

(1971) 02 KL CK 0022
In the High Court Of Kerala
Case No : Second Appeal No. 21 of 1966

Thekkittil Gopalankutty Nair

APPELLANT

Vs

Melepurath Sankunni Ezhuthaseah

RESPONDENT

Date of Decision : 12-02-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Criminal Procedure Code, 1898 (CrPC) — Section 107
Penal Code, 1860 (IPC) — Section 499

Citation : AIR 1971 Ker 280

Hon'ble Judges : P.T. Raman Nayar, C.J.;V.P. Gopalan Nambiyar, J;K.K. Mathew, J

Bench : Full Bench

Advocate : T.R. Govinda Warrer and K. Ramakumar, for the Appellant; K. Chandrasekharan and T. Chandrasekhara Menon, for the Respondent

Final Decision : Allowed

Judgement

Raman Nayak, C.J.—I have no doubt that a proceeding taken by a magistrate under provisions like Sections 107 - 110, 133, 144, 145 and 488 of the Criminal P. C. is a judicial proceeding see Babulal Parate Vs. State of Maharashtra and Others, and The State of Uttar Pradesh Vs. Kaushaliya and Others, ; indeed, the contrary has not been urged before us. That being so, I should think that in the state of the Indian authorities (whatever to the contrary counsel for the respondent plaintiff might think he has succeeded in extracting from certain observations by Sellers and Devlin, L. JJ. in Lincoln v. Daniels. 1962 1 QB 237 after all when, as in this case, the question is, what does public policy dictate under Indian conditions, Indian authorities must be of greater value) the per se defamatory statements made by the appellant defendant about the respondent plaintiff in a petition he submitted to the (Executive) First Class Magistrate, Ottapalam, with a view to initiating proceedings u/s 107 of the Criminal P. C. he not merely called the plaintiff and his brother notorious bad characters, but said that their success in life was by blackmail and criminal breach of trust--are absolutely privileged: Golap Jan v. Bholanath Khettry ILR 1911 Cal 880;In Re

Muthusami Naidu ILR Mad 110 : (AIR 1914 Mad 472) ; Chunni Lal Vs. Narsingh Das, and Ram Kirat Kamkar Vs. Biseswar Nath, there seems to be no Indian authority to the contrary. The question then is whether the same absolute immunity is available in respect of the copy of the petition to be presented the same day to the Sub-Inspector of Police, Ottapalam. I think it is, on the principle underlying decisions such as:

Watson v. M["]Ewan 1905 AC 480 statement made in the course of a proof taken by a solicitor with a view to examine the maker as a witness in a pending judicial proceeding, in other words, a statement made by a potential witness as Coutts-Trotter C. J. rightly put it in Pedda Sanjivi Reddy and Another Vs. Kondasari Koneri Reddi, the criticism whereof by Beaumont C. J. in Gangappagouda Gadigeppagouda Patil Vs. Basayya Shivarudrayya Lingad, seems to proceed on the misapprehension that the statement considered in AIR 1935 3 (Privy Council) was a statement made by a witness before a commissioner holding a statutory enquiry as a preliminary to a prosecution for a criminal offence whereas in fact it was a statement made by the Commissioner himself;

Pedda Sanjivi Reddy and Another Vs. Kondasari Koneri Reddi, statement made to a police officer from whom a magistrate had called for a report in connection with a proceeding u/s 107 of the Criminal P. C.; and

Madhab Chandra Ghose and Others Vs. Nirod Chandra Ghose, ; Bapalal and Co. Vs. A.R. Kishnaswami Aiyar, ; Lachhman v. Pyarchand AIR 1959 Raj 169 and Bira Gareri Vs. Dulhin Somaria and Others, statements made in the course of information given u/s 154 of the Criminal P. C.

And, if there is anything said in Mohammad Samiullah Khan Vs. Bishu Nath or Mayr v. Rivaz ILR (1943) Cal 250 or Thirumalirunjolaimalai Ayyangar Vs. K. Sarangapani Ayyangar and Another, that points to the contrary, I must express my respectful dissent.

2. The principle is that absolute immunity is not confined to statements made coram judice but extends to statements made in the course of proceedings so closely related to a judicial proceeding as to constitute a step in or towards such a proceeding and, therefore, proceedings forming part of the administration of justice. The true position is thus stated in Halsbury:

"The privilege attaches not merely to proceedings at the trial, but to proceedings which are essentially steps in judicial proceedings, including statements in pleadings and communications passing between a solicitor and his client on the subject on which the client has retained the solicitor and which are relevant to the matter."

