ATTORNEY-GENERAL
v.
NADESAN

SUPREME COURT
SAMERAWICKRAME, A. C.J., THAMOTHERAM, J., ISMAIL, J.,
WEERARATNE J. AND SHARVANANDA, J.
S.C. APPLICATION No. 1 OF 1980
12, 13, 14 AND 15 MAY, 1980

Parliament (Powers and Privileges) Act Cap 383 as amended by Law No. 5 of 1978, section 23 — Articles 131 and 169(16) of the Constitution —Defamatory Statements reflecting on the proceedings and character of the National State Assembly.

The National State Assembly had punished two editors in the Ceylon Observer case for publishing a photograph with a caption which it was alleged was intended and calculated to bring Mr. A. C. S. Hameed, Minister of Foreign Affairs into disrepute and this constituted a defamatory statement reflecting on the proceedings of and character of the National State Assembly. Offences specified in part A of the Schedule to the Parliament (Powers & Privileges) Act were originally punishable only by the Supreme Court and the National State Assembly. The respondent wrote an article published in the Sun wherein he criticized the decision and stated that the matter should have been referred as in the past to a Select Committee of the House.

Held :
There is an area of permissible criticism and comment and it is only if a person passes outside its bounds that he will be liable.

What arises for consideration of the Court is whether, in expressing his arguments and views, be they correct or incorrect, the respondent has kept within the bounds of proper criticism or not.

A statement that some course other than that which was followed should have been followed does not by itself reflect upon the House. The respondent made a point of the fact that the two editors were given only two hours to appear before the House and defend themselves. This offended natural justice because the right to be heard and defend oneself would be illusory without time to prepare a defence and knowledge of the case to be met. What is sufficient notice will vary with the facts as will the details which must be given of the case to be met. On the facts available, the respondent was entitled to make the point he did. The comment of the respondent was that the House proceeded to consider the question of punishment without knowing exactly what crime the two suspects had committed. Such a comment will apply equally to some cases tried in a court and is not by itself a reflection on the House. The Order that the fine should be paid to the Ceylon Deaf and Blind School was as an illegal Order. It was an illegal Order but at most a technical irregularity.

The entire effect of the allegations must no doubt be considered but it does not appear fair to take together only the conclusions arrived at by the respondent apart from his reasoning. An innuendo can be relied on but it must be supported on the facts. The respondent will be entitled to the benefits of any reasonable doubt.

Cases referred to :

(1) *Ambard v. Attorney-General for Trinidad and Tobago* 1936 AC 322, 335

(2) *Stevenson v. United Road Transport Union* 1977 2 All ER 942, 951 per Buckley L. J.

(3) *S. v. Van Niekerk* (1970) 3 SALR 655

(4) *R. v. Odhams Press Ltd.* 1957 1 QB 73

(5) *R. v. Griffith* 1957 2 QB 192

APPLICATION under s.23 of the Parliament (Powers and Privileges) Act.

S. Pasupathy A.G. with *S. Ratnapala, S.C.* and *G. K. R. Wijewardena, S.C.* for petitioner.

H. L. de Silva with *D. Fernando, S. Wickremasinghe, K. Kandasamy, Dr. N. Tiruchelvam, S. Rudiramoorthy, J. C. T. Kotelawala* and *P. S. H. M. Reeza* for respondent.

Cur. adv. vult

June 25, 1980

SAMERAWICKRAME, A. C.J.

The Attorney-General made this application under section 23 of the Parliamentary (Powers and Privileges) Act, Chapter 383 read with Articles 131 and 169(16) of the Constitution to this Court to deal with the respondent for certain statements published by him which he alleged were defamatory, reflecting on the proceedings of the National State Assembly on 2nd February, 1978 and on the character of that body. It would appear that offences specified in part A of the Schedule to the Parliamentary (Powers and Privileges) Act, were originally punishable only by this Court, but by an Amendment made by Law No. 5 of 1978, all offences specified in the Schedule were made punishable both by this Court and the National State Assembly. The respondent published in issues of the "Sun" newspaper of 27.2.78, 28.2.78, 1.3.78 and 6.3.78 a "Special Commentary" in four parts under the caption "Parliamentary Privilege", commenting on the change in the law and the first case dealt with by the National State Assembly the day after the law was enacted referred to in the proceedings as the "Ceylon Observer case", in which two editors were dealt with for publishing in respect of a photograph a caption defamatory of the Minister of Foreign Affairs, Mr. A. C. S. Hameed. The Attorney-General set out several statements from the last part of the "Special Commentary" published by the respondent which dealt with the said "Ceylon Observer case" and stated that these statements directly or indirectly alleged that the National State Assembly, in the course of dealing with the "Ceylon Observer case" had violated the rule of natural justice, erred on questions

