penal Code the intention or knowledge on the part of the accused-appellant to harm the reputation of Her Excellency the President by the said publication would be sufficient. When defamatory material is published in a newspaper, the intention or knowledge to harm the reputation may be more readily inferred. The article in question relating to this case being per se defamatory it would not be difficult to hold that the required intention or the knowledge to harm the reputation of Her Excellency the President has been established. The fact that the article in question is false, it would further strengthen this position. The defence submission that the accused-appellant did not intend to harm the reputation of the President has no relevance to the facts of this case. The presumption that a man intends the natural and probable consequences of his intentional acts may be rightly applied to the facts in this case, to infer the intention or knowledge since the accused-appellant had directly published the defamatory article or he had knowingly authorized or caused it to be published. Therefore in our view learned trial Judge was correct in holding that the required intention or knowledge to harm the reputation of the President has been established beyond reasonable doubt. Hence we hold that the learned trial Judge has correctly convicted the accused-appellant on the 1st count, since all the ingredients of the offence of defamation have been established beyond reasonable doubt.

With regard to the 2nd count in the indictment brought in terms of Section 15 read with Section 14 of the Press Council Law, learned Counsel for the accused-appellant submitted that in order to establish the said count all the ingredients of the offence of defamation have to be established. Therefore Counsel contended that in this case, since the accused-appellant did not intend to defame the President by the publication of the said article, the offence in count 2, has been committed without

the knowledge of the accused-appellant. In other words the Counsel was trying to make out a point that the offence of defamation in this case has been committed without the knowledge of the accused-appellant and therefore he would come under the proviso to Section 14 of the Press Council Law. Counsel complained that the learned trial Judge has not considered this position namely the absence of intention or knowledge to defame the President. Besides Counsel submitted that it was open to the accused-appellant to establish the fact that the offence (count 2) was committed without his knowledge on a balance of probability.

It is to be noted that according to count 2, of the indictment, once it is established that the article in question i.e. P3(a) - P4(a) which is defamatory within the meaning of Section 479 of the Penal Code has been published in the newspaper, the accused-appellant who is the editor of the newspaper is deemed guilty of the offence set out in terms of Section 14 and 15 of the Press Council Law unless he is able to bring himself under the proviso to Section 14 of the said law. In other words when it is established that the defamatory material has been published in the newspaper, where the accused-appellant is the editor, he is deemed guilty of the offence unless he could bring himself under anyone of the two defences available i.e. by proving that the offence in question was committed without his knowledge or that he exercised all due diligence to prevent the commission of the offence. In relation to the 2nd count the first matter to be considered is whether the article published in the Sunday Times Newspaper of 19.02.1995 is defamatory within the meaning of Section 479 of the Penal Code. With regard to this matter we have already decided that the offence of defamation in terms of Section 479 of the Penal Code has been proved. It is only then that the accused-appellant as the editor is deemed to be guilty under Section 14 of the Press Council Law, unless he comes within the proviso to Section 14 of the Press Council Law.

The submission of learned Counsel that since the accused-appellant did not think that the article was defamatory or that it was harmless and therefore the offence must be held to have been committed without the knowledge of the accused-appellant who should be acquitted on count 2, cannot be accepted. In terms of the proviso to Section 14 of the Press Council Law which says that "no such person shall be guilty of the offence..... if he proves that the offence was committed without his knowledge" on a balance of probability. Therefore this submission that the accused-appellant did not have the necessary knowledge cannot hold good for the reason that the editorof a newspaper will be guilty of an offence under Section 14 of the Press Council Law if as stated in Section 15 of the said law that "any statement or matter concerning a person which will amount to defamation of such person within the meaning of Section 479 of the Penal Code" is published in the newspaper. What the accused-appellant intended is not material, but what matters is whether in the eyes of the right thinking members of the society the material published by the accused-appellant has the capacity to defame Her Excellency the President. In other words the editor of a newspaper cannot escape criminal liability by saying that he believed the article in question to be non defamatory. In order to get relief under the proviso to Section 14 of the Press Council Law the editor, - the accused-appellant in this case has to prove, on a balance of probability that the publication was without his knowledge, since there would not have been the commission of any offence had there been no publication in the newspaper. However the facts show that the accused-appellant has failed to prove on a balance of probability that the publication was without his knowledge. On the other hand there is cogent material to show that publication of the defamatory article had taken place with the accused-appellant's knowledge and on his express authorization. The fact that the publication of the relevant article P4(a) in the city edition has been freely admitted by the accused-appellant without any reservation, he has to be convicted on count 2. Eventhough he has taken up the position that the

publication of the provincial edition P3(a) had been without his knowledge, it is to be remembered that at one stage when he gave evidence he had admitted having seen the defamatory article before publication, and the said answer included both the city and the provincial edition. Besides it should also be noted as shown above that the accused-appellant is the maker of the article in question as well. Further with regard to the provincial edition even if one were to assume that the accused-appellant's evidence that he did not see the article in question before the publication in the provincial edition created a doubt, in such a situation there is no proof, since the standard of proof is on a balance of probability. However the evidence seems to show that the accused-appellant had knowledge prior to publication of the provincial edition as well.

