1971 *Present :* **Alles, J., and Weeramantry, J.**

C. NADARAJAH, Appellant, *and* H. I. OBEYSEKERA, Respondent

*S. C. 473/66 (F)—D. C. Kandy, 9219/M.R.*

*Delict*—Injuria per consequentias—*Rape of a married woman—Right of the husband to claim damages from the ravisher—Proof of acts of impropriety other than rape—Effect on order of Court in respect of costs.*

The plaintiff sued the defendant, a medical practitioner, for the recovery of damages for the humiliation and pain of mind caused to him as a result of the defendant having wrongfully and unlawfully had sexual intercourse with the plaintiff's wife in the consulting room of the defendant.

*Held,* that where a person has forcible sexual intercourse with a married woman, her husband has a cause of action for damages against her ravisher for the *injuria* caused to him. The present action, however, should be dismissed because forcible sexual intercourse was not established to the satisfaction of the Court. A very high standard of proof is necessary to establish such a serious allegation.

*Held further,* that although an act of rape was not proved, other acts of impropriety referred to in the plaintiff's wife's evidence did take place. The defendant had made severe attacks upon the plaintiff and his wife on the basis that they had recklessly, maliciously and without foundation made allegations of impropriety against the defendant. In the circumstances, in regard to the important question of costs in a case like the present, each party should be ordered to bear his own costs of the action.

APPEAL from a judgment of the District Court, Kandy.

*C. Thiagalingam, Q.C.*, with *K. Rajaratnam* and *S. C. Crossette-Thambiah,* for the plaintiff-appellant.

*S. Nadesan, Q.C.*, with *H. L. de Silva, S. S. Basnayake, A. N. Jayawardene* and *C. A. Amarasinghe,* for the defendant-respondent.

*Cur. adv. vult.*

March 27, 1971. ALLES, J.—

The plaintiff instituted this action against the defendant for the recovery of damages in a sum of Rs. 30,000 for the humiliation and pain of mind caused to him as a result of the defendant having wrongfully and unlawfully had sexual intercourse with his wife, Ranee Nadarajah on 22nd June 1962 in the consulting room of the defendant at premises No. 54, Victoria Drive, Kandy. After a keenly contested and protracted trial, the learned District Judge of Kandy dismissed the plaintiff's action with costs. The present appeal is from this order.

The foundation of the plaintiff's action is for an *injuria* which primarily affects the wife but is regarded as mediately affecting the husband—*injuria per consequentias*. This is an action which has been recognised in the Roman Dutch Law, particularly where persons stood in certain intimate relations with one another—husband and wife, father and child and betrothed persons (Vide McKerron on the Law of Delict—6th Ed. pp 52, 53). McKerron is of the view that in modern law this action should be primarily confined to the relationship of husband and wife, which is the most intimate of human relationships. This action for an *injuria* has been recognised in Ceylon in *Sudu Banda v. Punchirala*[1] (1951) 52 N. L. R. 512 where Dias S. P. J. in distinguishing the case of *Appuhamy v. Kirihamy*[2] (1895) 1 N. L. R. 83 said that the latter case was not an authority "either for or against the proposition that under the Roman Dutch Law a husband has a cause of action for injury caused to himself against the defamer of his *wife's honour and chastity*". In *Sudu Banda v. Punchirala* the Courts in Ceylon held, that the husband of a married woman was entitled to bring an action for damages against the defendant, who had committed adultery and was living in terms of illicit intimacy with his wife. *A fortiori,* where a person has forcible sexual intercourse with a married woman, her husband has a cause of action for damages against her ravisher for the *injuria* caused to him. It is, however, not every contumelious act that will ground an action for *injuria* and Mr. Thiagalingam for the plaintiff-appellant conceded that in this case for him to succeed he had to establish that the defendant had forcible sexual intercourse with the plaintiff's wife or at least that there was an attempt to commit rape. The main issue raised in this case was that the defendant wrongfully had sexual intercourse with the plaintiff's wife. Anything less than forcible sexual intercourse or attempted sexual intercourse would be "too trivial an impairment of the plaintiff's personality for the Courts to take cognisance of; *de minimis non curat lex*"—McKerron 6th Ed. p. 53.

[1] *(1951) 52 N.L.R. 512.* [2] *(1895) 1 N. L. R. 83.*

The entire case for the plaintiff, therefore, centred round one important question of fact, whether the defendant had unlawful sexual intercourse with the plaintiff's wife at his consulting room on the morning of 22nd June 1962.

The plaintiff married his wife on 2nd April 1956 and the defendant, who at times material to this action was the Visiting Physician of the Kandy Hospital, had treated the plaintiff's wife and also her mother when the latter fell ill and was hospitalised at the Kandy Hospital on 31st December 1961. According to the plaintiff's wife on the night of 5th January 1962 the defendant, having falsely represented to her that her mother was dying, took her out in his car and tried to kiss her but she rebuffed him. She did not mention this incident to anyone as her mother was being treated by the defendant at the time. On 5th March 1962 the plaintiff's mother-in-law left the hospital and came to live with the plaintiff and his wife and continued to be treated by the defendant until her death on 12th June 1962.

