NAGPUR HIGH COURT

Bhagwati Charan Shukla

Vs

Provincial Government

(Pollock, J.)

11.04.1946

JUDGMENT

Pollock, J.

1. The short point before us is whether the article in question offends against Section 4(1), Press (Emergency Powers, Act, 1981, as tending, directly or indirectly, to bring into hatred or contempt the Government established by law in British India or to excite disaffection towards it. There is no doubt that anyone reading the article would understand it as accusing the Provincial Government of "Three years of suffering, of brutal repression, of killing, of shooting, rapes and murders". "Three years of sufferings" must, I think, be understood as meaning "Three years of inflicting suffering", for the sufferings referred to were presumably the sufferings alleged to have been suffered by the supporters of Congress at the hands of Government and not vice versa. With the truth of, or justification for such remarks we are not concerned; we have only to see whether such remarks tend to bring the Government into hatred or contempt or to excite disaffection towards it. That is what Beaumont C.J. held in 56 Bom. 472.

2. When he said at 486, The effect of the Ordinance seems to us to bring within Section 4, Indian Press Act every charge of misconduct by Government, whether such charge is well founded or not, he was dealing only with charges tending to bring the Government into hatred or contempt or to excite disaffection towards it, and the dictum, if I may say so with respect, was, I think, clearly correct. Even if Explanations 2 and 3 to Section 124-A, Penal Code, apply to cases under the Press (Emergency Powers) Act, they cannot apply when there has been an attempt to excite hatred or contempt:

> People who are so unfortunate as to be unable to advocate change in the form of Government, without attempting to bring into hatred or contempt or to excite disaffection towards the Government established by law, have not been specially favored by the legislature, either by the terms of the section itself or by the explanations. They may take their grievance, if any, to the legislature, but the section while it stands, must be interpreted according to the plain and natural meaning of its words. (Per Rankin C.J. at p. 1226 in 57 Cal. 12172.)

3. I agree that even the more credulous readers of the Nagpur Times were unlikely to suppose that these murders and rapes were committed by the Governor or his Advisers, or even by the Chief Secretary. They would no doubt gather that the charge was directed against the magistrates, police and soldiers who suppressed the disorders of 1942. "Government", however, as defined in Section 17, Penal Code, denotes more than the Governor and his Advisers; it denotes the person or persons authorized by law to administer executive Government in any part of British India. "It is possible to excite such feelings towards the Government by, an unfair condemnation of any of its services", as Shah J., pointed out in *Bal Gangadhar Tilak v. Emperor*[1], and It is quite possible, by the abuse of Government officials as officials, to make an endeavour to bring into hatred or contempt the Government established by law in British India, as Rankin C.J., remarked in *Emperor v. Satya Ranjan Bakshi*[2],

4. The magistrates, police and troops who suppressed the disorders of 1942 were the agents of the Government, and a charge against them of wholesale murder and rape could hardly fail, I should have thought, to tend to arouse hatred against the Government that employed them. It might be possible to bring forward charges more likely to arouse hatred or contempt or to excite disaffection, and there is, of course, the famous case mentioned by Gibbon in which the more scandalous charges, but not those of murder and rape, were suppressed, but it would probably require some thought to compose charges more likely to produce that effect. As, however, my learned brothers take the view that such charges do not tend, even indirectly, to have such an effect, I do not propose to pursue the matter further and I merely record my somewhat surprised dissent.

Bose & Puranik JJ.

5. This order will govern Misc. Cri. cases Nos. 126 and 127 of 1945. These are two applications under Section 23, Indian Press (Emergency Powers) Act, 1931. The applicant Bhagwati Charan Shukla is the same in both cases. In Misc. Cri. case No. 126 of 1945 he appears as the publisher of the "Nagpur Times", a daily newspaper published in English, and in Misc. Cri. Case No. 127 of 1945 he appears as keeper of the Press known as the Hindusthan Printing Works Ltd. This is the Press which publishes the paper. In each case the Provincial Government has forfeited further security deposited under the Act. In the former case the amount of the deposit was ₹ 2,000/- and in the latter ₹ 1,500/-.

6. In Misc. Cri, case No. 127 of 1945 a technical irregularity occurred which was later set right. The person who figured as the keeper of the Press before the present applicant was one Rewa Prasad Dube. He was succeeded by the applicant Bhagwati charan Shukla. On 21st November 1945 the Provincial Government forfeited the security by an order of that date. The notice was, however, issued to Rewa Prasad Dube and not to the applicant Bhagwati Charan Shukla. Dube was not then the keeper and so, of course, the notice and order of forfeiture were both open to challenge. Shukla however waived the irregularity, accepted the notice and filed the present

[1] AIR 1916 Bom 9 : 39 Ind. Cas. 807

[2] AIR 1930 Cal 220 : (1929) ILR 56 Cal 1085 : 121 Ind. Cas. 682.

application on 27th November 1945. Government later realised its mistake and attempted to regularise the position by issuing a fresh notice dated 80th November 1915 on Shukla. The

learned Advocate. General took the technical objection that the application in Misc. Cri. case No. 127 of 1915 did not lie because in so far as it seeks to challenge the notice of 21st November 1945 it is ineffective for the reason that the notice is a nullity; and as regards the second notice of 80th November 1945, it has never been formally challenged and any challenge made to it at this stage would be beyond the limitation of two months prescribed by Section 23. We are not impressed by this objection particularly as it is taken by the Crown which is responsible for the muddle.

