

INDEPENDENT NEWSPAPERS LTD.  
v.  
NISSANKA PARAKRAMA WIJERATNE

COURT OF APPEAL  
ANANDA COOMARASWAMY, J.  
EDUSSURIYA, J.  
C.A. 312/85(F)  
D.C. COLOMBO 83551/M  
FEBRUARY 2, MAY 17, JUNE 2, 13, 1995.

*Defamation – Photographs – Newspapers – Malicious Publication – Innuendo – Per-se defamatory Statements – Fair comment.*

Plaintiff-Respondent sued the Defendant-Appellant for publishing two photographs side by side, one of which was the Plaintiff carrying the casket containing the sacred relics and the other of Schoolgirls – Hewisi band, with the headlines covering the two photographs. “Don’t turn a hallowed ceremony into a school boy joke”, and also with the words, “perhaps there will be film stars occupying Yakada Doliyas next year” immediately below the photographs of the Plaintiff.

It was the position of the Plaintiff-Respondent, that the Defendant published the aforesaid photographs in the manner aforesaid wrongly and maliciously and brought the Plaintiff into hatred, contempt and ridicule and caused the Plaintiff pain of mind – the publication been grossly defamatory of the Plaintiff. The Learned District Judge granted the reliefs prayed for by the Plaintiff.

**Held:**

***Per Edussuriya, J.***

“There are no such things as Yakada Doliyas, hence the words below the photographs of the Plaintiff make no sense and therefore cannot be defamatory.”

(1) Where a Plaintiff pleads *per se* defamation then the passage complained of or the photographs and the sub-titles as in this case must be by themselves defamatory and the Plaintiff cannot contend that they convey such and such a meaning.

(2) The words and the photographs are meant to deter the Plaintiff/Respondent from taking any steps to turn the perahera into a joke (“*Don’t turn* a hallowed ceremony into a school boy joke.”)

(3) The Respondent in order to succeed on the innuendo pleaded must establish to the satisfaction of court **firstly**, that the Publication of the two photographs and the Sub-Titles was capable of leading a reasonable reader of ordinary intelligence into the belief that both photographs were taken at one and the same time during the Kandy Perahera season, **secondly**, that the said photographs were capable of conveying to a reasonable reader of ordinary intelligence that the Respondent whilst performing his religious functions and duties was secretly enjoying or was delighted at the presence of the young Schoolgirl Hewisi drummers in the Kandy Perahera and the Respondent was at the sametime privately entertaining the idea of seeing film stars participating in the Perahera in the following year, and **thirdly** that the photographs and the sub-titles did in fact convey such a meaning or was capable of conveying such a meaning.

(4) A Judge ought – not to take into account any mere conjectures which a person reading the document might possibly though unreasonably form.

“It is unreasonable that where there are a number of good interpretations the only bad one should be seized upon to give a defamatory sense to the document”.

(5) In deciding whether words are capable of conveying a defamatory meaning the Court will reject those meanings which can only emerge as the product of some strained or forced or utterly unreasonable interpretation.

**AN APPEAL** from the judgment of the District Court of Colombo.

**Cases referred to:**

1. *Capital and Counties Bank v. Henty* – 1882 7 Appeal cases 744.
2. *Jones v. Skelton* (1963) 1 W.L.R. 1370.

*H. L. de Silva P.C.*, with *S. C. Crosette Thambiah* for the Defendant-Appellant.  
*Romesh de Silva, P.C.*, with *Palitha Kumarasinghe* for Plaintiff Respondent.

*Cur. adv. vult.*

October 21, 1994.

**EDUSSURIYA, J.**

The plaintiff-respondent hereinafter referred to as the Respondent sued the Defendant-Appellant hereinafter referred to as the Appellant for the recovery of a sum of Rs. 1000,000/- as damages and pleaded as follows in paragraphs 5, 6 and 7 of the plaint.