The plaintiff's case, supported by the evidence of his wife, is that the defendant called over at his house on 14th June to condole with his wife; that on that occasion the plaintiff's wife told him she wanted a medical certificate to be given to her school where she was teaching; that the defendant asked her to come over to his consulting room to give her the certificate; that she went back to school (St. Scholastica's School, Kandy) on 20th June 1962 and that as the Principal of the School wanted a medical certificate to cover her absence the plaintiff's wife went with a fellow teacher Mrs. Jayamanne, in a car driven by Mr. Jayamanne to the defendant's residence at Victoria Drive shortly after 8 a.m. on 22nd June. Continuing her story the plaintiff's wife states that after several other patients, who had been waiting to consult the defendant had been attended to she went to the consulting room alone; that after she entered the consulting room, the defendant himself closed the door and wrote out a certificate; that when she stretched her hand to take the certificate, the defendant caught her by the wrist and while still holding her hand, came across to where she was standing and started to embrace and kiss her and then put her down on the floor and had intercourse with her forcibly; that thereafter he gave her the certificate, patted her on the back, opened the door and let her out of the room. She further stated that she told Mrs. Jayamanne in the car that the Doctor had misbehaved and later at school told her that the Doctor had intercourse with her forcibly; and on the

same day she wrote to her husband, who was then on circuit at Batticaloa, requesting him to come home immediately.

The plaintiff, who was the Manager of the Singer Sewing Machine Company at Kandy, had been out in the field and read his wife's letter at Moneragala only on the evening of 6th July 1962 ; he then set out immediately for Kandy and reached home about 10 or 11 p.m. and his wife told him what had happened in the consulting room on 22nd June. Thereupon the plaintiff proceeded to thrash his wife mercilessly ; and thereafter tried to contact the defendant, but failing to do so he telephoned the defendant's wife on 9th July and also wrote to the defendant himself on 18th July demanding a reply within 10 days ; that on 28th July the plaintiff received a letter from the Bishop of Kandy informing him that he (the Bishop) wanted to see him in connection with a letter written by the plaintiff to the defendant and asking him (the plaintiff) not to take any action until he saw the Bishop ; that subsequently the plaintiff and his wife saw the Bishop who informed them that the defendant had seen him (the Bishop) and had offered to pay a sum of Rs. 10,000 to the Church ; that the plaintiff was quite content and thought that the humiliation suffered by him and his pain of mind would be sufficiently assuaged if the defendant paid this sum to the Church but as this sum was not paid, the plaintiff did, on 25th September 1962, through his Proctor Mr. K. I. Perera of Avissawella send a letter of demand to the defendant demanding the payment of a sum of Rs. 10,000 as damages. This action was instituted on 18th March 1963.

The plaintiff's wife had also forwarded an Affidavit (D 2) dated 20th January 1963 to the Ceylon Medical Council charging the defendant with having taken advantage of her helpless condition and committing a series of acts which were unworthy of a member of his profession ; and she prayed that a fair and impartial inquiry be held into her complaint. She however did not proceed with this complaint on the advice of her lawyers as, by then, the present action had been instituted.

The defendant denied the allegations made against him and, whilst admitting that the plaintiff's wife did come to his consulting room to obtain a medical certificate on 22nd June 1962, denied that he had intercourse with her on that day. His position was that this was an entirely false claim made against him in an attempt to extort money.

Since the entire case for the plaintiff depended on one important question of fact, it is necessary, in order to appreciate the Judge's finding on this question of fact, to

examine critically and closely, as far as it is possible, the character of the plaintiff, his wife and the defendant and examine their relationship with one another.

The plaintiff, Chandra Nadarajah, was a Hindu and a Tamil and after a successful carrier from small beginnings was at the relevant time the Manager of a well established Company at Kandy and in receipt of a comfortable salary of Rs. 1,000 a month. His work entailed his absence from Kandy on circuit for lengthy periods in the Eastern and Uva Provinces of Ceylon. At about the time of his marriage he sold his ancestral properties at Matale and provided the money to his wife to enable her to purchase the shares of her sisters in their ancestral house situated at Peradeniya Road. His wife became, thereafter, the sole owner of this property in 1958 and the plaintiff and his wife and child were residing in this house during the relevant period. The plaintiff met his wife, who was a Sinhalese and a Roman Catholic, when she was an undergraduate at the Ceylon University and married her soon after she graduated in English, History and Economics. It was a love marriage and against the wishes of the parents of both parties. Soon after the marriage the plaintiff changed his religion and became a Roman Catholic, as he felt that it was not in the interests of his infant daughter that the parents should be of different religions, and was baptised at St. Anthony's Cathedral, Kandy. There is no doubt that the plaintiff was very much in love with his wife whom he described "the apple of his eye". His wife has been described as good looking and he must have had qualms about leaving her alone at Kandy for long periods while he was on circuit. He has been described as a jealous and possessive husband.

The learned trial Judge has referred to him as "a man of a domineering nature and possessed of an aggressive temperament, a man who when he makes up his mind in a particular matter would leave no stone unturned in order to achieve his object. He has also shown himself to be a man who, in order to support a particular view he has formed, would not hesitate to exaggerate or even distort the truth, and even state things that are deliberately false". A consideration of the evidence in the case would indicate that the observations of the learned Judge are not without justification. The plaintiff's wife, though educated and cultured, appears to have been completely under the domination of her husband. For a long period prior to the filing of the action and thereafter she suffered physical violence at the hands of the plaintiff. She was in a constant state of fear and, being bruised and battered until she was black and blue, appeared to be prepared to fall in readily with any

suggestion of her husband. This relationship between the husband and wife is, in my view, extremely important in deciding whether Mrs. Nadarajah's story of a rape is factually true or whether she has been compelled to describe an incident which never took place. The learned Judge who had the advantage of listening to her for three days formed the impression that she was a reluctant witness and has observed that "she no doubt had to say in public what no woman would like saying even in private" and poses the question whether her reluctance was due not only to that circumstance but also "due to her having to say what she said not of her own free will but because of some other force which was driving her to say so". Having regard to the domineering nature of her husband, was the story of her ravishment in the consulting room of the defendant a calculated conspiracy between the husband and the wife to put the defendant into trouble and, as suggested by the defendant, to blackmail him ?

