

Emperor Vs. Bhaskar Balvant Bhopatkar

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Court : Mumbai

Decided On : Feb-14-1906

Reported in : (1906)8BOMLR421

Judge : Batty, J.

Appellant : Emperor

Respondent : Bhaskar Balvant Bhopatkar

Judgement :

Batty, J.

1. Gentlemen of the Jury, you have heard this case very patiently and listened very carefully to the evidence placed before you, as well as to the very able utterances of counsel on both sides. No doubt, it will not be necessary for me to say much in addition to what has already been said, but I trust that I may be able to give some little assistance in placing before you the essentials of the offence with which the accused is charged, so that you may be able to apply correct principles to the facts which appear in the evidence and especially in Exhibit C, the article which is the subject of the charge.

2. Now the charge against the accused is that he being the proprietor and publisher of a certain vernacular newspaper entitled the Bhala, under the heading or title translated 'A Durbar in Hell' on page 2 of that newspaper dated 11th

October 1905 did attempt to bring into hatred or contempt, or attempted to excite disaffection towards the Government established by Law in British India : that is to say, the offence alleged is one punishable under Section 124A. It is desirable first to read the whole of that section through, with its explanations and comments, and then to make a few remarks on the words that require specially to be emphasized and explained. [His Lordship here read the section].

3. Now you will see that the liability arises from certain action, viz. the bringing or attempting to bring into hatred or contempt the Government of the country. This is a result which may be effected in various ways, i.e. either by speech, writing, or by signs or by visible representations. The offence consists of making use of any means for the purpose. It is quite immaterial whether such means had been previously prepared for the purpose by the person who uses them-or by some other person-if those means are used for the purpose of bringing the Government into hatred or contempt. It is, therefore, not sufficient for a person who has published matter calculated to excite hatred, contempt, or disaffection, to say : ' This is not my own work,' because the adoption of the means, the publishing thereof was in itself his work, and therefore it is, that the printer or publisher of an article, which is open to these objections is always to be held liable. In the Madras case which has been cited to you it was held that a declaration under Section 5 of Act XXV of 1867 (an Act requiring all printers and publishers to register their names), in the absence of proof to the contrary is proof of publication by the person making the declaration, unless he can prove that the matter was published in his absence and without his knowledge, and that he had in good faith entrusted the temporary management of his business to a competent person. That is to say for everything that appears in his paper, the editor, printer, or publisher is as responsible as if he had written the article himself. No doubt the question of his liability to punishment is a matter which has to be seriously considered and circumstances may considerably mitigate the penalty which has to be imposed. But his liability to conviction under the section is not affected by the circumstance that the publisher who used the words did not originate them. The result of his using the words in his publication is the same whether he had written the article himself, or made use of it in other ways. ' Whoever the composer might be, whosoever wrote or caused it to be written, the person who used it for purposes of

exciting disaffection is guilty of an offence under Section 124 A.' Then, in another case, the decision of the present Chief Justice of Bombay, it was said: ' The publisher is prima facie liable for whatever appears in his paper and if he seeks to get rid of that liability the onus lies on him. It is for him to prove such circumstances as would justify him in asking you not to fasten responsibility on him. What is necessary for him to establish is that the article was published without his knowledge or authority or consent or without any acquiescence or intention on his part. Mere absence is obviously insufficient to state in answer to the charge. There must be more than that. That is to say, it is not sufficient for an accused person to say that what was put into his paper of a seditious character was 'put in during his absence and without his authority. If he did not authorise it, it is for him to prove that as a fact, because it must be within his knowledge whether any such authority was. given. It is not enough for him to say 'I never authorised publication of this particular article."

4. The same rule of law obtains in England and I think, gentlemen, you will recognize how very necessary it is to make responsible the editor or publisher who gives forth, to the whole world, articles which are of a dangerous character. It is a serious responsibility which a person undertakes as an editor or publisher and it is one not lightly to be undertaken. The power, so assumed, is to be exercised with care and caution.