5. The Defendant published or caused to be published in the issue of the Weekend News paper on Sunday 29th July, 1979 two photographs which were taken on different occasions. One of the

photographs was of the Plaintiff carrying the casket containing the sacred relics and the other photograph of Schoolgirls – Hewisi band. The said two photographs were placed side by side with the headlines covering the two photographs “Don’t turn a hallowed ceremony into a school boy joke” and also with the words – “perhaps there will be film stars occupying Yakada Doliyas next year”, immediately below the photographs of the Plaintiff. **The photographs were published in the manner aforesaid and with the sub-title referred to above with deliberate intent that the readers of the newspaper would necessarily be led into the belief:**

- (a) that both photographs were taken at one and the same time;
- (b) the said photographs were taken during the Kandy Perahera season;
- (c) that the Plaintiff whilst carrying the casket containing the sacred relics was deliberately turning his glance towards the school-girls and thinking to himself that perhaps there will be film stars occupying the Yakada Dodiya next year.

6. The Plaintiff states that the Defendant published the aforesaid photographs in the manner aforesaid and the sub-title aforesaid wrongly and maliciously, in that the said publication was calculated to convey to the readers of the said issue of the said newspaper and did convey the idea of the message:

- (a) that the Plaintiff even while performing his religious duties and functions was secretly enjoying and/or was delighted at the presence of the young Schoolgirls Hewisi drummers in the Kandy Perahera, and
- (b) that the Plaintiff was at the same time privately entertaining the idea or thought of seeing film stars participating in the Kandy Perahera, the following year.

7. The Plaintiff states that the publication of the aforesaid photographs and the sub-title aforesaid by the Defendant was wrongful, malicious and brought the Plaintiff into hatred, contempt

and ridicule and caused the Plaintiff pain of mind. The publication of the photographs in the manner aforesaid and with the sub-title is grossly defamatory of the Plaintiff.

Counsel for the Respondent contended at the hearing of this appeal that the Respondent had pleaded an innuendo in paragraph 5 and 6 of the plaint and *per se* defamation in paragraph 7.

It is common ground that the Respondent had pleaded an innuendo in paragraphs 5 and 6 but Counsel for the Appellant contended that the Respondent had not pleaded *per se* defamation and that the trial proceeded only on the innuendo and that in paragraph 7 of the plaint the Respondent pleads *animus injuriandi*.

Counsel for the Respondent submitted that the Respondent's case must be understood in the manner it was presented in the District Court.

The written submissions of the Respondent in the District Court show quite clearly, that the Respondent did not rely on *per se* defamation. Submissions had been made only on the basis of the innuendo pleaded in paragraphs 5 and 6 of the plaint. Further, the Learned District Judge has in his judgment dealt only with the innuendo. The Learned District Judge having considered what is set out in issues 2 and 3 raised with reference to paragraphs 5 and 6 of the plaint, then finds (at p. 376 of the Brief) that the Respondent has been brought into hatred, contempt and ridicule as pleaded in paragraph 7 of the plaint in respect of which issue 1 has been raised.

Paragraph 7 of the plaint does not in our view deal with *per se* defamation. It is clear from the judgment that the Learned District Judge himself was of the same view and therefore the Learned District Judge has nowhere in his judgment dealt with the question of *per se* defamation and quite rightly so, since *per se* defamation was not in issue before him. In fact the Learned District Judge has first considered the innuendo pleaded, second, whether the photographs and sub-title complained of were published maliciously, third, the question of privilege and fourth the question of damages.

Paragraph 7 of the plaint in our view pleads *animus injuriandi* and is a follow up on the averments in paragraphs 5 and 6 in which the innuendo was pleaded, as contended by the counsel for the Appellant.

The Counsel for the Respondent stated in the course of his submissions that he was "relying mainly on *per se* defamation". Thus, it appears that the Counsel for the respondent realising the weakness of his case based on the innuendo attempted to make out at the hearing of this appeal that the Respondent presented a case based on *per se* defamation as well in the District Court.

Although, we are of the view that it was not the position of the Respondent at the trial that the photograph and sub-title were *per se* defamatory, we propose to deal with the submission of *per se* defamation as well.