The connection between the proceeding in which the offending statement is made and the judicial proceeding must be so close that the former can be regarded as essentially or, in essence or substance, a step in the latter. But the closeness does not depend exclusively on the former being indispensable for the

latter or on being taken pursuant to a direction given in the latter. Else, proof taken by a solicitor or information given u/s 154 of the Code of Criminal Procedure would not qualify for absolute privilege since neither is indispensable for the judicial proceeding, whether pending or in contemplation. A witness can well be examined in court without proof being taken--so far as this country is concerned, it would appear that it is very rarely that proof is taken--and a complaint can well be--and often is--made to a magistrate of the commission of a cognizable offence, instead of being reported to the police. If, by its very nature, the proceeding is in substance a step towards a judicial proceeding, it is essentially a step in a judicial proceeding and is part of the administration of justice. Now, although there is nothing in the Criminal P. C. that requires his, in practice no magistrate takes action u/s 107 thereof or declines to do so without first obtaining a report from the police, and, if he is moved by a private party, he invariably calls for a report from the police--that was done in this very case. That being so. it seems obvious that the defendant's object in presenting a copy of his petition to the magistrate to the Sub-Inspector of Police, after presenting the petition at the office of the magistrate and learning that the magistrate was out of station which meant that there would be delay in his calling for a report from the police--it is important to note that what was presented to the Sub-Inspector of Police was statedly only a copy of the petition presented to the magistrate--must have been that the Sub-Inspector of Police might, after enquiry, make a report to the magistrate on the basis of which the latter might proceed. If the defendant wanted the magistrate to act on his petition, it was proper and reasonable, indeed it was practically necessary, to secure a report from the police and it must have been to secure this that he presented a copy of his petition to the Sub-Inspector. And, I might add, that it was no less the duty of the Sub-Inspector to make a report to the magistrate if he considered that action under the preventive provisions of the Code was necessary than it would have been his duty to make a report had the information given to him by the defendant disclosed the commission of a cognizable offence.

3. That the police have independent powers for preserving the peace and that the defendant might have had the concurrent object of invoking those powers cannot deprive the statement he made in the copy presented to the Sub-Inspector of Police of the absolute privilege that attaches to it, if indeed it was essentially a step in the proceeding before the magistrate.

4. The statements made by the defendant in the petition he presented to the magistrate and in the copy thereof which he presented to the Sub-Inspector of Police are both absolutely privileged. His plea of absolute privilege was, in my view, rightly accepted and the plaintiff's suit for damages for defamation rightly dismissed by the trial court. It was wrongly rejected and the suit wrongly decreed by the lower appellate court.

5. I would allow this appeal and dismiss the plaintiff's suit leaving the parties to bear their own costs throughout. That, of course, means that the memorandum

of cross objections filed by the plaintiff claiming a sum of Rs. 5,500/- as damages (as claimed by him in the plaint) instead of the sum of Rs. 500/- awarded to him by the lower appellate court has to be dismissed.

Mathew, J.

6. This is a second appeal by the defendant from a decree awarding damages in a suit for recovery of damages for defamation.

7. The defendant filed a petition Ext. A1 on 26-10-1961 in the Court of the Executive First Class Magistrate, Ottapalam, alleging that the plaintiff and his brother are "two notorious bad characters", that their "success in life was by blackmailing and criminal breach of trust", and that they are making frantic efforts to encroach on his property on that night or next morning and have hired bad characters to assault him if he resisted them; and prayed for maintenance of peace, by maintaining the status quo till the resurvey of the property. The petition runs as follows:

"From T. Gopalakrishnan Nair. To the Executive First Class Magistrate, Ottapalam. Sir, Meleppurath Sankunni Ezhuthassan and his brother Krishnan Ezhuthassan are two notorious bad characters in my village. During the last paddy planting season the above Sankunni Ezhuthassan made encroachment on the land survey No. 36/8 Mulanhur amsom. When questioned he agreed to abide by the decisions of the Taluk Surveyor when rains subside. But now he has gone back on his word and it is rumoured that he together with his brother Krishnan Ezhuthassan is making frantic and secret arrangements to make further encroachments tonight or tomorrow morning and has even hired bad characters to assault me in case I resist his attempt at encroachments.

I belong to a family who have no record of any complaint having been preferred against or having preferred against anyone till date. These two whose success in life was by blackmail and criminal breach of trust are nefariously planning to have me assaulted to involve me in criminal proceedings.

I request immediate action to maintain peace by strictly adhering to status quo till my application to the Tahsildar for resurvey of the land is disposed of. Stamps to the value of 75 np. being the fee for the application is enclosed. Yours faithfully."