5. I now pass on to discuss the meaning of other words in the section. And first as to the words hatred, contempt and disaffection. Unfortunately we all of us know too well what hatred is. It is a passion which every wise and good man endeavours to check in himself. Hatred never did any good. It can only do harm and if unchecked would tend to the disruption of social ties and a return to barbarism. With the feeling of hatred the law can do nothing because it cannot see into the heart and cannot reform it, but law does step in when any attempt is made to excite that feeling in others. And it does so as much for the protection of the individual as for the protection of the State. If it is the individual against whom hatred is excited the offence is described as defamation, and the law extends similar protection to the collective body which is called the Government, and which represents the community as a whole and whose duty it is to perform the functions of preserving

order and peace, which are essential to the beneficent co-operation of human beings and to the enjoyment and safety of life and property. It must be very obvious to you, gentlemen, that a Government, however imperfect it may be, is always better than no Government at all, and that no community can allow individuals to excite feelings which must necessarily weaken and impair the usefulness of Government.

6. Now the word disaffection is less obvious in regard to its meaning. As you have already heard it is a feeling, the opposite of affection and in one case it has been defined as a want of affection. But it is now generally accepted that this is not a correct definition. Disaffection is a feeling, and not the want of a feeling. It is not the absence of affection. It is not indifference, but a positive emotion not necessarily prompting to action, but with a tendency to influence conduct just as all our feelings do. It has been judicially defined as enmity, hatred or hostility or contempt, and no doubt it may include all these. It is not necessarily limited to feelings of enmity. It includes enmity but it is not necessarily limited to that. I would invite attention to the fact that disaffection is a phrase that is never used with regard to individuals. We never speak of one man being disaffected against another individual. It is only in regard to the Government that we use the term disaffection, and therefore you may take it that it is intended to express a feeling which can only exist between the ruler and the ruled. Feelings of personal affection in such a connection are not demanded, but only such feelings as the relation of the subject to the Government necessarily implies. That which is necessarily implied by the relation between the ruler and the ruled is the recognition, on the part of the ruled, of the Government as a Government. The ruler must be accepted as a ruler, and disaffection which is the opposite of that feeling, is the repudiation of that spirit of acceptance of a particular Government as ruler. Therefore it is not necessary to consider for the purposes of this section merely whether the fact of the article was to bring into contempt or hatred, if the tendency was to induce a feeling that the Government which exists ought not to exist as a Government. A feeling of enmity may possibly not exist. It is quite possible for a person to desire that a Government should cease to exist, without having any feeling of personal hostility or enmity either to the individual or even to the principles of the Government. The feeling towards the Government is not

necessarily a personal one, as the Government is not an individual or a person for whom any personal affection can be entertained. Therefore it is not necessary to show that any personal hatred was excited in order to bring the case within this section.

7. It is not necessary that the individual should be the object of hatred. What is contemplated under the section is the collective body of men-the Government, denned under the Penal Code, as the person or persons authorised by law to administer executive Government in any part of India. That does not mean the person or persons for the time being. It means the person or persons collectively, in succession, who are authorised to administer Government for the time being. One particular set of persons may be open to objection, and to assail them and to attack them and excite hatred against them is not necessarily exciting hatred against the Government because they are only individuals, and are not representatives of that abstract conception which is called Government. Individuals come and go, but the Government is supposed to remain. The individual is transitory and may be separately criticised, but that which is essentially and inseparably connected with the idea of the Government established by law cannot be attacked without coming within this section. And you do not need to be reminded that it is of the essence of Government in India that it is British Government and British Rule, and so long as it continues to be that, the Government remains unchanged however much the persons administering it may change.

8. Therefore you will consider whether in attacking what is essentially British, the thing aimed at is the Government or the individual or a particular measure-that which is transtory, occasional and temporary or that which is vital and permanent in the idea of the Government as established by law. I now pass on to discuss the word 'attempt.' You will observe, as has already been pointed out to you by learned counsel, it is not necessary in order to bring the case within this section that it should be shown that the attempt was successful. Attempt does not imply success. It is merely trying. Whoever tries to excite, attempts to excite, &c.; is held to come within the section. Whether the intention has achieved the result is immaterial.