of law, given untenable reasons for the decisions, acted in ignorance of the law and made an illegal order. He averred that these statements by themselves and taken with other statements in the said "Commentary" imputed that the National State Assembly was incompetent and unsuited to exercise any judicial power relating to its own privileges which was vested in the Assembly by the Constitution.

Paragraph 7 of Schedule A sets out the act which constitutes the offence alleged to have been committed by the respondent and reads :—

> "The publication of any defamatory statement reflecting on the proceedings and character of the House."

The offence of breach of privilege of Parliament is analogus to the offence of Contempt of Court. Each of them is made an offence because of the importance in the public interest that the proceedings of Parliament or of a Court should not be impeded or obstructed in any way. Erskine May "Parliamentary Practice" 19th Edition, p. 144 states :—

> "In 1701 the House of Commons resolved that to print or publish any books or libels reflecting on the proceedings of the House is a high violation of the rights and privileges of the House, and indignities offered to the House by words spoken or writings published reflecting on its character or proceedings have been constantly punished by both the Lords and the Commons upon the principle that such acts tend to obstruct the House in the performance of their functions by diminishing the respect due to them."

It is clear that where a case is concluded, a law proposed or passed or proceedings of Parliament take place, the case, the law and the proceedings are matters of public interest and may be the subject of fair comment, or proper criticism. In respect of a case concluded in a Court the classic statement of a law is contained in a dictum of Lord Atkin in *Ambard v. Attorney-General for Trinidad and Tobago,* (1) —

> "But whether the authority and position of an individual Judge, or the administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way; the wrong-headed are

permitted to err therein : provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune."

The report of the Committee of Privileges of the House of Commons dated 16th June, 1964 contains the following paragraph :—

> "Your Committee recognises that it is the duty of the House to deal with such reflections upon Members as tend, or may tend, to undermine public respect for and confidence in the House itself as an institution. But they think that when the effect of particular imputations is under consideration, regard must be had to the importance of preserving freedom of speech in matters of public controversy and also, in cases of ambiguity, to the intention of the speaker. It seems to them particularly important that the Law of Parliamentary Privilege should not, except in the clearest case, be invoked so as to inhibit or discourage the formation and free expression of opinion outside the House by Members equally with other citizens in relation to the conduct of the affairs of the nation."

It is clear, therefore, that there is an area of permissible criticism and comment and that it is only if a person has passed outside its bounds that he will be liable. In the report of the Committee of Privileges of 14th June, 1964 there appears the following:

> "The question is whether (a) there has been a Contempt of the House in the sense that disgrace or ignominy has been cast upon it as an institution, or (b) it has been brought into disrepute."

It is not the case of the Attorney-General that the Respondent has alleged malice, lack of impartiality or improper motive in the National State Assembly or its Members. The complaint made by him appears to be that the Respondent has gone beyond the limits of permissible criticism and has made statements which have brought the House into disrepute or are calculated to lower it in the estimation of right-thinking members of society. We do not have to consider whether the arguments or views expressed by the respondent are correct or incorrect: what arises for our consideration is whether, in expressing his arguments and views, be they correct or incorrect, he has kept within the bounds of proper criticism or not.

