IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

C.A. Case No. 309/2000

D.C. Bandarawela Case No. 1160/M

Widyaratna Ganithalage Chandrawathie

1a. Weerasngali Durayalage Dilani Manjula,

Urellegedara, Ulugala,

Bowela,

Welimada.

Substituted PLAINTIFF-APPELLANT

-Vs-

Weerasangali Durayalage Jayasena,

Gaalawattegedara,

Bowela,

Welimada.

DEFENDANT-RESPONDENT

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Prof. W.M. Karunadasa with S. Munasinghe for the Substituted Plaintiff-Appellant.

Aravinda Athurupana for the Defendant-Respondent.

Argued on : 11.05.2015

Decided on : 08.08.2016

A.H.M.D. Nawaz, J.

By a plaint dated 19.08.1991 the original Plaintiff-Appellant (hereinafter sometimes referred to as "the Plaintiff") namely Vidyaratne Ganithayalage Chandrawathie instituted action against the Defendant-Respondent (hereinafter sometimes referred to as "the Defendant") and claimed damages in a sum of Rs.200,000/- on a cause of action alleging seduction which she averred had occurred at the hands of the Defendant. In an amended answer dated 16.11.1992 the Defendant denied that any cause of action had arisen to the Plaintiff to sue the Defendant and prayed for a dismissal of the plaint. When the trial commenced before the learned District Judge of Bandarawela on 08.12.993, the Plaintiff raised five issues, whilst the Defendant put forward two issues.

By a judgment dated 28.06.2000, the learned District Judge of Bandarawela dismissed the action of the Plaintiff and this appeal is against the said judgment. During the pendency of the appeal in this Court, the Plaintiff passed away and the daughter born to the Plaintiff and Defendant was substituted in place of her mother to prosecute this appeal-see the Journal Entry dated 28.05.2013 in this Court.

It is apt to allude to the evidence led in this case and ascertain whether the evidence led in the case supports the conclusion reached by the learned District Judge of Bandarawela.

The Plaintiff testified that she had been carrying on an affair with the Defendant from the time she left school and the act in question took place on 25.09.1990 after the Defendant had taken her to a nearby jungle and at that time when she was taken she had been on her way back home after having fetched a pot of water. According to the Plaintiff, when the Defendant had sexual intimacy with her on 25.09.1990, she was a *virgo intacta* and he promised her that he would take her home with him and in any event he would not let her marry the man for whom there had been a proposal. In other words there was clear evidence that there had been a promise to marry on the part of the Defendant. The Plaintiff also stated that the Defendant was suggesting an abortion and requested her not to tell her parents. If one closely scrutinizes the evidence of the

Plaintiff as to the events in question on the 25.09.1990, the Plaintiff's testimony reveals that the Defendant had forcibly taken her into the nearby jungle in order to commit the sexual act. The evidence is to the effect that the Plaintiff struggled with the Defendant to escape but it was of no avail. The Plaintiff also referred to a second act of intimacy at her home when both the Plaintiff and Defendant were surprised by her younger sister Ramyalatha as she accidentally walked into the house from the paddy fields. Ramyalatha giving evidence quite clearly stated that she discovered both the Plaintiff and Defendant behaving as husband and wife but when caught in the act, the Defendant entreated her not to tell her parents and repeatedly promised- "'In any event I will marry your sister' 'මම කොහොමහරි අක්කා බඳිනවා'". Upon a careful perusal of the evidence it is quite clear that this vivid account of Ramyalatha was not shaken by cross-examination. The sister was emphatic that she saw the act of intimacy between the Plaintiff and Defendant somewhere in October 1990. The Plaintiff stated in evidence that as a result of the sexual intercourse that occurred between the Plaintiff and the Defendant, she gave birth to a child on 29.10.1991. As I have said before, the child is the substituted Plaintiff-Appellant who has produced a birth certificate in the course of these proceedings which bears the name of the Defendant as the father of the child. Whilst yet on the evidence led before the District Court Judge, I have to state that despite a long and protracted cross-examination the deceased Appellant who alleged seduction stuck to her version that though the affair between her and the Defendant began in 1984, if at all, the first act of intimacy took place only on 25.09.1990.

In the action before the District Court of Bandarawela, the Plaintiff had claimed a sum of Rs.200,000/- as damages for seduction.