9. I read you a passage from the observations of the Chief Justice in a case tried in 1900 in this Court. 'An attempt is an intentional, premeditated action which if it fails in its object, fails through circumstances independent of the person who seeks its accomplishment. If its failure is to be attributed to something which he cannot control, its failure is no excuse.' As stated by Mr. Justice Cave in *Reg. v. Burns & others* (1886) 16 Cox. 355 'A man cannot escape from the uttering of words with intent to excite people to violence solely because the persons whom he addressed may be too wise or temperate to be induced to act with violence.' It is no excuse for a man who shoots at another to plead that he missed his aim and could not hit him or that the other was armed and could not be hurt, or if he tried to poison a man to plead that the attempt proved innocuous because the intended victim had taken an antidote. So if you come to the conclusion that there has been an attempt to excite a feeling of hatred, or contempt or disaffection by the article in question, it will not be necessary to take into consideration the possibility that the persons addressed would not be likely to have hatred or contempt excited by that article. If the accused tried to excite hatred and contempt, the fact that he failed to do so will be no justification for him. No doubt that will be a matter to be decided in determining any sentence which may have to follow upon a verdict of guilty. But you will not allow yourselves to be led to think that because the article in question may have been in itself incapable of producing on sober minded and reasonable persons any evil effect, that therefore it is absolutely innocent of the offence specified in Section 124 A.

10. Next, it is unnecessary to hold that actual violence was excited or even contemplated or that any attempt was made to induce an effort to overthrow the Government by law established.

11. It is one of the chief functions of Government to execute justice with mercy and to maintain truth, and the public, the subject, is entitled to look with confidence to the Government for its protection and for the preservation of order. And any effort which aims at impairing that confidence and at producing an unwillingness to accept the intervention and protection of the Government, for the purposes for which Governments exist, is within the mischief contemplated by the section, even though there be no intention to excite a rising or actual violence of any kind. You

will consider, therefore, not merely whether the article in question was an attempt to excite a rising or actual violence of any kind, but whether it was an attempt to excite feelings of unwillingness to accept Government as such and whether the intention to excite such feelings can be inferred from an article which -if its representations were accepted and believed-would deprive the subject of all confidence in Government as such, and which represents that the Government is of a character execrable, cruel and merciless.

12. The effect of an article may not be serious to those who can reason and think, but you must remember that articles which are published in vernacular papers are not always read by reasonable men, that there is always a residuum in every community of disappointed poor men who go through life in a state of discontent and who in ignorance are often prejudiced and prepared to accept allegations made against the Government. Those who are in a state of gross ignorance might be injuriously affected by such writings. The learned counsel for the defence has told you that a thousand of such articles might circulate in British India without any fear of exciting any feelings of animosity. The fact that in the present condition of India no evil effects may follow the publication of such articles is not one which you need take into consideration. Punishment is necessary not so much for the actual injury done in itself, as to deter others from pursuing a course which has every tendency to create injury. If you think that the accused has in this case attempted what was wrong, it cannot be a sufficient answer for him to say that the peaceful circumstances and conditions of the Empire rendered his act innocuous. Articles have been put in by the defence during the course of cross-examination of witnesses, and it was with some regret that I had to come to the conclusion that this will deprive the defence of their solo right of reply, but I find on inquiry from the Chief Justice that that has been the practice since the amendment of the section. The fact that the evidence was put in, gives the Advocate General the right to comment upon that evidence, which would otherwise have been undiscussed. Now five different newspapers have been placed before you by the defence, and one, in addition to that which is the subject of the charge, on behalf of the Crown. I think you may have no doubt that those articles put in by the defence do express just such a comment on individual measures and particular actions on the part of the Government as would come fully within the protection of explanations to

Section 124A. I am speaking of those articles which Mr. Davar has put in on behalf of his client, and not the article the subject of the charge. They are all of them articles, which contain discussion, more or less referring to subjects of a temporary character, particular measures, or particular lines of policy. They do not aim at that which has been termed the essential character of Government. Changes in policy and changes in measures are liable to criticism, and to criticise and urge objections to them is a special right of a free press in a free country. The British nation has always specially boasted that it had a free press but the freedom of that Press is conditional upon one thing; every liberty is given to all men to express their opinions, so long as they do not misuse or abuse that power to the injury of others, including among injuries to others, injury to the State. It is only on that condition that it is possible to have a free Press.

