Present : Bertram C.J. and Schneider A.J. 1920.

WIJEGUNATILEKE *v.* JONI APPU.

108—D. C. Kalutara, 8,394.

False statement made by a person before the police implicating another—Inquiry by police under Criminal Procedure Code, chapter XII.—Privilege—Action for damages—Malicious prosecution.

At a preliminary inquiry by the police under chapter XII. of the Criminal Procedure Code the defendant made a false statement to the police implicating the plaintiff in an affray.

Held, that as the statement was made on a privileged occasion, an action for damages did not lie against him.

THE facts appear from the judgment.

A. St. V. Jayawardene, for defendant, appellant.

H. J. C. Pereira, for plaintiff, respondent.

Cur. adv. vult.

December 2, 1920. BERTRAM C.J.—

I have read and agree with the judgment of Schneider A.J. I would only add that the conclusion of this Court appears to be in harmony with the principle observed in the Courts of South Africa. I cite the following passage from *Nathan's Common Law of South Africa, vol. III., para. 1643*, the case referred to not being available locally :—

> "The defendant must have set the criminal law in motion, that is, he must have voluntarily instituted criminal proceedings. If A is asked by the civil authorities, or, where martial law is in force, by the military authorities, to make an affidavit concerning certain acts of B, and A makes an affidavit stating certain facts which, if true, would constitute a crime, in consequence whereof B is prosecuted at the public instance, A is in the position of mere witness, and his affidavit will not be regarded as having been made by him voluntarily with a view to securing the prosecution of B. (*Michau v. Westerman.*[1])"

[1] *10 C. T. R. 671.*

1920.

Wijegunatileke v. Joni Appu

SCHNEIDER A.J.—

For the purpose of this appeal I would take the following to be the facts :—

The President of a Village Tribunal reported to the police that an affray had taken place between some Tamil labourers on the one side and a number of Sinhalese villagers on the other. The President's own observations told him that the affray was of a serious nature. An Assistant Superintendent of Police proceeded to the spot and began an inquiry into the occurrence, but shortly afterwards he handed this to a Sub-Inspector. This officer examined a number of witnesses. In the course of his inquiry it transpired that the boutique of Lewis, one of the witnesses examined by him, had been looted, and that the defendant owned the adjoining boutique. The Sub-Inspector questioned the defendant. He told him that he knew nothing. The Sub-Inspector then pressed the defendant to disclose what he knew, presumably because he had been told that the defendant was present in his boutique at the time of the occurrence. The defendant then stated to him that he saw the plaintiff with a club among the crowd, but that he did not see him do anything.

As a result of the inquiry the Sub-Inspector, under the instructions of the Assistant Superintendent of Police, made a report to the Police Court under section 148 (*b*) of the Criminal Procedure Code, in which he charged four Tamils and seven Sinhalese—the plaintiff being the fifth accused—with having committed an affray. In his list of witnesses for the prosecution the name of the defendant was not given. In the course of the Police Court trial the President of the Village Tribunal when giving evidence stated that the names of the Sinhalese who had run away from inside a boutique upon his approach were given to him by Lewis and the defendant. The names were those of the tenth and eleventh accused. The defendant was called as a witness presumably because of this statement. In his evidence he stated that he identified the fifth, sixth, seventh, eighth, ninth, tenth, and eleventh accused, and three other Sinhalese in the crowd during the affray. These three others, whose names he mentioned, were not among those who were originally charged by the police, nor were they charged subsequently. He said the fifth, eighth, and ninth accused had clubs in their hands. He said he could not say what each of the men, whose names he gave, had done, but that he saw only the tenth and eleventh accused hitting the second accused. The Magistrate acquitted the fifth (plaintiff), seventh, and eighth accused. He convicted the rest.

At the date of the affray there was ill-feeling between the plaintiff and the defendant over some dispute about land.

In this action the plaintiff sued to recover Rs. 5,000 as damages. His cause of action as set out in the plaint was that the defendant

" had falsely and maliciously and without any reasonable cause " given information to the police and caused him to be charged with riot and robbery and to be arrested and detained in custody, and that the defendant had also given false evidence at the trial and " had procured other false witnesses."

The defendant denied those allegations, and pleaded that upon an inquiry by the police he had given information in regard to the plaintiff, and that no action lay against him.

The parties went to trial upon several issues, but towards the close of the trial Mr. J. S. Jayawardene, who appeared for the defendant, raised the following issue: " Is the action maintainable against the defendant for statements made by him at the police inquiry? "

This seems to me the real and the only material issue in the action.

The learned District Judge gave judgment for the plaintiff in the sum of Rs. 1,000 as damages and costs. For this he gives as reason that there " can be no doubt that though the police prosecuted, it was defendant and he alone who gave plaintiff's name to the police as one of the rioters. He, therefore, is responsible for plaintiff's arrest and prosecution."

I accept the learned District Judge's findings that it was the defendant and he alone who gave the plaintiff's name to the police, and that the plaintiff was not present at the affray.

In his judgment the District Judge has not even referred to the real issue in the action. He called the action one for malicious prosecution, and regarded it as identical with the action of that name as known to the English law. There are cases in our reports which have been decided upon the assumption that the English law action is the one which is recognized in our Courts. But it seems to me that the correct view of our law is that expressed by Bonser C.J. in *Naide Hangidia v. Abraham Hamy* [1] and by De Sampayo J. in *Podi Singho v. Appuhamy* [2] and *Appuhamy v. Appuhamy*.[3]

Bonser C.J. said in the course of his judgment :—

> " He then brought an action against the defendant in the form of an English action for malicious prosecution. I asked what authority there is for such an action, and none was produced. It is clear that an action on this case for injury lies. That is a form of action free from the technicalities of the English form of action."