On the other hand would the plaintiff, who was holding a responsible position in a well known Company, in receipt of a comfortable salary and a person of some standing in society, enter into a conspiracy with an educated and cultured lady who was herself a graduate teacher and in receipt of a salary of Rs. 575 a month, to make such a false and vile allegation against a professional man, knowing full well the humiliation and the publicity that a case of this nature entails, in order to extort money from the defendant ? It is also relevant in this same context to consider the position of the defendant. He is a highly qualified Doctor, a specialist in Cardiology, and during the relevant period was the Visiting Physician at the Kandy Hospital and on the threshold of higher professional attainments. He enjoyed a lucrative practice at Kandy and lived with his wife and children at Victoria Drive in a substantial house. Is it likely that he would commit an act of such gross indiscretion in his consulting room and jeopardise his entire future thereby ? These are problems that must necessarily weigh with any Tribunal when it has to decide this difficult and complex question of fact and we are beholden to learned Counsel on both sides for the assistance rendered to us in the course of the argument.

The evidence of rape depends entirely on the uncorroborated testimony of the plaintiff's wife. This is of course a matter of such gravity as to require a standard of proof commensurate with the gravity of the allegation. We have in mind in this connection the recent developments of the English law on the question whether in civil matters such as this, proof beyond reasonable doubt

is required as in a criminal case, but whichever way one approaches the question, it is clear that a very high standard of proof is necessary to establish such a serious allegation. Quite apart from this high degree of proof, a Tribunal has to guide itself by the rules of evidence that in a charge of rape, although it is not illegal to act on the uncorroborated testimony of a prosecutrix, it would be unsafe to do so. According to the plaintiff's wife she went to the defendant's consulting room with Mrs. Jayamanne to obtain the medical certificate by prior arrangement. The defendant was fully dressed to go to the Hospital where he had to report for duty by 9 a.m. Before doing so he had to attend to ten or twelve patients who were waiting to consult him. It is admitted that he saw the plaintiff's wife after he had examined all his other patients. The plaintiff's wife was also fully dressed ready to go to school after obtaining the medical certificate. According to her, after her mother's death ten days previously, she could not get over the shock and suffered from dizziness and fainting. She states that she was completely dazed at the time the defendant put her on the ground ; she was powerless to resist ; the defendant had to remove his trousers completely in order to commit the act of intercourse ; he separated her thighs with his legs ; there was penetration and she felt her skirt and her thighs to be wet ; she was unable to raise any cries to be heard outside by Mrs. Jayamanne and her explanation was that she was too dazed to realise what was happening owing to her weak condition. If this story had been related in a criminal court, it is extremely unlikely that a reasonable jury would have accepted her version of a forcible intercourse, and we find it difficult to act upon this version. The victim was a married woman, quite healthy and in spite of her distressed condition it is inconceivable that she could not have put up any kind of resistance to an act of forcible intercourse or that she could not have shouted to be heard by Mrs. Jayamanne. It is equally incredible that the defendant would have taken the grave risk of committing such an act in his consulting room and attracting the attention of his wife and family who were in the house at that time. The learned Judge has described her story as being improbable and it is not possible for us to state that he was not justified in this observation.

The belatedness of the complaint of rape must next be considered. The learned Judge has disbelieved the evidence of Mrs. Jayamanne and the plaintiff's wife that a complaint of rape was made by the latter to Mrs. Jayamanne on 22nd June in the school room. I can understand the reluctance of Mrs. Nadarajah to disclose this incident to anybody before consulting her husband but if an allegation of this nature is going to

be made subsequently, it is pertinent to consider whether the allegation has been promptly made to a person in authority by the aggrieved party. Even in regard to the statement to Mrs. Jayamanne, what the plaintiff's wife told her in the car was that the defendant had used criminal force on her, which Mrs. Jayamanne understood as a charge of rape. This would indicate, of course, that the plaintiff's wife had made a complaint fairly promptly, but does it necessarily indicate that an act of rape was committed ? Criminal force on a person may or may not amount to an act of rape. The plaintiff's wife stated in evidence that she mentioned to the Mother Superior, Mother Rita of what had happened to her in the consulting room. Mother Rita was not on the list of witnesses for the plaintiff until a late stage and was cited as a witness long after the plaint and the lists of witnesses had been filed. The plaintiff and his proctor did not want to embarrass a nun in Holy Orders by calling her to give evidence in Court although the plaintiff was prepared to rely on the evidence of the Bishop of Kandy and Fr. Theophane Wickremaratne, the Parish Priest of St. Anthony's Cathedral, Kandy. The application to call Mother Rita as a witness was made after the two latter witnesses were called and when Counsel felt that their evidence did not adequately support his case. We think, having regard to the discretion of the trial Judge under Section 175 of the Civil Procedure Code, the learned Judge exercised his discretion properly when he refused the application of Counsel for the plaintiff to call Mother Rita as a witness.