It is necessary to consider the matters complained of and the submissions made in respect of them. The respondent states in the article that the past practice of referring complaints of breach of privilege to a Select Committee of the House was not followed in the case of the two editors ; that the matter should have been referred to a Select Committee for consideration and report as to whether there was a breach of privilege or not and that the advice of the Attorney-General should have been sought. The respondent is entitled to express this view and no exception can be taken to his doing so even by persons, if any, who take the view that the ordinary practice need not invariably be followed. Further, a statement that some course other than that which was followed should have been followed does not by itself reflect upon the House. The respondent next states that the motion passed by the National State Assembly resolving that the editors should be called upon to show cause stated that the caption to the picture was intended and calculated to bring Mr. Hameed into disrepute and thereby constituted a defamatory statement. He says that this appears to be a mistake and that what the motion should have said is that Mr. A. C. S. Hameed had made a complaint to this effect. He added, "otherwise it would mean that the Assembly had prejudged the issue without hearing the defence." The respondent was not saying that the Assembly had in fact prejudged the issue: he was only saying that the statement in the motion that the caption was intended and calculated to bring Mr. Hameed into disrepute might suggest this. In other words, he was only dealing with the propriety of the wording of the motion. The suggestion of the respondent that the motion should have said that Mr. Hameed had made a complaint to this effect does not take into account the fact that the Speaker had ruled that there was a prima facie case of breach of privilege. Accordingly, it may have been better if the motion stated not that Mr. Hameed had made a complaint but that it appeared that the caption to the picture was intended and calculated to bring Mr. Hameed into disrepute. The point taken by the respondent in regard to wording of the motion is rather technical as it would be apparent to the parties noticed as well as to any reasonable person reading the motion that as the parties noticed were called upon to show cause, this matter of whether the caption was or was not defamatory was left open for decision.

The National State Assembly decided at 3 p.m. on the 2nd February, 1978 to summon the two editors to show cause and fixed the time for their appearing before the Bar at the National State Assembly at 5 p.m. of the same day. The respondent makes

a point that a basic principle of natural justice demands that a person accused of an offence should be given adequate opportunity to study the charge, get advice and equip himself to meet the charge before he shows cause and that the period of less than 2 hours was not sufficient. The principle of natural justice referred to by the respondent has been stated in textbooks on the subject. "Natural Justice" by G.A Flick, p. 25 there appears –

> " In the absence of some statutory or regulatory requirement specifying the amount of time which should be given an administrative notice must be served at a time sufficiently prior to the hearing to enable a party to prepare his case and to answer the case against him. That notice which will satisfy these requirements will obviously vary with the facts of each particular case but will involve a consideration of such factors as the need to secure legal representation, the ability of an unrepresented party to appreciate what action he must take to effectively answer the case against him, the complexity of the legal or policy issues involved, the amount of time needed to analyse the factual grounds of the case to be met, the availability of evidence, the need for prompt action, and so on."

In "Natural Justice" by Paul Jackson, page 63 –

> " The right to be heard and defend oneself is illusory without time to prepare a defence and knowledge of the case to be met. What is sufficient notice will vary with the facts as will the details which must be given of the case to be met."
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> " A case may be of so uncomplex a character and the issues may be so well-known to all parties concerned that no more particular notice of any charge may be required, an opportunity for the party of whom complaint is made to state his case being sufficient." *Stevenson v. United Road Transport Union* (2).

As indicated in the above statements of the law the amount of time required will vary with the circumstances of each case. It will depend to some extent on the resources available to a party noticed. For example, it may well be that an organisation like Lake House which publishes a number of newspapers have a panel of lawyers under general retainer capable of advising at short notice on matters such as defamation, breach of copyright or breach of privilege which are matters that normally arise in respect of the publication of newspapers but there is no data or information that there is such a panel. On the facts available, the respondent was

entitled to make the point he did. The respondent further went on to state the one member suggested that the matter be put off but that his suggestion did not commend itself to the House and nothing came of it. It has been pointed out by the Attorney-General that when this matter was under discussion, the then Prime Minister said – " if the accused – I do not know whether they should be called " accused " or "suspects", it might be less harmful to call them "offenders" – if the offenders want time, certainly we will consider it. " He submitted that in fairness the respondent should have mentioned this willingness of the then Prime Minister, which must be taken to have reflected the will of the House, to consider giving time if the editors asked for it. It was submitted on behalf of the respondent that this statement by the then Prime Minister was made in the absence of the editors and that when the editors appeared before the National State Assembly, it was not repeated to them nor were they asked whether they wanted time. It was further contended that if they asked for time, what else could the House have done but consider it and that the statement of the then Prime Minister amounted to no more than a statement of the obvious and that the respondent was under no obligation to refer to it. On consideration, we do not think that even on the view of the matter less favourable to him the omission of the respondent to refer to the statement of the then Prime Minister takes his comment out of the bounds of permissible comment or constitutes a departure from the exercise of a legitimate right to comment. What was more important and relevant was that the editors did not ask for time and that one of them said that he had consulted a lawyer and that they both came with prepared statements. The respondent's article, however, does mention these facts. There appears in thick type –

> "It must be mentioned that the two persons on whom notice had been served did not ask for an adjournment and that one of them said he had consulted a lawyer."

