

# BOMBAY HIGH COURT

Emperor

Vs

Abdool Wadood Ahmed

(Batty and Heaton, JJ.)

01.01.1907

## JUDGMENT

### **Batty, J.**

1. In this case we have been obliged to await an officialised translation of the pamphlet which forms the subject of the charge, exceptions having been taken to the accuracy of that which accompanied the record. The charge against the accused is one under Section 500, Indian Penal Code, of defamation. The alleged defamatory imputations are contained in a pamphlet which the present appellant admittedly wrote as an answer to certain criticisms written and circulated by the complainant on discourses compiled by a religious teacher designated in the pamphlet as the Khutba.

2. As the appellant does not disown the authorship of the defamatory pamphlet, the only question which arises in this appeal is whether the passages cited in the charge, amount to defamation. The main contention of the appellant's counsel is that whatever imputations are made in the passages cited in the charge, fall within the 3rd, 6th and 9th, exceptions to Section 499 of the Indian Penal Code, that is to say, it is contended that those passages either express an opinion in good faith respecting the character of the complainant so far as it appears in his conduct touching a public question and the merits of the Fatwa or criticism published by him and no further, or an imputation made in good faith, in reply to attack, for the protection of the person attacked, or for the public good. It is also contended for the appellant that the meaning and application of various passages in the pamphlet have been distorted and misrepresented by the prosecution-either through incorrect translation or the perverse suggestion of constructions which the appellant did not intend and could not have intended those passages to bear. The Advocate General, who supported the conviction, relied on *Thomas v. Bradbury*<sup>1</sup> as showing that the right of fair comment set up for the defence could not avail to protect malicious attack under the cloak of criticism. *Fisher v. Clement*<sup>2</sup> was cited by the Advocate General, as showing that the ambiguity of the language used, would not avail the accused whatever his alleged intention, if the actual

tendency of that language was defamatory.

3. With reference to the case of *Totems v. Bradbury* it is to be noted that the question there raised and determined was whether an action for libel, when the defence is that the writing complained of is fair comment, evidence that the defendant was actuated by malice towards the plaintiff was admissible.

4. That question does not arise in the present case. For no evidence has been adduced of actual malice in the accused, extrinsic to the pamphlet alleged to be defamatory. The appellant disclaims and the prosecution does not aver any such personal animosity in the accused as would be connoted by the word malice in the ordinary colloquial use of that word. But the word "malice" in the legal use of that term is not limited to hostility of feeling, but by virtue of its etymological origin, extends to any state of the mind which is wrong or faulty (whether evinced in action by excess or defect), such as would be unjustifiable in the circumstances and incompatible with thoroughly innocent intentions.

5. It is not necessary that such impropriety of feeling should in all cases be established by evidence extrinsic to the comment which is the subject of the complaint. For whether fair comment is to be regarded as falling under a branch of the law of privilege or not, it cannot excuse an injury arising not from the mere act of criticism, but from a state of mind in the critic which is in itself unjustifiable. And the excuse may be so forfeited either by reason of an evil intent in him, or by reason of mere recklessness in making an unwarrantable assertion. For then the comment would not be fair comment at all. This clearly follows from the language of the exceptions to Section 499, Indian Penal Code, which by requiring the "good faith," defined in Section 52, excludes all that is done without due care and attention as well as all that is done with injurious intention.

6. Thus the protection given by these exceptions corresponds with the right of fair comment described in *Thomas v. Bradbury* [1906] 2 K.B. 627 p. 638. The right, "says the Court of Appeal, arises to criticise honestly, however adversely," (page 639) "it does not extend to) cover mis-statements of fact however bona fide. "The Court of Appeal questions whether if the comment be malicious, it can then be described as comment at all. (Page 688).

7. It is clear from a later passage in that judgment (page 643) that, apart from extrinsic evidence of malice, protection must be withheld even from what purports to be criticism, if it states as a fact to be inferred from the book criticised, an imputation for which the book itself contains absolutely no foundation whatever. In *Merivale v. Carson*<sup>3</sup> Bowen L.J., said: "The writer would be travelling out of the region of fair criticism if he imputes to the author something which in fact he has not written."

