1937 *Present :* **Soertsz J. and Fernando A.J.**

CHELLIAH *v.* FERNANDO.

299—D. C. Colombo, 169.

Defamation—Truth is no defence—Public interest—Privileged occasion—Exceeding limits of privilege—Proof of malice—Roman-Dutch law.

Under the Roman-Dutch law it is no defence to an action for defamation that the words complained of were true in substance and in fact. It must be proved that it was for the public benefit that they should be published.

A satement is to be considered as made on a privileged occasion when it is fairly made by a person in the discharge of some public or private duty whether legal or moral or in the conduct of his own affairs in matters where his interest is concerned.

The plea of privilege will not protect a person who has published something beyond what is reasonably appropriate for the occasion.

Where the defendant has exceeded the limits of a privileged occasion it is not incumbent on the plaintiff to prove express malice.

THE plaintiff who was a married woman and maternity nurse by profession sued the defendant to recover a sum of one thousand rupees as damages in consequence of the defendant having defamed her by alleging in a communication to the Superintendent of Police, Colombo North, that she was the mistress of more than one person, that she was a woman of doubtful character, and that she used her certificate in midwifery as a cloak to hide her shameless conduct. The learned District Judge held that the allegations were true and dismissed plaintiff's action.

N. E. Weerasooria, for plaintiff, appellant.—The learned trial Judge's finding on the facts is wrong, the inferences drawn by him are not justified by the evidence. As a result of a wrong inference the trial Judge approached plaintiff's case with a bias ; he himself called a witness who did not support his view. The allegations made against the plaintiff were untrue in fact ; the occasion was not a privileged one ; there is evidence of ill-feeling between the parties ; the defendant was actuated by malice ; even if the occasion was privileged the allegations complained of went beyond the matter in regard to which a complaint to the Police may have been made ; they were irrelevant and not for the public benefit. Counsel also cited *Tissera v. Holloway* [1] and *Serajudeen v. Allagappa Chetty* [2].

H. V. Perera (with him *Chelvanayagam*), for defendant, respondent.—The trial Judge is right on his findings of fact. The occasion was a privileged one ; there is no evidence of malice. The intervention of the Police was properly sought and the information was given in the course of and for the purpose of the complaint which the defendant had a right to make. It was relevant and pertinent to the discharge of the duty. Counsel cited *Adam v. Ward* [3].

Cur. adv. vult.

Weerasooria, in reply.

[1] *(1878) 1 S. C. C. 29.*

[2] *(1919) 21 N. L. R. 428.*

[3] *(1917) A. C. 320.*

February 11, 1937. SOERTSZ J.—

The plaintiff, a married woman, and a certified maternity nurse by profession, sued the defendant to recover a sum of one thousand rupees as damages she claimed to be entitled to, in consequence of the defendant having defamed her by alleging, in the course of a written communication made by him to the Superintendent of Police, Colombo North, that "she had been kept as a mistress by more than one person"—"she is apparently a woman of doubtful character"—"she uses her certificate in midwifery as a cloak to hide her shameless conduct"—"she is often not at home and when she is, there is a constant stream of callers at any time of the day or night."

That these statements were made is beyond question. The letter was produced and was received in evidence, and the defendant admitted he wrote it. It was not, and indeed it cannot be denied, that these statements are defamatory. The learned trial Judge found that "the allegations made in the petition are true," and he went on to say, "therefore plaintiff's case for damages fails." Roman-Dutch law requires not only "that the words were true in substance and in fact, but that it was for the public benefit that they should be published". (*Botha v. Brink* [1].) Adultery is not an offence under our law, and I fail to see how the private morals of a woman can be of public interest, or how it can benefit the public to be informed of them. It is not necessary, however, to consider that question further, for after a careful examination of the evidence I am unable to agree with the District Judge that the statements published of the plaintiff have been proved to be true. The learned trial Judge appears to have reached his conclusion by a curious course of reasoning. The plaintiff in her evidence stated that "it is not true that my husband is really separated from me. My husband has been in Jaffna for the last two years. During that time he came to Colombo. Before those two years, he was in Colombo for some time. He is a canvasser and has to be on the move always. He goes all over the Island. Now he is permanently fixed at Jaffna, canvassing orders in Jaffna . . . . My husband is a canvasser for Baur & Co."

A witness, Ponniah, deposed to having seen the plaintiff's husband at a Hindu temple at Kochchikade about the year 1933, dressed in a hermit's saffron robes, and Jamion (an Invoice Clerk at Baur's) said that he had been working nearly two years at Baur's, but that he knew of no employee of Baur's by the name of Chelliah. This witness admitted in cross-examination "that appointments and general supervision of business are in the hands of the manager."