Later in the article it is stated that each of the two persons read out a statement that he had brought with him.

The respondent states that *mens rea* or guilty mind is an essential element of the offence of the breach of privilege and on this basis he states that the statements made by the two editors were exculpatory and, inter alia, clearly negatived the existence of *mens rea* or the guilty mind. He further states that one of the editors who was on leave on the morning when the issue of the "Observer" newspaper in question was made cannot be considered even to have made the publication. The Attorney-General contended that *mens rea* was not an ingredient

of the offence of breach of privilege and that an editor could not avoid liability by reason of want of knowledge of the error at the time of publication unless he was able to show that he had taken all due precautions against the publication of offending material. In the South African case of *S.v.Van Niekerk* (3), cited by learned Counsel for the respondent, it was held that for the commission of the offence of contempt of court by the publication of imputations of partiality in the Judges of the South African Courts a necessary ingredient was the intention known as the *dolus eventualis*. But in *R. v. Odhams Press Ltd.* (4) The Queen's Bench Division held that "mens rea" – a guilty mind – was not a necessary constituent of contempt. The judgment suggested that comment likely to cause prejudice to a party to a pending case may be contempt even though the person publishing it could not possibly have known of the pending civil action or criminal proceeding. This was followed by *R. v. Griffith* (5), in which Lord Goddard C.J. said,

> "This Court lately reviewed the decisions on this subject in *R. v. Odhams Press Ltd.* And held that lack of knowledge of the contents of the offending article was no defence, nor was lack of intention."

The question whether *mens rea* is an ingredient of the offence of breach of privilege is not free from difficulty and we would be disposed to express a view on it only after hearing a full argument in a case in which the point directly arises for decision. As we have indicated earlier, the decision of this matter does not turn on whether any view taken by the respondent is correct or not. We are satisfied that the view taken by the respondent is one that is probably shared by others and is not one arbitrarily taken by him. On the basis of that view, the respondent states that it was difficult to understand how the editors were found guilty and fined Rs. 1000/ each: that such a matter required to be carefully examined before decision: and that in effect the fine of Rs. 1000/- that had been imposed on each of the editors was not justified.

The respondent further stated that according to Mr. J. R. Jayewardene, the House did not know exactly what the crime was that the two suspects had committed because the House did not go into the details of it and the merits of the defence. Even a Court knows less of the details of a crime and, for example, the degree of culpability of an accused who is convicted on his own plea than it does where there is a trial and hears the case for the prosecution and defence and acquires a knowledge of the full facts. The comment of the respondent that without knowing exactly what crime the two suspects had committed the House proceeded to consider the question of punishment will apply

equally to some cases tried in a Court and is not by itself a reflection on the House. Towards the end of the proceedings against the editor, Mr. Jayewardene stated reasons for imposing the fine that had been proposed. The respondent comments that the three reasons adduced for imposing the fines are untenable and cannot bear examination. If one examines the reasons in the same way, as one does the reasons for a fine stated in the formal order of a Court, they are a little unusual. But Mr. Jayewardene was not formulating reasons for incorporation in a formal order; the procedure before the House does not involve making one. As the thinking of a judge, particularly before the selection of the formal reasons to be adopted, they can be appreciated. The respondent further states that the order that the fine should be paid direct to the Ceylon Deaf and Blind School appears to be an illegal order. A fine is payable to the State and for a Court to impose a fine and direct it to be paid elsewhere would be illegal but so far as the National State Assembly is concerned, the matter is at the most a technical irregularity for that body could have voted to donate an amount equal to the fine from State funds to the Deaf and Blind School. But in his article the respondent does mention that the National State Assembly could have made a grant equal to the fine to School.