The Executive First Class Magistrate was not in the station for passing immediate orders. The petitioner, therefore, submitted a copy of the petition before the Sub-Inspector of Police, Ottapalam. The Sub-Inspector sent two constables to patrol the spot, and he also met the parties the next day and took an undertaking from the plaintiff that he would not take the law into his own hands, but would resort to civil proceedings to resolve the dispute. The magistrate thereafter referred Ext. A1 petition to the Police for report and on the basis of the report of the Police, the proceedings before the magistrate were dropped.

8-9. The plaintiff instituted the suit claiming Rs. 5,500/- as damages for the

defamatory statements of and concerning the plaintiff in Ext. A1 and for the publication of the copy of Ext. A1 to the Sub-Inspector.

10. The Subordinate Judge dismissed the suit for the reason that the defendant was entitled to absolute privilege in regard to the defamatory statement in Ext. A1 of and concerning the plaintiff. But in appeal by the plaintiff, the District Court reversed the decision finding that the defendant was entitled only to qualified privilege, and the privilege was defeated by malice and awarded Rs. 500/- as damages. The plaintiff has filed a cross-appeal claiming a decree for balance of the plaint claim.

11. In this branch of law the various High Courts in India have been adopting the English Law and that law recognises that there are some occasions on which there ought to be no liability for defamation because the interest of the public or of those individuals who originate the defamation outweighs the plaintiff's right to reputation. Such occasions are said to be privileged. The cases in which privilege exists are speaking generally those in which there is some just occasion for publishing defamatory matter in the public interest or in the furtherance of some interest or protection of some right of individuals. The right of free speech is allowed wholly or partially to prevail over the right of reputation.

12. There can be no dispute that any step which is essentially a step in a judicial or quasi judicial proceeding would be immune from liability for defamation as it gives rise to an occasion for absolute privilege. If proceedings u/s 107 or 145 of the Criminal P. C. are judicial in character, then, there can be no question that a petition to initiate proceedings under either of the sections is essentially a step in a judicial proceeding, and would give rise to an occasion for absolute privilege. Whether a proceeding u/s 107 before the issue of notice to the opposite party by the magistrate is judicial or administrative in character is a matter on which there is scope for controversy. But I think that the proceeding from its inception is judicial or quasi-judicial in character. It is however difficult to hold that Ext. A1 is a petition to initiate proceedings u/s 107. Section 107(1) reads.

"Whenever a Presidency Magistrate, District Magistrate, Sub Divisional Magistrate or Magistrate of the first class is informed that any person is likely to commit a breach of the peace or disturb the public tranquillity, or to do any wrongful act that may probably occasion a breach of the peace, or disturb the public tranquillity, the Magistrate if in his opinion there is sufficient ground for proceeding may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for keeping the peace for such period not exceeding one year as the Magistrate thinks fit to fix." Ext. A1 is not a petition invoking the power of the Magistrate u/s 107. There is no prayer in it asking for taking any security from the opposite party for keeping the peace. (See for similar case *Thirumalirunjolaimalai Ayyangar Vs. K. Sarangapani Ayyangar and Another*, . Even assuming that Ext. A1 can be treated as a petition to initiate proceedings u/s 107, and therefore gave rise to an occasion for absolute privilege, the question remains whether

publication of a copy of the same to the Sub-Inspector of Police was absolutely privileged.

13. I cannot regard the presentation of the copy of Ext. A1 to the Sub-Inspector as essentially a step in a judicial proceeding. Nor can I regard it as the statement of a potential witness in the proceedings before the Magistrate attracting the principle of the decision of the House of Lords in 1905 AC 480. The reason why the preliminary statement to a solicitor is protected is because unless that is also protected no effective protection can be given to the witness. Lord Halsbury, L. C. said that the privilege which surrounds the evidence actually given in a court of justice necessarily involves the same privilege in the case of making a statement to a solicitor or other person who is engaged in the conduct of proceedings in courts of justice when what is intended to be stated in the court is narrated to the solicitor, for otherwise the witness could be sued not for what he said in court, but for what he said in his proof and the privilege would be of no avail. If the protection of the witness is necessary for the administration of justice, it must necessarily involve the protection of his statement to the solicitor, as the preliminary examination of the witness to find out what he can prove is a necessary step towards and part of the administration of justice.

In *Gerhold v. Baker* (1918) CWN 368 : ILR 102 (CA) where Bankes and Warrington 1905 AC 480, a potential witness (the defendant in the action), at the request of a military representative for the County of London, complying with the express wish of the Chairman of the appeal tribunal constituted under the Military Act, 1916, had written a letter during the pendency of an appeal by the plaintiff, stating what his evidence would be if he attended the hearing, which he found it difficult to do. The defendant escaped liability on the basis of a qualified privilege and no evidence of malice. This case would show that the court restricted the decision in 1905 AC 480 to the precise facts of the case, and was not prepared to enlarge it.