8. Thus the right involves two essentials, first that the imputation should be comment on the work criticised and second that it should be "fair"-that is to say, that if it professes to be an inference drawn from the contents of that work, it must be an inference which it is possible to draw therefrom. It would be monstrous, for instance, for a critic to suggest as an inference from a mere grammatical inaccuracy in a work, that its author was a swindler or a libertine. For that would be a recklessness of inconsequence, excluded by the requisites of good faith. Good faith requires not, indeed, logical infallibility but due care and attention. But how far erroneous actions or statements are to be imputed to want of due care and caution must, as indicated in *Bhawoo v. Mulji*<sup>4</sup> in each case be considered with reference to the general circumstances and the capacity and intelligence of the person whose conduct is in question. It is only to be expected that the honest conclusions of a calm and philosophical mind may differ very largely from the honest conclusions of a person excited by sectarian zeal and untrained to habits of precise reasoning. At the same time it must be borne in mind that good faith in the formation or expression of an opinion, can afford no protection to an imputation which does not purport to be based on that which is the legitimate subject of public comment. The object of the exception on which the defence mainly relies is that the public should be aided by comment in its judgment of the public performance submitted to its judgment. Comment otherwise defamatory is justified on this ground alone. The comment must, therefore, make it clear to the public that decision is invited only on such evidence as is supplied by the public performance. It follows that an imputation on an author made by a critic without reference, express or implied, to the work under criticism, if in terms so general as to be capable of conveying an unfavourable impression of him apart from what appears in his work, cannot be justified by the critic on the ground that his intention was to base his imputation solely on the work reviewed and that he had in his mind passages therein supporting the imputation. In such case the reading public is not left to decide for itself on evidence legitimately before it and the tendency of the comment is to suggest that the imputation is based on some conduct of the author other than that appearing in his work. In such a case the ruling in *Fisher v. Clement* might apply and the responsibility of the critic is to be gauged by the effect which his comment is calculated to produce and not by what he says was his intention. It is not enough that he should intend to form his opinion in the work before him; he is also bound in the words of the exceptions to express his opinion with due care and caution and to give the public no ground for supposing that he is speaking of anything but the performance submitted to its judgment.

9. It has been necessary to state at some length the principles which we conceive to be applicable in such a case as the present, partly because the latitude allowed by law to literary comment seems to have received somewhat scant consideration in the judgment under appeal and partly because the arguments for the appellant, on the other hand, claim that all passages in the charge

are equally defensible as based solely on the work criticised and have no reference to anything extrinsic thereto and that admitting impropriety, coarseness, vehemence in expression and weakness of reasoning, they must be ascribed to want of literary culture, the heat of sectarian polemics and the tone in which the controversy was started.

10. We have therefore endeavoured before dealing seriatim with the passages in the charge, to indicate the tests which we conceive the Indian Penal Code requires us to apply. We now proceed to apply those tests accordingly.

11. The first passage is that beginning-Kazi Saheb did not give up his habit.

12. There has been much contest as to the precise meaning of the words *naphse amard* which follow in this passage. The officialised translation renders them-"the evil promptings of the soul"-while in the charge the reading is "sensual appetite or lust". Richardson (p. 1325) gives the phrase as meaning "inordinate appetite or concupiscence". The Court interpreter translated the phrase "appetite for bad works." From a passage cited in argument from a commentary on the Koran, the defence urges the phrase means no more than the evil tendency of unregenerate human nature: the carnal mind as opposed to the spiritual. And if it were absolutely necessary to decide between these varying interpretations, we should hesitate to ascribe to the phrase a mere opprobrious connotation, seeing that one of the witnesses Kazi Mahomed Ismail Chilmai classes the frequenting a club, keeping late hours, playing billiards and the like, as among the habits to which the spiritual condition indicated tends, while another witness Kazi Mahomed Ali Morgay says *naphse amara* would prompt a man not to go to a mosque and to spend his nights at a theatre and Kazi Ismail Mehri who says it means animal passion, the spirit which tends towards evil and serious vices, admits (page 93) that he has himself applied the term in criticism of an opponent's literary style. The expression, in whichever of these senses it be taken, does not appear to imply any grave moral turpitude but rather the absence of spiritual excellence-and so much at least the defence would apparently concede. It may be that as applied to an ordinary layman no imputation seriously calculated to lower him in the eyes of his secular brethren would be conveyed by the phrase. We understand that no hierarchical rank is claimable by the complainant. But he deposes and it appears also from Exhibit A that he has been appealed to as a Mufti and Moulvi Kazi (i.e. as an expounder of and an authority learned in the law) for a pronouncement on the orthodoxy of the Khatib. We think the phrases used cannot but be regarded as implying that the person indicated is unfit to give the counsel for which some at least of his coreligionists look up to him. and the language used would, therefore, we think, be defamatory as applied to him unless justified as fair comment on a public performance of his then under review. That the phrase *naphse amara* was intended to be depreciatory is confirmed by the words that follow "having shelved (or laid aside) the fear of God, shame and modesty

