Present: Bertram C.J. and Shaw J.

1919.

FERNANDO *v.* PERIS *et al.*

232— D. C. Colombo, 43,550.

Defamation—Privileged communication—Proof of express malice—Costs—Withdrawing allegation at the trial.

In an action for defamation, when it is shown that the occasion on which the words were uttered or written was privileged it lies upon the other side to displace that privilege by positive proof of express malice.

THE facts appear from the judgment.

Bawa, K.C. (with him *Samarawickrema*), for the plaintiff, appellant.

Hayley (with him *Tisseverasinghe*), for respondents.

January 31, 1919. BERTRAM C.J.—

This is an appeal from the decision of the District Judge of Colombo. The action was brought by one U. J. Fernando, lay reader of an Anglican church in the neighbourhood of Colombo, for the purpose of the vindication of his character. It is an action for libel against the three defendants, who are church wardens of the church, and who wrote a letter to the incumbent of the church imputing immorality to Mr. Fernando, expressing the belief of the wardens in the charge made against Mr. Fernando, and calling upon the incumbent to take action in the matter. The learned District Judge has found the charge against Mr. Fernando was false, but that the occasion on which the charge was made was a privileged occasion; and he has further held that the plaintiff has not satisfied him that the defendants made the charge otherwise than in good faith. He has, therefore dismissed the plaintiff's action, with costs.

[His Lordship set out the facts, and continued]:—

Now it must be taken for the purpose of this case that the charge against U. J. Fernando was a false charge. But it was not until the actual trial of this action that the defendants accepted this position. Mr. Fernando, on June 30, 1916, instituted this action to defend his character. The defendants in their answer expressly pleaded that the charge was true, and, as I say, it was not until they came into Court that, on the advice of counsel, they disclaimed any attempt to justify the charge. In spite of this fact, however, the first witness called on behalf of the defence was the woman, Maria Gomes, whose evidence was not confined merely to saying that she had made communications to the defendants, which would explain the action they took, but made specific charges of the most serious nature: charged the plaintiff with being the father of her child, with having attempted to procure abortion, and with having bribed her witnesses in the maintenance proceedings. All these statements were made in examination-in-chief.

The learned District Judge, most properly, and in spite of the fact that the defendants at that stage withdrew the charge of adultery, thought it right that an issue should be framed on that point, and he has expressly exonerated the plaintiff from the charge against him. All that we have to ask ourselves, therefore, is not whether the charge is true, because it is expressly found to be false, but whether the defendants are entitled to claim privilege on the occasion on which they made it.

Mr. Bawa has brought before us a variety of circumstances which he contends, preclude them from the right of claiming privilege. Those circumstances partly consist of certain antecedent facts in the relationship between the parties, and partly in the manner in which they made and pressed their charge. He draws attention to the fact that the charge was accompanied, as I have said, by an

attempt to get the woman churched, and the attempt to get the child baptized, and by the institution of the maintenance proceedings. There is no question that this combined and concerted action shows a certain animus and determination on the part of the defendants, which, as I say, is open to comment. Mr. Bawa further asks us to say that the manner in which, many months after the actual occurrence, they concerted together in this persistent manner could only be explained by personal malice, and he explained the origin of that personal malice in the circumstances to which I have previously referred. There was, undoubtedly, considerable friction in the church. Mr. Fernando, who was church warden, had lost that position. It is said that his parishioners had not re-elected him to the general treasurership in 1915, one of the defendants having taken his place. There was certain friction with regard to one of the defendants arising out of one of these when Mr. Fernando's pew had been occupied. There was also a Police Court charge made by Mr. Fernando against the brother of one of the defendants two or three days before the writing of the letter. All these circumstances, no doubt, point to a state of rivalry and friction, and to a certain amount of personal feeling. Mr. Bawa asks us to say it was because of that state of feeling that this charge was pressed upon the incumbent of the parish, and that we ought not to impute the action of these defendants to a *bona fide* desire to discharge a public duty. At any rate, he says it is for them to make out the fact that they were actuated by consideration of public spirit, and that such a claim made by persons who are open to the criticisms I have summarized above ought not to be accepted by the Court. He claims that the learned District Judge has misdirected himself in the manner in which he has approached the question. The learned District Judge says: "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."