In this state of the evidence on that point, the trial Judge says at the very outset of his judgment "She says her husband was a canvasser at Baur's getting a salary of Rs. 150 a month and a commission and during the period relevant to the case employed as such canvasser at Jaffna. There is evidence, for instance, the evidence of Ponniah that the plaintiff's husband on the contrary has been seen by him going about in a yellow garb otherwise engaged, and Jamion (an Invoice Clerk at Baur's) says that that company did not employ canvassers and that there is certainly no employee of the firm called Chelliah. In his petition

[1] *8 Bush. 119.*

. . . . the defendant referred to the plaintiff as being separated from her husband. That is probably true, because the plaintiff does not give a true statement with regard to her husband which would indicate that she no longer has any interest in her husband or his doings. I am unable to accept the plaintiff's evidence on that point. Therefore the plaintiff for some purpose of her own has attempted to deceive the Court as to her husband's relationship with her." It is obvious that a judgment which begins with so strong a bias against the plaintiff, must end disastrously for her. I have quoted the whole of this part of the judgment to draw attention to the fallacious reasoning that underlies it. I do not see how the evidence of Ponniah and Jamion, assuming it to be true, necessarily results in the plaintiff's evidence being false. Ponniah saw the plaintiff's husband *once* in 1933 in a Hindu temple clad in hermit's robes. Surely, this does not mean that he could not have been a canvasser for two years—at the time the plaintiff was giving evidence—in Jaffna. Even a busy and worldly canvasser may find the time, and feel the desire to go on a pilgrimage to a temple. Many things may worry even a canvasser's conscience and suggest to him the desirability of purification by pilgrimage in the full attire of a hermit. Chaucer speaks of one such among his Pilgrims "with his bargeines and his chevisance." With regard to Jamion, admittedly, he is scarcely the man to know who all the employees of Baur & Co. are. In a word, the evidence of Ponniah and Jamion was not sufficient for holding that the plaintiff was untruthful when she said that her husband was not really separated from her, but was residing in Jaffna as his business required him to do so. The premise of the learned Judge, resting as it does on insufficient data, the conclusion he draws from it "that therefore the plaintiff for some purpose of his own has attempted to deceive the Court" is not justified.

The next point made by the trial Judge is that plaintiff and Corea denied that there were any improper relations between them and they also denied that Corea used to visit the plaintiff. The learned Judge says with regard to this "Neither party called Corea, but I considered that this case required proper investigation as it involved on the one hand, the character of the plaintiff, and on the other hand the *bona fides* of the defendant. I myself called Corea as a Court witness. My object was to see if he could give any explanation as to his presence there, *for I had made up my mind that he did go there.* He, however, denied having gone there and denied even knowing the plaintiff. That evidence in my opinion is totally false." Now, it is clear that if one has made up one's mind that a certain person goes frequently to a certain house and then asks him why he does so, and that person denies his visits, the natural reaction is to disbelieve the denial. But the question is whether there was sufficient justification for the trial Judge to have made up his mind that Corea did visit the plaintiff. In the communication addressed by the defendant to the Police, all he says is "to the best of my belief this *ex*-married woman has been kept as a mistress by *more than one person* whose names I am in a position to divulge to you personally". When the plaintiff was in the witness box, defendant's Counsel subjected her to an exhaustive cross-examination, but he did not put one single

question to her to suggest that she had been Corea's mistress. She was questioned only with regard to a cousin of her's named Saverimuttu who was living in the same house as the plaintiff. If the defendant had "Corea" in mind as one of the several persons referred to in the letter sent to the Police, who had the plaintiff for mistress, it is hardly possible to account for the omission to put one question to her on that point. After the cross-examination of the plaintiff, the trial Judge put some questions to her and then for the first time, the plaintiff was asked whether she knew Corea, and whether she and Mrs. Corea did not have a quarrel. It is not at all clear to me how the learned Judge knew to put these questions, for there is nothing on the record up to that stage to show that Corea or Mrs. Corea had been mentioned at all. However, the point I make is that defendant does not appear to have instructed his Counsel to make any suggestion as to improper relations between her and Corea, and a quarrel between her and Mrs. Corea in consequence. Then again when the defendant gave evidence all he said was that the plaintiff was kept by Mr. X, and curiously enough, this too was said in answer to a question by the Court. Not one statement to that effect had, up to that stage, been made by the defendant in answer to questions by his Counsel. The defendant's wife gave evidence and spoke in detail to certain incidents from which she inferred intimate relations between the plaintiff and Saverimuttu, but did not so much as mention the names of Corea and Mrs. Corea. The Judge put no questions to her. The witnesses Ponniah and S. A. Fernando speak to Corea's relations with the plaintiff, but my own impression is that they are unreliable witnesses and their evidence would hardly have been accepted by the Judge were it not for the fact that by the time they came to give evidence, he had "made up his mind" without any evidence to justify his so doing, that Corea did go to the plaintiff's house. The Judge having thus reached the conclusion that Corea did visit the plaintiff, goes on to draw from Corea's and plaintiff's and Mrs. Corea's denial of those visits, the inference that Corea's visits could not have been innocent. To use his own words "Therefore, I think his (Corea's) denials indicate that his visits could not have been innocent. Again the plaintiff herself denies the visits. If they were innocent and explicable she would have admitted them. The fact that she falsely denies these visits indicates to my mind that these visits were not innocent. Of course, Mrs. Corea says she knows nothing of these visits. Therefore the plaintiff was receiving into the house rented by her the visits of Corea *unknown to his wife*, which she falsely denies." I say with regret that this is impossible reasoning. It also overlooks the facts, at least the very important fact according to the defendant's case that Mrs. Corea came to the plaintiff's house and quarrelled with the plaintiff over her relations with her husband.

