Present : Branch C.J. and Garvin J.

1925.

LEISA *v.* SIYATUHAMY.

171—D. C. Kegalla, 6,600.

Defamation—Statement made in course of proceedings in answer to Magistrate—Privilege.

An unsworn statement made by a headman, in the course of proceedings before a Police Magistrate, in answer to questions put by the Magistrate is absolutely privileged.

ACTION for defamation brought against the defendant, a village headman, by the plaintiff, a resident of his wasama. It was based upon a statement made by the defendant, in answer to the Police Magistrate, in the course of a case in which the plaintiff charged certain persons with assaulting and robbing her. During the course of the proceedings in the Police Court the plaintiff was cross-examined as to her moral character, and when objection was taken to these questions, on the ground that there was no foundation for the allegations, it was suggested to the Magistrate that the defendant should be called and questioned on the point. While the plaintiff was in the witness box the defendant was summoned into court, and in answer to a question stated that " the plaintiff's house is a house of prostitutes." The learned District Judge held, that the defendant made the statement, without sufficient ground or material, and awarded the plaintiff fifty rupees as damages.

Drieberg, K.C. (with him *H.V. Perera*), for defendant, appellant.—The learned Judge was wrong in thinking the statement was not privileged. In *Silva v. Balasuriya*[1] the court only considered the case of a witness making a statement in the witness box. It did not consider at all the case of a statement not made on oath or affirmation. Generally speaking, privilege is extended not because it is sworn testimony but on grounds of public policy.

Privilege is extended to judges, counsel, witnesses, and parties. (*Royal Aquarium and Winter Garden Society v. Parkinson.*[2])

Privilege extended to witness in witness box is extended to the preliminary statement made by him to his solicitor before trial. (*Watson v. J. M'Ewan*[3]).

In *Wijeygoonetileke v. John Appu*[4] privilege was extended to statements other than those on sworn testimony.

[1] *(1911) 14 N. L. R. 452.*
[2] *(1892) 1 Q. B. (at page 451).*
[3] *(1905) A. C. 480.*
[4] *(1920) 22 N. L. R. 231.*

Statements made to Police Office under Chapter XII., Criminal Procedure Code, are privileged.

Section 165, Evidence Act, allows Judges to ask questions from witnesses. There is no irregularity in it. This is also allowed by section 429, Criminal Procedure Code.

Even if it is qualified privilege, express malice must be proved to support a claim for defamation, *Fernando v. Peiris.*[1]

F. J. Soertsz (with him *Ranawake*), for plaintiff, respondent.—No privilege is available here. This benefit is available only if he is a witness in the case and the testimony is on oath (*Odgers on Libel and Slander, 4th Edition, page 227*) ; *Trotman v. Dunn.*[2]

The facts show that the statement was irrelevant, and malice is therefore present.

December 15, 1925. BRANCH C.J.—

The facts of this case are shortly as follows :—The defendant, Siyathuhamy, is a village headman, and is the Gan-Arachchi of Eturupotha wasama, and the plaintiff is a resident of that wasama. In August, 1923, the plaintiff was the complainant in a Police Court case in which certain persons were charged with assaulting and robbing her. The defendant, in his capacity as village headman, had made the usual report as to the offence, and came to the court-house on the day of the trial. He had not been summoned as a witness, but his evidence is that he was asked by the Police to come to court and give evidence for the prosecution. The learned District Judge thinks he came to the court as a spectator merely. During the course of the case the plaintiff was cross-examined as to her moral character, and when objection was taken by her proctor to these questions, on the ground that there was no foundation for the allegation, it was suggested to the Magistrate who tried the case—presumably by the proctor for the accused persons—that Siyathuhamy should be called and questioned on the point. The Magistrate consented and while the plaintiff was in the witness box Siyathuhamy was sent for and questioned either by the Magistrate or by the proctor for the accused persons, with the Magistrate's consent, as to the moral character of the complainant, namely, the present plaintiff-respondent. The Magistrate's note is as follows :—"The headman present states that complainant's house is a prostitute's house." The headman, namely, the defendant-appellant, was not sworn, and he made his statement from the body of the court. The present plaintiff-respondent brought an action for defamation of character against Siyathuhamy, and the learned District Judge has found that the statement above set out was made by Siyathuhamy, he knowing very well he had not sufficient grounds or materials for the making of such reckless statements. The trial Judge further held that the statement was not privileged, and he awarded damages to the plaintiff.

[1] *(1919) 21 N. L. R. 7.*

[2] *4 Camp. 211.*

1925.

BRANCH C.J.

Leisa v. Siyatuhamy

It was held in *Silva v. Balasuriya* (*supra*) that the question as to the protection offered by law to a witness is governed by the Law of England and not by the Roman-Dutch Law.

At English Law the statements made by a witness in the course of proceedings before a Court of Justice are absolutely privileged, and no action can be brought against him in respect of such evidence given by him, even if it be false and malicious. The ground of that rule is public policy. The rule was established not for the benefit of witnesses but for that of the public, and the advancement of the administration of justice.

The evidence given by Siyathuhamy comes, I think, within that rule. I do not think that the fact that he was not examined on oath or affirmation, and that he did not enter the witness box, and that he cannot be prosecuted for perjury disentitles him to the protection which would otherwise be his. I think he enjoys the immunity, which he would have enjoyed had he been summoned as a witness and put into the witness box and either sworn or affirmed.

No case directly in point was cited but counsel for the defendant-appellant referred to *Watson v. M'Ewan.*[1] In that case the appellant appeared before a solicitor at, what is called in Scottish Law, his "precognition"—what is called in English Law, the interview between the intended witness and the solicitor who takes from him the "proof"—namely, reduces to writing the evidence which the witness will give in the pending suit. It was held that the preliminary examination of a witness by a solicitor is within the same privilege as that which he would have if he had said the same thing in his sworn testimony in court. The fact, therefore, that the author of such a statement cannot be indicted for perjury is not an essential element. *Watson v. M'Ewan* (*supra*) goes further than *Wijegunatileke v. Joni Appu.*[2] In the latter case the statement was made during the course of an investigation under Chapter XII. of the Criminal Procedure Code, and this was held to be a privileged occasion.

The true ground for the immunity enjoyed by a person making statements in a Court of Law is the overwhelming consideration that protection is necessary on the ground of public policy, and an intolerable burden would, I think, be laid upon a witness if he had to determine before he made answer, whether the question put to him was relevant to the issue, whether he was making his statement from the ordinary place appointed for witnesses, and whether he had been properly sworn. In this case the headman had really no option in the matter. The Magistrate had directed him to attend and he was required to give answer to the questions put to him as to the moral character of the plaintiff and his statement was not *dehors* the character of witness.

I would allow the appeal, with costs.

Appeal allowed.

[1] *(1905) A. C. 480.*

[2] *(1920) 22 N. L. R. 231.*