

CALCUTTA HIGH COURT

Queen-Empress

Vs

Jogendra Chunder Bose

(W.C Petheram, Kt. C.J.)

25.08.1891

JUDGMENT

W. Comer Petheram, Kt., C.J.

1. I shall direct the Jury as to the meaning of the section.
2. Mr. Jackson. I submit that it is for the Jury to decide with regard both to law and fact.

W. Comer Petheram, Kt., C.J.

3. It will be my duty to direct the Jury on the construction of the section.
4. Mr. Jackson.-There is no case to go to a Jury under Section 124-A. The offence under that section really consists in writing a seditious libel, and the publishing it or causing it to be published is no offence under the Penal Code. The prosecution admit that they have been unable to discover who is the writer of these articles. The only person liable is the composer of the articles, if Section 124-A be read by the side of Section 499, it will be seen that no mention is made of publication in the former section, and its omission must have been intentional, as the framers of the law had already the defamation section before them. In England, under Lord Campbell's Act, the publication of the libel itself had to be proved, and a person is not criminally responsible for the acts of his agents--Reg. v. Holbrook-and Ors. L.R., 3 Q.B.D., 60.
Petheram, C.J.

5. It appears to me perfectly clear that there is a case to go to the Jury. The question turns upon the meaning of Section 124-A, and Mr. Jackson's contention is that only the speaker of the words or the composer of the sentences is liable under the section. I do not think that contention is borne out by the words of the section. The offence is attempting to excite disaffection by words intended to be read, and I think that whoever the composer or the writer might be, by whomsoever the writing or the printing was composed, the person who used them for that

purpose within the opinion of the Jury was guilty of an offence under Section 124-A.

6. Mr. Jackson.--I would ask to have the point reserved under Section 25 of the Charter.

Petheram, C.J.

7. declined to reserve the point.

8. (Mr. Jackson, in proceeding to address the Jury, referred to the case of Reg. v. Sullivan 11 Cox. Cr. Ca., 52 for the purpose of showing that both the law and the facts were for the consideration of the Jury, it being for them to determine the whole question of law and fact, whether this was a seditious libel or not. He referred to the history of the Press in India, and proceeded to call the attention of the Jury to the interpretation which the section had received from Sir James Stephen and others. And on this point continued]:

9. Originally the section was Section 113 of Macaulay's Penal Code, but was for some reason omitted from the Code itself. Sir J. Stephen, when the matter came to be considered in the year 1870, referred to Sir Barnes Peacock, who on looking at his notes, said he thought the section had been omitted by mistake, but had no positive recollection (vide Gazette of India, August 6th, 1870, Supp. Vol., 1019, 1311). There was on that occasion a discussion as to Section 113, and Sir J. BARNES PEACOCK proposed a section which was thought to be too severe, and no corresponding section was enacted. Sir J. STEPHEN in introducing the present section explained what the law of England then was, and stated that he proposed that Section 124-A should be passed into law, because if there were no provision in the law of India, the offence would fall under the common law of England, and would be more severely punishable; and he most distinctly asserted that there must be an intention to resist by force or an attempt to excite resistance by force before the offence could be brought under the present section. The peculiarity of the law of treason in England is that it considers every thought of the heart criminal, which is to be punished as soon as it is manifested by any overt act, but the clause as it stands insists on a distinction between disaffection and disapprobation. A person may freely say what he pleases about any Government measure or any public man as long as it is consistent with a disposition to render obedience to thy lawful authority of Government. In connection with this subject Sir J. Stephen has clearly said that the freedom of the press would not be curtailed so long as the principle above laid down was adhered to. Sir J. STEPHEN has pointed out that articles far more violent than the ones which have been made the subject of this prosecution had appeared in the English newspapers in India and had passed unnoticed. [Mr. Jackson then referred to Lord Hobhouse's minutes of the 18th May 1875 and the 10th August 1876 in connection with the discussions on the Vernacular Press Act, and also referred to Lord Lytton's and Sir A. Arbuthnot's speeches in Council, adopting these as part of his argument to show the view which those authorities then took as to the scope and meaning of the present section--vide Gazette of India, Supp. Vol., 1878, pages 457 to 481.] The interpretation then put upon the section by those