Counsel for the Respondent submitted that the words "Don't turn a hallowed ceremony into a school boy joke", "perhaps there will be film stars in Yakada Doliyas next year" and the two photographs convey the meaning that the Plaintiff was responsible for the "deterioration of the perahera and has deviated from tradition".

At the outset it must be mentioned that there are no such things as **Yakada Doliyas** as the Plaintiff/Respondent himself has said in evidence. Further, the word used is Doliyas and needless to say there is no such word called Doliyas. Hence the words below the photograph of the Plaintiff make no sense and therefore cannot be defamatory.

Where a statement complained of is defamatory *per se* and the Plaintiff does not wish to state that the words complained of bear a secondary meaning but nevertheless sets out an innuendo, the purpose of the innuendo will be only to emphasise the sting in the words complained of. It is a paraphrase of the words used or a statement of what these words are in their ordinary sense (Dr. Amerasinghe on Defamation).

In this case the innuendo pleaded in paragraphs 5 and 6 cannot be said to be a paraphrase of the photographs and sub-title complained of, nor is that the position of the Respondent since the Respondent's position is that the sub-title and the photographs convey the meaning that the Plaintiff/Respondent was responsible for the "deterioration of the Perahera".

It is obvious to any reader that the photographs have been taken on two different occasions.

Where a Plaintiff pleads *per se* defamation then the passage complained of or the photographs and the sub-titles as in this case must by themselves be defamatory and the Plaintiff cannot contend that they convey such and such a meaning. Here, the Plaintiff/Respondent's submissions that the words and photographs complained of convey the meaning that the Plaintiff is responsible for the deterioration of the Perahera means that the Plaintiff/Respondent is relying on an innuendo which has not been pleaded, since the photographs and sub-titles do not by themselves convey that meaning. The words and the photographs are meant to deter the Plaintiff/Respondent from taking any steps to turn the Perahera into a joke ("**Don't turn** a hallowed ceremony into a school boy joke"). The heading does not say "Hallowed ceremony turned into a school boy joke".

Even if we accept the contention that the Respondent was prone to allow a deterioration, yet, as a newspaper, they are entitled to a fair comment, since it is in evidence that the Respondent was attempting to bring in schoolboy cultural groups to participate in the perahera and had issued a directive to that effect.

We are therefore of the view that the headline and the sub-title complained of along with the photographs are not *per se* defamatory.

We will next consider the innuendo pleaded in paragraphs 5 and 6 of the Plaintiff.

The Respondent in order to succeed on the innuendo pleaded, must establish to the satisfaction of Court **firstly**, that the publication

of the two photographs side by side under the head lines "Don't turn a hallowed ceremony into a school boy joke" together with the sub-title "Perhaps there will be film stars in Yakada Doliyas next year" immediately below the Respondent's photograph was capable of leading a reasonable reader of ordinary intelligence into the belief that both photographs were taken at one and the same time during the Kandy Perahera season and that the Respondent whilst carrying the sacred relics was deliberately turning his glance towards the schoolgirls and thinking to himself that perhaps there will be film stars occupying Yakada Doliya next year, **secondly**, that the said photographs published in the manner aforesaid together with the sub-title immediately below the Respondent's photograph were capable of conveying to a reasonable reader of ordinary intelligence that (a) the Respondent even while performing his religious duties and functions was secretly enjoying and/or was delighted at the presence of the young schoolgirl "Hewisi" drummers in the Kandy Perahera and that the Respondent was at the same time privately entertaining the idea or thought of seeing film stars participating in the Kandy Perahera in the following year and **thirdly**, that the photographs and the sub-title did in fact convey such a meaning or was capable of conveying such a meaning.

In this endeavour the Respondent has led the evidence of one, Wittachchi and one Panibaratha as is usually done in this type of case. Wittachchi, being a retired Government Servant engaged in private enterprise and Panibaratha being a dancer who had followed courses in dancing both here and in India and at the date of the publication complained of, the Principal of the Department of Indigenous Dancing at the Vidyalkara University. So that it is safe to conclude that their evidence was led because the Respondent believed that they fell into the category of "reasonable readers of ordinary intelligence", and their evidence was presented to Court as such.