7. The act which aggrieved Shukla was the forfeiture of his security. There was only one sum in deposit on 21st November 1945 in connection with this Press and that was the sum forfeited on 21st November 1945. The fact that it was wrongly forfeited does not lessen the grievance of the keeper of the Press. In our judgment he was entitled to apply under Section 23, otherwise, if he had taken no steps, he might have run the risk of being faced with a plea of limitation. It has to be remembered that the notice was served on Shukla as the keeper of the Press and was accepted by him in that capacity, and the forfeiture was actually made. There is only one press of that name in this Province and it has only one keeper. The notice was served on the keeper and the keeper was informed that the security of his Press had been forfeited. In the circumstances we consider that it was open to him to waive the irregularity in the entitling and to treat Rewa Prasad Dube's name as an alias for himself and to treat the subsequent notice of 80th November 1945 as surplusage.

8. Shukla was at no time informed that his deposit, forfeited on 21st November 1945, had been restored, nor is there anything to show that orders of restoration were in fact passed. On the contrary, it is unlikely that any such orders would have been passed. Government quite evidently considered the forfeiture of 21st November 1945 to be irregular and so issued the subsequent notice to regularise what had already occurred. But that hardly altered the position so far as Shukla was concerned. It was his money they were forfeiting and not anybody else's, and by reason of an irregularly worded notice they led him to believe that his money relating to his press has forfeited and that consequently publication by his Press of the paper in respect of which the order was made would have to cease. The notice of forfeiture was addressed to the keeper of the press and was accepted by the keeper and was acted on by both parties and treated as a regular and proper one. Consequently, seeing that the slip in the name has occasioned no prejudice, we are of opinion that the requirements of the law have been fulfilled and that therefore the application is competent. Section 25(1) vests this Court with jurisdiction when. "Any person having an interest in any property in respect of which an order of forfeiture has been made under etc." applies to the High Court to set aside such order. Seeing that the order here was served on the person who was the keeper of the press at the time, seeing that it was intended for the keeper of the press, seeing that it was accepted by the keeper and that it affected his press, seeing that it was acted on by both sides as if regular in all respects, and seeing that no prejudice has been caused, we are clear that the applicant had a grievance within the meaning of Section 28(1) of the Act at the date of his application, which entitled him to come before us, and it invested us with jurisdiction to entertain and investigate the complaint. Had any prejudice been caused that might have been another matter, but no one pretends that any prejudice ensued here.

9. When we come to look into the matter, we find that the forfeiture of 21st November 1945 has never been cancelled. Whether the forfeiture was wrongly made or right, the money was forfeited on that date and remains forfeited to the present day. The subsequent order of 80th November

1945 was, in the circumstances of this case, surplusage. One cannot re-forfeit that which has already been taken away unless that which was wrongly withdrawn is first formally replaced. There is nothing here to indicate that there was any such formal replacement. Accordingly the applicant was entitled to assume, and the Court is entitled to hold, that there was no replacement or cancellation and that therefore the forfeiture continued with effect from 21st November 1945 with the consequence that the order of 30th November 1945 was surplusage so far as the fact of forfeiture was concerned. It is the act of forfeiture which causes the grievance and forms the basis of the Court's jurisdiction. That act occurred on 21st November 1945 and the forfeiture has continued uninterrupted from then to the present day. Therefore this Court has jurisdiction. Turning now to the merits. The orders of forfeiture were made in respect of the following matter which appeared in the "Nagpur Times" of 19th November 1945. YOUR VOTE Three years of sufferings...of brutal repression...of killing, of shooting, rapes, murders...of ZULUMS...on THEIR part...of unshaken resolve, of unquenchable enthusiasm...on OUR part...From thousands of graves the cry comes...Remember 1942...the Baptism of fire.... The man-made famine Remember the dead, the murdered Men, women and children, Martyrs of 1942. Shall their death be vain? They call you Do not betray them Vote for Congress Vote for SALWE AND GOLE.

