MENDIS
v.
CHULANIE

COURT OF APPEAL.
YAPA, J.,
GUNAWARDANA, J.
C.A. NO. 27/96 (F).
D.C. MT. LAVINIA NO. 128/91 (M).
AUGUST 29, 1997.
DECEMBER 14, 1998.

Defamation – Assault – Proof required – What is corroboration – Falsus in uno, falsus in omnibus – Demeanour and deportment of witness.

Held:

(1) Wrong of defamation consists in the publication of defamatory matter concerning another without lawful justification or excuse.

(2) Wrong may be committed not only by words, written or spoken but also by acts, for example by the exhibition of a picture or effigy holding up another to ridicule or contempt.

Per Yapa, J.

"Defamation may be described as that species of injuries in which the character of a person is assailed or hurt, ie defamed, brought into ill repute by the use of language, ie words, written or spoken and with the intent of so defaming him."

(3) It is a well-established proposition of law that a plaintiff in an action for defamation must set out in his plaint the exact words alleged to have been used or uttered by the defendant, in order to entitle him for damages.

Per Gunawardana, J.

"an assault or unlawful personal attack would not tantamount to defamation because the tort of defamation consists in the publication of defamatory words concerning another without lawful justification."

APPEAL from the judgment of the District Court of Mt. Lavinia.

Cases referred to :

1. *Director of Public Prosecutions* v. *Hester* – 1972 vol. 3 WLR 910 at 919.
2. *Queen* v. *Julis* – 65 NLR 505.
3. *Francis Appuhamy* v. *The Queen* – 68 NLR 437 at 443.

Ranjan Suwandaratne for plaintiff-appellant.

S. C. Gunasekera for defendant-respondent.

Cur. adv. vult.

November 1, 1999.

HECTOR YAPA, J.

The plaintiff-appellant (hereinafter referred to as the appellant) instituted an action in the District Court of Mount Lavinia suing the defendant-respondent (hereinafter referred to as the respondent) for damages – the cause of action pleaded being that the latter had defamed the former. In the said action filed against the respondent, the appellant stated, *inter-alia,* that on or about the 16th March, 1990, the respondent defamed the appellant in public, by alleging that the appellant is a "famous writer of fraudulent deeds" and on the same day at the Sri Saranankara road junction, respondent abused the appellant in obscene language and slapped him without any reasonable cause. Therefore, the appellant in the said action claimed a sum of Rs. 500,000 against the respondent as damages, for the said injurious acts on the part of the respondent. After the trial, the learned District Judge by her judgment dated 22.02.1996, dismissed the appellant's action with costs. The present appeal is against the said dismissal of the action.

At the trial the appellant gave evidence stating that he was defamed in the manner referred to above by the respondent. Further, in support of his case the appellant also led the evidence of one Peter, Anverdeen and the Assistant Government Agent Kulatunga. After the appellant's

case was closed reading in evidence P1 to P7, the respondent gave evidence denying the allegation that he defamed the appellant.

At the hearing of this appeal the main complaint of the learned counsel for the appellant was that the learned trial Judge had failed to consider and determine the evidence led in the case as in a civil action, by applying the balance of probability test. On the contrary counsel contended that the learned Judge had sought to view the appellant's case as a criminal trial and thereby placing a higher burden of proof on the appellant. In other words, the submission of the learned counsel for the appellant was that, there was sufficient evidence for the Court to hold that the appellant was defamed by the respondent, since the appellant had discharged the burden of establishing his case on a balance of probability. It would be necessary, therefore, to examine the nature of the evidence led before the learned District Judge, in order to appreciate the justification or otherwise of this contention advanced by learned counsel for the appellant.