However, after analysing the evidence of the two witnesses Learned District Judge has stated that "Both these witnesses are Learned persons. Although, some displeasure was created in their (witnesses) minds immediately on seeing the pictures, they (witnesses) have changed their idea later. The reason for that is

because they specially understood matters relating to the Perahera and these photographs. But, can it not be concluded that an ordinary reader will feel *prima facie* as mentioned above, without knowing or realising the facts about the Perahera or the photographs? Accordingly, I conclude that the Plaintiff has been subject to defamation, contempt and ridicule by publishing that he is person of low level".

In arriving at this conclusion Learned District Judge has completely misdirected himself on the evidence, in that, firstly, Wittachchi's evidence was solely with regard to the article published below the photographs and the sub-title and he has also stated categorically that on seeing the photographs he did not draw any adverse inference regarding the Respondent, and secondly, Panibaratha's evidence was that he changed his mind on the sub-title being explained to him since he could not read English. Therefore, quite clearly, both witnesses whose evidence had been led had failed to support the position taken up in paragraph 6 of the plaint. This finding of the District Judge cannot therefore stand in view of the reasons given above.

Learned District Judge's statement that Panibaratha changed his mind because he understood the facts relating to the Perahera is incorrect since Panibaratha has stated that the initial displeasure that arose in his mind on seeing the photographs disappeared after the sub-title which he could not understand was explained to him.

It is important to bear in mind that the Respondent's position is that the photographs, the headline and the sub-title immediately below the Respondent's photograph convey or are capable of conveying the meaning set out in paragraph 6 of the plaint.

Therefore, when, quite clearly both witnesses whose evidence was led had failed to support the position taken up by the Respondent in paragraph 6 of the plaint, Learned District Judge had proceeded to hold that these witnesses were Learned persons but that ordinary persons would have understood the photographs and the sub-titles as set out in paragraph 6 of the plaint. We do not see how the Learned District Judge could have arrived at this conclusion by calling Panibaratha, a mere dancer, and in our view a man of mere

ordinary intelligence who had himself changed his mind after the sub-title was explained to him, a Learned man, even though, on reading the evidence given by Panibaratha a question arises as to whether he is a **reasonable reader** of ordinary intelligence, because he could not read English and therefore did not fall into the category of readers of English Newspapers.

I may also add that Panibaratha, according to his own evidence has seen things in the photographs which no other person would ever claim to have seen, namely that he saw a group of Schoolgirls dancing. It is clear to the naked eye that the schoolgirl drummers are marching to step and no one in his wildest dreams can say they are dancing. Any adverse inference he may have drawn of the Respondent on seeing the photographs disappeared the moment the sub-title he was unable to read was explained to him within about three minutes of his seeing the photographs. It also appears from his evidence that during that period of three minutes, in spite of the fact that he knew the Respondent well, he had formed the impression that the Respondent whilst carrying the sacred relict casket, had the look of a lecher who was entertaining unhealthy thoughts about schoolgirl drummers, who were clad from shoulder to ankle and marching immaculately.

We cannot accept the evidence that Panibaratha entertained any of the thoughts he claimed arose in his mind. On the other hand we are of the view that he was merely repeating what was expected of him in an attempt to further the Respondent's case. In this connection the evidence of Wittachchi bears repetition, namely, that he did not draw any inference adverse to the Respondent on seeing these photographs and the sub-title complained of.

Quite apart from the evidence led in this case, it is clear to any reasonable reader of ordinary intelligence that these two photographs had been taken at two different occasions since the background has been removed from the Respondent's photograph. It is also seen from photograph D6 that if the background of that photograph had not been removed a reader may perhaps have formed an impression that both photographs were taken on the same occasion.

In our view, to conclude that the photographs were taken at the same occasion and that the photographs together with the sub-title published immediately below the photographs are capable of conveying the meaning set out in paragraph 6 of the plaint is mere conjecture and utterly unreasonable and strained.