10. According to the Provincial Government this offends Section 4(1), Press (Emergency Powers) Act 1931. As that section contains a large number of clauses, we asked the Advocate-General at the outset to specify the particular portions of the section which, in his opinion, are attracted here. He replied that the Crown relied on Sub-clauses (d), (f) and (bb). We do not think Sub-clause (f) has any application and can exclude that from consideration. Sub-clauses (d) and (bb) are, for the purposes of this case, the same except that (bb) is wider than (d). Sub-clause (d) applies when the matter complained of tends, directly or indirectly,

> * * * * *
>
> (d) to bring into hatred or contempt...the Government established by law in British India...or to excite disaffection towards...the said Government.

11. Sub-clause (bb) applies by way of Rule 34(7), Defense of India Rules, read with Rule 34(6)(e), (all of which are called into play), when the matter is:

> Intended or is likely
> * * * *
>
> (e) to bring into hatred or contempt, or excite disaffection towards...the Government established by law in British India....

12. There can be no doubt that these are words of wide import and that unless they are applied with restraint and care, almost every criticism of Government would fall within their purview. But we think there is equally no doubt that the words have acquired a distinct legal connotation by the passage of time and that they are now almost terms of art. In saying this, we do not mean that the Act of 1931 or the Rules of 1934 are ancient but that the phrases used here are the ones employed in Section 124-A, Indian Penal Code. They are old and have been much construed by the Courts. So far as the disaffection part of the section is concerned, it was an offence to excite or attempt to excite "feelings of disaffection" to Government in the Indian Penal Code, 1860. In

1898, the section was amended, and in addition to the above, it was also made an offence to bring, or attempt to bring Government into "hatred or contempt". The substance of the offence has accordingly not altered since 1860 and 1898, and all that the modern legislation has done is to extend its scope. In the Penal Code, the matter complained of must incite or actually bring the Government into hat red or contempt etc., whereas under the modern legislation it is enough if they tend to bring or are likely to bring; also the words "directly" or "indirectly" have been added.. But none of this alters the substance of the matter. We cannot say what is likely to excite disaffection or what will tend to that unless we are clear what exciting disaffection means; and so with the "hatred and contempt". Therefore, the cases which construe these phrases in the Penal Code are to that extent relevant.

13. Now as to this the decisions have laid down certain broad rules of construction. First there is the Federal Court, by whose decision we are bound, which construe the very measures we have here. One of the rules the learned Judges lay down at p. 48 of 1942 *Niharendu Dutt Majumdar v. Emperor*[1] is that:

> The time is long past when the mere criticism of Government was sufficient to constitute sedition.... Criticism of an existing system of Government is not excluded, nor even the expression of a desire for a different system altogether.

14. Their Lordships go on to say that no one supposes that the section is to be read in a literal sense for,

> The language of Section 124A Penal Code, if read literally, even with the explanations attached to it, would suffice to make a surprising number of persons in this country guilty of sedition.

15. Now this sounds as if it is counter to the rule of construction of Statutes which their Lordships of the Privy Council have repeatedly laid down namely, that if the words of a statute are plain and unambiguous they must be given effect to. In *Wallace Johnson v. Rule*[2] their Lordships said, construing a statute of the Gold Coast Colony containing a phrase similar to the one here, that the words were "clear and unambiguous." But we do not understand the Federal Court to hold anything different. What we understand the learned Judges to say is that when the words are construed as a whole in the light of the explanation to the section, then it is clear that they are not meant to be construed too literally--in other words, they are to a certain

[1] A.I.R. 1942 F.C. 22

[2](1940) A.C. 231

extent terms of art which had already acquired a definite legal meaning before they were incorporated into the Indian Act and Ordinance. That raises another point. Are these words to be construed in the light of the explanation to Section 124A or not? There again the Federal Court held that they are. The learned Judges point out at p. 48 that the language is the same in the two cases and that therefore the meaning must be the same. They say that:

> Sedition is none the less sedition because it is described by a less offensive name; and in our opinion the law relating to the offence of sedition as defined in the Code is equally applicable to the prejudicial act defined in the Defence of India Rules.

16. The learned Judges point out that the explanations, appended to the section in the Indian Penal Code, are added to remove any doubt as to the true meaning of the Legislature; they do not add to or subtract from the section itself; and the words used in the rules ought to be interpreted as if the;; had been explained in the same way.

17. At this point we meet what seems to be an opinion to the contrary of a Special Bench of the Bombay High Court, in *In re Pothan Joseph*[3] in which judgment was delivered by Beaumont C.J., who is now a member of the Privy Council. The second explanation to Section 124A imports the element of intention into the enquiry. If the matter complained of consists of comments on the measure of Government, then, if they are made with a view to obtain their alteration by lawful means, they are not sedition, provided they do not excite or attempt to excite hatred etc. And so also regarding Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection.

