1951 *Present:* **Dias S.P.J. and Gunasekara J.**

SUDU BANDA, Appellant, *and* PUNCHIRALA, Respondent

S. C. 323—D. C. Badulla 8,969

Injuria—*Mediate injury—Defamation of wife—Right of husband to sue.*

Under the law of Ceylon a defamatory statement about the honour or chastity of a wife is an injury to the husband and gives him a cause of action.

Appuhamy v. Kirihami (1895) 1 N. L. R. 83 distinguished.

APPEAL from a judgment of the District Court, Badulla.

E. B. Wikramanayake, K.C., with *N. Kumarasingham*, for the plaintiff appellant.

Cyril E. S. Perera, with *M. A. M. Hussein*, for the defendant respondent.

Cur. adv. vult.

May 23, 1951. DIAS S.P.J.—

This case raises an important and interesting question of Roman Dutch Law. The defendant is alleged to have stated in a petition addressed to the Education Department that Bandaramenika, who is the married wife of the plaintiff-appellant, was living in terms of illicit intimacy, or was committing adultery with one P. T. M. K. Banda, an assistant teacher in a government school. The lady instituted action against the defendant and recovered damages for the injury caused to her reputation. In the present action her husband has sued the defendant for the *injuria caused to him* by reason of his wife's honour and chastity having been defamed by the defendant. The question for decision is whether such an action lies in Ceylon.

The District Judge following the Full Bench case of *Appuhamy v. Kirihami* [1] dismissed the plaintiff's action with costs.

Under the Roman Law an injury to the wife, child or servant was construed to be an injury to the husband, parent or master. In *Voet XLVII. 10. 6* the rule of the Roman Law is stated thus : " In addition to the foregoing cases, a husband may be injured through his wife, and an unmarried man through the woman who is betrothed to him. Conversely, however, if an injury has been done to such husband or unmarried man, the wife or the intended wife respectively cannot on that account maintain an action of injury ; for (as Voet quaintly adds) it is fitting that wives should be under the protection of their husbands, but not that husbands should be under the protection of their wives "—*de Villiers pp. 67, 68.* Under the modern law of Ceylon, however, it can happen that a husband may be under the protection of his wife—see s. 26 of the Married Women's Property Ordinance (*Chapter 46*). This question, however, does not concern us in the present case.

McKerron (*2nd edition*) *at pages 54-55* discusses this principle and sums up as follows: " It has been questioned, however, whether the whole trend of modern law is not to discourage any such principle. *If this be so,* then there is much to be said in favour of *confining the principle* in the

[1] *(1895) 1 N. L. R. 83.*

modern law *to the relationship of husband and wife*. This is the most intimate of human relationships, and there is *ample authority* in the other branches of the law for placing it *in a category by itself* ". At page 170 McKerron says : " Thus, in certain circumstances a husband could sue for an *injuria* to his wife, a *paterfamilias* for an *injuria* to his son or slave ".

Professor R. W. Lee in his text-book on the Roman Dutch Law (4th edition) page 335 says—" In the Roman Law an injury to wife, child or servant was construed as an injury to the husband, parent or master—*Voet XLVII. 10. 6*. There are South African cases in which an insult to or defamation *of a wife* has been held to give *the husband* a cause of action ". Professor Lee refers to the following South African cases—*Banks v. Ayres* [1], *Jacobs v. Macdonald* [2]. He also makes reference to the Ceylon case of *Appuhamy v. Kirihamy* [3] in the following terms : " In the Ceylon case of *Appuhamy v. Kirihamy* [3] it was said that *a father* is not entitled to sue for words defamatory of his *daughter*, although he may have felt pained and distressed. See also *Miller v. Abrahams* [4]".