No complaint of an alleged rape was made to the Police or any person in authority. The plaintiff was on circuit in the Eastern Province on 22nd June and according to him he was at Moneragala in the Uva Province on 6th July when he received a letter from his wife dated 22nd June, which had been readdressed to him, asking him to return to Kandy immediately. He states that he came to Kandy late on the same night and his wife related to him the story of the rape. The letter from Mrs. Nadarajah to the plaintiff has not been produced. The learned Judge has disbelieved the plaintiff and his wife that any such letter was sent, and has come to the conclusion that the plaintiff returned to Kandy on 6th July after his normal circuit. This is a finding that appears reasonable. Even if no mention was made in the letter about the consulting room incident, there was a note of urgency in the letter, when the plaintiff's wife asked him to return home quickly and as the learned Judge remarks, " If he did receive such a letter on the reading of which he decided to set out for home immediately, the natural and more likely course would have been for him to put the letter in the car."

Furthermore, when he heard his wife's story "the plaintiff would have realised the importance of such a letter and would have preserved it." Again the means of communication in our country are not so barren that the plaintiff's wife could not have traced her husband when she did not receive prompt attention to her letter of 22nd June and it was not impossible for her to have gone in search of her husband and informed him of the calamity that had befallen her instead of waiting for his return on 6th July.

When his wife related her story of what had happened, the plaintiff's first reaction was one of disbelief and he felt that intercourse could not have taken place unless she was a consenting party, and he had to assault her and she had to swear on the statue of the Sacred Heart, before he could convince himself that the story of the rape was true. However, he was still not quite sure and states that he was in a changing frame of mind believing her at one time and disbelieving her at another. Whenever he disbelieved her, his emotions got the better of him and he used physical violence on her. This state of uncertainty appears to have clouded the plaintiff's mind for a considerable period. He appears to have been satisfied that there was some kind of intimacy between his wife and the defendant but he does not appear to have been certain that there was a rape. Of course if he thought that his wife was a willing party to any kind of intimacy he must know that there could not be a case of rape. The documentary evidence seems to support this attitude of uncertainty. In his first letter written to the defendant's wife on 9th July (P 5) following a telephone conversation with her he refers to the defendant's "misbehaviour" and requests that the defendant should be asked "to keep his hands off his property as he had put his house in order." This language is consistent with the plaintiff suspecting that the defendant and his wife were only carrying on a clandestine love affair. The next letter D 4 of 18th July was addressed to the defendant himself. In this letter the plaintiff has made two false statements—that it has been brought to his notice that the defendant was on terms of intimacy with his wife for the last six months and that his wife had confessed the whole story to him. The plaintiff also warns the defendant not to have further dealings with his wife hereafter and proceeds to demand the necessary amends for causing unpleasantness in his family affairs and pain of mind to him. The learned Judge seems to think that this is a mild attempt at blackmail. In P 8 and D 4 there is no reference to any act of forcible intercourse and I agree with the learned Judge that "they both appear to be addressed on the basis that the plaintiff had discovered

the existence of a clandestine affair between the defendant and the plaintiff's wife; and that, whilst the plaintiff himself had set his house in order by taking steps to see that his wife would not carry on in the future, an appeal is made to the defendant's wife to see that her husband is restrained, and that the defendant himself is warned not to have anything further to do with the plaintiff's wife." The first written intimation of an allegation of rape in the consulting room was made over three months later, when in D 5 of 25th September, the plaintiff's proctor sent a Letter of Demand to the defendant for damages in Rs. 10,000 for the pain of mind caused to him consequent on an act of molestation in the consulting room on 22nd June. This letter refers to an agreement to make a donation to the Bishop of Kandy to stay legal action. I shall deal later in my judgment with the steps taken for an alleged settlement before the ecclesiastical authorities. The allegation contained in D 5 was denied by the defendant's proctor by D 15 of 8th October 1962.

If the plaintiff's first reaction to his wife's story was one of disbelief and the documentary evidence indicated that until he sent the Letter of Demand he only thought there was a clandestine love affair between his wife and the defendant, is it surprising that the learned Judge, who had the advantage of watching the demeanour of the plaintiff and his wife, did not believe that an act of forcible intercourse took place in the defendant's consulting room on 22nd June ?

The defendant left Kandy on transfer to Colombo in November 1962. He was given several public farewells at Kandy where he appears to have been a popular social figure and the plaintiff's vindictive nature has been demonstrated when he sent a scurrilous postcard on 12th November (D 11) addressed to him to the General Hospital at Colombo in which he falsely stated that the defendant left Kandy in disgrace, adding further that he has not finished with him yet. It was thereafter that the affidavit D 2 was prepared and sent to the General Medical Council signed by the plaintiff's wife.

This affidavit was signed by the plaintiff's wife on 20th January 1963, before the plaint was filed, and in that affidavit the allegation of forcible sexual intercourse in the consulting room was directly made. The plaintiff had earlier made representations to the Medical Council by letter, but since no response was made by the Council and, as he understood that any accusation against a medical man had to be made in the form of an affidavit, he consulted Proctor Wickramaratne of Kandy