The final stage in the reasoning of the trial Judge is concerned with a statement made by the defendant in the course of his evidence, again in answer to a question by the Judge, that one day after this case had been instituted, he peeped through a crack in the door and saw the plaintiff and Saverimuttu engaged in sexual relations. The defendant admitted that he had not mentioned a word about this to his lawyers, and the

defendant's wife knew nothing about it. She says "I have never seen my husband peeping through that hole." But so far as the trial Judge was concerned, the weakness of this evidence appears to be its strength.

I have examined the evidence with great care and I find it impossible to hold on the evidence that the defendant has substantiated the allegations he made in his letter. As I observed earlier in my judgment, the Roman Dutch law requires a defendant in a case like this to prove not only that the defamatory statements are true, but that it was for the public benefit that they should he made. In my view, it was not possible for the defendant to contend that it was for the public good for him to make those statements. His defence failed for that reason, apart from the other defence of a privileged occasion and absence of malice, but I have none-the-less examined the evidence on this question of the truth of the statements as found by the Judge, because I think in a case of this nature, a person in the position of the plaintiff is entitled to the benefit of the view of this Court if it is not in agreement with the view taken by the trial Judge.

The only other question for consideration is whether the plea of a privileged occasion and of absence of malice protects the defendant. Baron Parke's dictum states the true criterion as to whether an occasion is privileged both in the English and the Roman-Dutch law. He said in *Toogood v. Spyring*[1] that a statement is to be considered as made on a privileged occasion when it is "fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned.

If fairly warranted by any reasonable occasion or exigency, honestiy made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right, to make them within any narrow limits". Testing the present case by that criterion, a privileged occasion arose for the defendant to make a complaint to the Police with regard to the alleged assault on his servant, the abuse to which his wife and the other immates of his house were being subjected, and the fact that the previous warning said to have been given by the Police on an earlier complaint of his had had no effect. These are matters in which the intervention and assistance of the Police may properly be sought. With regard to these matters the defendant had a right, if not a duty, to place them before the Police and the Police had a corresponding duty or interest to be informed. But the Police could do nothing in the matter of a woman's morals, unless of course an offence resulted. The fact that a woman was guilty of adulterous intercourse with one or more men is deplorable, but is not an offence and does not call for Police interference. Therefore, the allegations complained of are not protected. In the words of Earl Loreburn in *Adam v. Ward*[2] "anything that is not relevant and pertinent to the discharge of the duty and the exercise of the right or the safeguarding of the interest which creates the privilege will not be protected. To say that foreign matter will not be protected is another way of saying the same thing. The facts of different cases vary infinitely, and I do not think the principle can be put more definitely than by saying that the Judge has to consider

[1] *C. M. & R. 181 at p. 193.*

[2] *(1917) Appeal Cases at pages 320–321.*

the nature of the duty or right or interest and to rule whether or not the defendant has published something beyond what was genuine and reasonably appropriate to the occasion . . . . For a man ought not to be protected if he publishes what is in fact untrue of someone else or *when there is no occasion for his publishing it to the person to whom he, in fact, publishes it.*" I am not overlooking the earlier dictum I have quoted that communication made by a person in the discharge of some duty, or in the exercise of a right, or in matters where his interests are concerned have not been restricted by the law within "any narrow limits" but I insist that to say that these allegations complained of in this case were not relevant and pertinent to the defendant's duty, right or interest, is not to attempt to restrict the communication within narrow limits. The defendant himself in calmer moments appears to have realized this. He says in the course of his evidence "I was not particular that her character should be investigated . . . . I was not concerned at all with her character."

In my opinion, a privileged occasion had arisen, but the defendant transgressed far beyond the proper limits of that occasion. I, therefore, hold that it is not incumbent on the plaintiff to establish express malice. The necessary element of a *animus injuriandi* can be inferred from the publication of the defamatory words.

The plaintiff has, then, made out a case for damages. The sole question left is the amount of damages. In this connection, I think I am entitled to take into consideration the fact which emerges clearly from the evidence that the plaintiff and the other inmates of her house acted in a very unneighbourly and provocative manner towards the defendant and his family. The plaintiff has claimed one thousand rupees as damages. I think it will be sufficient if I award her three hundred rupees and costs in that class both here and below.

FERNANDO A.J.—I agree.

Appeal allowed.