PIYADASA DE SILVA v. GUNASEKERA

COURT OF APPEAL
RATWATTA, J. AND ATUKORALE, J.
C.A. (S.C.) 12/70 (F) D.C. COLOMBO 67800/M
JULY 14, 15, 16, 1980

Defamation – Animus injuriandi – Privilege.

The original defendant attended the E.N.T. clinic at the Balapitiya General Hospital as a patient on 20.08.1966, where he alleged the doctor in attendance behaved in a rude and insulting manner towards him. As he did not know the identity of that doctor, he made prompt inquiries from the dispenser of the hospital who gave the name of the plaintiff as the doctor concerned. On the same day the original defendant by letter P1 addressed to the Minister of Health with copies to the P.S.C. and the Director of Health Services, complained about the incident referring to the plaintiff by name and giving probable reasons for the plaintiff so behaving towards him. At an inquiry held in consequence to P1, the plaintiff was shown to the original defendant who stated that he was not the errant doctor. It transpired that the plaintiff was the eye surgeon, and the E.N.T. surgeon on duty on that day of the alleged incident was someone else. The plaintiff sued the original defendant for defamation on the contents of letter P1.

Held:

There was no intention on the part of the original defendant to defame the plaintiff, and the reference to the plaintiff was due to a *bona fide* belief that the

E.N.T. surgeon was the plaintiff. P1 was published on a privileged occasion. If the occasion on which the alleged defamatory words were written was privileged, it was open to the plaintiff to displace that privilege by positive proof of express or actual malice. So long as the original defendant honestly believed what he said to be true he was not guilty of malice merely because the honest belief was induced by gross and unreasonable prejudice.

Cases referred to:

1. *Naude* v. *Glaassens* – SALR 191 CPD 181.
2. *Hulton & Co.* v. *Jones* – 1910 AC 20.
3. *Gulick* v. *Green* – 20 NLR 176.
4. *Fernando* v. *Peris* – 21 NLR 7.
5. *Ariyaratne* v. *Wickremaratna* – 32 NLR 235.
6. *Carbonel* v. *Robinson & Co. (Pte) Ltd. and Another* – 1965 (1) SALR 134.
7. *Harrock* v. *Lowe* – 1973 (3) AER 1094; 1974 (1) AER 662.

APPEAL from the Order of the District Court of Colombo.

H. W. Jayewardene Q.C. with *Chula de Silva* and *Ms. P. Seneviratne* for the defendant-appellant.

N. R. M. Daluwatta for the plaintiff-respondent.

Cur adv vult.

12th September, 1980.

RATWATTE, J.

The original Defendant-Appellant (referred to hereinafter for convenience as the Defendant) died during the pending of the appeal and his widow was substituted as his legal representative. The Plaintiff-Respondent (referred to hereinafter as the Plaintiff) instituted this action against the Defendant claiming damages for defamation. It was averred by the Plaintiff that the Defendant by his letter dated 20.08.1966 addressed to the Honourable The Minister of Health with copies to the Public Service Commission (P.S.C.) and the Director of Health Services (D.H.S.), published to them defamatory statements contained in the said letter concerning the Plaintiff. A copy of the said letter was annexed to the Plaint marked A with the defamatory statements underlined therein. The Plaintiff pleaded that the said defamatory statements were false concerning the Plaintiff and made maliciously and recklessly. The Plaintiff asked for a sum of Rs. 25,000/- as damages for the injury suffered by him to his feelings, credit and reputation.

The Defendant in his answer admitted that she sent the letter referred to in the Plaint to the Minister of Health with copies to the P.S.C. and to the D.H.S., but he denied that the letter contained any defamatory statements. The Defendant pleaded that the occasion of the publication of the said letter to the Minister of Health and of the publication of copies thereof to the P.S.C. and to the D.H.S. was privileged and that such publication was made by the Defendant without malice and without *animus injuriandi.* The Defendant further pleaded the defence of fair comment.