&e". It may be that no mere layman has a right to complain at not being credited with spiritual excellence, but no one can have a right gratuitously to denounce his neighbours as having laid aside all sense of shame and modesty. The only question, therefore, is does this denunciation purport to relate only to the conduct of the complainant so far as it appears in the tractate or Fatwa under review? We should be prepared to give the accused the benefit of ail doubt on this point, on the ground that the next sentence mentions the complainant's work under review and thus suggests that work as the source from which the critic was about to cite justifications for his invective. But this view seems hardly possible in face of the opening words of the passage, "How astonishing it is that even at such a troublesome time the Kazi did not give up or could not refrain from his habits". The word "habits" certainly must refer to a course of conduct previously pursued and therefore to matter distinct from the performance under review. What are the previous habits imputed as not given up in the Fatwa-the reader is left to gather from the passages which immediately precede and follow. The last preceding sentence imputes indifference both to the love and the condemnation of God and to the souls of his fellowmen. "The dead may go to heaven or hell". And this imputation is introduced with the words who is ignorant of his qualities?". The sentence which follows alleges that the Kazi has abandoned all fear of God and all shame and modesty. Such being the characteristics imputed, they are spoken of not merely as apparent in the Fatwa but as habitual in the Kazi and as already known to all. This we think places the passage on the footing of illustration (e) to the 6th exception in Section 499. The clear effect of the passage is "The Kazi has long been known to be such a man as is here described and this work shows he has not improved." There is no attempt to show from the work itself that the previous life of the Kazi was marked by the blemishes appearing in his Fatwa and the reader can only infer that the traits are imputed as having been evinced by something in his earlier career.

13. It might perhaps be suggested that the accused refers to the Fatwa as indicating what the past history of the Kazi must have been, in the words "In fact the Fatwa appears to be. as it were, the register of the actions of a wretch eternally doomed." But unfortunately the accused does not appeal to the Fatwa alone as containing the grounds for his imputations about the Kazi's habits in the past. For it is by an appeal to their alleged notoriety that he introduces those imputations "who is unaware of his qualities? he has no regard &c., he could not refrain from his habits." Thus it is the alleged notoriety of the Kazi's habits that is cited as accounting for the character of the book. It is not the character of the book that is given as the evidence of the past life. And this is precisely the distinction between illustrations (d) and (e) to the exception. We think, moreover, that in the criticism of a public performance, an inference as to the present character of the writer is the utmost that is allowable and a conjecture as to his previous mode of life is irrelevant and therefore unjustifiable.

14. The next sentence in the charge "he has awakened sedition" does not appear to us defamatory. The word translated "sedition" evidently means only "rupture" or "schism" and it is quite within the proper limits of criticism to point out that a controversial work is calculated to excite violent difference of opinion.

15. The reference in the succeeding sentence to "audacious forgery" we think would be more reasonably taken as an anticipation of the remarks that follow about garbled extracts from the Khatib's tractate. This imputes only a literary misdemeanour and is fair controversial comment.

16. The assertion that the Kazi was misleading his readers and undermining their faith, is made only as the legitimate result of an attempt to show that the views expressed in the Fatwa are erroneous and a controversialist is necessarily at liberty to question the accuracy of his opponent's views.