At this juncture it is pertinent to refer to the nature and the manner in which the accused-appellant had given evidence before the learned trial Judge. It would appear to us, as was observed by the trial Judge himself that accused appellant's evidence in relation to some of the material issues in this case had been very evasive, inconsistent and per se contradictory. When giving evidence at times he had been vacillating and at times he had attempted to manipulate evidence to suit his own ends. When perusing his evidence one gets the impression that the accused-appellant had lied to court on some of the material issues and had come out with the truth under incisive cross examination or when he spoke the truth not realizing the implications of the answer he had given or when had spoken the truth during his unguarded moments. Therefore it could be said without any measure of doubt that the accused-appellant had uttered falsehood on a number of matters at his convenience and for his advantage. When an accused person intentionally utters falsehood in Court such falsehood weakens his case and advances in strength the case of his adversary. In fact the view has been expressed that in certain circumstance, the lies uttered by a party could amount to corroboration of the case of his

adversary. In the case of *R Vs. Lucas*[9] at 1011 where Lord Lane C.J. in the course of his judgment made the following observation in relation to giving false evidence by the defendant (accused-appellant in this case). "It accords with good sense that a lie told by a defendant about a material issue may show that the liar knew that if he told the truth he would be sealing his fate".... Further he observed "As a matter of good sense it is difficult to see why, subject to the same safeguard, lies proved to have been told in court by a defendant should not equally be capable of providing corroboration. In other common law jurisdictions they are so treated.....".

A submission was made by learned Counsel for the accused-appellant that an alternate count i.e. Count 2, has been brought in the indictment under the Press Council Law, because the prosecution had doubts in establishing the first count under Section 480 of the Penal Code. In other words what the Counsel was trying to impress upon the Court was that since the prosecution had doubts in proving the first count, the alternate count under Section 15 read with Section 14 of the Press Council Law had been added to the indictment. This submission of learned Counsel is without merit for the reason that the prosecution had every right to indict the accused-appellant under both counts. The question whether the prosecution would succeed in establishing the 1st count or both counts in the indictment was a matter to be decided by Court and not by the prosecution. Hence the only permissible argument that could have been taken by the defence in this case would be a situation where it could be shown that there was no justification to have both these counts in the same indictment due to any inconsistency. However in our view there appears to be no inconsistency in having both these counts against the accused-appellant in the same indictment. (Vide provisions relating to joinder of charges in the Code of Criminal Procedure Act No. 15 of 1979). There is therefore no justification in the contention advanced by Counsel that due to the uncertainty that prevailed

in proving the first count i.e. the doubt in relation to the person who published the defamatory article in question, that prompted the prosecution to have the 2nd alternate count in the indictment. It would be appropriate to consider here the other point that was raised by learned Counsel for the accused-appellant that, since the second count was an alternate count, if the accused-appellant was convicted on the first count it was not possible to convict him on the second count. In our view it was really unnecessary for the prosecution to have had the 2nd count in the indictment as an alternate count, since the prosecution could very well have maintained both these two counts quite independently, as there is no inconsistency in having both these counts in the same indident. Further the accused-appellant has to be automatically convicted on the 2nd count, once he is convicted on the first count. This situation arises by virtue of the strict operation of law provided for in Sections 14 & 15 of the Press Council Law which state that "every person" who publishes, or causes the publication of a defamatory statement in any newspaper, the editor of such newspaper shall be deemed to be guilty of that offence unless the editor proves that the offence was committed "without his knowledge or that he exercised all due diligence to prevent the commission of the offence." However in this case, the accused-appellant as editor failed to establish the only defence that he pleaded in connection with the 2nd count, namely that the offence was committed without his knowledge. The accused-appellant will not be prejudiced in any way by being justly convicted on both these counts in view of the operation of law, as he had defended himself in respect of both these counts.

