

1929

Present : Fisher C.J. and Maartensz A.J.

D. A. ARIYARATNE v. BARLIS DE
SILVA WICKRAMARATNE.

164—*D. C. Galle*, 25,371.

Defamation—Statement made on privileged occasion—Evidence of express malice—Burden of proof.

Where a statement defamatory of the plaintiff was made by the defendant in answer to a question put by a superior officer to which he was bound to reply,—

Held, that the statement was made on a privileged occasion.

In such a case the burden is on the plaintiff to displace the privilege by proof of express malice.

APPPEAL from a judgment of the District Judge of Galle.

H. V. Perera (with him *Ameresekere*), for defendant, appellant.

De Zoysa, K.C. (with him *Rajapakse*), for plaintiff, respondent.

October 15, 1929. FISHER C.J.—

In this case the plaintiff sued the defendant, who is a Vidane Arachchi, for Rs. 3,000 as damages for defamation. The plaintiff was an applicant for the post of Attendance Officer and "on February 22, 1926, the Assistant Government Agent held an inquiry to select a suitable person from among the application for the above-mentioned post". Paragraph 4 of the plaint is as follows:—"The defendant at the above inquiry defamed the plaintiff by falsely and maliciously stating to the Assistant Government Agent that the plaintiff had been convicted and fined Rs. 50 and Rs. 25 in two criminal prosecutions". On February 24, 1927, the plaintiff gave notice of the action to defendant in accordance with section 461 of the Civil Procedure Code and it is not without significance that the plaint is dated February 20, 1928, that is to say, approximately two years after the alleged defamation. The evidence shows that the defendant was present at the meeting in his official capacity. The learned Judge in his judgment says that the defendant "who was present when questioned stated that the plaintiff had been convicted and fined twice, once Rs. 50 and the other time Rs. 25". The statement that the defendant was questioned is in accordance with the evidence given by the defendant and the Mudaliyar whom he called as a witness. It is clear that the occasion on which the statement was made was a privileged occasion and the onus therefore lay on the plaintiff to prove that the statement was made maliciously, that is to say, that the defendant availed himself of the privileged occasion for stating what he

knew to be false, or had no reason to believe was true, in order to damage the plaintiff. Having regard to the circumstances, I think that the statement which admittedly was not true was defamatory. It would have been taken to indicate to the person to whom it was made that the character of the plaintiff was open to objection. It is clear, however, that the statement was not volunteered, but was made in answer to a question put by a superior officer to which the defendant was bound to reply. I gather from the judgment of the learned Judge that he did not take into account the fact that the occasion was a privileged occasion and therefore did not regard the case from the point of view that the onus of proving malice lay on the plaintiff. I do not think that the evidence given by the plaintiff himself on the point of express malice can be considered seriously. He says: "About two days prior to February 22, I met defendant and he spoke to me. He reminded me of the wrongs my father had done to him and said that I would never succeed in my application". I do not think this statement can be relied upon. Had such an occurrence taken place the natural thing to have happened was that the plaintiff who was in the presence of a number of people of whom he says "Almost everyone there knew me. They knew I bore a good character", would have at once told the Assistant Government Agent of what had taken place two days previously. He did not do this nor did he refer to it in a petition which he addressed to the Government Agent on February 25 three days afterwards. Nor do I think that if he had in fact had such cogent reasons for believing that the defendant was actuated by spite against him he would have delayed in bringing the action for approximately two years. As regards the petitions which were sent by the plaintiff's father to the authorities, they seem to me to be very unsubstantial

ground on which to base personal malice. The only matter in regard to malice it seems to me necessary to consider is the fact that what was stated was untrue. The mere fact that it was not true does not involve the implication of malice. Malice cannot be presumed under circumstances such as obtain in the present case and there must at least be some evidence to show that the defendant made the statement deliberately knowing it to be untrue, or recklessly. In the case of *Fernando v. Peris*¹ the question of the onus on a plaintiff who brings an action for defamation based on words uttered on a privileged occasion was discussed. It was held in that case that the onus was on the plaintiff to displace the privilege by positive proof of express malice, and a passage from the judgment of the learned District Judge who tried the case in the first instance which was cited with approval by Bertram C.J. seems to me to embody succinctly the law on the subject. That passage runs as follows :—“It is not for the defendants, however, to establish that they *bona fide* believed in the truth of the statement referred to in this plaint in the circumstances of this case, for the occasion on which the statement was made was clearly privileged in my opinion, as I shall presently show, and the onus was accordingly on the plaintiff to show that the defendants acted from something other than a sense of duty in making the statement referred to, that they used the occasion for some reason or motive other than that which makes it privileged, and the plaintiff has, in my opinion, failed to do that in this case”. Those words embody the opinion that I have formed in the present case. I do not think the plaintiff in this case has shown that the defendant used the opportunity afforded him by the Assistant Government Agent’s question to give vent to spite against the plaintiff or his father. It is difficult to think that had this action really been brought by

the plaintiff to vindicate his character he would have waited two years, less two days, to bring it.

Under all the circumstances therefore I think the learned Judge’s judgment cannot be supported and the decree must be set aside and judgment entered for the defendant with costs in this Court and in the District Court.

MAARTENSZ A.J.—I agree.

Appeal allowed.

¹ 21 N. L. R. 7.