

Emperor Vs. Hasrat Mohani

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Court : Mumbai

Decided On : Jul-11-1922

Reported in : (1922)24BOMLR885; 75Ind.Cas.299

Judge : Lallubhai Shah, Kt., Acting C.J. and Crump, J.

Appeal No. : Criminal Reference No. 30 of 1922

Appellant : Emperor

Respondent : Hasrat Mohani

Judgement :

Lallubhai Shah, Acting C.J.

1. This is a reference under Section 307, Criminal Procedure Code, by the Sessions Judge of Ahmedabad.

2. The accused in this case was charged in respect of three speeches : two of these speeches were made by him at a meeting of the Indian National Congress, and the third was made by him as the President of the All-India Moslem League in December last at Ahmedabad. In respect of the first two speeches he was charged under Section 124A, and in respect of the third under Sections 124A and 121, Indian Penal Code. The offences under Section 124A were triable with the aid of assessors and the offence under Section 121 was triable by a Jury in that district. He was accordingly tried by the Sessions Judge and a Jury in respect of the

offence under Section 121 and with the aid of the jurors as assessors as regards the other offences, The Jury returned a verdict of 'not guilty' under Section 121 and, as assessors, they were of opinion that the accused was not guilty under Section 124A. The learned Sessions Judge was competent to deal with the case so far as it related to Section 124A and, differing from the assessors, he found the accused guilty under that section in respect of all the three speeches, and sentenced him to suffer rigorous imprisonment for two years on each count directing the sentences to run concurrently, There has been no appeal from these convictions and sentences and we are not concerned with that part of the case. The Sessions Judge did not agree with the verdict of the Jury as regards the charge under Section 121 and as he considered it necessary for the ends of justice to refer the case to the High Court he has done so.

3. We have to consider the entire evidence in the case, to give due weight to the opinions of the Jury and the Judge, and to decide whether the speech in question offends against Section 121.

4. The accused wanted to present his case in person; and this Court ordered that he may be allowed to do so. We have now heard the learned Advocate General for the Crown and the accused, who appeared in person.

5. The charge against him is that by making the speech in question he abetted the waging of war against the King within the meaning of that section, that is, he instigated his audience to wage such war. Whether the accused did so or not is a question of fact to be decided mainly upon the speech itself. There can be hardly any evidence outside the speech in a matter of this kind; and it is not suggested that there is any evidence except the evidence of the witness Durgadas, representative of the Associated Press (Ex. 12). I doubt whether his opinion as to the effect of the speech is relevant; and even if it be relevant it has hardly any real value. The learned Advocate General has mainly relied, and in my opinion rightly, upon the speech itself.

6. Before dealing with the speech, I may mention that, as pointed out by Heaton J. in *Emperor v. Ganesh Damodar Savarkar* I.L.R. (1909) 34 Bom. 394 12 Bom. L.R. 105 so long as a man only tries to inflame feeling, to excite a state of mind, he is

not guilty of anything more than sedition. It is only when he definitely and clearly incites to action that he is guilty of instigating and therefore abetting the waging of war.' It is perfectly true that it is not essential that as a result of the abetment the war should be waged in fact. But the main purpose of the instigation should be the 'Waging of war'. It should not be merely a remote and incidental purpose, but the thing principally aimed at by the instigator. The mere fact that a person may try to do it in an indirect and disguised manner would not be sufficient to save him from the operation of the section; but I think that the Court ought to be satisfied that he has instigated the waging of war, i.e., the use of violence for the purpose of effecting innovations of a general and public nature. I have no desire to attempt to lay down any general proposition as to what is sufficient to constitute an abetment of the waging of war against the King within the meaning of Section 121. Having regard to the facts of this case it is sufficient to bear in mind what I have said above in determining the question of fact arising for our decision.