After trial the learned District Judge held that the letter referred to in the Plaint concerned the Plaintiff and that the said letter was defamatory of the Plaintiff. He further held that the occasion of the publication of the letter was privileged, but that the presence of *animus injuriande* destroyed the privilege. The learned District Judge was of the view that the publication was made with malice towards the Plaintiff. He further held that the allegations of fact contained in the letter were not true in substance and in fact in so far as the allegations concerned the Plaintiff. As regards the defence of fair comment the learned Judge held that there was no fair comment where there was no truth. The Plaintiff was awarded the sum of Rs. 8,000/- as damages.

According to the Defendant who was a senior legal practitioner of the Balapitiya courts and a J.P.U.M., the circumstances under which he came to write the letter in question which was produced marked P1 at the trial, were as follows: On 20.08.1966, as the Defendant was suffering from an earache he went to the Balapitiya Hospital shortly before 2 p.m. to attend the Ear Nose and Throat Clinic (E.N.T.) which according to a notice board was to be held at 2 p.m. The Defendant went there and sat down in the room meant for patients. A nurse who was there wrote down the names of the patients. The Defendant was given the number 1 ticket. The doctor came at about 2.30 p.m. and the Defendant was called in by the E.N.T. Surgeon. The Defendant had not seen the E.N.T. Surgeon before and did not know his name. The Defendant went into the consulting room, which was separated from the rest of the room by a curtain. The doctor was seated inside on a chair and there was another chair in front of him. By the side there was a table with some instruments on it. The Defendant sat down on the empty chair and turned it about 10 degrees to enable the doctor to see his ear better. Then the doctor asked the Defendant rudely "Why did you turn the chair which I had placed in the way I wanted." The Defendant had replied that he turned the chair for the purpose of enabling the doctor to see the ear better and the Defendant put the chair in the original position.Then the doctor is said to have replied "You had no business to turn the chair." He had

asked the Defendant to get out. The Defendant thereupon got up and when he had gone about 5 or 6 feet, the doctor called him back and examined him. The doctor had given him a prescription for some medicine. As the Defendant spoke in a loud and rude voice, what he told the Defendant could have been heard by the other patients who were waiting. The Defendant wanted to find out what the name of the doctor was. He went to the Dispensary where the drugs are dispensed with the prescription and there were two people in the dispensary whom the Defendant did not know. It transpired at the trial that the two persons in the Dispensary were two dispensers named Weliwitigoda and M.. A. Gunatilleke. The Defendant asked them for the name of the E.N.T. Surgeon and Weliwitigoda had stated that the name was Dr. Goonesekera, the son of a former Minister. The Defendant stated that he had no reason to doubt the information given to him by the dispensers. The defendant states that he addressed his mind as to why the doctor should have behaved in the manner in which he did, merely because the Defendant turned the chair. Then it struck the Defendant that the doctor may have got annoyed because the Defendant was at the time wearing a green bush coat, green being the colour of the U.N.P. of which the Defendant was a member. The Defendant knew the Plaintiff's father, Mr. D. S. Goonesekera who was the Minister of Labour and Social Services under the previous government which was defeated by the U.N.P. at the General Elections. Mr. D. S. Goonesekera had also lost his seat. The Defendant on the same day sent the letter P1 to the Honourable Minister of Health with copies to the P.S.C. and the D.H.S.

It is necessary to quote the letter P1 in its entirety. I therefore do so with the portions underlined as in the copy of P1 annexed to the Plaint:

Piyadasa de Silva, J.P.U.M.
Proctor & Notary.

"Waidya Bhawan",
Kandegoda,
Ambalangoda.
20th August, 1966.

To: The Hon. the Minister of Health,
Colombo.

Sir,

Complaint against a Public Servant – a Doctor

I have the honour to bring to your notice the **rude and insulting manner** a Public Servant treated me today at Balapitiya Hospital.

I went there at 2 p.m. to consult the E.N.T. Surgeon about my ear trouble. He came in at about 2.30 p.m. I sat in front of him and turned my chair about 10 degrees to enable him to see my ear better.

He without any provocation by me asked me roughly what business I had to turn the chair which he has in front of him as he wanted. I explained that I did it to be able to show my ear better. He talked to me very rudely and asked me to get out of the Consultation Room. After this humiliation he called me back into the Consulting Room and talked to me roughly still indicating his annoyance.

