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Present : Lascelles C.J. and Middleton J.

SILVA *v.* BALASURIYA.

230 — *D. C. Matara,* 5,086.

Defamation—Action does not lie against witness for statements made in Court—Dutch law when deemed obsolete.

A witness is protected by the law of Ceylon from proceedings for defamation in respect of statements made by him as witness in the course of a judicial proceeding.

LASCELLES C.J.—When we find that the Dutch law on a matter of frequent occurrence is inconsistent with the well-established and reasonable practice of the Colony, and that it has never been recognized by the Supreme Court, it is a fair inference that the Dutch law on this matter has either never been introduced into the Colony, or, if introduced, that it has been abrogated by disuse.

THE facts are set out in the judgments.

Sampayo, K.C., for the plaintiff, appellant.—Under the Roman-Dutch law a witness has only a qualified privilege ; the Roman-Dutch law does not go so far as the English law and give a witness an absolute privilege with respect to statements made by him in the witness box. (3 *Nathan* 1631 ; *Norden v. Oppenheim.*[1]) The law applicable to this case is the Roman-Dutch law and not the English law. See *Durasamy v. Ferguson.*[2]

It is open to the plaintiff to rebut the presumption arising in favour of the defendant from the fact that he is a witness. The District Judge was wrong in not permitting us to prove the *animus injuriandi* of the defendant and the absence of reasonable cause for belief in the truth of his statement. Counsel referred to *De Villiers, De Injuria, p.* 192 ; *Marshall's Judgments, p.* 402 ; *Attennaike v. Don Juanis* ;[3] 2 *Thom.* 471, 472 ; *Nell's Court of Requests Cases, p.* 87.

Bawa, for the defendant, respondent.—The Roman-Dutch law in its entirety has not been introduced into Ceylon. Large portions of that law have not found its way into Ceylon ; the Dutch forms of apology in cases of defamation, for instance, are obsolete. See 2 *Pereira's Laws of Ceylon* 671. There is no case so far where a witness has been held liable for statements made by him in the witness box.

Under the English law and the law prevailing in India a witness enjoys an Absolute privilege with respect to statements made by him. See *Amir Ali, Introduction to Chapter X., p.* 722 ; *Muleshvar v. Ravidat* ;[4] *Singh v. Chowdhry.*[5]

It is against public policy that actions for defamation should be permitted to be brought against witnesses ; witnesses would be deterred from telling the truth by fear of an action ; actions would multiply indefinitely. [Middleton J.—Is not a witness bound to answer all questions under section 132 of the Evidence Ordinance ?] Yes, it is so under our law ; we do not know what the law of evidence on the point in Holland was.

Counsel referred to *De Villiers, pp.* 189–192 ; *Marshall, p.* 403 ; 2 *Pereira's Laws of Ceylon* 677 *and* 679.

Sampayo, K.C., in reply.—The liability of a witness is not a question of the law of evidence ; it is part of the law of defamation. Advocates, Judges, and witnesses enjoy the same kind of privilege.

Section 132 of the Evidence Ordinance protects a witness only when he is compelled to answer ; the question here is whether in every case the privilege is absolute.

[1] *3 Menzies 41.*
[2] *1 Br. App. D. iv.*
[3] *2 Lor. 122.*
[4] *(1889) 14 Bom. 97.*
[5] *(1872) 17 W. R. 283.*

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It is quite true that portions of the Roman-Dutch law may grow obsolete. For instance, law prohibiting marriage between parties living in adultery is obsolete ; but that is because adultery is no longer a crime. Because the law of evidence is the English law, it does not follow that the law of defamation in the case of witnesses is also the English law.

Cur. adv. vult.

September 1, 1911. LASCELLES C.J.—

This appeal raises an important question as to the extent to which a witness is protected by the law of Ceylon from proceedings for defamation in respect of statements made by him as a witness in the course of a judicial proceeding. The plaint alleges that the defendant was sued in D. C. Matara, No. 4,805, by the plaintiff's sons for the recovery of Rs. 6,000 entrusted by their grandmother to the defendant to be paid to them, and that the defendant, being examined, falsely, maliciously, and without reasonable and probable cause spoke and published in the presence of a large gathering the following words : " Ayaneris " (meaning thereby the plaintiff in this case) " is a burglar, and is not admitted into our houses." Assuming that the statement was not wholly irrelevant matter to the inquiry, there can be no doubt but that under the rules of English law such a statement would be absolutely privileged (*Seaman v. Netherclift*[1]). But it is contended that by the Roman-Dutch law in force in Ceylon immunity of witnesses from proceeding for defamation is of a less absolute character, and that the action could be maintained if the plaintiff proved the *animus injuriandi* on the part of the defendant.