It was held in *Capital and Counties Bank v. Henty* <sup>(1)</sup>, that "the judge ought not to take into account any mere conjectures which a person reading the document might possibly (though unreasonably) form".

Even if the two photographs were taken at the same time by two different photographers and the Respondent was looking at the girls, can it not be that the Respondent had a look of appreciation since the girls were immaculately marching to step, and at the same time thought that Schoolgirl drummers in the Perahera would be an item which would attract larger crowds and when taken together with the sub-title can it not be said that the Respondent thought that film stars would attract still larger crowds.

Then again can it not be said that the Respondent's eyes were following the marching Schoolgirl drummers because he as the Minister of Education was thoroughly pleased with the manner in which the students of a school under his Ministry were marching. He not only had reason to be pleased with the performance of the Schoolgirl teachers under his Ministry, who had done a perfect job of training the Schoolgirl drummers. Then again, can it be said that where a middle aged gentleman turns his head and looks at a group of Schoolgirls (clad from shoulder to ankle) marching perfectly that he is secretly enjoying and/or entertaining unhealthy thoughts of the girls..

In *Jones v. Skelton* <sup>(2)</sup> it was held that "In deciding whether words are capable of conveying a defamatory meaning the court will reject those meanings which can only emerge as the product of some strained or forced or utterly unreasonable interpretation". It was also held in *Capital and Counties Bank v. Henty* (*supra*) that "it is unreasonable that, where there are a number of good interpretations the only bad one should be seized upon to give a defamatory sense to the document". Further, that "the defamer is he who, of many inferences chooses a defamatory one" (Lord Bramwell).

For these reasons we are of the view that the judgment of the Learned District Judge cannot stand.

The Respondent whilst giving evidence has attempted to convince Court that on seeing the two photographs in the newspaper, that at first he thought that they were taken on the same occasion and later has even gone to the extent of saying that he thought that both photographs constituted one photograph. It is impossible for the Respondent to have thought so, since he would have known at once that he never appeared in the presence of Schoolgirl hewisi drummers garbed in the official attire of the Diyawadana Nilame and carrying the Sacred Relic Casket.

The Appellant has marked as D1(b) a letter written by the Respondent to the Appellant immediately after the publication complained of, and published by the Appellant. However, in that letter the Respondent has not complained that he has been defamed as a result of the two photographs and the sub-title. Further, this action has been filed six months after the publication complained of.

We also see from the judgment, that the Learned District Judge appears to have misdirected himself in upholding the Respondent's version and in doing so, he has even referred to hearsay evidence namely, what the Respondent's mother is alleged to have said on seeing the photographs complained of. He has even gone on to say that he had examined the photographs of the Schoolgirl drummers and found them to be girls who had attained puberty and thereby arrived at certain conclusions. Learned District Judge appears to have examined the photographs very closely. We do not think that a reasonable reader of ordinary intelligence would have gone to that extent.

For the above mentioned reasons we are of the view that the Respondent has strained himself to unimaginable limits when he complained that the photographs and sub-title in question were capable of being understood by a reasonable reader of ordinary

intelligence in the manner set out in his plaint. This therefore appears to be a speculative action and the quotation set out above from the judgment in *Capital and Counties Bank v. Henty (supra)* bears repetition, namely, that the defamer is he who, of many inferences chooses the defamatory one.

It is our considered view, that, at the most photographs and subtitle are capable of conveying to the reasonable reader of ordinary intelligence the idea that the Respondent was entertaining the thought that film stars participating at the Perahera would attract even a larger crowd than Schoolgirl drummers and would make the Perahera more colourful.

For the reasons hereinbefore mentioned we set aside the judgment of the Learned District Judge and dismiss the Plaintiff/Respondent's action with costs. This appeal is therefore allowed with costs fixed at Rs. 3150/-.

**ANANDA COOMARASWAMY, J.** – I agree.

*Appeal allowed.*