The Attorney-General submitted that the entire effect of the statements made by the respondent taken together should be considered. He said that the respondent had alleged that the House had passed a resolution so worded as to give the impression that it had pre-judged a matter; that it had failed to give adequate time to the parties noticed to prepare their case before they had to appear and show cause and had thereby failed to observe a principle of natural justice; that on the occasion when the editors appeared it had rejected a suggestion that they should be given time; that they had misapplied the law and erred in finding them guilty; that the reasons given for imposing the fine of Rs. 1000/- were untenable and irrelevant and that the direction in regard to the payment of the fine to the School for the Deaf and Blind was illegal. He said that the total effect (of the allegations) was to hold up the House to derision as incompetent and incapable of handling a matter that it had taken power to deal with.

It does appear to us that the respondent has scrutinised the report of the proceedings to pick out points that could be urged against their propriety and legality and has urged all of them. In that process, he has put forward points which in the circumstances are technical. He has failed to make an assessment

of the weight that should be given to any of these points in the particular matter under consideration and has failed to consider what effect any point has in regard to the substance of the matter. He has thus ignored and omitted to mention considerations that may limit or modify the effect of these points in arriving at the actual decision of the matter.

It is, therefore, necessary to consider whether the respondent was genuinely exercising the right of comment or was in fact making belittling comments and criticism of the proceedings in the House calculated to have the effect of bringing the House into disrepute.

In doing so, it is necessary for us to consider the facts and circumstances set out in the affidavit of the respondent, many of which appear also in his article. The respondent is an Attorney-at-Law, in practice for 49 years. He had been appointed a Queen's Counsel in 1954 and at one time was Chairman of the Bar Council of Ceylon. He had also been a Member of the Senate from its inception in 1947 to 1971 when it ceased to exist except for a period of 2 years. He had served as a member of the Joint Committee which had advised on the law relating to the privileges of Parliament and had been a party to the recommendation and decision that the offences set out in Schedule A to the Parliament (Privileges and Powers) Act be punishable only by a Court. It appears that the respondent felt that the amending Bill had been passed in some haste as urgent in the National interest and that the amendment made by the Bill of extending the jurisdiction of punishing offences in Schedule A of the Act to the National State Assembly was ill advised. He also states in his affidavit —

> "In my view a large body such as a Committee of the whole National State Assembly is not a suitable forum to conduct any inquiry least of all a judicial inquiry. As stated by May, 'The function appropriate to a Committee of the whole House is now recognised to be deliberation and not inquiry."

The respondent further states that for his part he honestly considered the proceedings in respect of the editors far from satisfactory and that he had come to this view after a careful and considered examination of the debate on the Bill and the proceedings in the Ceylon Observer case, in the light of his own understanding of basic principles of the law and justice. Towards the end of his article the respondent states more or less as his

conclusion towards which his article led and which it sought to support —

> "Courts of law are the best institutions equipped to interpret a Statute. It is their proper function, just as legislation is the proper and rightful function not of the Courts but of the legislature."

In view of his record as a lawyer and a Senator and the part he played in having the Parliament (Privileges and Powers) Act brought on to the Statute Book, we have no hesitation in accepting his position that he held the view that the courts should be vested with sole jurisdiction to punish offences of breach of privilege and that he considered the change made by the amending law ill-advised. We also accept that he honestly considered the proceedings in respect of editors far from satisfactory and that his views thereon were formed in the light of his own understanding of the basic principles of law and justice. The respondent had written this article to give expression to his beliefs and views and adduce reasons in support of them. He was therefore entitled to pick out points that support his views and state them whether they are technical or not; but all the points made by the respondent have some bearing on the matter. The position of the respondent was that of a critic. Though it is a function of a judge to assess the weight that may be given to a point and set out counter arguments and considerations, a critic while he must not misstate the facts, may be partisan and restrict himself to the arguments and considerations that support his point of view. Another critic who takes a point of view opposed to that of the first may state the arguments and considerations which support that point of view.