7. Coming to the speech itself, it may be stated at once that the appeal or instigation to violence, such as it is, is to be found in the two paragraphs at p. 11 of the print, to which I shall refer presently. Apart from those paragraphs, it could not be said that the speech is open to the construction that the accused meant to instigate his hearers to violence. His plea for the change in the wording of the aims and objects of the League by substituting the words 'possible and proper' for the words 'peaceful and legitimate', and his appeal for starting immediately a parallel government independent of all British control, by setting up on a separate and permanent foundation, Courts, schools, art, industry, commerce, army, police, and national parliament, would not constitute by themselves the 'waging of war' within the meaning of Section 121, though those ideas would be open to other objections. This speech is fairly long and it is not necessary to refer to all other matters in the speech in detail. But when it was put to the learned Advocate General, he fairly, and I think rightly, conceded that but for the two paragraphs it would be difficult to bring the case within Section 121. His argument, however, is that the speech should be read as a whole and that the above ideas coupled with the said two paragraphs amount to a sufficiently clear and direct incitement to violence for the purpose of overthrowing the government established by law in this country. The accused has also argued that the speech should be read as a whole;

and he contends that if it be so read it is nothing more than a plea for the amplification of the scope of the present aims and objects of the League, and for starting a parallel government with a view to obtain complete Swaraj, that his object was not to dissuade the members of the League from the creed of non-violence but to persuade them to adhere to it as far as possible, and to so modify the aims and objects of the League as to leave it open to any member to depart from non-violence when absolutely necessary for his self-defence. He has argued that he definitely rejected the alternative of upsetting the present government by 'sword'; and has throughout pleaded for another alternative for establishing an independent parallel government by peaceful means resorting to violence only if it becomes necessary to do so in self-defence in future for maintaining such a government.

8. It will be convenient to quote the material paragraphs instead of attempting to summarize them :-

People are no doubt prepared to bear and suffer gladly the hardships of a few days of imprisonment. But on the declaration of Martial Law the non-violent non-cooperation movement will prove totally insufficient and useless. Amongst the Mussalmans at least there will hardly be found a man who will be prepared to sacrifice his life uselessly-man gave only one of two feelings in his heart when faced by the barrel of a gun either to seek refuge in flight or to take advantage of the law of self-preservation and despatch his adversary to hell, the third alternative that of cheerfully yielding up one's life to the enemy and considering it to be one's real success will remain confined to Mahatma Gandhi and some of his adherents and fellow thinkers. I on my part fear that in general the reply to the Martial Law will be what is commonly called guerilla warfare or in the words of the Koran 'Kill them wherever you find them.' The responsibility for all this bloodshed will rest on the shoulders of the Government.

Consequently as representatives of Mussalmans the members of the All-India Moslem League should consider it their duty either to refrain from adopting non-cooperation as their creed or free it from limitation of keeping it either of violence or non-violence, for it is not in our power to keep non-co-operation peaceful or

otherwise. So long as the Government confines to the use of chains and fetters non-cooperation can remain peaceful as it is to-day but if things go further and Government has recourse to gallows or machine guns it will be impossible for the moment to remain non-violent. At this stage some people would like to ask : how is it that while the Hindus are content to adopt non-violent non-cooperation as the means for attaining independence that the Mussalmans are anxious to go a step further The answer is that the liberation of Hindustan is as much a political duty of a Mussalman as that of a Hindu. Owing to the question of Khilafat it has become a Mussalman's religious duty also.'

9. Reading these paragraphs it is difficult to say that they are not susceptible of the construction which the accused seeks to put upon them. In any case I am unable to say that they constitute a direct and clear incitement to violence. Taking the speech as a whole, and taking the broad effect of these paragraphs in relation to the main theme of his speech as indicated above, viz., the change in the aims and objects of the League and the immediate starting of a parallel government, I am not satisfied that it is sufficient to bring the case within the scope of Section 121, that is, to constitute a clear and direct incitement to action as distinguished from a state of mind.