Before a close evaluation of the evidence led at the trial is made, it would be necessary to make the following observations. According to the plaint, one of the allegations made by the appellant against the respondent and his wife had been that on 07.03.1990, in the course of the inquiry conducted by the Assistant Government Agent Kulatunga relating to the supply of electricity to the respondent, both the respondent and his wife had made serious allegations against the appellant. However, it would appear that the appellant had later abandoned any claim for damages against the respondent in respect of the said allegation by omitting to frame any issues at the trial. In addition, it is observed that the appellant had even failed to mention the words alleged to have been used by the respondent and his wife on that occasion, ie on 07.03.1990. It should be mentioned here, that, it is a well-established proposition of law that a plaintiff in an action for defamation must set out in his plaint the exact words alleged to have been used or uttered by the defendant, in order to entitle him for damages. Perhaps, it was due to this reason that no issues were framed in regard to the said allegation. Further, it must be remembered that the same principle of law would apply with regard to the allegation made by the appellant in his plaint, that on 16.03.1990 both the

respondent and his wife made allegations defamatory in nature, against the appellant, but had failed to mention the words spoken or used on that occasion by them (vide para 5 (A) of the plaint). Therefore, it would be seen that, even though an issue was framed by counsel for the appellant pertaining to the said allegation at the trial, no damages could have been claimed by him in respect of the unspecified words spoken to or uttered by the respondent. In these circumstances the only material that should be considered in this appeal arises from the two main issues raised on the pleading referred to in paragraph 5 (B) and 6 of the plaint. Two issues that were raised on the said pleadings are as follows :

(i) Did the respondent defame the appellant in public, by alleging that the appellant is a famous writer of fraudulent deeds.

(ii) Did the respondent defame the appellant by abusing the appellant in obscene language and slapping him without any reasonable cause.

It is worth mentioning here that the respondent in his answer had denied the allegations made by the appellant against him and had prayed for the dismissal of the appellant's action in the District Court with costs.

With regard to the first allegation, that the respondent had accused the appellant alleging that he is a famous writer of fraudulent deeds, the appellant, Peter, Anverdeen and the Assistant Government Agent Kulatunga, had given evidence. According to the appellant on 16.03.1990, the AGA Kulatunga had conducted an inquiry into a dispute between the respondent and the appellant's clients Peter and Anverdeen. The dispute arose over the refusal by Anverdeen and Peter to allow electricity supply line being taken over their lands to the house that was being constructed by the respondent. The appellant had stated in the course of the said inquiry, that both the respondent and his wife had made various allegations against him, and one such allegation was that the appellant is a person who writes fraudulent deeds. In respect to this allegation, it is significant to note that in the statement made to the Kohuwala police by the appellant soon

after the incident, he had not mentioned anywhere in the police statement that the respondent on that occasion had accused the appellant as a person who writes fraudulent deeds. The police statement was produced marked P1. The appellant was cross-examined in detail with regard to this omission in his police statement to mention the allegation made by the respondent against the appellant. This is a vital omission which required a plausible and reasonable explanation. The appellant while admitting the fact that he had not mentioned it to the police, sought to explain the said omission on various grounds. At first appellant stated that he did not mention it in his police statement as he was of the view that what was important then, was the slap that was given to him by the respondent. However, later the appellant tried to explain this omission in his police statement, by saying that since the police wanted him to make his statement in brief, he did not mention it in his police statement. Finally, in the course of his evidence, the appellant sought to resile from the earlier positions taken by him on this matter by saying that he did mention to the police that the respondent accused him as a person who writes fraudulent deeds but the police had failed to record it in his statement. Therefore, when one considers these excuses given by the appellant for his failure to mention to the police the fact that the respondent accused him as a person who writes fraudulent deeds, it is manifestly clear that none of these excuses could be accepted as true for several reasons. It is common knowledge that the appellant being a lawyer was in a better position to know whether this material which he had omitted to mention in his police statement was important or not. Besides, what is strange in the conduct of the appellant is the trouble he had taken to refer in his police statement to the fact that the respondent's wife had scolded him saying that the deed the appellant had written in respect of the particular land was a fraudulent deed and further that the appellant had done number of acts unbecoming of a lawyer. As stated by the appellant, according to him if it was the slap that was important, what was the need for him to refer to the allegation of making a fraudulent deed that was made by the respondent's wife against him. Further, it would be difficult to believe the appellant when he says that the police had told him, who is a lawyer, to be brief when making his statement or even the fact that the police had omitted to record any material which the appellant had

stated when making his statement to the police. It should also be remembered that all these excuses given by the appellant for his omission to refer to the accusation of a fraudulent deed writer must be considered in the light of the admission made by the appellant that his statement to the police was read over to him and thereafter it was signed by him.