That summary of the legal position is challenged by Mr. Bawa. But, in my opinion, the learned District Judge has expressed the legal position with perfect accuracy. The principle which governs the question of privilege in actions for libel has been summarized in the case of *Harrison v. Bush* [1]: "A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged if

[1] 5 *F. & B. 348.*

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made to a person having a corresponding interest or duty, although it contained criminatory matter which without the privilege would be slanderous and actionable." Mr. Bawa, as I understand, accepts that definition, that it is an essential condition that the communication should be made in good faith, but contends that it is for the person who sets up the privilege to prove that it was made in good faith. That contention is contrary to the law as I understand it. It is, I think, clear in regard to the law of defamation that the law distinguishes between two sorts of malice. One may be called implied malice, or as it is expressed in Roman-Dutch law, *animus injuriandi*, and the other is express malice. *Animus injuriandi* may be presumed, but express malice must be proved, and the onus of proof of express malice lies upon the person alleging it. When once the circumstances are shown which *prima facie* indicate that the occasion on which words were uttered or written was privileged, it lies upon the other side to displace that privilege by positive proof of express malice.

My Brother Shaw has quite recently discussed and summarized the law on the position in the case of *Gulick v. Green.*[1] I need not do anything more than refer to his remarks and to the cases there cited. The Judges in the case of *Harrison v. Bush*,[2] and a case to which he there refers, concurred in their judgments in saying that, if the occasion is privileged, it lies upon the plaintiff to give evidence of express malice. The law is similarly expressed by Lopes L.J. in *Nevill v. Fine Arts and General Insurance Company*,[3] another case cited in the same connection. His words are as follows: "The effect of occasion being privileged is to render it incumbent upon the plaintiff to prove malice, that is, to show some indirect motive not connected with the privilege, so as to take the statement made by the defendant out of the protection afforded by the privileged occasion."

The learned District Judge was, therefore, quite right in saying that it was for the plaintiff to satisfy him that the charge was not made by the defendants out of a sense of public duty, but for some indirect motive. I confess that, if the onus of proving that this charge was made by the defendants in good faith solely or principally for the purpose of discharging a public duty lay upon the defendants, it is quite possible they might have been in a different position. As it is, what are the facts? The woman had made a definite charge against Mr. Fernando. That charge was freely repeated by her family. It had been made the subject of a police inquiry, and though it had been disbelieved by the police, that opinion would not necessarily influence the defendants. We know very well how charges of this nature are far too readily believed, though the belief which is extended to them is very often in complete good faith. . . .

[1] *(1918) 20 N. L. R. 176.* [2] *5 F. & B. 348.* [3] *(1895) 2 Q. B. 156.*

I think the learned District Judge is fully justified in saying that it was not made out to his satisfaction that the defendants, however much their action may be open to criticism in certain particulars, acted otherwise than in good faith. I think, therefore, this judgment should be upheld. In view, however, of the fact that the charge against Mr. Fernando was pressed right up to the time when he came into Court, so that he had to incur expenses with a view to meeting it and to disproving it in Court and in view of the fact that although the charge was formally withdrawn, evidence was, nevertheless, tendered in support of it, I think it would have been better if the learned District Judge had dismissed the plaintiff's action without costs. I would therefore, vary the judgment in that respect. The substantial matter fought out, however, has been whether the learned District Judge was right as to the view which he took on the question of privilege, and as I am of opinion that his view was justified, I think that the appeal should be dismissed, with costs.

SHAW J.—

I agree. I think there can be no doubt that the circumstances under which the letter complained of was written rendered it a privileged occasion. Under those circumstances, it lies upon the plaintiff to satisfy the Court that the defendants acted from malicious motives. It is pointed out in *Gulick v. Green* [1] that this malice which it is necessary for the defendants to prove is a state of mind, and we are asked in this case to say that the Judge was wrong in his finding that he was not satisfied that such a state of mind existed in the defendants. There are circumstances in this case from which, in my opinion, the Judge would have been justified in finding this malicious state of mind had he thought right to do so after seeing the witnesses and hearing the other details of the case. But he has not done so, and it is impossible, in my view, for the Court of Appeal, not having had the advantage of the Judge in seeing the witnesses and hearing them give their evidence, to say that he was wrong with his finding. I, therefore, think that the appeal should be dismissed. In view of the conduct of the defendants in maintaining right up to the date of trial that they still believed the guilt of the plaintiff, it was proper for the Judge to have directed the issue of justification to be tried before him, in order to enable the plaintiff to clear his character from the aspersions which had been put upon him. The defendants having failed to make out justification which they up to the date of trial alleged, and having compelled the plaintiff to take legal steps to clear his character, I agree with the order that my Lord proposes with regard to costs.

Appeal dismissed.

[1] *(1918) 20 N. L. R. 176.*