The Roman-Dutch law on the subject may, perhaps, be summarized as follows. There is no passage in the older text writers which deals specifically with the subject, but a passage in *Voet* 47, 10, 20, dealing with the liability of suitors, is to some extent in point. The text is translated in M. de Villier's book as follows :—

> But if one of litigant parties, whether the plaintiff or the defendant, has made an imputation against a witness produced against himself either to increase or to impugn his credibility, he should not in such a case either be supposed to have done this with an intent to injure, but rather with the object of defending himself, even though he should not be able to prove such an imputation to the fullest extent, if only he is able to bring forward any reasonable ground for the imputation made, lest otherwise it should seem that a person is allowed, under the pretence of self-defence, with impunity to start and heap up slanderous charges against his adversaries and their witnesses as if proclaiming them from a platform.

It is clear from this passage that Voet did not consider that suitors enjoyed an absolute immunity as regards defamatory statements; there was merely a presumption that they were not actuated by the *animus injuriandi*.

[1] *(1876) 46 L. J. C. P. 128.*

The Roman-Dutch law on the subject as now understood in South Africa is thus stated in *Nathan, vol. III., p.* 1631 :—

> In the same way as we have seen, a witness is, as a general rule protected with regard to any statement made by him in reply to questions put to him in the course of a trial or ony other judicial proceeding. But a witness who volunteers a defamatory statement not relevant to the matter in issue, or who goes out of his way to make an attack on the character of another, may be held liable if it is clear there was an *animus injuriandi* ; such *animus* may be presumed from the circumstances. It is clear then that the privilege of a witness is a qualified one depending on the peculiar circumstances.

The contrast between the English rule and the rule of the Roman-Dutch law is commented on in *Dippenenaar v. Henman*[1] cited in Nathan ; and from *Norden v. Oppenheim*[2] decided in 1846, which appears to be the leading South African authority on the subject. It appears that no reported decision of the Courts of Holland or of Cape Colony, nor any doctrine of any of the authoritative text writers, had been found which was decisive of the present question. The decision seems to have been based partly upon the general principles of the Roman law, which in proceedings for defamation did not allow any absolute privilege, but allowed the *animus injuriandi* to be proved in all cases, even in petitions to the Emperor (*Odgers on Libel and Slander, 4th ed., p.* 216), and partly on an opinion which was discovered in the Utrecht Consultations.

The practical question for determination is whether the privilege of witnesses in Ceylon is governed by the principles of English law, or whether the Roman-Dutch law as interpreted in South Africa has become part of the law of Ceylon.

The local authorities speak with no uncertain voice. They are I believe, unanimous. With regard to text writers of repute on the laws of Ceylon, we find Thompson, at page 472 of vol. II. of his *Institutes of the Laws of Ceylon*, stating that examinations, as a witness in the course of a judicial proceeding before a court of competent jurisdiction, are privileged.

Mr. Walter Pereira, in his *Laws of Ceylon, vol. II., p.* 679, states that an action for slander will not lie for words used by a party in the course of his examination in Court, and cites in support of this decision *Attennaike v. Don Juanis*[3] where the Judge adopted the law as stated in *Borthwick's Treatise on Libel.*

In *Nell's Court of Requests Cases, p.* 87, there is a note of a decision of the Supreme Court in 1845 to the same effect. In *Marshall's Judgments* two cases decided respectively in 1835 and 1834 are noticed, in which it was held that an action cannot be sustained for libellous matter contained in the pleading of a case, or for words made use of in *viva voce* pleading, as where the defendants had said in the Magistrate's Court that the plaintiff was a rogue. But the

[1] *Buch. (1878) 140 ; 3 R. 43.*

[2] *3 Menzies 41.*

[3] *2 Lor. 122.*

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most cogent argument in support of the opinion that the Dutch law in this respect has not been introduced into Ceylon is to be found in the circumstance that no case can be cited where an action has been maintained in Ceylon against a witness in respect of statements made by him during his examination in a judicial proceeding.

In a country where litigation is so freely resorted to, where litigants are not slow to use every weapon of defence or of offence which the law puts within their reach, the importance of this consideration cannot be exaggerated. If it were the law of Ceylon that an unsuccessful litigant, after exhausting his rights of appeal, could continue the litigation by suing his adversary for defamation, cases of this description would not have been wanting. Fortunately they are unknown.

Assuming that at the date of the British occupation of Ceylon the law of Holland was the same as it was subsequently held to be in Cape Colony, the inference that this branch of the law of Holland was not introduced into Ceylon is irresistible.

The whole of the Roman-Dutch law, as it prevailed in Holland at the end of the eighteenth century, was, of course, never introduced into this Colony. Numerous examples could be cited of branches of Roman-Dutch law which have never become part of the law of Ceylon.