to have the affidavit prepared. According to the plaintiff he obtained the facts from his wife and gave them to Wickramaratne who put down the facts in the document using his own language. Wickramaratne states that he took down the facts in the shape of rough notes (which were not available at the trial) and got his typist to prepare the affidavit. This affidavit was produced by Counsel for the defendant and was not relied upon by Counsel for the plaintiff, even though he was aware that such an affidavit was in existence before the trial commenced. Wickramaratne was the plaintiff's proctor at the commencement of the trial but revoked his proxy and was called as a witness by the plaintiff when an allegation was made by Counsel for the defendant that the case of rape was engineered by him to pay off a personal grudge against the defendant. The plaintiff admitted that some of the facts contained in the affidavit were incorrect and not given by him. This position was contradicted by Wickramaratne who was emphatic, that although the language used was his, all the facts were given to him by the plaintiff. Some of the corrections in the affidavit were made by Wickremaratne, either when it was being prepared or when it was signed before Latiff, the Justice of the Peace. Wickramaratne states that, after the preparation of the affidavit, he asked the plaintiff to bring his wife to meet Latiff and on a Sunday evening while he was going to the pictures at the Regal Theatre, the plaintiff and his wife came to his house and then proceeded to Latiff's residence to have the affidavit signed. Mrs. Nadarajah has denied that she read the affidavit before she signed it, but her denial has not been accepted by the Judge, who preferred to believe that Latiff, who was a respected member of the Kandy bar, would have read the contents to the affirmant before she signed it.

I regret I am far from being satisfied that the affidavit D 2 was prepared with that degree of care which a document of such importance deserved. It appears to me to have been prepared hastily and in a most slipshod manner and contains misstatements of fact, distortions of the truth and exaggerations which seriously affect the plaintiff's case. Wickramaratne, whom the plaintiff consulted before the affidavit was prepared, was a senior member of the Kandy Bar, a Justice of the Peace, a Vice President of the Law Society and Proctor of experience who had acted for the Magistrate of Kandy on several occasions. The learned Judge has described him as a tanacious fighter and accepted his evidence that the facts set out in D 2 were given to him on the instructions of the plaintiff, and after considering the entirety of his evidence, has been satisfied that he has not engineered the

case of rape against the defendant to serve his own personal ends. This finding however does not, in our view, affect or excuse the careless manner in which the affidavit has been prepared. I am not impressed by Wickramaratne's evidence that since he was a busy proctor and as about 100 affidavits are sworn daily at his office, they are not compared with the original before they are sworn or affirmed, nor do I think that affidavits should only be read over to illiterate people, and that, as Mrs. Nadarajah was a graduate and an educated person, the necessity for reading over to her the affidavit did not arise. Whatever be the educational attainments of a declarant or affirmant, it is essential that he or she should be apprised of the matters contained in the affidavit before it is signed. The plaintiff's position was, that although the affidavit was prepared on his instructions, it was never shown to him or his wife by Wickremaratne at any time, and that they depended entirely on Wickramaratne in regard to the manner in which the facts were stated in the affidavit. Wickramaratne also admits that Mrs. Nadarajah had no opportunity of reading the affidavit before she went to meet Latiff. Wickramaratne could not have been unaware that the allegations made by the plaintiff and his wife against a professional man were of a very serious nature; that the allegations in the form of sworn testimony were being conveyed to a body which had the right to remove him from the Roll of Doctors for unprofessional conduct; that the allegations were being made by a cultured and educated married woman holding the responsible position of a teacher and above all he had to be extra cautious because the Doctor against whom the allegations were being made was one with whom, on his own admission, there was a talk of personal animosity.

The affidavit commences by Mrs. Nadarajah affirming and declaring to the contents, when as a Roman Catholic she should have sworn to the contents. She denied that in regard to the January incident that "she demurred owing to the lateness of the hour; that the defendant put his arm round her and made violent protestations of love" (Para 6). In regard to Paragraph 7 she denied that she stated that when she repelled the defendant's advance "this attitude only inflamed the Doctor's passions and he said that her mother's life was in his hands and unless she wanted to see her mother a corpse she should be more accommodating and that when the Doctor discovered that she was not in a frame of mind to yield to his wishes he took her to the Hospital about 9.40 p.m." She denied that she told the Doctor that "she had to produce a medical certificate to cover her absence from school for

several days and that she was asked to come to the consulting room any morning after 9 a.m." (Paragraph 9). Paragraph 10 commences with the words " the following day that is on the 22nd June " suggesting that the Doctor had met her the previous day and asked her to come for the certificate. This is in the teeth of the evidence, since on Mrs. Nadarajah's testimony the Doctor visited the house to condole with her on 18th June, she went to school on the 20th and it was at the instance of the Mother Superior that she went for the certificate on the 22nd. In Paragraph 12 she makes no reference to the letter sent by her on 22nd June to her husband and the language suggests that it was on his return from Moneragala in the normal way that she apprised her husband of the incident. Although Paragraph 13 refers to the letter D 4, which mentions a period of sexual intimacy for six months and a confession by the plaintiff's wife to the plaintiff, there is no such reference to these matters in that paragraph and the plaintiff's wife's position is that these statements in the letter D 4 are false. Paragraph 13 contains a statement that the plaintiff wrote D 4 " charging the Doctor with having taken advantage of her helpless condition and depressed state of mind "—matters which find no place in D 4. The statement in Paragraph 14 that the plaintiff went to the Hospital and " accused the defendant with having illicit relations with his wife " is false because the plaintiff's position was that although he went to the Hospital with that object, he could not meet the defendant as he was avoiding him and hence the necessity of writing P 8 to the defendant's wife.