Upon a perusal of the evidence led at the trial, it is clear that the Plaintiff has sought to prove seduction (Issue No.1) and the fact of her being a *virgo intacta* (Issue No.2) and the quantum of damages in a sum of Rs.200,000/- (Issue No.3). The learned District Judge of Bandarawela having found in favour of the Plaintiff on the question of seduction and her being a *virgo intacta* denied her the relief of damages having regard to a passage in *the*

Law of Delict by R.G. McKerron (2009 reprint ed.) which appears at page 164. The pertinent paragraph goes as follows:-

> *"The action will fail if it is proved that the woman herself was the seducing party; or that she stipulated for or accepted payment or reward as the price of her virginity; or* ***that she continued to have intercourse with the defendant instead of immediately severing her association with him and instituting action***"

No doubt McKerron states that if a woman continues to have intercourse with the Defendant, instead of immediately severing her association with him and instituting action, the action would fail-see the case of ***Carelse v. Estate de Vries*** (1906) 23 S.C. 532 for this proposition. However the celebrated author has also cited the case of ***Saheb v. Mather*** 1946 N.P.D. 703 where the failure to sever relations was due to a fraudulent misrepresentation by the Defendant that a religious ceremony that took place constituted a valid marriage between him and the Plaintiff in that case. In other words if the Defendant had held out a fraudulent misrepresentation as a result of which sexual intercourse continued, the Court would not be hesitant to find for the Plaintiff. In other words if there is evidence in this case that despite the first act of Intimacy on 25.09.1990, sexual intimacy continued, which is evidenced by the subsequent act in October 1990, but it is referable to a fraudulent misrepresentation on the part of the Defendant, the elements of seduction would clearly be made out. This Court finds that the learned District Judge of Bandarawela failed to take into account the fact that it was the promise of marriage held out by the Defendant that led to the Plaintiff succumbing to the sexual overtures of the Defendant. In fact the corroborative evidence of the sister Ramyalatha as to statements made by the Defendant on the day of the second sexual intercourse in October 1990, affords ample evidence of the representation which the accused made as soon as Ramyalatha surprised the Plaintiff and Defendant *in flagrante delicto.*

Even in the course of her evidence the Plaintiff stated that she was still entertaining a glimmer of hope that the Defendant would marry her and the inference is inescapable

that it was this expectation that had given rise to the continued consent on her part to yield to the prurient desires of the Defendant. In the circumstances the Court is of the view that the learned District Judge misdirected himself on the question of fact in the case which has resulted in a misdirection of law in all the circumstances of this case.

At this stage it is quite relevant to advert to the evidence given by the Defendant in the case. The Defendant denied that there was ever any kind of sexual intimacy with the Plaintiff and attempted to contend that the Plaintiff had a relationship with a man called Neel Wickremasinghe. As quite rightly observed by the learned District Judge, the Defendant had not referred to this fictional lover Neel Wickremasinghe in a police statement which he had made subsequent to a complaint of the Plaintiff. This omission on the part of the Defendant casts a serious doubt on the testimonial trustworthiness of the Defendant. It would appear that Neel Wickremasinghe was a figment of the Defendant's imagination in order to deflect the evidence that had unfolded in court.

This evidence of the Defendant coupled with other items of telling evidence against him touches on two issues in the trial which are germane to the resolution of the case presented by the Plaintiff before the learned District Judge. Issue No.2 raised by the Plaintiff put in issue the question of virginity of the Plaintiff. In other words the issue was to the effect that the Plaintiff was a *virgo intacta*. It has to be borne in mind that the Plaintiff was unmarried and it is a presumption that unmarried women are virgins before defloration and the learned District Judge found for the Plaintiff on this issue.