On the other hand the evidence of the Assistant Government Agent Kulatunga was entirely different. According to him, he could remember having gone for an inquiry on 16.03.1990 relating to the drawing of electricity wires to the house of the respondent. At the said inquiry respondent and his wife had been present and the appellant had appeared for Peter and Anverdeen. When Kulatunga was questioned with regard to the incident that arose between the appellant and the respondent and his wife, his response was that other than the respondent and his wife eagerly urging matters in support of their case, there had been no other incident. In cross-examination witness Kulatunga had stated that in inquiries of this nature, it is usual for both parties to present their case with interest and that there was nothing unusual about it. However, he stated that the use of obscene abuse or personal insults at such inquiries were uncommon and on that occasion, if such a thing had happened he would well remember. Therefore, it must be stressed here that, if such an incident as stated by the appellant took place, the only independent witness who could have corroborated or supported that fact was AGA Kulatunga. Furthermore, if an incident of this nature, where a lawyer appearing at such inquiry was accused of being a writer of fraudulent deeds, along with other abuse, that would have been something that an officer conducting such an inquiry could not have forgotten or would have failed to observe. Besides, if any such incident took place, under normal circumstances, an inquiry officer would have intervened to prevent or stop such an incident taking place. In the circumstances the evidence of AGA Kulatunga who says that such an incident as referred to by the appellant did not take place at that inquiry, amounts to a contradiction, *inter se*, of the evidence given by the appellant on this matter. This would necessarily affect the credibility of the appellant on this point.

It is also necessary to consider the evidence of Peter and Anverdeen who were the supporting witnesses of the appellant's case. It must

not be forgotten that they were the appellant's clients on whose behalf the appellant had appeared at the inquiry before the Assistant Government Agent. Even though their evidence was led to support the evidence given by the appellant, it would be seen that these two witnesses do not lend any support to the evidence given by the appellant. The appellant's evidence was that in the course of the inquiry before AGA Kulatunga, the respondent had stated that the appellant is a writer of fraudulent deeds. Both Peter and Anverdeen gave evidence in Court supporting the position that the respondent had stated that the appellant is a writer of fraudulent deeds. However, in the two statements made to the police on 16.03.1990 by Peter and Anverdeen soon after the incident, there is no reference to the respondent making such a general allegation that the appellant is a person who writes fraudulent deeds. What these two witnesses had stated to the police in their statements had been that the respondent and his wife while scolding the appellant using obscene language, had stated that the appellant had written a false deed relating to the particular land in question. These two police statements were produced marked P4 and P5 at the trial. Therefore, it is seen that quite contrary to what had been stated in their police statements, Peter and Anverdeen had stated in Court that the respondent had stated at the inquiry before the AGA that the appellant is a writer of fraudulent deeds. In the circumstances there appears to be a serious contradiction in the evidence given by Peter and Anverdeen, when their evidence is examined in the light of their police statements. Besides, according to the police statements of Peter and Anverdeen, it is not clear whether the allegation that appellant had written a false deed relating to the land in question was uttered by the respondent or his wife. In view of this serious contradiction and the lack of consistency observed in the evidence given by Peter and Anverdeen, it is not safe to act on their evidence. Further, these infirmities observed in their evidence, goes to show that Peter and Anverdeen had given false evidence in Court, quite contrary to what they had told the police, in order to fall in line with the evidence given by the appellant that the respondent accused the appellant alleging that he is a writer of fraudulent deeds.

In the light of the observations referred to above in relation to the evidence given by Peter and Anverdeen, the submission of learned

counsel for the appellant, that the appellant's evidence had been corroborated by witnesses Peter and Anverdeen cannot be accepted. It must be mentioned here, that, as observed above, even the evidence given by the appellant that the respondent had stated in the inquiry before AGA Kulatunga, that the appellant is a writer of fraudulent deeds, cannot be accepted or acted upon, as true. Therefore, in a situation where the evidence of a witness appears to be untrue and unacceptable, any corroborative evidence on that item of evidence cannot make it credit worthy. On this matter learned counsel for the respondent referred us to the case of *Director of Public Prosecutions v. Hester*[1] at 919 where Lord Morris in the course of his judgment stated as follows :

> "The essence of corroborative evidence is that one creditworthy witness confirms what another creditworthy witness has said. . . The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible : and corroborative evidence will only fill its role if it itself is completely credible evidence."