18. The content and meaning of these explanations was expounded at length by Strachey J., in his charge to the jury in Tilak's case reported in *Queen-Empress v. Bal Gangadhar Tilak*[4] The learned Judge said at page 139:

> "You will thus see that the whole question is one of the intention of the accused in publishing these articles." This was upheld by the Privy Council in appeal at page 532 of the same volume of the reports *Bal Gangadhar Tilak v. Queen-Empress*[5] Beaumont C.J., however, in construing the Press Act held that:
>
> This Court is not concerned to consider the wisdom, or lack of wisdom, of a policy of suppressing criticism upon unlawful or injudicious acts of Government. We have merely to apply the law as we find it. The effect of the Ordinance seems to us to bring within Section 4 every charge of misconduct by Government whether such charge is well-founded or not.

19. As we are bound by the decision of the Federal Court we must naturally accept their interpretation of Section 4 in preference to that of the Special Bench of Bombay. But even if we are not bound we would venture with the utmost respect to dissent

[3] A.I.R. 1932 Bom. 468 [5](97) 22 Bom. 528

[4](98) 22 Bom. 112

from the Bombay view despite the eminence of the source from which it obtains. It would take a lot to convince us that the legislature--even an Ordinance-making body--ever contemplated such sweeping immunity to Government. Of course that would be no reason for not giving effect to the law if it is clear, but as Lord Buckmaster said in *Bowman v. Secular Society*[6]

> It is quite right to point out that, if the law be as the appellants contend, these considerations afford an argument for its alteration, but do not prove that it does not exist. If, on the other hand, the law is not clear, it is certainly in accordance with the best precedents so to express it that it may stand in agreement with the judgment of reasonable

men.

20. But that apart, explanations 2 and 3 to Section 4 reproduce word for word explanations 2 and 3 to Section 124-A and so we find it difficult to see how the question of intention can be excluded after what the Privy Council said in *Bal Gangadhar Tilak v. Queen-Empress*[7] It is true that the Ordinance which incorporates Clause (bb) into Section 4 says nothing about these explanations, but seeing that the object of the Ordinance was to incorporate an extra clause into the section, we find it impossible to hold that this clause is not as much governed by the explanations to the section as are the rest of the clauses when the question relates to the exciting of disaffection etc., and the tendency or the likelihood to do so. We agree with Beaumont C.J., that the Ordinance, and indeed the Press Act itself, travels further than Section 124A, but we cannot see how the explanations can be ignored, when they have not been excluded. In our opinion, the general content of the offence of sedition has not changed, and as the Federal Court says, the substance of a matter defined in precisely the same words in two Acts cannot alter simply because it is called by a different name. The contents of a given tin of fish remain the same whether they are labelled sardines, kippers or herrings, and a packet of salt does not acquire sweetness simply because it is called sugar. The only difference the Press Act and the Ordinance make is that whereas in Section 124A it is necessary to prove sedition as defined there, in the Press Act matter which "tends directly or indirectly" to incite to sedition is also included, and under the Ordinance not only when this is intended but also when it is likely to produce that result. In other words, the element of sedition remains constant in all three cases. Under Section 124A it is necessary to establish sedition itself. Under Section 4 it is enough to establish a direct or indirect tendency to sedition, and under the Ordinance a likelihood of sedition.

21. Now, of course, a man's speech or writings may be likely to produce a result, the very reverse of what was intended. To that extent the question of intention is not material. But equally matter which is patently not intended to produce a given result and is so understood by those to whom it is addressed and those who are likely to see it, is less likely to produce the result than when the intention to produce is clear. To that extent, the intention of the writer is, in our opinion material. If he intends the result he falls within the ambit of Clause (bb). If he does not intend it, then it is a question of fact whether his words, construed in the light of the attendant

[6](1917) A.C. 406

[7](97) 22 Bom. 528

circumstances, and viewed in their natural environment and surroundings, will be likely to induce sedition or tend to do so. His own intention as expressed by his words, and viewed against the background in which they are uttered, is, we think, one of the attendant circumstances and so is an element which cannot be excluded from consideration.

22. That brings us to what we think is the root of the matter. The question in all these cases is at base one of fact. The scope and content of the offence of sedition has not changed. But the meaning of words changes in the course of time and sO words which were once seditious are found not to be so in a later age, and vice versa; so also environment and circumstances change. For this reason the Federal Court tells us at p. 48, quoting Lord Sumner in *Bowman v. Secular Society*[8] that:

> The words, as well was the acts, which tend to endanger society differ from time to time in proportion as society is stable or insecure in fact or is believed by its reasonable

> members to be open to assault. In the present day, meetings or processions are held lawful which a hundred and fifty years ago would have been deemed seditious, and this is not because the law is weaker or has changed, but because the times having changed society is stronger than before.

23. Nothing can illustrate this more forcibly than the fact that in England it was treason in the year 1534 not to believe Mary illegitimate and Elizabeth legitimate; in 1536 it was treason to believe either lady to be legitimate; in 1543 the law declared it to be treason not to believe both legitimate.