With reference to the submission of the Attorney-General that the entire effect of the allegations made by the respondent should be considered; while this submission is undoubtedly correct, it does not appear to be fair to take together only the conclusions arrived at by the respondent in respect of various matters apart from his reasoning, as that will not give the correct effect of the article of the respondent. No doubt, it is correct that the Attorney-General can rely on an innuendo but it must be clear that the innuendo is amply supported by the matters on which it is raised. If there is any reasonable doubt in regard to that, the respondent being in the position of an accused person, is entitled to the benefit of the doubt.

On a reading of his article it is clear that many of the allegations made by the respondent and referred to by the Attorney-General

flow from the respondent's view of the law. For example, he said that the House had misapplied the law and had come to an erroneous decision. This conclusion had been arrived at by the respondent because in his view it was clear beyond doubt that *mens rea* or the guilty mind was an ingredient of the offence. He accordingly drew the inference that the statements of the two editors were exculpatory though it is obvious that the members of the House who had among their number several lawyers and who unanimously voted to impose a fine, had all taken the view that the editors were not disputing liability. It is correct as pointed out by the respondent that an editor may state that he takes full responsibility for what appears in his paper in a sense that does not include accepting liability for an offence, but where an editor is noticed to appear and show cause why he should not be dealt with for breach of privilege and on that occasion he states that he takes full responsibility for what appears in the paper and in addition tenders an unqualified apology, his statement takes on a different complexion. But the comment of the respondent arises from the different view of the law taken by him and as stated earlier the view of the law taken by him is not one taken arbitrarily but one that may reasonably be taken. In regard to the submisson, that the respondent was in fact holding up the House to derision, we find that the language and tone of the article is sober and serious and that throughout the article no recourse is had to ridicule as such. It appears to us also that the respondent was genuinely seeking to set out views bona fide held by him and that in all the circumstances he has not stepped outside the area of permissible comment.

It must be borne in mind that the view that the power to deal with offences of breach of privilege should be left to the Court and not be exercised by Parliament has been expressed not only in this country but is one taken by legal experts in almost all parts of the Commonwealth. In "Parliamentary Privilege in Australia" by Enid Campbell, p.123, there appears —

> "On grounds of expediency and convenience, much is to be said for reserving to the Houses power to deal summarily with persons who, by their misconduct, disturb the orderly conduct of proceedings. No more seems to be required here than power to remove and exclude (forcibly if necessary) persons creating disturbances in the House or in its vicinity, and power to suspend or expel members guilty of disorderly conduct or wilful interruption of proceedings. Except in regard to offences of this kind, transfer of parliamentary penal jurisdiction to the ordinary courts of law is, in this writer's opinion, imperative if the accepted standards for administration of justice are to be satisfied."

In a lecture given on the Law of Parliamentary privilege by Viscount Kilmuir when he was Lord Chancellor, he referred to criticisms against the power of Parliament to punish for contempt though it does not appear that he agreed with them.

> "The criticisms that may have most commonly been made are these. It is said that the proceedings are inquisitory, that a member of the public who may be publicly censured or even committed to prison is not given legal representation and that he had not the advantages of an accused on a trial on indictment of knowing the evidence against him and being given the opportunity to reply according to formal and well-established rules.
>
> It is a tribute to the power and influence of the English common law and its quality of preferring justice even to truth, that the inquisitorial system is so disliked in England. No one in this country is happy unless, if a charge or claim is brought against him, he has the right to have it clearly formulated and to have a clear indication given to him of the evidence on which it is based. There are, however, occasions where no one is accused but it is essential to inquire whether something has taken place and if so whether anyone is responsible for the happening."

It will thus be seen that the criticism is not so much against the National State Assembly as such but against Parliamentary bodies exercising the right to punish for the offence of breach of privilege. Another matter to be noted is that as by and large the points sought to be made by the respondent are that the jurisdiction to punish for contempt should be exercised by the Courts rather than by Parliament, and that the Courts are better equipped to do so, there is really no reflection on Parliament. We have dealt with the respondent's comments in regard to the Ceylon Observer case in some detail earlier.

In the result, we hold that an offence under paragraph 7 of Schedule A to the Parliament (Powers and Privileges) Act has not been made out and we discharge the respondent from the notice served on him.

THAMOTHERAM, J. — I agree.

ISMAIL, J. — I agree.

WEERARATNE, J. — I agree.

SHARVANANDA, J. — I agree.

Respondent discharged