It is worth pointing out that, even if, the evidence of Peter and Anverdeen is accepted as true, yet their evidence could not have corroborated the evidence of the appellant on this matter, for the reason that appellant's evidence is so unsatisfactory and untrustworthy to be acted upon by Court. Besides, it must be remembered here that the evidence of Peter and Anverdeen on this matter as referred to above is equally unsatisfactory. Therefore, considering all these infirmities in the appellant's case, one cannot blame the learned District Judge for deciding not to accept and act upon the evidence given by the appellant and his supporting witnesses on this vital question which had to be decided, namely did the respondent allege at the inquiry before AGA Kulatunga that the appellant is a famous writer of fraudulent deeds. It must be mentioned here that the learned District Judge with reasonable clarity has set out the reasons why she was not acting on the evidence given by the appellant and his supporting witnesses. In the circumstances there appears to be no merit in the submission of the learned counsel for the appellant that the learned

District Judge had failed to consider the evidence led in the case as in a civil action, applying the balance of probability test. If the evidence was not trustworthy, there was nothing that the Court could have done except to hold that the appellant had failed to establish his case. It is worth mentioning here that when proving a case applying the balance of probability test, it has to be done on evidence which is trustworthy and not on false or shaky evidence.

The next matter to be considered is whether the respondent had defamed the appellant by abusing him in obscene language and slapping him. This involves the consideration of the question whether the respondent had in fact given a slap to the appellant and whether the alleged conduct of the respondent resulted in defaming the appellant. It is to be noted that the respondent had denied this allegation. Even with regard to the use of obscene language and the slap given to the appellant by the respondent, the available evidence comes from the appellant and his two supporting witnesses Peter and Anverdeen. The only additional material being the medical evidence. It is to be observed that the learned District Judge would have been very cautious or even reluctant to act on the evidence of the appellant and his two supporting witnesses, after having disbelieved their evidence with regard to the 1st incident where the respondent had accused the appellant as a writer of fraudulent deeds. On this matter learned counsel for the respondent also submitted that the learned trial Judge could not have accepted the evidence of the appellant and his witnesses unless their evidence was corroborated in some material particulars by independent testimony on the principle "*falsus in uno, falsus in omnibus*" meaning he who speaks falsely on one point will speak falsely upon all. In the case of *Queen v. Julis*[2] it was held, among other things, that when such evidence is given by witnesses, the question whether other portions of their evidence can be accepted as true should not be resolved in their favour unless there is some compelling reason for doing so. In the case of *Francis Appuhamy v. The Queen*[3] at 443 it was stated as follows : . . . "In that situation the Judge or Jurors have to decide for themselves whether that part of the testimony which is found to be false taints the whole or whether the false can safely be separated from the true".

According to the appellant the respondent had abused him in obscene language and slapped him when several people who were there had chased after the respondent in order to arrest him or attack him. This position was supported by Peter and Anverdeen when they gave evidence in Court. However, in the police statements made by the appellant, Peter and Anverdeen there is no reference at all to the persons chasing after the respondent when the appellant was slapped. Similarly, in the police statements of the appellant and Peter there is no reference at all with regard to the use of obscene language prior to the slap. In the police statement of Anverdeen he merely states that the respondent scolded the appellant and then gave him a slap, but he does not refer to any obscene material. It is also strange that if the incident happened in that manner, why the persons who chased after the respondent failed to arrest him, till he ran a distance of about 100 yards to reach the respondent's house. Furthermore, according to the evidence of the appellant the impression is created that the people who chased after the respondent were people who were loyal to the appellant and in this situation one may ask the question why, there was a failure on the part of the appellant to lead the evidence of anyone of those persons who were equally eyewitnesses to this incident, and who could have been treated as independent witness. It is obviously clear from the reasoning of the trial Judge that she had not accepted the story of the appellant that the respondent had returned from his house, given a slap to the appellant and thereafter managed to escape from the crowd who had chased after him. In this case having regard to the conclusions arrived at by the learned trial Judge, it would appear that this was a case of deliberate falsity on the part of the appellant and his supporting witnesses. In this situation it is to be remarked that in cases of this nature this Court should not underestimate the priceless advantage the learned District Judge had only to observe the demeanour and deportment of the witnesses, but also the facility she had to form a general impression with regard to the veracity of witnesses who had testified at the trial.