24. And, in our own country, similar inversions of thought have been witnessed. In one year it is sedition to support Congress, in another, with Congress in power, it is dangerous not to support it. In our opinion all this means that at bottom the question is one of fact. The doubt is not as to what constitutes the offence in law but whether a given matter, viewed in its proper setting along with its attendant surroundings and circumstances, in fact falls within the scope of the definition. Otherwise, it would be impossible to hold, as does the House of Lords, that the same words under the same law are offensive in the eighteenth century and innocuous in the twentieth. Lord Sumner explains that....

> The fact that opinion grounded on experience has moved one way does not in law preclude the possibility of its moving on fresh experience in the other; nor does it bind succeeding generations, when conditions have again changed. After all, the question whether a given opinion is a danger to society is a question of the times and is a question of fact. I desire to say nothing that would limit the right of society to protect itself by process of law from the dangers of the moment, whatever that right may be, but only to say that, experience having proved dangers once thought real to be now negligible, and dangers once very possibly imminent to have now passed away, there is nothing in the general rules as to blasphemy and irreligion as known to the law, which prevents us from varying their application to the particular circumstances of our time in accordance with that experience.

[8](1917) A.C. 406

25. These observations were made in relation to the law of blasphemy, but in so far as the gist of that offence is, according to Lord Sumner, its danger to society, (he says, that the "gist of the offence is a supposed tendency in fact to shake the fabric of society generally"), the general considerations to be applied are, we think, not different here. This is particularly so as the Lord Chancellor, Lord Finlay, said that—

> It is difficult to see how a change in the spirit of the time could justify a
> change in a principle of law by judicial decision. Such changes in public opinion may lead to legislative interference and substantive alteration of the law, but cannot justify a departure by any Court from legal principle, however they may affect its application in particular cases.

26. And Lord Sumner emphasized that If that maxim expresses a positive rule of law, once

established, though long ago, time cannot abolish it nor disfavor make it obsolete.

27. If then the law is the same and the words complained of are the same, how can they be an offence in one age and innocent in another except on the hypothesis that fundamentally the real question in each case is one of fact and not of law? It will be observed that Strachey J. left the question of sedition or no sedition to the jury as a question of fact after he had explained the law in *Queen-Empress v. Bal Gangadhar Tilak (98) 22 Bom. 112(Supra)*, and Privy Council upheld him at p. 528. Also the Federal Court says that it is necessary in these cases for the Courts to put themselves as far as possible in the place of a jury and take a broad and liberal view. That leaves one matter outstanding. It was argued that the Federal Court has laid down in the ruling cited, that an incitement to violence is a necessary ingredient of the law of sedition, whereas the Privy Council has held otherwise in *Wallace Johnson v. Rule*[9]. Now if there is conflict between the Federal Court and the Judicial Committee in a case not arising from India, it is a moot question whether the Indian High Courts are not bound to follow the Federal Court. This is particularly so when the law which the Privy Council was considering in the Gold Coast case differs on a vital point from what we conceive to be the law in India. One of the clauses in the Gold Coast Code provides that "a seditious intention is an intention... to bring about a change in the Sovereignty of the Gold Coast." This clause is not to be found in either of the Indian Acts nor is it in the Ordinance and we think it is patent that that cannot be an offence here because the right of India to demand for itself the right to secede from the Empire has long been recognised, and its right to complete independence, if it so desires, was unambiguously conceded by the present Prime Minister on the floor of the House of Commons only the other day. There is therefore a difference in the two laws, and as the Privy Council observes, "The Code was no doubt designed to suit the circumstances of the Colony."So Also the Indian Acts and Ordinance. We doubt, however, whether that is what the Federal Court meant. At p. 50 the learned Judges say:

> This is not made an offence in order to minister to the wounded vanity of Government, but because where Government and the law cease to be obeyed because no respect is felt any longer for them, only anarchy can follow. Public

[9]1940 A.C. 231

> disorder or the reasonable anticipation or likelihood of public disorder is thus the gist of the offence.

28. Again at p. 51 they draw a distinction between violence and disorder because the learned Judges say:

> We cannot regard the speech, taken as a whole, as inciting these who heard it to attempt by violence or by public disorder to subvert the Government etc.

29. And at p. 49 they describe sedition as that which is calculated to "disturb the tranquillity of the state."

30. Now disorder merely means throwing into confusion and this can be done by non-violent means as well as by more forcible ones, and though violence may, and often does, result in the end, it is not necessary that that should be intended nor do we think it is necessary that that should be even a likely result. It is enough that there should be a likelihood of public disorder. As

the Allahabad Full Bench say in *Queen-Empress v. Amba Prasad*[10].:

> It is obvious that feelings of hatred, dislike, ill-will, enmity or hostility towards the Government must be inconsistent with and incompatible with a disposition to render obedience to the lawful authority of the Government and to support that lawful authority against unlawful attempts to subvert or resist it.