In 1962 1 QB 237 the question was whether two communications sent by the defendant to the Secretary of the General Council of the Bar alleging professional misconduct were absolutely privileged. It was argued that writing to the secretary was the proper way of making a complaint against a member of the Bar and that the Benchers of an Inn of Court act in every way similar to a court and therefore communication to the secretary was entitled to the same protection as a communication to the Benchers, namely absolute privilege. It was also contended that if the defendant had said to the Benchers what he wrote to the secretary of the Bar Council he would have been absolutely privileged and that it is not possible to distinguish between statements made to Benchers and those made to the Secretary of the Bar Council for the purpose of being transmitted to the Benchers. Devlin, L. J. after referring to the *Watson's* case said that absolute privilege covers everything that is done from the inception of a judicial or quasi-judicial proceedings and extends to all pleadings and other documents brought into existence for the purpose of the proceedings starting

with the writ or other document which institutes the proceedings. He further said on the authority of 1905 AC 480 that absolute privilege attaches to evidence which a witness gave coram judice extended to the precognition or proof of that evidence taken by a solicitor.

14. In *Beresford v. White* (ILR 1914 591) absolute privilege was held to attach to what was said in the course of an interview by a solicitor with a person who might or might not be in a position to be a witness on behalf of his client in the contemplated proceedings.

15. I agree that the principle in *Watson's* case is not whether it is absolutely necessary for a witness to give a proof before being called or for a party to act through a solicitor; but whether it is proper and reasonable that such things should be done. But all the same the proceeding must be in Lord Halsbury's words "a step towards" the administration of justice. As to how far the principle in 1905 AC 480 is to be extended to other cases. Devlin, L. J. said in 1962 1 QB 237:

"It is not at all easy to determine the scope and extent of the principle in *Watson v. M'Ewan*. I have come to the conclusion that the privilege that covers proceedings in a court of justice ought not to be extended to matters outside those proceedings except where it is strictly necessary to do so in order to protect those who are to participate in the proceedings from flank attack. It is true that it is not absolutely necessary for a witness to give a proof, but it is practically necessary for a litigant to engage a solicitor. The sense of Lord Halsbury's speech is that the extension of the privilege to proofs and precognition is practically necessary for the administration of justice; without it, in his view, no witness could be called. I do not think that the same degree of necessity can be said to attach to the functions of Bar Council in relation to the Inns of Court. It is a convenience to the public to have a central body to deal with, but that is as high as it can be put. In my judgment the defence of absolute privilege fails." Danckwerts, L. J. in the same case said: "I do not think that a complaint to the Bar Council comes within that condition. The Bar Council is in no sense the agent of the Benchers. The Bar Council does not derive its authority from the Benchers or from the same source as that from which the Benchers derive their authority. The Bar Council derives its authority from the General Meeting of the Bar, and it is only as a matter of practice that complaints are received by the Bar Council and receive some investigation. The two bodiesare two distinct bodies."

16. Judicial proceedings had been initiated by filing Ext. A1 in the court of the Executive First Class Magistrate and it was because the Magistrate was not in station at the time when Ext. A1 was presented that the defendant submitted the copy of Ex. A1 to the Police Inspector; and his object in doing so was that the Police Inspector should take immediate action. I can conceive of no other purpose in the mind of the defendant for presenting the copy of Ext. A1 to the Sub-Inspector. Under the Police Act the Police have the duty to prevent breach of

peace in their administrative or executive capacity. It is settled law that proceedings before an executive or administrative authority or a step to initiate such proceedings can only give rise to an occasion for qualified privilege. See Lord Atkin's observations in AIR 1935 3 (Privy Council) . As the purpose of presenting the copy of Ext. A1 to the Sub-Inspector was only to invoke the executive or administrative power of the Police under the Police Act, I cannot regard it as essentially a step in the judicial proceedings before the magistrate. I can conceive of no reason for extending to it absolute privilege, as it was not practically necessary for the purpose of the judicial proceeding before the magistrate. It is not like the statement of a witness to a solicitor before he is being examined in court. Without such previous statement to the solicitor, it might be practically difficult, if not impossible, to examine a witness successfully in court. Such a statement is therefore practically necessary for the administration of justice in a court of law. But how was the statement by the defendant to the Sub-Inspector practically necessary at that stage for the administration of justice by the magistrate in the proceedings before him? What material connection has the statement to the Sub-Inspector with the proceedings before the magistrate? What statutory authority the Sub-Inspector had except the authority conferred upon the Police under the Police Act to entertain the petition at that stage? I see none.