competent to do so must be taken as the right interpretation. The Jury have a right to take into account the opinion of such men as Sir J. STEPHEN, and up to the year 1878 there was but one opinion as to the meaning of the section. When the Vernacular Press Act was repealed in the year 1882, it was again expressly laid down that the freedom of the native press was to be interfered with only on very special occasions--Gazette of India, Supp. Vol., 1882, page 90.

10. [Mr. Jackson then went through the articles in great detail, and argued that they contained no direct incitement to rebellion or the use of force, and did not exceed the bounds of legitimate criticism, when allowance was made for the difference between European and native methods of thought and the conservative character of the paper. He also referred to the arguments for and against the Age of Consent Bill.] Petheram, C.J.

11. Charged the Jury as follows:

12. The four accused are charged with an offence under Section 124A of the Penal Code, and inasmuch as the offence in question is treated and defined by that section, I have thought it desirable that you should have the section itself in your hands whilst I explained the law to you, and also whilst it was being discussed by Mr. Jackson. There are really two questions for you to consider. First, you must clearly understand what it is that has been made into an offence by the section, and when you understand that, you have to consider whether the evidence before you proves that such an offence has been committed by the prisoners. The section is divided into two parts, and is as follows: "Whoever, by words either spoken or intended to be read, or by signs, or by visible representation, or otherwise, excites or attempts to excite feelings of disaffection to the Government established by law in British India, shall be punished with transportation for life or for any term, to which a fine, may be added, or with imprisonment for a term which may extend to three years, to which fine may be added, or with fine." Explanation.--Such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority of the Government, against unlawful attempts to subvert or resist that authority, is not disaffection. Therefore the making of comments on the measures of the Government with the intention of exciting only this species of disapprobation is not an offence within this clause.

13. Mr. Jackson contended that the words "disaffection" and "disapprobation" were synonymous words, and had one and the same meaning. If that reasoning were sound, it would be impossible for any person to be convicted under the section, as every class of writing would be within the explanation. But you, gentlemen of the Jury, are thoroughly acquainted with the English language, and must know that there is a very wide difference between the meaning of the two words disaffection and disapprobation. Whenever the prefix 'dis' is added to a word, the word formed conveys an idea the opposite to that conveyed by the word without the prefix. Disaffection means a feeling contrary to affection; in other words, dislike or hatred. Disapprobation means simply disapproval. It is quite possible to disapprove of a man's sentiments or action and yet to like him. The meaning of the two words is so distinct that I feel it

hardly necessary to tell you that the contention of Mr. Jackson cannot be sustained. If a person uses either spoken or written words calculated to create in the minds of the persons to whom they are addressed a disposition not to obey the lawful authority of the Government, or to subvert or resist that authority, if and when occasion should arise, and if he does so with the intention of creating such a disposition in his hearers or readers, he will be guilty of the offence of attempting to excite disaffection within the meaning of the section, though no disturbance is brought about by his words or any feeling of disaffection, in fact, produced by them. It is sufficient for the purposes of the section that the words used are calculated to excite feelings of ill-will against the Government and to hold it up to the hatred and contempt of the people, and that they were used with the intention to create such feeling. The second question for you, gentlemen of the Jury, then, will be whether, upon the evidence before you, you think that the articles circulated by the prisoners were calculated to create such feelings in the minds of their readers, and if so, whether they intended to create such feeling by their circulation.