I have been unable to obtain the law report in regard to the case of *Banks v. Ayres* (*supra*). The case of *Jacobs v. Macdonald* (*supra*) appears to be exactly in point. In that case the defendant said of the plaintiff's wife that she was " nothing else than a prostitute from Kimberley ". It was held that the husband had a cause of action against the defendant. Innes C.J. said: " It is clear from the authorities that the Roman Law recognised the principle that where persons stood in certain intimate relations towards one another in *injuria* to the one might in certain cases be an *injuria* to the other. Husband and wife, father and child, betrothed persons and others came within this category. And the same principle—though not, perhaps, to the same extent—appears to have been adopted in the Roman Dutch law. That is clear from the passage quoted from Voet, and from other authorities to which we were referred. Of course we are bound by those authorities, unless we are prepared to hold that they must be considered obsolete. Now, without going so far as to say that this doctrine ought to apply to all cases of *injuria*, I think there are cases in which an insult to a wife is also an insult to her husband, though it may not be directly levelled against him. There are certain things which, if said of a man's wife, imply necessarily *contumelia* to the man—amount to an impairment of his *dignitas*, that dignity and freedom from insult which every citizen is entitled to enjoy. And I think that words such as are alleged to have been used concerning the wife of the plaintiff amount to such an injury. They are very gross words indeed. And I think that the use of such words about a man's wife constitutes an insult to the husband, an impairment of his dignity, for which the law will give him some redress. I do not say that they actually constitute a slander against the man—it is not necessary to say that ; but they amount to an *injuria*, and that is the basis of the present action. Indeed, the words here complained of might almost be construed as directly reflecting upon the character of the plaintiff. But that is not the point which the Court is asked to decide. The point is whether, if the words were directed against the wife alone they nevertheless would, having regard to their gross nature, constitute an insult to, and impair the dignity

[1] *(1888) 9 Natal L. R. 34.*
[2] *(1909) T. S. 442.*
[3] *(1895) 1 N. L. R. 83.*
[4] *(1918) Cape Prov. Div. 50.*

of her husband. I think they would." Solomon J. agreed, and Mason J. while agreeing said: " I may say the principle we are now applying was substantially acted upon in a case in Natal—*Banks v. Ayres*.[1] There, where the defendant made improper overtures to the wife of the plaintiff, the latter was held, even after the death of his wife, entitled to sue the defendant for damages ; and he recovered damages in respect of those improper overtures, as for an *injuria* inflicted upon him. That is practically the principle we are applying in the present case, and I think it is one which is supported by the authorities which have been cited ".

The case of *Miller v. Abrahams* [2] arose in this way. Mrs. Miller sued Mrs. Abrahams for defamation. In reconvention Mrs. Abrahams sued Mrs. Miller also for defamation, the words set forth as having been used by Mrs. Miller affecting the daughter of Mrs. Abrahams. Both the plaintiff and the defendant sued in their personal capacities. Mrs. Abrahams was not counter-claiming on behalf of her daughter. In the circumstances it was held that Mrs. Abrahams' counter-claim for the alleged injury to herself by reason of the defamation of her daughter, gave her no cause of action. Buchanan J. said : " By the pleadings, if anyone had a right to sue, it was the daughter; and if the daughter had sued, the magistrate might have been justified in giving judgment for her. But the mother has not sued on behalf of the daughter. *She sued on her own behalf*, and she does not allege that she was in any way libelled, nor is there any inference drawn from the words that they affected her character. The magistrate was wrong in giving judgment for the defendant ".

As the District Judge in the present case has based his decision on the case of *Appuhamy v. Kirihamy* (*supra*) it is necessary to ascertain what the *ratio decidendi* of that case is. It is a judgment of a bench of three Judges at a time when the Supreme Court consisted of three Judges. Therefore, if that decision is relevant to the case before me and cannot be distinguished, I am bound to follow it.

The facts of *Appuhamy v. Kirihamy* (*supra*) were as follows: A father and daughter had been invited to a dinner party where several other guests were present. One of the defendants was alleged to have openly remarked that the female plaintiff having eloped with " a Wahampura man ", it was not fitting that they should sit to dinner with a woman who had disgraced herself with a man of a lower caste and had shown herself to be a woman of immoral character. The father and the daughter each alleged that these remarks caused them *injuria* and jointly claimed Rs. 500.