10. I have considered the reasons given by the learned Sessions Judge in support of his view. Even taking the summary of the speech as given in paragraph 8 of his charge to the Jury, I cannot say that it amounts to a clear and direct incitement to violence. The learned Judge has observed that 'step by step the speaker maps out the stages which are to culminate in possible resistance to the government established by law.' That seems to me to constitute the weakness of the prosecution case, for it shows that the immediate and direct object is not the use of violence; but it indicates a realisation on the part of the accused as to the probable use of violence in future under certain circumstances which no doubt the accused thinks will arise, but which in fact may or may not arise. After giving my best consideration to all the arguments and the speech itself I am unable to hold that it constitutes such an incitement to action as would bring the case within the meaning of Section 121. At its best it is a doubtful case : and it was open to the Jury under the circumstances to find the accused not guilty.

11. I do not express any opinion about the exact meaning and scope of the quotation from the Qur'an in relation to its context in the holy book as to which there was some argument before us and upon which the accused laid some emphasis : for after all the effect of the quotation has to be considered in relation to its context in the speech, in which the words are quoted; and, secondly, in the view I take of the case it is not necessary to do so.

12. I need hardly add that on the present reference I am only concerned with the question as to whether the speech amounts to an abetment of the waging of war : and my observations as to the speech are made with reference to that question only.

13. I would, therefore, acquit the accused of the charge under Section 121, Indian Penal Code.

14. It is desirable to point out that in view of the explanation to Section 35 of the Criminal Procedure Code and the provisions of Section 71 of the Indian Penal Code as interpreted by a Full Bench in *Queen-Empress v. Malu* I.L.R. (1899) 23 Bom. 706; 1 Bom. L.R. 142 the accused would be liable to one punishment only in respect of the speech. The learned Sessions Judge found him guilty under Section 124A and sentenced him to two years' rigorous imprisonment in respect of the speech in question. In case this reference had been allowed, we could not have imposed a second penalty without setting aside the sentence already passed. Though at one stage I thought that there might be some difficulty in doing so, I am satisfied that in view of the provisions of Section 307, Sub-section (3), and Section 423, Sub-section (1), Clause (d), of the Code of Criminal Procedure, there would be no insuperable difficulty in dealing with the case under Section 121 as regards the sentence and in setting aside the sentence under Section 124A for that purpose, if it were necessary to do so.

Crump, J.

15. This is a reference by the Sessions Judge of Ahmedabad under Section 307 of the Code of Criminal Procedure. It is for us to form our own opinion on the case after giving due weight to the opinions of the Judge and the Jury. The nature of the

case is such that these opinions cannot be of much assistance, for we have to deal not with facts but solely with the correct interpretation of a single speech which is Ex. 7 in the case.

16. It is a commonplace, but one which requires to be restated from time to time, that criminal charges must be strictly proved and that the benefit of any reasonable doubt must be given to the accused. The question here is whether the accused has committed the offence of abetting the waging of war against the King. The abetment charged is abetment by instigation, and the point for decision is whether the speech (Ex. 7) discloses such instigation. Instigation is active suggestion or stimulation of another to do an act. The act here is the waging of war, and the waging of war is the attempt to accomplish by violence any purpose of a public nature. As to the purpose here there is no disguise. It is to bring about complete independence by establishing a republic. If the accused actively suggested to his audience that they should use violence, or stimulated them to use violence in order to achieve that purpose he is guilty. It is immaterial that he may have sought to disguise his meaning so long as the meaning is clear. On the other hand it is equally immaterial that the speech is within the scope of Section 124A, if it does not contain any active suggestion or stimulation to the use of violence.

17. The test-the only test-is to read the words, and to decide what is the probable effect on the audience to whom it was addressed. The words must be taken in their natural meaning and in the order in which they stand. If the result charged is not clear beyond reasonable doubt then the offence is not made out. If it is not possible to say affirmatively that the accused intended to instigate his audience to violence, then he must be acquitted, however mischievous the speech may be.

18. The opening portions of the speech may be summarized as follows :-

(1) It would have been better had an abler president been selected.

(2) The All-India Moslem League is in a weak condition.

(3) The existing objects of the League are set out, The first is 'the attainment of Swaraj by the people of India by all peaceful and legitimate means.'