In view of these serious discrepancies, it is not surprising that Mr. Thiagalingam placed no reliance whatsoever on the affidavit. According to the plaintiff and his wife they never saw the affidavit after the plaintiff gave instructions to have it prepared ; Wickramaratne states that the facts were given to him by the plaintiff and this has been accepted by the Judge ; the plaintiff admits that he gave instructions to Wickramaratne on some matters which he thought his wife had said—there is no evidence that he was in a distraught state of mind at the time ; the plaintiff's wife admits that although she stated the correct facts to the lawyers at the conference her husband and she had with them, the persons present were responsible for setting out false facts in the affidavit to get her to perjure herself ; the plaintiff states that although he gave the correct facts to Wickramaratne and the latter used his own language some of the facts stated therein are incorrect and finally Wickramaratne admits that some of the facts given to him by the plaintiff have been denied by the plaintiff's wife. In all this confusion it is difficult to state

with any degree of confidence who has been responsible for the introduction of false matter in the affidavit. But, be that as it may, learned Counsel for the defendant submits, with considerable force, that the contents of the affidavit illustrate quite clearly that the plaintiff, who has taken responsibility for the contents, is not beyond exaggerating a story to serve his own purposes. I have already indicated earlier in this judgment, in dealing with the character of the plaintiff, that I am in entire agreement with the assessment of his character by the learned trial Judge. It seems to me that the story of a ravishment in the consulting room was the result of a conspiracy between a domineering husband and a reluctant wife. I am not prepared however, to hold that blackmail was the object. Mrs. Nadarajah and her husband have stated on oath that money was of no concern to them ; there was no necessity for the Nadarajahs to resort to blackmail when they were comfortably well off and they were quite content if a donation was made to the Church as a recompense for the humiliation and pain of mind caused to them. But the plaintiff has proved himself to be an abnormal man and determined to prosecute his campaign against the defendant with vigour if not with venom. He was in a disturbed state of mind when his wife related the incident ; he gave way to his pent up feelings by using physical violence on her ; it maddened him to know that "his wife had been handled by a cad" who he was satisfied was a "ladies man" and whom he accused of "womanising" in an open post card addressed to a public institution. Having convinced himself that there was a clandestine love affair between his wife and the defendant, he jumped to the conclusion that the incident that occurred in the consulting room could not have taken place unless his wife was a consenting party, but was not able to extract a confession from her to that effect, even though he used physical violence on her. It is perhaps on this basis, and in the hope of obtaining an admission from the defendant and his wife, that in D 4 he falsely stated that his wife had been on terms of intimacy with the defendant for six months and that she had confessed to him to that effect. Even the plaintiff's wife conceded that she was probably thrashed because the plaintiff had come to the erroneous conclusion that she had been intimate with the defendant. The plaintiff has pursued the defendant with a purpose that can only be described as tenacious. He went to Colombo to have the summons served on the defendant who was about to leave the Island ; he deposited £ 15 with his lawyers to take steps to have the summons served on him in England ; he wrote to the Nuffield Foundation in England to trace the whereabouts of the defendant in England and the probable date of his return to the Island (D 12) ; he sent a telegram to the defendant's mother-in-law

informing her of the date of trial and asking her to inform her son-in-law not to run away (D 9) ; and it was even suggested that he tried to contact the defendant's daughters at Ladies College to ascertain the whereabouts of their father. The plaintiff admits having acted like a madman at the thought that his wife had behaved foolishly in going to the defendant to obtain a medical certificate after the January incident ; regardless of her innocence or guilt since he was not able to use physical violence on the defendant he thrashed his wife ; he admits that he was a jealous husband and taxed his wife with infidelity ; he proved himself to be a revengeful man when he tried to get his wife to transfer her house in his own name because he wanted to deprive her of all the wealth she possessed and chase her into the streets. When she refused to transfer the property before the Proctor, he felt humiliated, came home and thrashed her, had forcible intercourse with her to make her pregnant and chased her out of the house.

One might sympathise to some extent with the plaintiff for his abnormal behaviour brought about by a sense of grievance, genuine or otherwise, engendered in him as a result of his possessive and jealous attitude towards his wife but his behaviour certainly lends colour to the suggestion of Counsel for the defendant that the plaintiff's wife, battered and bruised by numerous assaults and acts of cruelty perpetrated on her, was a willing tool in the hands of her husband to relate an account of an episode which had magnified itself beyond its true dimensions in the warped and abnormal mind of her husband.

In the final assessment of the plaintiff's case there is the vital question which always arises in cases of this kind where the appellate Tribunal has to decide how it has to deal with questions of fact on which the trial Judge has already arrived at a decision. This is a case which largely depends on the impression which the trial Judge has already formed in regard to the credibility of the witnesses. It is not a case in which inferences have been drawn from a consideration of certain primary facts. The plaintiff and his wife were in the witness box for several days and the learned trial Judge had ample opportunity of watching their demeanour and assessing their credibility. On several important questions of fact he has disbelieved the plaintiff and his wife and given cogent reasons for his findings. He has disbelieved them in regard to the January incident and preferred to accept the denial of the defendant ; he has disbelieved them in regard to the despatch of the letter of 22nd June and on several matters contained in the affidavit D 2 he has not accepted their testimony.

He has characterised the evidence of the plaintiff as lacking in frankness and not being candid on several matters; he has observed that the reason given by him for wanting the property transferred from his wife to him before Proctor Navaratnam as being unconvincing; and he has held that he obtained the text of the telegram P 9 from Fr. Theophane Wickramaratne with an ulterior motive. In regard to Mrs. Nadarajah, he has disbelieved her when she stated that she went to the consulting room to obtain the medical certificate by prior arrangement; that she was lacking in frankness when she stated that she did not know that the defendant did his daily rounds at the Hospital; that it was untrue that she was not aware of the contents of D 2 before it was signed; and that her evidence in regard to the reason for calling Fr. Wickramaratne was deliberately untrue. In view of these strong findings of fact, based as they are particularly on demeanour and the impression created on the mind of the trial Judge, we see no reason whatever to disturb these findings.