17. If the magistrate had sent Ext. A1 to the Police for report, the publication of Ext. A1 to the Police would be an action by the magistrate in the exercise of his judicial function, and would have been absolutely privileged. And if any statement were made by the defendant to the Police in the course of their investigation of the petition, probably it could have been said that the defendant was a potential witness in the judicial proceeding before the magistrate. In *Pedda Sanjivi Reddy and Another Vs. Kondasari Koneri Reddi*, the plaintiff sued for damages for malicious prosecution and defamation. The defendant presented a petition to the Deputy magistrate, Adoni, praying that plaintiffs and some others should be bound over u/s 107, Criminal P. C. The magistrate on receipt of the petition sent it to the Police for inquiry and report. The police reported after taking the statement of the defendant that there was no foundation for the allegations. The court relied upon the decision in 1905 AC 480 and said that the defendant in making the statement to the Police was a potential witness in the proceedings before the magistrate u/s 107 and the occasion was one of absolute privilege. Whether u/s 202 of the Criminal P. C. a magistrate has power to send a petition praying for action u/s 107 of the Criminal P. C. to the Police for enquiry and report and whether enquiry by the police in pursuance of the direction of the magistrate would form part and parcel of the judicial enquiry before him, are questions which do not call for detailed consideration here. It was assumed in that case that the magistrate had power to send the petition to the Police for enquiry and report, although the learned Judges were not in agreement as to its basis. On that assumption, it might be said that a statement to the Police in the course of their investigation would be an occasion for absolute privilege, on the

theory that the Police for the time being are delegates of a judicial authority and their investigation is to be considered as part and parcel of the judicial proceedings before the magistrate.

In *Gangappagouda Gadigeppagouda Patil Vs. Basayya Shivarudrayya Lingad*, it was held that statements made before a mahalkari holding a preliminary inquiry into the conduct of a Police patil on the direction of the Collector in order to make a report to the Collector were not absolutely privileged as the mahalkari was not acting in a judicial or quasi-judicial capacity. Beaumont, C. J. said:

"We were referred to a case of the Madras High Court *Pedda Sanjivi Reddy and Another Vs. Kondasari Koneri Reddi*, in which the learned Chief Justice in giving judgment quoted a passage from Lord Halsbury's speech in 1905 AC 480 and said:

I take that as clearly implying that all statements made by a potential witness as a preliminary to going into the witness-box are equally privileged with the statements made when actually in the box in Court.

To my mind, that statement is too widely expressed. I think it should be confined to statements made by a potential witness in some preliminary essential to his going into the witness-box. That is the way in which the proposition is expressed in Halsbury's *Laws of England*, Vol. 20, para 564, where the learned author says:

The privilege attaches not merely to proceedings which are essential steps in judicial proceedings, including statements in pleadings and communications passing between a solicitor and his client."

18. Even substituting the word "essentially" in the place of "essential" in the quotation from Halsbury's *Laws of England*, in a case like the present where the magistrate had not sent the petition to the police for enquiry and report I can see no connection between the statement to the Sub-Inspector of Police and the proceedings before the magistrate. How was the statement to the Sub-Inspector so closely related to the judicial proceedings before the magistrate so as to constitute a step in that proceedings? The sense of Lord Halsbury's speech is that extension of the privilege to proofs and precognition is practically necessary for the administration of justice. Without it, in his view, no witness could be called. The question to be put adopting the language of Lord Halsbury is: was the presentation of the copy of Ext. A1 to the Sub-Inspector a step towards and was part of the administration of justice? As I said I cannot regard the statement as either practically necessary or a step towards the administration of justice by the magistrate.

19. In a number of cases it has been held that report to the Police of a cognizable offence is absolutely privileged (See the decisions in *Madhab Chandra Ghose and Others Vs. Nirod Chandra Ghose*, ; *Bapalal and Co. Vs. A.R. Kishnaswami Aiyar*, and *Bira Gareri Vs. Dulhin Somaria and Others*, . These cases proceed on the basis that the information which initiates judicial proceedings

before a magistrate is a necessary step in a judicial proceeding. The Police, when informed of the commission of a cognizable offence has a statutory duty to investigate and submit a report to the magistrate and on the basis of the report judicial proceedings are taken by the magistrate. In *Majju and Another Vs. Lachman Prasad and Another*, and *Mohammad Samiullah Khan Vs. Bishu Nath* a different view was taken. Whatever that might be, in this case we are only concerned with the question whether the presentation of a copy of Ext. A1 petition to the Sub-Inspector after the proceedings before the magistrate have been initiated was essentially a step in a judicial proceeding.