31. In our opinion, that puts the law in a nutshell. As we see it, it is not sedition merely to criticise Government however bitterly or forcibly that may be done, it is not sedition to seek its overthrow by constitutional means in order that another Government, equally constitutional, may be substituted in its place in a constitutional way. It becomes sedition under Section 124-A only when the intention or the attempt is to induce people to cease to obey the law and to cease to uphold lawful authority, and it falls under Section 4 if the matter complained of tends to produce that result or is likely to do so. When that happens on a sufficiently large scale, public disorder, whether violent or otherwise, follows. If the machinery of Government ceases to function as a whole or in any vital part, public disorder is the result; confusion, insecurity and chaos follow. We think we may at this point quote with profit Blake Odgers in the 4th edition of his book on Libel and Slander dealing with seditious libel at pp. 486 and 487. He says—

> If this is to be taken literally, all opposition newspapers commit such crime every day. Such a doctrine, it strictly enforced, would destroy all liberty of the press and is moreover in conflict with more recent dicta: The people have a right to discuss any grievances that they may have to complain of.... It is clearly legitimate and constitutional to endeavour, by means of arguments addressed to the people to replace one set of ministers by another. And the precise object of such arguments is to bring the ministers now in office into diseseem, and to alienate from them the affections of the people.

[10](98) 20 All. 55

32. We note in passing that Strachey J., who was upheld by the Privy Council, observed, in 22 Bom. 112 that:

> The offence consists in exciting or attempting to excite in others certain bad feelings towards the Government. It is not the exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small.

33. And again at P. 138...

> What that means is...that persons reading those comments would carry their feelings of hostility beyond the Government measures to their author, the Government, and would become indisposed to obey and support the Government.

34. Now applying these principles to the present case, the first thing we have to examine is, as Strachey J. said at P. 140, "the place, the circumstances and the occasion of publication." As regards the place of publication, the matter appeared in a local daily written in English with a small and distinctly limited circulation. The paper is read by those who understand English and

who therefore have a certain degree of education. It is not something scattered broadcast before an ignorant, illiterate and inflammable mob. It is ordinarily read in the quiet of the home or at a club. Then as regards the circumstances of the publication, a number of them will have to be considered. The first is that the war was at an end when the words were published on 19-11-1945. That at once means that the security of the state was not imperiled to anything like the same extent as during the stress and strain of war with the enemy literally at the gates, or striving to get there. And that, as Lord Sumner observes, in turn diminishes the tendency of articles and speeches, objectionable in times of graver peril, to endanger society when things are more normal not because the law has changed or is weaker but because society is stronger than before.

35. The next circumstance is that the matter was published at a time when Government had ordered elections to be held for the Central Assembly. Government knew that elections set loose in all democratic countries a mass of stupid rhetoric and flood of wild speeches full of empty froth and foam Billy utterances to which people as a whole do not pay over much heed. Even a British Lord Chancellor recently made allegations in the course of the recent election campaign in England for which he later publicly apologized. Government must therefore have considered that the fabric of Indian Society was strong and sound enough to withstand the repeated shock of silly speeches and wild utterances.

36. Next we must analyze what these elections meant and imported. So far as this Province is concerned, there was in power at the time what is known as a Section 93 Government. One of the objects of the elections indirectly so far as the elections to the Central Assembly were concerned, but an object nonetheless--was to overthrow or displace these Section 93 regimes and to substitute popular governments in their places. Different parties were competing for this purpose, among them the Congress Party. A popular Government would be unlikely unless one party or the other secured a stable majority. Therefore, it was legitimate to criticize these Section 93 governments in order to convince voters that unless a stable majority for a given party was returned to power Section 93 governments would continue to function. It follows that criticism of government as such was legitimate and to be expected.

37. There was, however, an even deeper issue. The elections were contested by the Congress party, in part at any rate, on what was known as the "quit India" issue. This involved the demand for the complete independence of India and therefore for the constitutional overthrow, not only of all forms of Government now subsisting in the country, but also of the present sovereignty of the land. That the demand was legitimate has been conceded by His Majesty's Government in England through the mouth of the English Prime Minister. If it is legitimate it cannot be illegal, If it is not illegal, then it is permissible to show by a process of reasoning why such a change is desirable. Only thus can democracies function; and no process of reasoning could be considered complete in such circumstances without freedom to criticize the government now in power fully, freely and fearlessly.

