1954 *Present :* **Gratiaen J. and Gunasekara J.**

K. VAIKUNTHAVASAN, Appellant, *and* THE QUEEN, Respondent

S. C. 63, with Application 422—D. C. (Criminal) Colombo N. 1698/28641

Defamation—Charge of criminal defamation—Burden of proof—Newspapers Ordinance, s. 7—Penal Code, s. 479.

In a prosecution for criminal defamation as defined by section 479 of the Penal Code, the burden is on the Crown to establish *inter alia* :

(1) that the accused made or published the particular imputation complained of ;

(2) that he did so with the requisite intention or knowledge.

APPEAL from a judgment of the District Court, Colombo.

S. Nadesan, with *Izzadeen Mohamed*, for the accused-appellant.

H. A. Wijemanne, Crown Counsel, with *J. G. T. Weeraratne*, Crown Counsel, for the Crown.

Cur. adv. vult.

February 2, 1954. GRATIAEN J.—

This is an appeal against a conviction for defamation. The appellant, who was the printer and publisher of a weekly newspaper entitled the "People's Voice", was indicted before the District Court of Colombo with having defamed Mr. Allen Smith, the Auditor-General of Ceylon, by publishing in Colombo in an issue of the "People's Voice" of 30th May, 1952, an article containing a serious imputation on the integrity of Mr. Smith. The words complained of are grossly defamatory, and, if the conviction was justified, the fine of Rs. 250 imposed on the appellant was quite inadequate.

It was proved against the appellant that he was registered at the relevant date under the Newspapers Ordinance as the printer and publisher in Colombo of the "People's Voice". He gave evidence, however, in his defence, and explained that he had in fact been absent in Jaffna almost continuously during the months of April and May, 1952, in promoting his own candidature and the candidature of other persons at the Parliamentary elections. He stated that he had made arrangements for the newspaper to be edited and published during his absence by someone else, and that he was quite unaware of the publication of the particular article referred to in the indictment until he returned to Colombo after the newspaper of 30th May, 1952, had gone out in circulation.

The learned District Judge accepted the evidence that the appellant had been absent from Colombo almost continuously during the months of April and May, 1952. Nevertheless, the learned Judge stated that he was " not at all satisfied with the evidence given by the accused that he

was not privy to the publication of this particular newspaper ". On this basis, the learned Judge proceeded to hold " that the accused was the printer and publisher of the (defamatory) statement in question, and that he was guilty of the charge laid against him ".

It is unnecessary to analyse in detail the process of reasoning by which the learned Judge took the view that the commission of the offence had been brought home to the accused. Shortly stated, he assumed that, upon proof that a defamatory statement appeared in a newspaper of which an accused person was registered under the Newspapers Ordinance as its printer and publisher, the burden shifted to the defence to satisfy the Court that he was not criminally responsible for the publication of that statement. This assumption was based upon a suggested interpretation of section 7 of the Newspapers Ordinance which I am quite unable to accept.

In a prosecution for criminal defamation as defined by section 479 of the Penal Code, the burden is on the Crown to establish *inter alia* :

(1) that the accused made or published the particular imputation complained of ;

(2) that he did so with the requisite intention or knowledge.

If the defamatory imputation complained of appears in a newspaper of which the accused person was registered as its printer and publisher, section 7 of the Ordinance declares that the prosecution will have discharged the onus of establishing *the fact of publication* of the newspaper (and all its contents) by proving in evidence :

either (*a*) a copy of the particular newspaper in question duly signed by the accused person (as printer or publisher) and delivered to the Registrar-General (or Government Agent) as required by section 7

or (*b*) an unsigned copy corresponding to the authenticated copy " signed and delivered as aforesaid ".

In the former case, the proof of publication is irrebuttable, but in the latter case, the burden shifts to the accused to show that the unauthenticated copy " was not printed or published by him nor with his knowledge or privity ". In either case, however, the Ordinance raises no statutory presumptions as to the *intention* with which any particular statement contained in the newspaper had been published.

In the present case, the accused admittedly delivered to the Registrar-General, after he returned to Colombo from Jaffna, a signed copy of the newspaper containing the offending article. The *fact of publication* was therefore clearly established against him, but this by itself does not conclusively prove the other essential ingredients of the offence of defamation. It was necessary for the prosecution also to prove that the publication had been made with the requisite intention or knowledge specified in section 479. To this distinct and separate issue the judgment under appeal makes no reference, and is vitiated by the erroneous assumption that, as a matter of law, the burden had shifted to the appellant to satisfy the Court of his innocence.

There is an important difference between the offence of criminal libel under the English common law and the offence of defamation defined by section 479 of the Penal Code of Ceylon. In England, the common law penalises not only a person who intentionally defames another but also a newspaper vendor who is an unconscious instrument in circulating libellous matter, or an innocent newspaper proprietor whose editor has (without the proprietor's privity or knowledge) defamed a third party.— *R. v. Holbrook* [1], *Emmens v. Pottle* [2]. In other words, criminal liability depends not on the intention of the defamer but on the fact of publication. In order to mitigate to some extent the rigours of this rule, a remedial Act was passed (*6 and 7 Vict. c. 96*) whereby an accused person who was *prima facie* vicariously liable for criminal libel could secure his acquittal by proving that the publication was not authorised by him and that he had not acted without due care and attention. The burden of bringing himself within this statutory exception is on the accused person.

In Ceylon, however, section 479 of the Penal Code makes the requisite criminal intention or knowledge an additional ingredient of the offence of defamation, and the burden of proving that ingredient remains throughout on the prosecution. No doubt the bare fact of publication, especially if it be unexplained, is an item of evidence to be taken into account on the issue of intention in the facts of a given case, and the presumption that a man intends the natural and probable consequences of his intentional acts may properly but cautiously be applied in a prosecution for defamation in particular instances. This presumption, however, is not a rule of law which a Court is bound to apply in every situation. Indeed, it does not arise at all unless the evidence justifies the inference that the prisoner had directly published the imputation complained of or knowingly authorised its publication.

There is no justification in Ceylon for casting upon a person charged with defamation the onus of negativing criminal intention, and the correct rule to be applied, *mutatis mutandis*, by a judge trying a case without a jury in such cases has been laid down in *R. v. Steane* [3]:

> " If the prosecution proves an act the natural consequences of which would be a certain result, and no evidence or explanation is given, then a jury may on a proper direction find that the prisoner is guilty of doing the act with the intent alleged, *but if, on the totality of the evidence there is room for more than one view as to the intent of the prisoner*, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction, and if, on a review of the whole evidence, they either think that the intent did not exist, *or they are left in doubt as to the intent*, the prisoner is entitled to be acquitted. "

The judgment under appeal is vitiated by misdirection because the issue of criminal intent has not been examined by the learned Judge with due regard to the burden of proof which remained throughout on the prosecution. Having regard particularly to the finding that the appellant was not in Colombo at the time of publication, it is not possible to say

[1] *(1877) 3 Q. B. D. 60 and (1878) 4 Q. B. D. 42.* [2] *(1885) 16 Q. B. D. 354.*
[3] *(1947) K. B. 997.*

that, if the learned Judge had properly directed himself on this issue, he could not reasonably have entertained a doubt as to whether this ingredient of the offence had been established by the prosecution. I would therefore quash the conviction and make order acquitting the appellant. In the result, the foundation of the application of the Crown to have tho sentence enhanced has disappeared. The application in revision must accordingly be refused.

GUNASEKARA J.—I agree.

Appeal allowed.