If the present action be regarded as identical with the English law action of that name it is bound to fail, for in the circumstances the defendant cannot be said to have prosecuted the plaintiff. The defendant did no more than give information to the police, and

[1] *S. C. Min. of Mar. 1, 1898, C. R. Kandy—289/5,852.*

[2] *3 Bal. Rep. 145.*

[3] *(1920) 21 N. L. R. 436.*

1920.

SCHNEIDER A.J.

Wijegunatileke v. Joni Appu

the police after investigation prosecuted. In these circumstances it has been held that the defendant not being the prosecutor no action for malicious prosecution lay against him. *Uduma Lebbe Marikar v. Sarango*,[1] *Row v. Pillai*.[2]

The *actio injuriarum* of the Roman-Dutch law is much wider in its scope than the action for malicious prosecution known to the English law. It lies whenever a person does an act *dolo malo* to the detriment of another. The act of the defendant in this action in maliciously and falsely stating that the plaintiff was at the scene of the affray so that the plaintiff was charged by the police would entitle the plaintiff to maintain this action. But there is one fact which, I think, negatives that right in this case. It is well-settled law, and the rule is inflexible, that statements made by a witness are absolutely and unconditionally privileged, so that no action can be brought against him in respect of any evidence given by him, however false or malicious it may be. *Dudnath Keendu v. Mathur Prasad*,[3] *Seaman v. Nether Cleft*,[4] *Henderson v. Broomhead*,[5] *Kennedy v. Hilliard*,[6] *Dawkins v. Rokspy*,[7] *Sir Patrick Watson v. Mrs. J. P. Jones*.[8] " This privilege is founded on grounds of public policy in order to protect witnesses from being harassed by actions for damages and thereby deterred from speaking with that free and open mind which the administration of justice demands."

Earl of Halsbury L.C. said in the case of *Sir Patrick Watson v. Mrs. J. P. Jones*[8] :—

> " The remedy against a witness who has given evidence which is false and injurious to another is to indict him for perjury; but for very obvious reasons the conduct of legal procedure by Courts of Justice, with the necessity of compelling witnesses to attend, involves as one of the necessities of the administration of justice the immunity of witnesses from actions being brought against them in respect of evidence they have given."

It is evident, therefore, that the plaintiff's action, in so far as it is founded upon the allegation that the defendant had given false evidence in the Police Court, is bound to fail. There is no evidence whatever that the defendant procured false witnesses as alleged in the plaint. There remains, therefore, the question, whether, in respect of the statement made by the defendant before the sergeant of police, he can claim the same privilege as that which the law affords to the statements he made when giving evidence before the Police Court. I think he can. The case of *Sir Patrick Watson v. Mrs. J. P. Jones*,[8] to which I have already referred, is high authority for the proposition that the privilege which protects a witness in

[1] *5 S. C. C. 230.*
[2] *I. L. R. 26 Mad. 362.*
[3] *I. L. R. 24 All. 817.*
[4] *L. R. C. P. D. 540.*
[5] *4 H. & N. 569.*
[6] *10 I. C. L. Rep. N. S. 195.*
[7] *L. R. 7 H. L. 744.*
[8] *L. R. (1905) A. C. 480.*

respect of his evidence in the box also protects him against the consequence of statements made to the client and solicitor in preferring the proof for trial. To quote again from the Earl of Halsbury:—

> " It is very obvious that the public policy which renders the protection of witnesses necessary for the administration of justice must as a necessary consequence involve that which is a step towards and is part of the administration of justice, namely, the preliminary examination of witnesses to find out what they can prove. It may be that to some extent it seems to impose a hardship, but after all the hardship is not to be compared with that which would arise if it were impossible to administer justice, because people would be afraid to give their testimony."

It seems to me that the position of the defendant in this action is much stronger than the position of the defendant in the case which I have cited, inasmuch as here the defendant made his statement in circumstances in which he could have been compelled to disclose what he knew. The provisions of chapter XII. of the Criminal Procedure Code authorize the investigation which was conducted by the Sub-Inspector of Police, and also authorize him to compel the attendance of any person. They impose upon every person examined in the course of any proceedings under that chapter the duty to answer all questions relating to the case which may be put to him by a police officer. The defendant, therefore, was under a legal duty to disclose what he knew. He did not give any information or make any statement to the police voluntarily. To all intents and purposes he was in the position of a witness when he made the statement complained of to the police, except for the fact that he was not under an oath or affirmation. That statement was made in the course of a preliminary examination of witnesses to find out what they could prove, and therefore came within the principle of the decision I have cited. To deny to the defendant in those circumstances the privilege which he would have had had the statement to the Sub-Inspector of Police been made before the Police Court is to deny to him any protection at all. For if when he is sued in a Civil Court for damages because of the statement made by him, and he pleads that the statement was made as a witness, it is open to the plaintiff to say that the action is not founded upon the evidence given before the Police Court, but upon the statement made at the investigation preliminary to the trial, the defendant would in every such instance be exposed to an action for damages. Apart from the authority I have cited, it seems to me that the provisions of section 122 (3) of the Criminal Procedure Code protect the defendant, for it is there enacted that the statement

1920.

SCHNEIDER A.J.

Wijegunatileke v. Joni Appu

should not be used for any purpose other than the purposes mentioned in that section. An action of this kind is not one of those purposes. Therefore, the statement may not be used for the purpose of this action. The remedy for giving false information to the police is provided for in section 180 of the Penal Code.

I would accordingly hold that the statement to the Sub-Inspector was made upon a privileged occasion and that no action lay.

I, therefore, allow the appeal, with costs, and dismiss the plaintiff's action, with costs.

Set aside.