20. To sum up this part of "the" case the purpose of presenting the copy of Ext. A1 was only to move the Sub-Inspector to take administrative or executive action under the Police Act. So it was not a step in a judicial proceeding. Nor was the statement practically necessary in the sense that a statement to a solicitor is practically necessary for the examination of a witness in court. If a report from the Police had been called for by the magistrate, probably a statement by the defendant in the course of the enquiry would have been absolutely privileged, as being essentially a step in a judicial proceeding because the police for the time being are delegates of a judicial authority and their investigation can be considered as part and parcel of judicial proceedings. But before a report is called for by the magistrate if a statement is made to the police containing defamatory allegations, to say that since the statement is made with a view to its being repeated before the magistrate would be to carry the principle in 1905 AC 480 to a length not required by any public policy. I do not think that I can apply the principles laid down in *Pedda Sanjivi Reddy and Another Vs. Kondasari Koneri Reddi*, even if correct, as the facts here are different.

21. There was no plea by the, defendant that the occasion called for qualified privilege. He only claimed absolute privilege in the written statement. So there was no opportunity for the plaintiff to plead malice. No issue was also raised on the point. Therefore the defendant could not be allowed at this stage to raise the defence of qualified privilege, see *Pandey Surendra Nath Sinha and Another Vs. Bageshwari Pd.*, .

22. Now, even assuming that the plaintiff had no opportunity to plead malice and prove it, there is ample intrinsic evidence to show that there was malice on the part of the defendant. Malice is any corrupt or wrong motive, or personal spite or ill-will. Malice includes every unjustifiable intention to inflict injury on the person defamed, or in the words of Brett, L. J. in *Clark v. Molyneux* 1877 3 QBD 237 (CA), "every wrong feeling in a man's mind". Intrinsic evidence of malice consists in the contents of the statement itself. Its language, for example, may be so violent or insulting--it may go so far beyond the just requirements of the occasion--as to amount in itself to sufficient evidence of malice. In *Royal Aquarium & Society v. Parkinson* (1892 1 QB 431(CA)) Lord Esher explained the meaning of the word "malice" in this context:

"If a person from anger or some other wrong motive has allowed his mind to get

into such a state as to make him cast aspersions on other people, reckless whether they are true or false, it has been held, and I think rightly held, that a jury is justified in finding that he has abused the occasion." In the same case Lopes, L. J. said:--

"Not only must the occasion create the privilege, but the occasion must be made use of bona fide and without malice. The defendant is only entitled to the protection of the privilege if he uses the occasion in accordance with the purpose for which the occasion arose. He is not entitled to the protection of the privilege if he uses the occasion for some indirect or wrong motive." Cockburn, C. J. said in *Spill v. Maule* 1809 4 Ex 236:--

"It may be that the language used in a liberal though under other circumstances notifiable, may be so much too violent for the occasion and circumstances to which it is applied as to form strong evidence of malice upon the issue of whether the communication is covered by the privilege, and that an inference of actual malice may be drawn from its use."

Collins M. R. observed in *Edmondson v. Birch etc.* 1907 1 KB 381:--

"The language used may in some cases be so defamatory and so far in excess of the occasion as to be evidence of actual malice and to show that the publication of the defamatory matter was not abuse, but an abuse of the privileged occasion."

23. In other words, evidence of spite may be found in the statement itself if the language is utterly beyond or disproportionate to the facts. This will rebut the privilege. There was absolutely no necessity for the defendant to have stated that the plaintiff's success in life was by blackmailing and criminal breach of trust. In a petition alleging a threatened trespass, one might probably be justified in saying that the person threatening to trespass is a notoriously bad character. Though not absolutely necessary it would render probable the commission of the act threatened and thus be relevant. But to say that the plaintiff made his success in life by blackmailing and by criminal breach of trust has absolutely no relation or relevancy to the complaint. In *More v. Weaver* (1928 2 KB 520) Scrutton, L. J. gave an instance of an absolutely irrelevant statement, viz., that of a building owner, who when consulting his solicitor about a dispute with his builder, adds to his instructions the statement that Jones has run away with another man's wife. Even a plea of qualified privilege was available, as there is intrinsic evidence of malice, the plea would stand rebutted.

24. The plaintiff has by a cross-appeal claimed the balance of the plaintiff claim. The assessment of damages is! primarily a matter for the court below unless there is some question of principle involved. I do not think that the lower appellate court applied any wrong principle in assessing the damages to be awarded. I therefore see no substance in the cross appeal.

In the result, I would dismiss the appeal and the cross appeal, but without any

order as to costs.

Gopalan Nambiyab, J.