When we find that the Dutch law on a matter of frequent occurrence is inconsistent with the well-established and reasonable practice of the Colony, and that it has never been recognized by the Supreme Court, it is a fair inference that the Dutch law on this matter has either never been introduced into the Colony, or, if introduced, that it has been abrogated by disuse. *Seaville v. Colly.*[1]

For the above reason I hold that the law of Ceylon, with regard to the liability of witnesses to be sued for defamatory statements in the box, is governed by the law of England, and not by the Roman-Dutch law as interpreted by the South African Courts.

The appeal must be dismissed with costs.

MIDDLETON J.—

The question raised in this appeal is whether the Roman-Dutch law, which apparently contemplates a right of action against a witness for a defamatory statement made in that capacity, where the plaintiff, on whom the burden is cast, may be able to prove that the statement was untrue, and that at the time the defendant made it he had such knowledge it was untrue as to render him guilty of perjury in making it, is applicable in Ceylon, the *animus injuriandi* (*De Villiers, p.* 192) being the criterion of liability. (*Norden v. Oppenheim.*[2])

The statement made here would be actionable *per se* as defamatory, either under English or Roman-Dutch law, if not made under privileged circumstances.

[1] *9 Juta's Cape Reports 39, cited in Journal of Comp. Legislation, No. XV., N. S., 39.*

[2] *3 Menzies 42.*

In the judgment appealed against the District Judge has held that a witness in Ceylon is absolutely privileged in conformity with the English law as laid down in *Seaman v. Netherclift.*[1]

It was argued before us by counsel for the appellant that no inquiry had been made as to the circumstances under which the statement was made by the witness, and that the case might go back for this purpose ; but the plaint, while averring that the statement was made falsely and maliciously, also adds it was made as the defendant was being examined as a witness.

As regards the Indian cases quoted, I do not think they are material to a question which is really whether the Roman-Dutch law on the point has ever been introduced and followed in Ceylon rather than the English law.

It seems to me that if the Roman-Dutch law had prevailed in the Island, there must have been abundance of authority in reported cases to show it. The only local case that the learned counsel could refer to was *Attennaike v. Juanis,*[2] where it was held that no action would lie for words used by a party in the course of his examination as a witness. In this judgment Chief Justice Morgan would appear to have thought that the privilege would not extend to the same extent as against third parties. In *Norden v. Oppenheim* (*ubi supra*) the majority of the Judges thought that no principle of law or justice has been or can be alleged in support of this distinction. In the present case the words were spoken by the present defendant of the plaintiff, who was also plaintiff in the action in which the evidence was given by the defendant.

The salutary character of the English rule seems to me to render it particularly desirable that we should, if possible, adhere to it in Ceylon.

The learned counsel for the appellant also referred to some passages in *Thompson, vol. II., pp.* 471, 472 ; and in *Nell's Court of Requests Cases, p.* 87 ; and *Marshall's Judgments, p.* 40 ; but from none of these authorities is it deducible that any variation of the English rule has been applied in Ceylon in the case of witnesses, but in the citation from Thompson rather the contrary. In respect of the introduction of the restricted privilege of the Roman-Dutch law, I would draw attention to the case of *Karonchihamy v. Angohamy,*[3] where reference was made to the case of *Seaville v. Colly,*[4] in which Lord de Villiers laid down that any Dutch law which is inconsistent with well-established and reasonable customs, and has not, although referring to a matter of frequent occurrence, been distinctly recognized and acted on by the Supreme Court, may fairly be held to have been abrogated by disuse.

[1] *(1876) 46 L. J. C. P. 128 ; 2 C. P. D. 83 ; 23 L. J. 784.*
[2] *2 Lor. 122.* [3] *(1904) 8 N. L. R. 13.* [4] *(1891) 9 Juta 39.*

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I would not suggest here more than a general application of the dictum of that high authority on the Roman-Dutch law, as there is no question here of an ethical or customary character, but rather of actions on the part of the Courts. See also the dictum of Dias J. in *Wijekoon v. Goonewardene*[1] on the subject of the introduction of the Roman-Dutch law into Ceylon.

Again, we have in force in Ceylon an Evidence Ordinance, which by section 132 makes it obligatory on a witness to answer questions which may incriminate him or expose him to forfeiture or penalty, but protects him from prosecution where compelled to answer, and in fact, renders his answers inadmissible in any criminal proceeding against him, except a prosecution for prejury. The compulsion to give evidence is no doubt the ground of the privilege in both systems of law.

In the absence of authority in support of the application of the rule of the restricted privilege of a witness for defamatory statements made in that capacity prevailing under the Roman-Dutch law, I prefer to apply the English rule of absolute privilege, and I would affirm the judgment of the District Judge and dismiss the appeal with cost.

Appeal dismissed.