I had not known this Doctor before or seen him earlier. When I inquired from the Dispensary Clerk for the Doctor's name I was told that he was one Dr. Gunasekera, a son of a Minister of a former Government.

It then came to my mind that perhaps the colour of my bush coat which I was wearing, viz; green, may have upset him as **that** is the colour of the Political Party that had **deprived his father of a portfolio and his seat in Parliament. He may have been in a bad temper as he had come half an hour late for duty. But why should I be the victim of his ill-manners?** He was in a dominant position as doctor over me, a patient in his consulting room. Is it proper that a public servant should treat a taxpayer like this? **He displayed his power or arrogance in a public place** and in the presence of many members of the public who were present, there at that time. I request that you inquire into this officer's conduct.

Yours faithfully,

Sgd. . . . . .

Copies to P.S.C. & D.H.S.

In consequence of the letter P1, the D.H.S. by his letter D1A dated 05.09.1966, directed the Superintendent of Health Services, Galle, Dr. Siriwardene to hold an immediate inquiry into the complaint made by the Defendant in P1. A copy of P1 was forwarded along with D1A. On D1A Dr. Siriwardene had made an endorsement that the preliminary inquiry will be held on 24.09.1966 at the General Hospital, Balapitiya. Earlier by his letter D1 dated 03.09.1966 addressed to the Defendant the D.H.S. had acknowledged the receipt of P1 and informed the Defendant that he had requested the Deputy Director of Medical Services to cause an investigation to be made. Dr. Siriwardene, the S.H.S., Galle, by his two letters P4 and D3 both dated 08.09.1966, addressed to the Plaintiff and the Defendant respectively, informed them that a preliminary inquiry will be held by Dr. Siriwardene at the General Hospital, Balapitiya on 24.09.1966 at 10 a.m. The Plaintiff and the Defendant were requested to be present at the inquiry. Dr. Siriwardene is a brother-in-law of the Plaintiff. The

inquiry was held on that day. Both the Defendant and Plaintiff were present. According to the Defendant he was called in by Dr. Siriwardene and his statement was recorded. The Defendant stated that he narrated all what happened and also told Dr. Siriwardene that there was another patient who was with the Defendant at the E.N.T. Clinic on 20.08.1966 and who was number 2 on the list of patients, who was present at the inquiry. His name was Wilson Silva. After the Defendant's statement was recorded, according to the Defendant, a certain person was called in and he was asked whether that person was the E.N.T. Surgeon and the Defendant had replied in the negative. That other person who was called in was the Plaintiff. This evidence is supported by Dr. Siriwardene. According to the Defendant, Dr. Siriwardene then informed him that the Plaintiff was the Eye Surgeon and that the E.N.T. Surgeon who held the E.N.T. Clinic on 20.08.1966 was Dr. Ramachandaran. At the inquiry Dr. Siriwardene had recorded the statements of Dr. Ramachandran, Wilson Silva and the two Dispensers, Weliwitigoda and M. A. Gunatilleke. At the conclusion of the inquiry Dr. Siriwardene sent his report P5 dated 03.02.1967 to the D.H.S.

In the report P5 Dr. Siriwardene refers to what transpired at the inquiry and reported that the comments made by the Defendant in paragraph 5 of P1 would not apply to the Plaintiff. He further stated that the allegations of rudeness and callous treatment made in P1 referred to Dr. Ramachandran who held the E.N.T. Clinic at Balapitiya on the day in question. Dr. Siriwardene went on to state in P5 that there was no evidence to show that Dr. Ramachandran was rude to the Defendant or had given callous treatment.

The Plaintiff sent the letter of demand P2 dated 12.12.1966 to the Defendant claiming a sum of Rs. 25,000/- as damages. In P2 the Plaintiff has relied not only on P1, but on defamatory statements alleged to have been published orally to some of the Plaintiff's professional colleagues and members of the public. But in the plaint the Plaintiff has confined himself to P1 only. The Plaintiff has not pleaded an *innuendo*, he is relying on defamation *per se*.