38. Next, what is the intention of the writer as gathered from the article? He commences by asking for "Your Vote". He ends by saying "Vote for Congress, Vote for Salwe." What is that but an appeal to the electorate to return a Congress Government to power? What is that but an appeal to resort to the use of constitutional machinery? It is very different from appeals launched in earlier years for mass, or even individual, civil disobedience for the purpose of embarrassing or paralyzing Government. It is different from appeals to resist its laws and disobey its rules. Of

course, the writer seeks overthrow of the present regime, but in that he asks that that be done through the instrumentality of the ballot box, he is within his constitutional rights. Now of course we realise that a man may preach sedition in the guise of an innocent appeal and so it is necessary to look to other parts of the article, but the fact that the article formed part of an electioneering campaign and that therefore one of the important factors governing the writer's intention was to exhort voters to exercise their constitutional rights and have resort to the ballot box cannot be lost sight of. Once we get that far, then we reach the position that the writer desires the Congress to be returned to power, which in turn means that he wants all Section 93 Governments to go. If he is entitled to ask that, then he is entitled to give his reasons, and that he does by contrasting what in his opinion occurred under Section 93 Governments with what according to him the Congress did during that period. He speaks of what happened "on their part" and contrasts it with "on our part."

39. Now here we reach a point of some difficulty. What the article actually says is that "on their part" were "three years of sufferings, brutal repression, killing, shooting, rapes and murders." The question is what does this mean and who is referred to by the word "their"? It is at this juncture that the observations of the Federal Court regarding juries will have to be borne in mind. A jury would be in a position to appreciate he background in which these observations were made, to fit them into their proper setting and view them in their correct perspective. It is, we think, clear that the words cannot be taken literally because if that were done "Three years of suffering... on their part" would mean three years of suffering on the part of Government, assuming that the word "their" refers to Government. Quite clearly that is not the meaning however much it may be true. The sufferings referred to are the sufferings of the "people" in general and of Congressmen in particular. But that deduction cannot be made from a mere perusal of the article. It is necessary to keep in mind the general background of events and to know something of the political scene in general. But if it is legitimate to do that in respect of this phrase, it is equally permissible to apply the same principles to the rest of the article. The matter is not writ ten in precise prose but purports to be a sort of poem. That it is not poetry is evident to anyone who has any sense for literature, but that it purports to be is, we think, evident. In any case, it is necessary, as we have just shown, to depart from the literal and apply the more liberal rules of construction which one uses in the case of certain kinds of poetry-in other words to make allowances for what is termed "poetic licence"--a licence not merely to exaggerate, but at times to depart from the stricter rules of grammar which correct prose demands.

40. What then was the general political scene, which a jury would have been quick to appreciate, pervading at the time? No evidence has been adduced regarding this but Judges are entitled to take judicial notice of matters which have reached the Courts--prosecutions for political crimes, of the general trend of evidence adduced for the prosecution and the defence in such cases, of speeches to which exception has been taken in the matter of disbarring and suspending pleaders, and so forth. Sarkar on Evidence, edn. 6. p. 516 quoting Wigmore, says that a Judge must be allowed of course to use his knowledge of general or public facts, historical, scientific, political or otherwise in coming to his conclusion. Where to draw the line between knowledge in notoriety and knowledge by personal observation may sometimes be different, but the principle is plain.

41. Using then our knowledge of the general political scene at the relevant time, we feel we are in a position to conclude that complaints were publicly made about this time on a comparatively large scale about incidents of rape and it was said that innocent persons had been shot down

during the disturbances in circumstances which were not justifiable. We do not state that these accusations were true--there is no proof of that here nor does it fall within the scope of an enquiry like this--but the fact that such allegations were made, and what is more important, that demands for a public judicial enquiry into the truth of the accusations were also made from time to time, and refused, is beyond dispute. We also know that these accusations were repeated on the floor of the Central Assembly and that there also demands for an enquiry were turned down. (See 1943 Legislative Assembly Debates, Vol. I P. 169-191). Now none of that proves the truth of the accusations nor does it show that a refusal to institute an enquiry was otherwise than politic and proper, but it does give rise to a right to criticize a government which pays no heed to accusations of this kind and which refuses to institute an enquiry in the face of pressing demands, and it does give rise to a constitutional right to demand a change of government particularly at a time of election.

42. We must not be understood as endorsing the wisdom or expediency of this demand any more than we endorse the truth or accuracy of the accusations. We do not say that any of this is well founded. That is not our province. All we hold, as a matter of law, is that there is a constitutional right to put forward such demands and to make such criticisms. There can be no doubt that instances of rape do occur even in settled times, sometimes by the military, sometimes by the police, sometimes by others in positions of authority. Instances can be-found in cases which have reached the Courts. *James Dowdall v. Emperor*[12] originated in trouble of this nature (see p. 217). So also an Inspector of Schools was convicted of rape, and when he was prematurely released at the order of a Congress Minister, it produced repercussions which had a profound effect on the recent Congress Government of this Province. So also with murder. *James Dowdall v. Emperor A.I.R. 1936 Nag. 103(supra)* was a prosecution for murder, and only last year this Court convicted certain Indian Military personnel of that offence. If therefore such instances can occur when times are normal and the forces of law and order are functioning smoothly, they are not less likely to occur when disturbances are rife and disorder stalks through the land. Therefore, when accusations of this kind are made on a large scale, there is constitutional justification for demanding an enquiry.