25. I concur in the judgment of the learned Chief Justice. The principles of law have been so clearly and succinctly stated and the relevant judicial decisions have been so tersely and concisely analysed that I should think it beyond me to improve the statement of principles or to supply an annotation or paraphrase of the dissertation on judicial decisions. Yet I would, having regard to the important and interesting question raised, and to the elaborateness and thoroughness of the arguments of Counsel, and giving rein perhaps, to my lawyer-like instinct, dwell on some at least of the decisions cited.

26. That the statement complained of in the instant case is per se defamatory was beyond dispute. It was contained in Ex. A-1 addressed to the Executive 1st Class Magistrate, a copy thereof being marked to the Sub-Inspector of Police. That the statement contained in the petition to the Magistrate is absolutely privileged seems to be clear from the Indian decisions referred to by my Lord the Chief Justice, which I need not repeat. The controversy has turned on the question as to whether a similar privilege would attach to the same statement contained in the copy marked to the Sub-Inspector of Police.

27. In 1905 AC 480 statements made in the course of preliminary discussions or interview with a solicitor--the precognition or proof stage, as it is called--by one who was to be examined later on as a witness in regard to those statements, were held to be steps for initiation of proceedings and therefore absolutely privileged. Lord Halsbury observed that the public policy which renders the protection of a witness necessary for the administration of justice, must as a necessary consequence involve that which is a step towards, and is part of, the administration of justice, viz. the preliminary examination of witness.

In *Pedda Sanjivi Reddy and Another Vs. Kondasari Koneri Reddi*, the defamatory statement which was held to be absolutely privileged was contained in a report made to the police, which was called for by the Magistrate himself before whom proceedings were launched u/s 107 of the Criminal P. C. *Coutts Trotter, C. J.* who delivered the judgment of the Bench referred to Lord Halsbury's dictum in 1905 AC 480 and held that the protection of absolute privilege would extend even to statements made by such a "potential witness". That such a "potential witness" need not nature --if I may use that expression--into an actual witness seems to have been recognised by *Buckley, C. J.* in ILR(1914) 30 591. The "Potential witness" theory was accepted by *R.K. Ghose and B.K. Mukerji, JJ.* in *Madhab Chandra Ghose and Others Vs. Nirod Chandra Ghose*, ; in *Bapalal and Co. Vs. A.R. Kishnaswami Aiyar*, in *Lachhman Vs. Pyarchand and Others*, and in *Bira Gareri Vs. Dulhin Somaria and Others*, , all, with reference to statements made, not in the course of judicial proceedings, but by way of information u/s 154, Criminal P. C.

28. In *Gangappagouda Gadigeppagouda Patil Vs. Basayya Shivarudrayya Lingad*,

Beaumont, C. J. who spoke for the Bench felt that it was wrong to state that every statement of a potential witness likely to be repeated before court is absolutely privileged. The learned Chief Justice confined the principle propounded by Coutts Trotter, C. J. in *Pedda Sanjivi Reddy and Another Vs. Kondasari Koneri Reddi*, to statements made by a potential witness in some preliminary essential to his going into the box. Beaumont, C. J.'s criticism of, and dissent from, *Pedda Sanjivi Reddy and Another Vs. Kondasari Koneri Reddi*, seems to have been largely based on the Privy Council Ruling in AIR 1935 3 (Privy Council), where the defamatory statement complained of was made by the Investigation Commissioner to one of the Counsel appearing before him. The Commissioner having been found to be not a Court, or even a Tribunal having the trappings of Court, the defence of absolute privilege was rightly negated. The decision has little application to the question at issue. But Beaumont, C. J. seems to misunderstand the decision as one where the statement was made by a witness before the Commissioner in an enquiry which was to precede a criminal prosecution. On this basis the learned Chief Justice discounts the weight of authority of *Pedda Sanjivi Reddy and Another Vs. Kondasari Koneri Reddi*, or finds it weakened by the Privy Council ruling. In the light of the actual facts of the Privy Council decision the criticism is unfounded.

Reference may usefully be made to the decision in *Bira Gareri Vs. Dulhin Somaria and Others*, where a Division Bench of the Patna High Court surveyed the English and the Indian decisions and was of the opinion that in India, giving information to the police,--in that case of a cognizable offence--with the object of setting the law in motion, or to the police to investigate and institute the case to be tried in a court of law, is a necessary step to be taken in the conduct of a legal proceeding and statements made in such an information must be absolutely privileged. The decision of the Full Bench of the Allahabad High Court in *Majju and Another Vs. Lachman Prasad and Another*, which took the view that a report of the police was not absolutely privileged did not refer to the decision in 1905 AC 480. Nor did the later decision in *Mohammad Samiullah Khan Vs. Bishu Nath*. The decision in *Sajjad Husain v. Mul Chand* (AIR 1926 Oudh 18) followed the earlier Allahabad ruling. The decision of Blagden, J. in ILR (1943) Cal 250 considered many of the English and Indian decisions but I cannot share the view taken by the learned Judge that to a statement of the type here in question the protection of an absolute privilege cannot attach.