13. Now, so far as the articles put in for the defence are concerned they do contain such a moderate discussion of individual measures, without reflecting in any way upon the motives of Government, and I think you may take them as affording very fair specimens of what is allowed and does not come within the purview of the section we are discussing. These articles have been placed before you to show the general motive and spirit of the accused. On the other hand it has been suggested that there is something militant in the name and the motto of the paper, which is called 'The Spear' or 'Lance.' You will give, however, I think, no weight to that motto in considering the conduct of the accused in the particular instance which forms the subject of the charge. And this not only because he has in his own article repudiated any bellicose intentions in choosing such a motto, but also because the prosecution has not made it a part of their charge and evidently does not rely upon it in any way to prove an attempt to excite hatred or contempt against the Government or against any individual.

14. With regard to the criticisms that have been read to you on the actions of Government in regard to the University Act and other measures you will thoroughly understand that they do not profess to attack the Government but only certain of its measures and that therefore they cannot in any way come within the operations of Section 124 A. But of course they may be an indication of the general policy of the accused.

15. They may give you the impression that he is a temperate and moderate man, willing only to discuss questions in a way that will do good to the community, and avoid giving rise to any serious dissensions or violence of feeling. Exhibit M. I understand, was put in by the Advocate General, not so much for the purpose of giving you an illustration of violent and seditious writing on the part of the accused as for the purpose of showing that he had in certain articles used language and references similar to that used in Exhibit C. In considering these articles which have been placed before you by the defence you will, no doubt, bear in mind that in every instance the effect produced by the accused appears to be neutral. There is nothing to show any criminal intent to stir up disaffection. That, however, is no answer to the charge of guilt in the present particular instance. The question you have to consider is not whether the accused abstained from offensive and criminal language on every other occasion, but whether in this particular instance he did that which necessarily must excite, if it were accepted in the spirit in which it was written, feelings either of hatred or contempt, or of disaffection to Government.

16. I will now proceed to give in outline the main features of this article. It is entitled ' A Durbar in Hell.' It has been suggested that the vernacular word used may mean purgatory. But the surroundings and accessories of the Durbar and the whole atmosphere of the scene described are diabolical. You will notice it is barbaric cruelty, heads cut off, hands cut off, blood on all sides and the whole scene one of carnage, and fiendish inhumanity. Then the Emperor of Hell is represented as about to choose a successor, and the qualifications are said to be cruelty and mercilessness in a pre-eminent degree. Then three persons come forward having these characteristics. They are all described as rulers. Now the accused has told you in his statement that he took the document as allegorical. Of course, gentlemen, feelings may be excited as much by allegory and parable as by direct statement. What we have to find is the key to the allegory, and that is a question exclusively for you. The main points have been put before you by the learned Advocate General. There is the fact that the three persons brought before you are rulers and that the third person is a civilized ruler, and that his dress is admittedly that of a European. He wears a sun to pee or head covering which Europeans wear. If you think that this was intended to typify some European ruler, and to be taken in that sense by such persons as would be likely to read this