Therefore when one considers the improbable nature of Mrs. Nadarajah's story of a rape; that her version is uncorroborated; that her complaint is belated and not made to any person in authority; that her husband himself disbelieved her story and had to thrash her to convince himself that it was true; that the letters D 4 and P 8 contained false statements of fact; that the husband wielded considerable influence over his wife; that the affidavit D 2 contained several misstatements of fact and exaggerations and that the defendant had denied any sexual intimacy, it is not surprising that the learned trial Judge did not accept the version that Mrs. Nadarajah was the victim of an act of forcible sexual intercourse in the consulting room. Indeed, in our view, the surrounding circumstances would seem to suggest that it would be extremely unsafe, if not dangerous, to act on her uncorroborated testimony.

Our agreement with the trial Judge's finding that a case of forcible sexual intercourse has not been established to the satisfaction of the Court would be sufficient to dismiss the plaintiff's appeal, but having regard to the nature of the allegations in this case and the severe attacks made upon the plaintiff and his wife on the basis that they had recklessly, maliciously and without foundation made allegations of impropriety against the defendant, it becomes necessary for us to examine further whether the plaintiff had no foundation whatsoever for these allegations. This is pertinent, especially to the important question of costs, which in a case such as this, must necessarily demand the anxious consideration of this Court. What was the necessity

for the plaintiff's wife to relate to her husband something that happened in the consulting room to which she was a consenting party if in fact nothing had happened ? Could it be that she did not complain of a sexual assault but she did say something unpalatable which made the plaintiff think and honestly believe that something had taken place between his wife and the defendant ? Has some kind of mild flirtation been exaggerated to a case of rape in the suspicious and jealous mind of the plaintiff ?

We have given our most careful attention to the version narrated by the plaintiff and his wife. While no doubt we are satisfied that the plaintiff's wife's account of a rape is one that cannot be acted upon, the conduct of the plaintiff and his wife is incomprehensible if nothing whatsoever had taken place in the consulting room. The plaintiff's wife, with her social and educational background, could not have failed to realise the grave risk she was taking to her reputation in the eyes of the public and in particular among her friends, her superiors, fellow teachers and the pupils in the school where she taught ; she would have been conscious of the ordeal she would have to face in the witness box in cross-examination, and as a wife and mother would she have taken a step so serious to a Roman Catholic as to relate to her Bishop a story that was entirely fabricated ? While we think that she was pressed by the domineering nature of her husband to exaggerate a case of impropriety to one of Rape we find it difficult to believe that her story of improper conduct on the part of the defendant in the consulting room is entirely false.

In regard to the plaintiff, while no doubt he has displayed a vindictive nature in his relations with the defendant, would he have tarnished the reputation of his wife whom he dearly loved and to whom he was devoted and adversely affected the welfare of his child for whose sake he changed his religion unless he was satisfied in his own mind that something of an improper nature did take place in the consulting room ?

The learned trial Judge, although he has accepted the defendant's denial of an act of forcible sexual intercourse, has held against him on certain vital matters. It is not disputed that Mrs. Nadarajah, in the company of Mrs. Jayamanne did go to the defendant's house on the morning of the 22nd June ; that Mrs. Nadarajah entered the room alone without Mrs. Jayamanne after the defendant had seen all his other patients ; that she remained alone with the defendant for some time behind closed doors ; that the defendant gave her a medical certificate P 22 and that she came out of the room sobbing in a distressed condition. The

evidence of the sobbing is admitted by the defendant. His explanation of the sobbing was that when Mrs. Nadarajah entered the room she was in a depressed state and started sobbing at the thought of the mother's death. The defendant then told her that she and her husband were partly responsible for it. There was evidence that the mother fell seriously ill on 31st December 1961 on the same day that the plaintiff's wife, no doubt at the instance of her husband, had advertised on rent the ancestral house at Peradeniya Road, which then belonged to the plaintiff's wife. This was the house in which the plaintiff's wife's mother, who was a heart patient, lived all her life and the suggestion of Counsel for the defendant was that the mother's illness was brought about by shock that she received when she learned that her ancestral home was to be given on rent by the plaintiff and his wife. There is no specific finding by the learned Judge that he accepts the defendant's explanation for the sobbing and I find it difficult to accept his explanation as being a plausible one. Mrs. Nadarajah's mother died 10 days previously ; she had been ailing for a considerable time and her death was not something that was unexpected ; the defendant had met Mrs. Nadarajah on the 18th when he came to condole with her and no such distressing scene occurred on that occasion ; she had sufficiently recovered to go to school on the 20th and she was perfectly normal when she came to the Doctor's consulting room on the morning of the 22nd for the purpose of getting the certificate. I am therefore inclined to believe the evidence of Mrs. Nadarajah that the defendant was guilty of impropriety behind the closed doors of the consulting room which caused her to come out sobbing and which prompted her later to complain to her husband when he returned from circuit on the 6th of July, but that Mrs. Nadarajah has magnified this in her evidence to an act of rape. I am fortified in this view by certain findings of fact against the defendant, the relationship that existed between the defendant and the plaintiff's wife and the subsequent conduct of the defendant.