29. Stress was laid on the English decision of (1962 1 QB 237) where the question of privilege arose in regard to the complaint addressed to the Bar Council against a barrister. It was held that only a plea of qualified privilege would attach, as the Bar Council had no judicial or quasi-judicial powers. Sellers, L. J. was prepared to state that the position disclosed on the authorities was not wholly satisfactory and was inclined to think that absolute privilege might properly and reasonably be held to apply from the time charge is made, on which the conduct of the Barrister is assessed. Delvin, L. J. discussed the matter at length. He referred to the three categories of cases with respect to which a plea

of absolute privilege could arise, namely, first, matters which are coram judice; second, matters starting from the inception of the proceedings and covering pleadings and other documents brought into existence for the purpose of the proceedings; and third, statements made at the precognition or proof stage by a witness to a solicitor as in 1905 AC 480. The learned Judge realised that the third of these was the most difficult to define and that the plea of absolute privilege for matters said and done coram judice might be rendered illusory unless the privilege extended to this category as well. I may quote two passages from the judgment of Devlin, L. J. in *Lincoln v. Daniels*:

"Absolute necessity, Mr. Campbell submits, is not the test of whether 1905 AC 480 applies or not. It is not absolutely necessary for a witness to give a proof before being called or for a party to act through a solicitor; but it is proper and reasonable that such things should be done. Likewise, Mr. Campbell argues, it is not absolutely necessary, but it is proper and reasonable and customary, for complaints to the Bench of an Inn to be made through the Bar Council. The majority of complainants act in that way. It is, in Lord Halsbury's words: "a step towards" the administration of justice by the Bench of the Inn. Ought, therefore, a plaintiff in a libel action to be allowed to say in respect of such a complainant: "I do not faring my" action in respect of the complaint you made to the Bench; I bring it because you made the same complaint first to the Bar "Council?" This appeals to me as a formidable argument and I have hesitated a lot before reaching a conclusion upon it."

Further down the learned Judge stated:

"It is not at all easy to determine the scope and extent of the principle in 1905 AC 480. I have come to the conclusion that the privilege that covers proceedings in a court of justice ought not to be extended to matters outside those proceedings except where it is strictly necessary to do so in order to protect those who are to participate in the proceedings from a flank attack. It is true that it is not absolutely necessary for a witness to give a proof, but it is practically necessary for him to do so, as it is practically necessary for a litigant to engage a solicitor. The sense of Lord Halsbury's speech is that the extension of the privilege to proofs and precognition is practically necessary for the administration of justice; without it, in his view, no witness could be called. I do not think that the same degree of necessity can be said to attach to the functions of the Bar Council in relation to the Inns of Court. It is a convenience to the public to have a central body to deal with, but that is as high as it can be put. " In my judgment the defence of absolute privilege fails."

The question seems to have been debated --and may well be debated: what did Lord Halsbury mean in 1905 AC 480 when the noble and learned Lord referred to the privilege attaching to "a step towards and which is part of the "administration of justice". Construing these words as if they were words of a statute, or in the fashion of a lexicographer, should, I think, be avoided. In Vaguhan Williams, L. J.'s article on "Libel and Slander" in the 1st Edition (Vol. 18, para. 1254) of

Halsbury's Laws of England it is stated that absolute privilege extends also to proceedings which are essentially steps in judicial proceedings. Lord Hewart, C. J. in the Hail-sham's edition (para 465) would extend the privilege to statements passing between solicitor and client. In Lord Simond's (3rd) Edition of the work (Vol. 24, para 91), the statement is to the effect that the privilege attaches also to proceedings which are "essentially" steps in judicial proceedings including communications passing between a solicitor and client. Gatley "On Libel and Slander" (5th Edn. page 181) states the position thus:

"No action will lie for defamatory statements contained in any document which is incidental to the proper initiation of judicial or quasi-judicial proceedings, an information, complaint, writ or petition by which the quasi-judicial tribunal is set in motion."

(underlining mine)

31. Whatever be the difficulties and niceties that beset the problem in English Law, I am in agreement with My Lord the Chief Justice that in India a plea of absolute privilege does and should attach to a statement made to the police, in circumstances such as have been disclosed in the instant case.