Three questions arise for our consideration: Firstly, whether there has been a defamation of the Plaintiff as contemplated by our law. In considering that question it has to be borne in mind that in Roman-Dutch Law *animus injuriandi* is an essential element in proceedings for defamation. Secondly, whether the occasion on which the alleged defamatory statements were published, was privileged. Thirdly, if the occasion was privileged, was there malice.

As these three questions are closely connected and bound up with each other, they will have to be considered together. It was the

contention of Counsel for both parties that the document P1 must be read as a whole. Learned Counsel for the Defendant, Mr. Jayewardene contended that when P1 is read as a whole it is clearly seen that the complaint of the Defendant is against the E.N.T. Surgeon and not against the Plaintiff. The Plaintiff's name is mentioned in P1 because the Defendant believed that was the name of the E.N.T. Surgeon. The Plaintiff was an Eye Surgeon. On the other hand learned Counsel for the Plaintiff, Mr. Daluwatte contended that on a reading of P1 as a whole there can be no doubt that the Defendant intended to refer to the Plaintiff and no one else. He argued that the one thing that stands out in P1 is the Plaintiff's name and the reference to his father, a former Minister.

It is necessary to analyse the contents of P1. The heading of P1 is "Complaint Against a Public Servant Doctor." In the first three paragraphs of P1, the Defendant refers to the E.N.T. Surgeon. The word "He" in these three paragraphs is a reference to the E.N.T. Surgeon. The first reference to the Plaintiff is in paragraph 4. The word "He" in that paragraph refers to the E.N.T. Surgeon who the Defendant had been informed, was Dr. Goonesekera, the Plaintiff, a son of a Minister of a former Government. Taking paragraph 4 by itself it is not libellous. Having received the information from the dispenser that the name of the E.N.T. Surgeon was Dr. Goonesekera, the Defendant goes on in the 5th and last paragraph of P1 to attribute to the Doctor, who is said to have been rude to him, a possible motive for his behaviour. Mr. Jayewardene submitted that the mere attribution of a possible motive for the conduct of a person who is identified by a wrong statement made by the dispenser, does not by itself constitute *animus injuriandi.* On the first date of the inquiry held by Dr. Siriwardene, which was the very first opportunity the Defendant had of correcting his mistake, the Defendant said that the doctor whom he had consulted on the day in question was not the Plaintiff. The Defendant's evidence is that although he knew the Plaintiff's father very well for about 20 years, he did not know the Plaintiff and had never seen him till he saw him on the first date of inquiry on 24.09.1966. The word "He" is used four times in the last paragraph of P1 and the word refers to the E.N.T. Surgeon whom the Defendant mistakenly thought was the Plaintiff. I am inclined to agree with the submission of Mr. Jayewardene that at the most the reference to the Plaintiff in P1 was a statement made on a mistaken identity based on an inaccurate identification by the dispenser who ought to have known and certainly would have known that the doctor in question was not Dr. Goonesekera. We do not know whether the dispenser made a deliberate statement or what purpose he had in mind. The dispenser Weliwitigoda who gave the information to the Defendant was not called as a witness at the trial. Mr. Jayewardene drew our attention to the letters sent by the D.H.S. regarding the inquiry

to be held by Dr. Siriwardene. The letter D1 sent by the D.H.S. to the Defendant bears the heading "Complaint Against a Public Servant – E.N.T. Surgeon, Balapitiya G.H." The letter D1A addressed to the S.H.S., Galle by the D.H.S. bears the same heading as D1. The letter D3 addressed to the Defendant by the S.H.S. Galle summoning the Defendant for the inquiry bears the heading "Complaint Against a Public Servant – A Doctor." The letter P4 addressed to the Plaintiff by the S.H.S. Galle, summoning the Plaintiff for the inquiry bears the same heading as D3. The Plaintiff is described in P4 as the Eye Surgeon, Galle. None of these documents refer to any complaint against Dr. Goonesekera. There is substance in Mr. Jayewardene's submission that these documents show that the Department itself did not understand P1 as a complaint against Dr. Goonesekera but as a complaint against the E.N.T. Surgeon. This is further buttressed by the fact that the Department appointed the Plaintiff's own brother-in-law, Dr. Siriwardene to hold the inquiry. The Plaintiff himself in his evidence stated that he was officially made aware for the first time that the complaint had been made against him, was when he received the document P4 requiring him to attend the inquiry on 24.09.1966. He stated that earlier when he was in the Head Office he came to know that there was a complaint against him. According to the Plaintiff at the inquiry Dr. Siriwardene questioned him about the contents of P1.