Therefore, in view of the infirmities as referred to above it is difficult to believe the evidence given by the appellant and his supporting witnesses with regard to the incident of the respondent abusing the appellant in obscene language and slapping him. Due to the absence

of any reference in the statements made to the police by the appellant, Peter and Anverdeen to the use of obscene language by the respondent prior to the slap, the evidence given by them in Court for the first time five years later, saying that obscene language was used cannot be accepted as true. Further, in the light of all these infirmities, as referred to above, the question would arise – whether their evidence could be accepted in respect to the slap which they claim the respondent gave the appellant. The mere fact that a Hospital Ticket and Medical Legal Report were produced marked P2 and P3 will not clearly establish the fact that the mild swelling in the left cheek is only due to the slap. Also, the fact that on following day the appellant had given a history of having being slapped by the respondent to the doctor does not strengthen the appellant's case, since his evidence on other matters has not been accepted as trustworthy. As submitted by learned counsel for the respondent the mere fact that a person had a mild swelling on the cheek does not necessarily mean that it is the result of a slap. Such a swelling could have been caused in so many ways. Therefore, presence of a swelling on the cheek of the appellant does not give rise to the inference that the account given by the appellant to the doctor as to how he got that swelling is true. Such a conclusion appears to be reasonable having regard to the fact that the evidence of the appellant and his supporting witnesses has been disbelieved by Court in this case.

However, even for the sake of argument, if one were to accept the evidence of the appellant and his two supporting witnesses that the respondent in fact gave a slap to the appellant in public, there is also the other question to be decided namely, whether a mere slap given to a person in public would constitute defamation. It was sought to be argued by learned counsel for the appellant that an assault in certain circumstances can constitute defamation. Learned counsel's contention was that when a professional is assaulted in public and in the presence of his clients and the members of the general public for something done by him in his professional capacity, it should constitute defamation. Counsel, however, failed to assist Court with any authority to support this submission. Besides, it must be stated here that, there was no material before Court that the assault was in respect of something done by the appellant in his professional

capacity. Regard to this submission of counsel, it is to be noted that defamation is essentially limited to the case where words, or what the law regards as equivalent to words, are used concerning the injured party, the use of such words constituting the injury. Mckerron in the Law of Delict, 6th edition, page 160, refers to defamation in the following terms: "The wrong of defamation consists in the publication of defamatory matter concerning another without lawful justification or excuse. The wrong may be committed not only by words, written or spoken, but also by acts; for example, by the exhibition of a picture or effigy holding up another to ridicule or contempt. In practice, however, defamatory imputations are usually made through the medium of language, . . ." Therefore, it may be observed that according to most writers, defamation may be described briefly as that species of injuria in which the character of a person is assailed or hurt, ie defamed, and brought into ill-repute, by the use of language, ie words, written or spoken, and with the intent of so defaming him. In the circumstances it would appear that a mere assault will not constitute defamation.

Therefore, having carefully considered all these matters as referred to above, I see no reason to interfere with the decision of the learned District Judge. Accordingly, this appeal is dismissed with costs.

GUNAWARDANA, J.

I agree with the judgment proposed by my brother. I only wish to add this, that is, that an assault or unlawful personal attack would not be tantamount to defamation because the tort of defamation consists in the publication of defamatory words concerning another without lawful justification. However, one cannot be oblivious to the fact, which is well-known, that a man may defame another by his acts no less than by his words. It has been said that one may "*convey a libel in a frown. And wink a reputation down*".

Appeal dismissed.