17. The imputation of illegitimacy and infidelity to the Kazi would certainly be grossly defamatory if it had not been explained as intended only to emphasise a supposed *reductio ad absurdum* of the arguments used by the Kazi. It refers to a dispute as to the meaning of the word *sifla* which the Kazi had accused the Khatib of applying in the sense of "infidel" to his coreligionists. The accused argued that the word has other less objectionable meanings and that if when so used it was always construed as "infidel," it would impute infidelity and illegitimacy to all Mahomedans alike. The quibble is coarse and puerile but makes no real reflection on the faith or birth of the Kazi. The Magistrate observes that the accused has used false syllogisms and false logic and taken an opportunity of abusing the complainant in this passage. False reasoning in a critic is not criminal and the manifest intention of the passage was to show not that the Kazi was an infidel or illegitimate, but that he would be unable to deny that he was either, if his construction of the Khatib were correct. The vituperation in the following sentence accusing the Kazi of ignorance, want of modesty, impudence &c. is no doubt violent, considering the occasion. But it is directed entirely at a specified passage in the Kazi's work, which the accused may honestly have believed to deserve the severest condemnation as containing unwarranted aspersions on the writings of a holy man. The epithets used are strictures on the work rather than imputations against the person.

18. Next follows the extraordinary passage in which the accused on the strength of a misplaced dot or point in the word *farah* occurring in the Kazi's lithographed Fatwa, accuses the Kazi of having imputed to the Khatib the use of a most obscene expression in one of his sermons. The Kazi says it was merely by clerical error that the obscene word was substituted for one correctly quoted. And we should have thought that the most natural and probable explanation. But it is perfectly conceivable that a zealous partisan of a revered preacher might honestly believe it was by design and not by accident that a grossly offensive word had been introduced in quoting the

discourse attacked.

19. The Advocate General questions whether the word referred to as obscene, even in the incorrect form in which it occurs in the Kazi's Fatwa, bears the indecent meaning which the accused insinuates the Kazi intended it to have. But, we think, unless it was generally accepted that the word had that indecent meaning the accused could not have attempted to make any point out of it with his readers.

20. We also think that the passage in the charge relating to this word must be construed in its least offensive sense, that is as accusing the Kazi only of giving prominence to the obscene word in his Fatwa and not as accusing him of having indecently exposed his own person. This we think is the only version of the passage which conveys any intelligible meaning. The imputation no doubt is a very gross one indeed and it is extraordinary that it should have suggested itself. But in considering whether in the complete absence of any evidence of personal malice, it is in itself conclusive to show a want of good faith, we must, as we have laid down, make great allowances for the heat evidently excited in the controversy, for the manifestly low standard of critical discrimination and judgment observable throughout and also for the vehement and even scurrilous language in the Kazi's Fatwa Ex. A. which might lead an incensed opponent too readily to suspect offence even when it was not intended.

21. The next sentence in the charge taken from page 10 of the pamphlet, runs in the officialised translation, "this is an inborn habit of Kazi Meheri Saheb, deception is an element of his nature." The somewhat contradictory phrase "inborn habit," probably means either a habit which has become a second nature, or a congenital tendency fostered by habit. In either case, it is like the first passage in the charge dealt with above, an imputation as to the general character and conduct of the Kazi and as such beyond the legitimate scope of mere comment on the Fatwa. This is clear from the sequel where accused says, "I can quote innumerable instances in proof of this"; and then follows an account of some alleged incident entirely unconnected with the Fatwa. The defence says that account has not been challenged by the prosecution. But that does not show that the accused was justified in suggesting that there were "innumerable instances" of the same kind, or in recounting any such incident in the Kazi's career unconnected with his public conduct. No critic is justified in telling the public that he knows the author whom he is reviewing to be habitually or congenitally disingenuous.

22. The next passage in the charge cited from pages 14 and 16 has admittedly been satisfactorily explained and all that appears offensive in it is due to the playful application to the Kazi of a word the meaning of which the Kazi is said to have distorted in criticising the Khatib.

23. The next passage at page Hi of the pamphlet contained further allusion to the cum plainanfs

interpretation of the words *sifla* and the absurdity, which it is said that interpretation would involve, of establishing the illegitimacy and infidelity of the complainant. We are unable to agree with the Magistrate that there is anything either unfair or defamatory in the first sentence of this passage.