As I have already held above the reference to the Plaintiff by the Defendant in P1 was on a mistaken identity. I am of the view that there was no intention on the part of the Defendant to defame the Plaintiff, and further that the reference to the Plaintiff was due to a *bona fide* belief on the part of the Defendant that the E.N.T. Surgeon was Dr. Goonesekera. Nathan in his book *The Law of Defamation in South Africa* (1933 edition) at page 139 states as follows:

> "If the Plaintiff cannot clearly show that he was the person intended by the statement of the Defendant, he must fail in his action."

Nathan then goes on to refer to the case of *Naude v. Glaassens.*[1] The facts in that case are in the headnote. In that case too the Defendant did not know the Plaintiff or of his existence. It was held in that case that the circumstances tended to disprove any malice or ill-will on the part of the Defendant towards the Plaintiff. Mr. Daluwatte cited the judgment of the House of Lords in *Hulton and Company v. Jones*[2]. That too was a case of mistaken identity. The facts in that case are referred to in the headnote. The House of Lords held that the plaintiff in that case was entitled to maintain the action for damages. This judgment was considered in the case of *Naude v. Glaassens (supra)* and Searle, J. stated at page 186 that it was open to some doubt whether the rule laid down in *Hulton & Co. v. Jones*[2]

"that the true test in all cases is what would be the reasonable interpretation of what was said as appearing to those who heard it, is in accordance with the principles of Roman-Dutch Law." McKerron (6th edition) too states at page 168 that it is a debatable question whether the well-known English case of *Hulton v. Jones* can be reconciled with the principles of the Roman-Dutch Law.

As regards the defence of qualified privilege the learned District Judge has held that the occasion on which P1 was published was privileged. Mr. Daluwatte submitted that he does not concede that as far as the Plaintiff was concerned P1 was published on a privileged occasion, because the allegations contained in P1 relating to the Plaintiff were not true. I do not agree with this submission of Mr. Daluwatte. I have already held that the reference to the Plaintiff was due to a *bona fide* mistake. I am of the view that the learned District Judge was correct in holding that P1 was published to the Honourable Minister of Health, the D.H.S. and the P.S.C. on a privileged occasion. That finding is in accordance with the well-known principles relating to the plea of qualified privilege. But the learned District Judge went on to hold that the presence of *animus injuriandi* destroyed the privilege and that the publication was made with malice towards the Plaintiff. He was of the view that the Defendant had written the letter P1 with a reckless disregard of what the truth was as to the identity of the person concerned. The question then arises whether the Defendant was reckless or negligent in making the statements made in P1 in reference to the Plaintiff. I do not think that on the evidence it could be said that the Defendant was reckless or negligent. The doctor whom the Defendant consulted was not known to him and in view of what happened the Defendant was desirous of finding out the identity of the Doctor concerned. He went armed with the prescription issued by the Doctor to the Dispensary and made inquiries. He was told by Weliwitigoda that the Doctor's name was Dr. Goonesekera. Both Weliwitigoda and Gunatilleke were according to the Plaintiff's evidence old hands at the Balapitiya Hospital. I think the Defendant was entitled to rely on the information furnished by Weliwitigoda. The learned District Judge states that the Defendant instead of merely relying on the information furnished by the dispenser, should have made inquiries from the D.M.O. of the hospital. The learned Judge had lost sight of the fact that the Defendant went to the Dispensary armed with the prescription from the Doctor. It must also be remembered that the Defendant who was suffering from an earache must have been in pain at the time, and the letter P1 was sent on the same day. I am of the view that the learned District Judge has misdirected himself.