The headnote appended to the report of *Appuhamy v. Kirihamy* (*supra*) is misleading. Although three Judges took part in that decision, their views appear to be divergent. A father and his married daughter jointly sued the defendants. It is a question whether there was not a misjoinder of plaintiffs and causes of action.

Lawrie A.C.J., following an Indian case reported in *1 Madras 383*, said that the father was not entitled to sue for words defamatory of his daughter, and for that reason he held that so far as the father was concerned, the action should be dismissed with costs. So far as the action

[1] *(1889) 9 Natal L. R. 34.* [2] *(1918) Cape Prov. Div. 50.*

by the daughter was concerned, he entered judgment in her favour as against the 1st defendant in a sum of Rs. 50 and costs. Withers J. thought that there was a misjoinder of plaintiffs, but he did not definitely hold that the father had no cause of action. His order was " I would set aside the judgment against the 1st defendant and adjudge him to pay a sum of Rs. 50 with costs ". It is, however, not clear whether that was a decree in favour of the daughter alone or of the father and daughter jointly. Browne J. agreed, but it is not apparent whether he was of the view that the father had no cause of action. The Roman Dutch Law, which is the law applicable to a case like that, was not referred to or cited. Our law of torts is not based on the Indian Law, and, if I may say so with respect, the reference to the Indian authority was irrelevant. Whatever the value of *Appuhamy v. Kirihamy* (*supra*) may have as an authority for the proposition that under the law of Ceylon a father has no cause of action for the defamation of his daughter, it is not an authority either for or against the proposition that under the Roman Dutch Law a *husband* has a cause of action for injury caused to himself against the defamer of his *wife's honour and chastity*. The case of *Appuhamy v. Kirihamy* [1] was referred to in *Jayasuriya v. Silva* [2] but that reference does not affect the question under consideration.

I may, however, be permitted to point out that there may be cases under the Roman Dutch law where a father has a cause of action against the defamer of his son or daughter. If A says of B, the son or daughter of C, that " B is a *bastard* ", this conveys the imputation that the mother of B is an adulteress or an immoral woman, and may thus cause *injuria* to the father C for which he may be able to sue A. But should A say of B, the son or daughter of C, that " B is a *thief* ", that would not cause *injuria* under the Roman Dutch Law, as understood in South Africa, to C who in such a case cannot be said to have a cause of action against A. The case of *Appuhamy v. Kirihamy* (*supra*) therefore may have to be reconsidered and distinguished should the occasion arise. So far as the present case is concerned, however, it is clearly distinguishable and does not affect the question I have to decide.

Our Common Law is the Roman Dutch Law—*Weerasekera v. Peiris* [3], *Perera v. Silva*[4], *Chanmugam v. Kandiah*[5], *Sabapathipillai v. Sinnathamby*[6]. As pointed out by the Privy Council in *Perera v. Peiris* [7], " The gladsome light of Roman jurisprudence once shone on the Common Law. Repayment to the successor of the Roman Law should not take the form of obscuring " its leading principles.

I am of opinion that under the law of Ceylon a husband has a cause of action, provided he can establish the ingredients of proof and prove his damages, against the defamer of the honour or chastity or his lawful wife. I, therefore, set aside the judgment and decree of the lower Court and send the case back for trial in due course. The plaintiff will have his costs both here and below.

GUNASEKARA J.—I agree.

Appeal allowed.

[1] *(1895) 1 N. L. R. 83.*
[2] *(1914) 18 N. L. R. 74.*
[3] *(1932) 34 N. L. R. at p. 285, (Privy Council).*
[4] *(1935) 37 N. L. R. at p 159.*
[5] *(1921) 23 N. L. R. 221.*
[6] *(1948) 50 N. L. R. 307.*
[7] *(1948) 50 N. L. R. at p 159.*