It was submitted on behalf of the accused-appellant that the learned High Court Judge had failed to record a verdict and give reasons forthwith or within 10 days of the conclusion of the trial and thereby violated the requirement laid down in Section 203 of the Code of Criminal Procedure Act, No. 15 of 1979. In a case of this magnitude involving various question of

law and the proceedings running up to 1393 pages, the all important question to be raised would be, whether it is humanly possible for the trial Judge to strictly comply with the said Section. Further if that be the case, did the legislature intend the operation of Section 203 of the Code of Criminal Procedure Act, to be mandatory. In this regard it has been contended by Counsel that the failure of the trial Judge to record a verdict and give his reasons within 10 days would have a tendency to make the trial Judge lose sight of the arguments and the evidence presented in the case. On the other hand one must not fail to understand that the entire exercise of this process of decision making is to mete out justice by coming to a reasonable decision and such a decision necessarily involves the liberty of the subject. Therefore as referred to above in cases of this magnitude, what may become objectionable would be the failure of the trial Judge to take such reasonable time necessary to decide the case. Besides one must be mindful of the fact that in addition to the proceedings being available to the trial Judge to refresh his memory, he has his own notes made in terms of Section 278 of the Code of Criminal Procedure Act which could be perused by him when writing his judgment. Hence there can be no justification in the allegation that even a reasonable delay would make the trial Judge forget or even overlook the evidence and the arguments presented in a case. The all important question to be considered here is whether the requirement in Section 203 of the Code of Criminal Procedure Act which provides that at the conclusion of the trial, the Judge shall "forthwith or within ten days of the conclusion of the trial record a verdict of acquittal or conviction giving his reasons therefore....." is mandatory or directory. It is of interest to note that *Sri Skanda Rajah J. in the case of Dayaratne Vs. Bowie*[10] at 500 has interpreted the word "forthwith" to mean "within a reasonable time" or "as soon as practicable." This question was carefully considered in the case of *Anura Shantha alias Priyantha and another Vs. Attorney General*[11] where it was held that the provisions of Section 203 of the Code are directory and not mandatory. This is a procedural obligation that has been imposed upon the Court

and its non-compliance would not affect the individual's rights unless such non-compliance occasions a failure of justice. Thus in the present case it is to be observed that the learned trial Judge has delivered his verdict giving his reasons on 01.07.1997 after the proceedings were concluded on 04.06.1997. Therefore despite the large volume of evidence to be considered by the learned trial Judge, with commendable speed he has delivered his verdict giving reasons. Under these circumstances, there seems to be no merit in this complaint of learned Counsel regarding the delay on the part of the learned trial Judge to record a verdict giving reasons.

As a final note having regard to the nature of this case, a word of caution regarding the freedom of the press may not be out of place. Freedom of the press is part of the larger freedom of the individual. The public has a right of access to information which is of public concern and of which the public ought to know. The press is all about finding the truth and telling it to the people. In pursuit of that, it is necessary that the press should have the broadest possible freedom of the press. In other words if at all there should be very limited control over the newspapers. Otherwise wrong doing would not be disclosed. Charlatans would not be exposed. Unfairness would go unremedied. Misdeeds in the corridors of power - in government and private institutions will never be known. However with that great gift of press freedom comes great responsibility. In other words more powerful the press is, it should also be a responsible press which will not abuse the enormous power it has. What the press must do is to make us wiser, fuller, surer and sweeter than we are. The press should not think they are free to invade the privacy of individuals in the exercise of their constitutional right to freedom of speech and expression, merely because the right to privacy is not declared a fundamental right of the individual. However to appreciate the value of privacy in the life of an individual, it is well to remember the importance which our constitution attaches to the man's autonomous nature, through the guarantees of basic human rights. And these human

rights are aimed at securing the integrity of the individual and his moral worth. Therefore to invade his privacy is to assail his integrity as a human being and thereby deny him his right to remain in society as a human being with human dignity. The law of defamation both civil and criminal is also geared to uphold the human being's right to human dignity by placing controls on the freedom of speech and expression. The press should not seek under the cover of exercising its freedom of speech and expression make unwarranted incursions into the private domain of individuals and thereby destroy his right to privacy. Public figures are no exception. Even a public figure is entitled to a reasonable measure of privacy. Therefore Her Excellency the President even though she is a public figure is entitled to a reasonable measure of privacy to be left alone when she is not engaged in the performance of any public functions. That is a no entry zone which the press must not trespass. The case in hand is one where the press has attemped to enter into that no entry zone. Even if Her Excellency the President attended a private party it should not be a matter of concern for the press. Here what the accused-appellant had done through his newspaper is to involve Her Excellency the President with a party, which she had nothing to do and never attended and had published such material as referred to and discussed above which has the capacity to defame Her Excellency the President, who is also a mother of two children. In this instance, it is really irresponsible conduct on the part of the press, misusing it's freedom of speech and expression to injure another's reputation or indulge in what is called character assassination.

Therefore as observed above, we have given our most careful consideration to the submissions and the authorities cited at the hearing by the learned Counsel for the accused-appellant, the learned Additional Solicitor General and the learned Counsel for the aggrieved party. We are of the considered view that the learned trial Judge has arrived at the right decision in convicting

the accused-appellant on both counts in the indictment. Hence we proceed to dismiss the appeal and affirm the conviction and the sentence. Further we deeply appreciate the assistance given to us by Counsel.

KULATILAKA, J. - I agree.

Appeal dismissed.