Mrs. Nadarajah was not a stranger to the defendant. He had treated her before and after her marriage as a patient ; she was closely associated with the defendant over her mother's illness and had visited the defendant at his consulting room in connection with a case study which the defendant was making about her mother's case. The defendant was away at Nawalapitiya on the day of the mother's funeral but has remembered to send a wreath to the Nadarajahs and had come personally later to condole with Mrs. Nadarajah. On the Judge's finding Mrs. Nadarajah did not visit the defendant on the 22nd by prior arrangement but apparently she preferred to obtain a medical certificate from the defendant rather than her own Doctor, Dr. Weeratunge.

The position taken by Mrs. Nadarajah was that as soon as she went up to the door of the consulting room with Mrs. Jayamanne, who was apparently taken as an escort, the Doctor let her in and closed the door leaving Mrs. Jayamanne outside. Mrs. Nadarajah was cross-examined on the basis that the defendant himself used to escort a patient out and let another in. However, when the defendant gave evidence, he stated that he never escorted his patients in or out and he left it to the discretion of each patient whether the patient should close the door or not. According to him the only occasion when he would shut the door himself was when it became necessary for him to examine a patient on the couch. If this position is correct, Mrs. Nadarajah would have been aware of this practice and if she only came to obtain a medical certificate there was no necessity for her to close the door. Why then did the defendant alter his normal practice and close the door himself for no ostensible reason and leave the escort Mrs. Jayamanne outside ?

Finally there is the vital evidence of the Bishop of Kandy and Fr. Theophane Wickramaratne who were called by the plaintiff to speak to a proposed settlement before legal proceedings were instituted. After the receipt of P8 and D4 the defendant went to seek the advice of a pastor of his Church, Canon Amerasekere who contacted the Bishop of Kandy as the Nadarajahs were Roman Catholics. According to the Bishop the defendant and Canon Amerasekere told him that the plaintiff had accused the defendant of sexual intimacy with his wife, and that there was no truth in the allegation and that the defendant believed that it was an attempt at blackmail, and wanted the Bishop to speak to the plaintiff. The Bishop states that he contacted the plaintiff and his wife and he heard the versions of both parties. He however admits that the defendant told him that he (the defendant) was satisfied that the plaintiff was trying to blackmail him and asked the Bishop to find out from the plaintiff whether he would be satisfied if Rs. 10,000 was paid to the Church. The Bishop admits having put this proposition to the plaintiff. According to the Bishop the defendant did not make any express promise to pay money but the payment of Rs. 10,000 was suggested as a "test" to see whether "Nadarajah would be satisfied if that money was paid to the Church as much as he would be satisfied if the money was paid to him." I find it difficult to understand this story of a "test". If Nadarajah's allegations were entirely false the defendant was aware of it, and what was the necessity to suggest the payment of money for the purpose of testing whether he was a blackmailer or not ? That a payment of Rs. 10,000 was contemplated by the

defendant for the purpose of settling the case appears to be established. The documents P9 and P3 seem to suggest that the payment was to be in the nature of a donation to the Church. P9 is the draft of a telegram prepared by Fr. Theophane Wickramaratne to be sent to the Bishop at Colombo. It was drafted at the instance of the plaintiff and reads as follows :—

"Anxious to know whether donation received. Advise action.
Nadarajah."

The reply P 3 from the Bishop reads "Not received". The only reasonable inference to be drawn from this reply is that the defendant offered a sum of Rs. 10,000 to the Church for the settlement of the case. If, as I am inclined to think, the defendant offered Rs. 10,000 to settle the case, it can only mean that he wished to avoid publicity and humiliation for something improper which took place in the consulting room which the defendant was anxious should be settled out of Court. This circumstance appears to be inconsistent with a background of complete innocence on the part of the defendant. It may well be that the defendant, in view of his large and lucrative practice did not think the sum of Rs. 10,000 was too much to pay for some indiscretion on his part and thereby avoid publicity, but when the plaintiff endeavoured to exaggerate the incident to one of rape, he necessarily had to contest every issue.

To judge from the defendant's indignant and forceful attitude in Court, as referred to in the next paragraph, he was scarcely the man to offer a sum of Rs. 10,000 to stave off a charge by one whom he knew to be a blackmailer. If it was blackmail and he, the defendant was perfectly innocent, it is more likely that he would have resisted the allegation tooth and nail rather than, by negotiation through religious advisers, offered a substantial sum to put an end to this matter.

Before I conclude, I wish to comment on the evidence given by the defendant. To several questions put to him by learned Queen's Counsel he gave the answer "Rubbish" or "Absolutely rubbish". On one occasion he banged his fist on the table in anger. The learned Judge appears to have been strongly impressed by this action and characterised it as being the act of an innocent man. I regret I am unable to share the views of the learned Judge. The allegation of rape was not something that was sprung as a surprise on the witness for the first time in Court and therefore there was no reason for him to lose his patience or give vent to his feelings of seeming indignation. As

a witness of some standing he should have been able to act with more restraint. If this be the standard that has to be accepted in deciding whether a witness is a witness of truth it would be a dangerous precedent and likely to create chaotic scenes in Court when witnesses seek to protest their innocence.

Since we are of the view, that it is highly probable that although the act of rape has not been proved, the other acts of impropriety referred to in the plaintiff's wife's evidence did take place in the defendant's consulting room, we think the fairest course would be, while dismissing the plaintiff's action, to direct that each party should bear his own costs in appeal and in the court below.

WEERAMANTRY, J.—I agree.

*Appeal dismissed.*