24. The next passage is intelligible only as an attempt to show that an absurdity would be involved by adopting the Kazi's rendering of a passage in the Khatib's tract in which Mahomedans are said to be too slow in resenting insults. The Khatib, it is contended, spoke of affronted honour generally. The Kazi translated the passage as referring to outrage on wives and ladies. The accused argues that the term which he translates honour cannot be translated as "wives and ladies" as it is occasionally used in connection with the Deity and that in such an instance to give the term that meaning would involve heresy and blasphemy such as the accused suggests is involved in certain Christian tenets. Thus, the Kazi is taxed only with giving a construction to the Khatib's words which if strictly applied in other cases would involve impious conclusions. The argument is feeble, but to any one who follows it at all, it is clear that it is directed only as a *reductio ad absurdum* against the inaccuracy of the Kazi's translations and does not otherwise cast any real reflection on him at all.

25. Then follows a passage which it is unnecessary to discuss, as the Magistrate has found that the translation of it in the charge is incorrect. The prosecution has attempted to impugn the Magistrate's conclusion. But this it was not open to the prosecution, we think, to do. We also think that the foully offensive construction given in the charge to this passage, renders it so violently irrelevant and disconnected from its context, as to make that construction grossly improbable. If, however, the word translated by a term of most intolerable abuse, he construed as "materialistic", "gross", or "earthly", the passage fits in coherently with the preceding suggestion that the Kazi's use of words would lead to conclusions ascribing animal passions to the Deity. We notice the passage and the offensive translations of it, however, as illustrating the tendency of such polemical discussions to generate ill-founded suspicion of an opponent's meaning.

26. The words that follow appear to mean that it is the "growth" of the Kazi's mind that invents disgraceful imputations against others. But this and the denudations which follow are, we think, used by the accused, as expressions which in his opinion the Kazi has merited by what appears in the Fatwa and not as mere general abuse of his past life and general character and career. For the pamphlet proceeds to add "every statement (i.e. obviously every statement in the Fatwa) is like a carcass putrefying &c." Grossly offensive as this comment may be, it is still comment on the Kazi's work and not mere personal aspersion. There is no suggestion that it was prompted by any private malice or was not a sincere expression of the view which the accused took of the attack made on his religious teacher by the Kazi.

27. The remaining passages appearing in the charge as quotations from the pamphlet are, appellant's counsel urges, incorrect translations in that they represent as a personal attack on the Kazi what in the original is a general reflection on Mahomedan society. The officialised translation supports this contention and this seems more consistent with certain sentences which precede the passage quoted such as "Great calamity has fallen on Mahomedans &c." In the charge, the singular number is used and a parenthesis is interpolated to point the application of the passage to the Kazi. But that application is negated by the sentences "They are the degenerate descendants of noble ancestors" (which is officialised they are unworthy sons of worthy fathers)-and "Every one of these descendants is without equal? (unsurpassed) &c.- (officialised "Everybody is expert" &c.). And thus the last sentence in the charge "He is such a learned man" seems out of place and unmeaning in such a context which suggests as a more probable rendering. "The learned truckles to the ignorant".

28. On the whole then we think there are only two passages cited in the charge which unquestionably contain aspersions on the Kazi apart from the Fatwa under review, viz: the passage translated in the charge as beginning "Kazi Saheb did not give up his habit" from page 2 of the pamphlet;-and the sentence translated in the charge "This is an inborn habit of Kazi Meheri Saheb ; deception is a part of his nature" from page 10 of the pamphlet. These it is impossible to regard as anything else than a general imputation on the complainant, purporting to be based on his supposed general conduct and not solely on what appears in the Fatwa. And we therefore think that the accused cannot be wholly acquitted of defamation. But having regard to the very vehement nature of the attack in Exhibit A on a religious teacher to which the pamphlet of the accused is a reply and to the absence of any motive in accused except that of defending from insult the character of the teacher whom he revered, the sentence passed by the Magistrate is unduly severe and we accordingly modify it by setting aside the sentence of imprisonment altogether and reducing the fine to one of Rs. 200.

#### Cases Referred.

11[1906] 2 K.B. 627

2(1830) 10 B. & C. 472

3(1887) 20 Q.B.D. 275 p. 284

4(1868) I.L.R. 12 Bom. 377, p. 393