It is a well-known principle of the Roman-Dutch Law that in an action for defamation when it is shown that the occasion on whch the

words were uttered or written was privileged, it is upon the other side to displace that privilege by positive proof of express or actual malice – *Gulick v. Green,*[3] *Fernando v. Peris* [4] and *Ariyaratne v. Wickremeratne.*[5] In *Carbonel v. Robinson & Co. (Pte) Ltd. and Another,*[6] Hemmings, J. states as follows at page 151:

> "For the sake of completeness I deal briefly with the case on the basis that the defence of privilege has been proved. The Plaintiff could then only succeed upon proof that the newspaper, in publishing the letter was actuated by malice or express desire to injure him, or more accurately, by *animus injuriandi.* This may be established by proving that the newspaper acted from some indirect or improper motive, or that it stated what it did not know to be true, reckless whether it be true or false. Mere excess of language does not necessarily prove malice, though it may be evidence of it. A defendant who claims privilege is entitled to succeed if he acted in good faith, and had a genuine belief in the truth of his statements, even if the belief was founded on nothing but hearsay, or was a foolish one. It is, I think more accurate to say that it is for the Plaintiff to prove the absence of an honest belief. Unreasonableness, however gross, is only evidence of and not a substitute for *animus injuriandi.* Similarly, mere negligence can never amount to malice."

Mr. Jayewardene relied very strongly on the judgments of the Court of Appeal and the House of Lords in the case of *Harrock v. Lowe.*[7] The facts of that case are narrated in the headnote. It was accepted that the occasion on which the defamatory statements were alleged to have been made was privileged, but it was pleaded that the Defendant in that case was motivated by malice. It was held in the Court of Appeal judgment as follows:

> The appeal would be allowed since the judge had misdirected himself in finding that malice was established. So long as a defendant honestly believed what he said to be true he was not guilty of malice merely because the honest belief was induced by gross and unreasoning prejudice. Accordingly, the finding that the defendant honestly believed that what he said was true was inconsistent with a finding that he was actuated by malice, and the plea of qualified privilege therefore succeeded.

The House of Lords affirmed the judgment of the Court of Appeal and held as follows:

> Since the defendant, however prejudiced he had been, or however irrational in leaping to conclusions unfavourable to the

plaintiff, had believed in the truth of what he had said he was entitled to succeed in his defence of privilege. Although gross and unreasoning prejudice could give rise to an inference of malice where it constituted evidence that the defendant had been indifferent to the truth or falsity of what he had said, it could not do so in a case when it had induced him to believe in the truth of his allegations and there were no other circumstances from which malice could be inferred. Accordingly the appeal would be dismissed.

I am of the view that the *dicta* in the judgment in *Harrock v. Lowe*[7] are applicable to the instant case. I am of opinion that *animus injuriandi* has not been established in this case and that the plea of privilege succeeds.

For these reasons I would set aside the judgment of the learned District Judge and dismiss the Plaintiff's action.

As regards costs I do not think that in all the circumstances of this case the Defendant should be awarded his costs of action. When at the inquiry held by Dr. Siriwardene on 24.09.1966 the Defendant realized that he had made a *bona fide* mistake, he did not offer an apology to the Plaintiff or withdraw the allegations in so far as they concerned the Plaintiff. Even in his reply P3 to the Letter of Demand sent on behalf of the Plaintiff, the Defendant did not attempt to make any amends. In the answer filed by the Defendant, he maintained that "in so far as the said letter (i.e. P1) consists of allegations of fact, it is true in substance and in fact . . . .". No offer was made to express regret at the trial until a late stage. It was only after all the Plaintiff's witnesses had given evidence and just before Plaintiff's case was closed, that Counsel for the Defendant stated that his client was willing to express regret. Whilst these are not matters that would have been relevant in deciding whether the Defendant was liable in damages, they would have been relevant matters to have been considered in computing the quantum of damages if it was found that the Defendant was liable in damages for defamation. I am of the view that they are also relevant matters to be considered on the question of costs. I would therefore hold that the parties should bear their own costs of this action in both Courts.

ATUKORALE, J. – I agree.