newspaper, then your one consideration will be whether the character given to that allegorical person is of such a character as to give rise to feelings of disaffection. You will bear in mind that it is suggested that this description is apparently intended to identify the third person with British rule, and if you accept that suggestion, you will next consider whether the representation is likely to cause feelings of contempt or disaffection in the minds of those who read papers of this description. You will observe that the paper is not one that circulates only amongst the most educated classes in Bombay., Its readers pay only about half an anna per copy and while its circulation in Bombay is only 120, and in Poona 205, it is in the mofussil 1322, so that you must consider whether the persons among whom these articles circulated, are for the most part persons of reasoning power and sufficient calmness of judgment and understanding to avoid the effect which such writing might have on the credulous and ignorant. Because you may be able to withstand the writing, it does not necessarily follow that everybody will be in the same fortunate condition. You will take into consideration, both the means used and the subject of the article. You will consider accused's intentions from the point of view of the adaptation of means to an end. It has been suggested by the learned Counsel for the defence that the reading of the article may produce upon you no impression but that of contempt for the author, but you will probably be unwilling to infer that the article was written with that object. It will be for you to consider whether the intention was to excite such feelings as, if accepted by the reader, would stir his hatred or contempt or dislike for the Government. Then you will consider whether it is compatible with the retention of due authority whether it be in a home, or as between master and servants or employers, that the person in authority should be described as diabolical or as a fit successor to the kingdom of Hell. And if such sentiments would be subversive of authority in ordinary households can you regard them as more innocuous if 'entertained towards the Government of a state. If you think that it can reasonably be suggested that the connection between the third person described in the article as wearing European clothes and the ruling race has not been made out, you will give the accused the benefit of the doubt and will acquit him of the charge of attempting to stir up disaffection.

17. But you will, gentlemen, bear in mind that the accused is entitled only to the benefit of reasonable doubt, such as would influence your own conduct in the affairs of ordinary life. It is not necessary to say much in detail with regard to the innuendoes contained in this article. The prosecution has attempted to identify the details described with certain public events, with the Delhi Durbar, the University Act, the Arms Act, the undisputed removal of certain sums of money to a distant country and lamentable circumstances directly connected with Clive and Warren Hastings, to which Macaulay refers in his Essays. If you think that these references point to a distinct attack, not merely at individual measures or persons, but upon the Government of India, then the article comes within the section. Accused has stated that the article was not from his pen and the learned counsel for the defence suggested that it was the work of a school-boy. You must remember that accused edited and published the paper, inserted the article, and that it was scattered broad-cast and we learn the paper acquired through this article a considerably increased circulation. If you think that the article would excite such feelings as are described in the section, then the mere fact that it was not the composition of the accused himself would not be sufficient to justify you in returning a verdict of not guilty, although that might be a circumstance to be taken into consideration in the punishment of a person found guilty.

18. I will not detain you further. I have to thank you for the care and attention with which you have listened to all the evidence in the case. I will now ask you to consider your verdict.

19. The Jury, through their Foreman, returned a verdict of 'guilty ' and added: 'the Jury desire to recommend him to the mercy of the Court.'

20. Mr. Davar then addressed the Court in mitigation of the punishment : and referred to Queen-Empress v. Luxman (1899) 2 Bom. L. R. 286 and Queen-Empress v. Vinayek (1899) 2 Bom. h. R. 304.

Batty, J. (to the accused):

21. You have been convicted of the offence of attempting to excite hatred or contempt or disaffection towards the Government. Your own statement is that this

was not your own composition. But it was published by you in your paper as a contribution from some other person unnamed. By accepting the responsible position of editor or publisher of a newspaper-a position which gives you exceptional opportunities of doing good to your fellow-countrymen and helping them to co-operate for the benefit of the whole country, you became responsible for everything to which you gave publicity, and it was your duty to your paper to keep it free of articles which would only do damage by exciting feelings which would be injurious in their tendency. I have to take into consideration the recommendation of the Jury to mercy, and also the considerations advanced by Counsel just addressed to me. I also take into consideration the probability that you may not personally have indicted the article in respect of which you are charged. But the offence appears to have been a deliberate one, and has a tendency to thwart the efforts of the authorities to do good to the people and to lead them to regard with suspicion and distrust the efforts that may be made for their good, and that is very far from being a patriotic action. It aims at neutralising all that is intended for the good of the country as a whole.

22. The sentence I pass on you is one of simple imprisonment for six months, and inasmuch as I think you should not be allowed to make a profit out of the publication of such articles I add a fine of Rs. 1,000, in default of the payment of which you will suffer a further simple imprisonment of one month.