The false assertion by the Defendant that the Plaintiff was carrying on an affair with a fictitious *amour* called Wickremasinghe did not in any way rebut this presumption and the fact that the Defendant was disbelieved on this point shows that the Defendant had uttered a lie on a material point in the case-see observations of Atukorale J. in ***Karunanayake v. Karunasiri Perera*** (1986) 2 Sri.LR 27 (SC), where the learned Judge adverted to the case of ***R v. Lucas*** (1981) 2 All ER 1008. Atukorale J. followed the pronouncement of Lord Lane C.J in ***R v. Lucas*** which has declared the effect of a lie told within and without Court. If the Defendant has uttered a falsehood, ***R v. Lucas***

lays down that it will corroborate the version of the Plaintiff. But for a lie to be capable of amounting to corroboration,

1. It must be deliberate
2. It must relate to a material issue
3. Motive for the lie must be a realization of guilt and a fear of the truth and not merely an attempt to bolster up a just cause or out of shame or a wish to conceal disgraceful behavior from the family.
4. The statement must be clearly shown to be a lie by evidence other than that of the person who is to be corroborated-see the article of Professor J.D. Heydon entitled "Can lies Corroborate?"-89 Law Quarterly Review 552-563.

I hold that the tissue of falsehoods uttered by the Defendant on material points amply corroborates the version of the Plaintiff. The story of a fictional lover-Neel Wickremasinghe has been shown to be a lie by absence of evidence and his denial of an affair has been shown to be a lie by the evidence of Ramyalatha-the sister of the Plaintiff. His bald and blatant denial of a sexual intimacy has been laid threadbare as a lie.

In the circumstances I hold that the Defendant's testimony did not advance the case of the Defendant. The fact that the assertion of the sister that the Defendant made a promise of marriage when caught in the act remains uncontradicted. This strengthens the fact that the Plaintiff's case certainly fell within the exceptional case of seduction adverted to by the celebrated author on Delict R.G. McKerron namely the continuity of sexual intercourse without any severance after the first act would not bar the claim for damages for seduction if there was a fraudulent misrepresentation on the part of the Defendant. Thus I am of the view the judgment of the learned District Judge dated 28.06.2000 has to be set aside and I next proceed to consider the quantum of damages that the Plaintiff prayed for in her plaint.

The computation of quantum of damages for seduction is dealt with by McKerron at page 165 of his book *The Law of Delict* wherein the author states that "*the woman is entitled*

to be compensated in damages for the wrong that has been done to her by her defloration without proof of dannuon. ***In assessing the amount to be awarded the court must have regard to all the circumstances of the case.*** *Among the factors to be taken into account are the age of the woman, her condition in life, the degree of resistance shown by her and the means employed by the defendant to overcome it.* ***If the seduction has resulted in pregnancy, the woman is in addition entitled to recover her lying-in expenses, including such maintenance as is reasonably required for the period before, during and after the birth.....".***

The incident had taken place in the year 1990 and had this Plaintiff lived she would have been compensated for the wrong inflicted on her.

In my view it is not inequitable to award a sum of Rs. 100,000/- for seduction and I order a sum of Rs. 100,000/- to be paid and no doubt this would accrue to the estate of the Plaintiff. When this matter was taken up in appeal, the learned Counsel for the Defendant however contended that since the Plaintiff had passed away no compensation could be awarded. That turns on the transmissibility of an action of seduction upon the death of a victim. Here is a case where the victim passed away but at the stage of appeal and not during the trial.

When the seduced woman dies, Voet and Schorer are of the view that the action is not actively transmissible unless action has been begun and the Defendant placed *in mora.*[1] McKerron says that, *"There is no South African decision as to the effect of the death of the woman upon the right of action. Voet after stating that opinions differ as to whether the woman's right of action is extinguished or not, holds that the right is extinguished unless before her death action has been joined. It is submitted, however, that, if pregnancy resulted, the woman's executor would, in any event, be entitled to claim for the lying-in expenses."*[2]

There was a child born to the Plaintiff and Defendant and no evidence was placed before Court to repudiate this position. In a situation where a child is born, the action

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[1] *Voet 48.5.5; Schorer ad Gr. 3.35.8.*
[2] *McKerron 7th ed. p. 166.*

is transmissible and it is worth observing that the trial began long before the victim's death and the damnum had long crystallized when the learned District Judge dismissed the action.

In all the circumstances of the case it would meet the ends of justice if the Defendant is ordered to pay a sum of Rs. 100,000/- to the substituted Plaintiff-Appellant who represents the estate of the original Plaintiff-Appellant. Towards this end the Defendant is ordered to make this payment. Accordingly, I would set aside the judgment dated 28.06.2000 and proceed to allow the appeal.

JUDGE OF THE COURT OF APPEAL