14. Having taken this explanation of the section from me, it now rests with you to decide whether the accused by the words of the articles which were intended to be read have been guilty of an attempt to excite disaffection against the Government. You will have to bear in mind the class of paper which is being prosecuted and the class of people among whom it circulated, taking into consideration the articles which have been made the subject of the indictment and the others which have been put in during the course of the trial. Those articles are not addressed to the lowest or most ignorant mass of the people. You will see from the article referring to jute that they were not addressed to the cultivating classes. They are addressed to people of the respectable middle class who can read and understand their meaning--more or less the same class as the writers. You will have to consider, not only the intent of the person who wrote and disseminated the articles among the class named, but the probable effect of the language indulged in. Then you will have to consider the relations between the Government and the people, and having considered the peculiar position of the Government, and the consequence to it of any well-organized disaffection, you will have to decide whether there is an attempt or not to disseminate matter with the intention of exciting the feelings of the people till they become disaffected. British India is part of the British Empire, and is governed like other parts of the Empire by persons to whom the power is delegated for that purpose. There is a great difference between dealing with Government in that sense and dealing with any particular administration. Were these articles intended to excite feelings of enmity against the Government, or, on the other hand, were they merely expressing, though in strong language, disapprobation of certain Government measures? You will bear in mind that the question you have to decide has reference to the intention; and, in fact, the crime consists of the intention, for a man might lawfully do the act without the intention. The evidence of the intent can only be gathered from the articles. The ultimate object of the writer may be one thing, but if, in attaining that object, he uses as the means the exciting of disaffection against the Government, then he would be guilty under Section 124A. If you think that these people, with the object of procuring the repeal of the Age of Consent Act, or of increasing the sale of their paper, disseminated these articles intending to

excite feelings of enmity, you will be bound to find a verdict of guilty. As to the evidence of intent, the articles are the only evidence. The charges are based on the five articles which are the subject of the indictment. Other articles have been quite properly put in during the progress of the trial, but no charges are laid in connection with the latter. They were put in, some by the prosecution and some by the defence, to prove that their view of the intent of the articles charged was indicated in the others. These articles have been read and re-read to you, gentlemen, so frequently, that I do not consider it necessary to discuss them in detail again. I will simply touch on their bearing on the case, and as to whether they disclose an intent to cause disaffection or disapprobation only.

15. [His Lordship then proceeded to refer to the articles and afterwards continued-]

16. It will be for you to come to a decision on the tone of these articles. You must not look to single sentences or isolated expressions, but take the articles as a whole, and give them a full, free, and generous consideration as Lord FITZGERALD has said; and even allowing the accused the benefit of a doubt you will have to say whether the articles are fair comments and merely expressions of disapprobation, or whether they disclose an attempt to excite enmity against the Government.

17. In leaving the matter to your consideration, gentlemen of the Jury, I would ask you, and ask you earnestly, to dismiss from your minds all questions of prejudice, and look at this matter in as impartial a spirit as possible. The only question is that of the intent; you have nothing to do with the policy of the Government in instituting this prosecution, or the policy of the Government in passing the Consent Act, or what has been called the Gagging Act; you have nothing to do beyond dealing with the evidence in this case; and if you allow anything else to influence you in your decision upon the question before you, you will be failing in your duty.

18. Your opinion should not be influenced by the opinions of any person however eminent. The opinions of many great men have been quoted to you, and you have been requested to accept those opinions as your own in arriving at a correct, decision in this case. I would repeat that you are not to accept the opinion of any one, be he ever so eminent; if you do so, you would not be doing your duty; you are to judge of this case, and give your verdict only on the evidence in the case. The only question for you to decide is, were the articles intended, and were they likely, to cause disaffection. The defence urge that the articles only expressed disapprobation of Government measures: the prosecution say they were deliberate attempts to incite the people to disaffection. I have now dealt with the whole matter, and having told you what is the law to guide you, I now ask you to consider your verdict on the evidence before you.

19. The Jury then retired to consider their verdict. On their return the Clerk of the Crown asked them if they were agreed upon their verdict.

20. The Foreman of the Jury stated that the Jury were not agreed, and that there was no chance of their returning an unanimous verdict. Upon which His Lordship said that he would not take any verdict that was not unanimous in this case.

21. The Jury were then discharged, the case being ordered to remain as a remanet for next Sessions, the accused being enlarged on bail.