- (4) The causes of the weakness of the League are analysed. The main cause is that Swaraj is not defined in accordance with Moslem desires.
- (5) In order to remove this cause of weakness 'Swaraj' should be defined as 'complete independence'. The form of Government should be 'an Indian Republic on the lines of the United States of India.' Further the words 'peaceful and legitimate' should be deleted and the words 'possible and proper ' be substituted.
- (6) The advantages of an Indian Republic are explained. The main advantage is the removal of the English power which is a hindrance to the removal of misunderstanding between Hindus and Mussalmans as is shown by the Moplah troubles in Malabar, as to which a long digression is introduced.
- (7) After this digression the speaker returns to his main theme, viz., the amplification of the definition of Swaraj and the necessity of substituting 'possible and proper' for 'peaceful and legitimate' in defining the means by which 'Swaraj' is to be attained. The reason given for this change is that it is necessary to open the League 'to those who do not honestly believe non-co-operation alone as the sole path of salvation and recognizing the possibility of other methods adopt them also.' Also it is necessary to 'remove the complaint of those who believe that non-co-operation can under no circumstances remain peaceful to the last...and refuse to remain non-violent even in intention.
19. The portion of the speech summarized above leads up to the passage on which the prosecution mainly rely. So far the meaning is shortly thus:- 'Let us define as our goal complete independence, and widen the definition of our means so as to admit all shades of opinion violent or non-violent.' Up to this point the speaker advocates no line of action.
20. It is unnecessary for me to set out again the passage which follows. I propose to give briefly the meaning of it as I understand it. The speaker says that there are only two possible means of replacing one Government by another : one destruction by the sword : the other by setting up a parallel Government. So far as he advocates either it is the latter. 'Friends, to achieve this object we must immediately set up on a separate and permanent foundation our own courts,

schools &c.; &c.:' He then goes on to point out that ultimately a stage will be reached when action on peaceful lines will become impossible because the existing Government will undoubtedly interfere. When Government interferes and if and when Martial Law is declared non-violent non-cooperation will become utterly useless. For the Mussalmans at least will defend themselves 'when faced by the barrel of a gun.' 'I on my part fear,' the speaker says, 'that in general the reply to Martial Law will be what is commonly called guerilla warfare, or, in the words of the Koran, 'Kill them whenever you find them': the responsibility for all this bloodshed will rest on the shoulders of Government.' The meaning may be further illustrated by a passage which follows : 'So long as the Government confines itself to the use of chains and fetters non-cooperation can remain peaceful as it is to-day, but if things go further and Government has recourse to gallows and machine guns it will be impossible for the movement to remain non-violent.'

21. The substance of the matter is this. 'Let us continue by peaceful means: probably in the future Government will proclaim Martial Law and use machine guns. If so certain persons will use violence in self-defence. The blame will rest on Government.'

22. Does such language amount to instigating the waging of war I adopt the words of Heaton J. on this matter : 'So long as a man only tries to inflame feeling, to excite a state of mind, he is not guilty of anything more than sedition, It is only when he definitely and clearly incites to action that he is guilty of instigating and therefore abetting the waging of war' (Emperor v. Ganesh Damodar Savarkar I.L.R. (1909) 34 Bom. 394 12 Bom. L.R. 105 I cannot find here any incitement to action. The accused says no more than this. 'Let us proceed on peaceful lines as long as we can. In the future some of us will be compelled to use violence in self-defence.' Such language is gross sedition, but it is not to my mind an offence under Section 121 for the plain reason that there is no incitement to action. If the worst construction is put upon the speech it amounts to a prophecy or even a threat that violence may be necessary in future. It does not suggest action here and now, or stimulate any one to such action. The distinction is clear enough if reference is made to any of those cases in which there has been a conviction

under Section 121. I hold, therefore, that the accused cannot be held guilty of that offence.

23. I would only add that I agree with my learned brother as to the applicability of Section 307 read with Section 423 to the circumstances of this case.

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