43. There is constitutional precedent for enquiries also. Enquiries have been held in the past and firing in which innocent persons in a crowd have lost their lives has not always been found to be justified, though more usually the drastic action which police and the troops are often compelled to take in times of grave disturbance is upheld and the death of innocent bystanders written off as one of the unfortunate but inevitable consequences of bloodshed, riot and disorder. When not justifiable, such killings may in given circumstances amount to murder. An English Judge whom we will quote later has also said so. Therefore, accusations of rape and murder in times of disturbance and demands for an enquiry cannot be dismissed as the wicked outpourings of a malicious mind if they are soberly made; nor, when demands for an impartial enquiry have been made and refused, can the further demand for the removal of a government which pays no heed to popular clamour be termed sedition, provided the means advocated are Constitutional. We do not say that this is expedient or wise. We do not say that Government was wrong in refusing the enquiry. We are not concerned with that. What we are concerned with is the law, and that in our opinion, wisely or otherwise, gives the subject a constitutional right to demand an enquiry when widespread allegations of this kind are publicly made, just as much as it empowers Government to refuse an enquiry. It further affords a constitutional right to call for the removal by constitutional means of a government which, however legal, proper and justifiable its acts may

be, offends popular sentiment. That is democracy. It may be fortunate or unfortunate. But that is the constitutional privilege of every citizen under the law.

44. The question now is whether the impugned article falls within the limits of constitutional controversy permitted by law or whether it travels beyond the limits which the law imposes. That of course is the only question we have to answer. But it cannot be answered without taking into consideration the background and setting which we have elaborated above. Bearing that in mind, what do the words "on their part" mean? We think it is clear that they cannot mean that Government did the killings or the shootings etc. We say that for these reasons.

45. As everyone knows, the Government under a Section 93 regime is His Excellency the Governor. He is assisted by advisers, but even so no one has yet accused either his

[12] A.I.R. 1936 Nag. 103

Excellency or his Advisers of having killed or shot anybody, and it is ridiculous to think that this was intended; nor do we think that anybody could have read the words to mean that. After all, the paper only circulates among those who can read and understand English and who have at any rate enough political education to know who runs a Section 93 Government and to realize that such persons do not go round shooting people. Everybody knows that the killing and the shooting is done by troops called out to maintain order and by the police. Therefore, the accusations made regarding the actual acts of shooting and killing are directed against the troops and the police and not against members of Government; and so also regarding the rape and murder. But of course the matter does not end there. Government is, in our opinion, being held responsible. It is being attacked. But responsible in what sense? The learned Advocate-General said that there is here a personal attack on His Excellency and his Advisers and that the innuendo is that they directly authorized the killing and the shooting and rape and murder. We do not think so.

46. As we have shown, the one word "their" has been used to cover different things, one of them being not Government, or Government officials or Government servants, but members of the Congress. In the same way, it has been used to attribute the shootings and so forth to those who actually committed the acts, and the responsibility for them to Government, but in varying degrees. One knows that when A does act X, and B act Y, and C act Z, persons often loosely say that A, B and C have done X, Y and Z. The same looseness of phraseology has, we think, been employed here, and in fact is patent in so far as it relates to the "three years of suffering." We repeat that this matter cannot be appreciated aright unless it is read in connection with the background in which the words were written and the surrounding circumstances. We have already referred to the wide-spread allegations and the demand for an enquiry which were prevalent in those years and of which we think we are entitled to take judicial notice. Now we will be more specific. We will refer to the debates in the Central Assembly. Whatever may be the view regarding our right to take in to consideration the general political situation at the time, there can, we think, be no doubt that we are entitled to take judicial notice of proceedings in the Assembly--not indeed of the truth of the facts asserted in the speeches but of the fact that the speeches were made. The official report of the Central Assembly proceedings shows that a resolution was moved on 24-9-1942. "Re. Committee for enquiry into the alleged Military and Police excesses." The reply of the Home Member Sir Reginald Maxwell to this was, among other things, that—

> the main objection to the proposal... is the disastrous effect it would have on the morale of the service concerned if an enquiry, such as has been suggested was ordered.

47. The matter was pursued five months later on 12-2-1943 when, as Mr. Jamnadas Mehta said, there had been considerable improvement in the situation in the country with the consequence that it was possible to debate the matter more dispassionately. He purported to have made personal investigations, as far as he was able, into some of the complaints regarding excesses which were brought to his notice, and he said on the floor of the House-- all the evidence we get is that whenever an excess has been perpetrated, the authorities are-most unwilling to examine it--in fact they are willing to screen it--and much less willing to punish those who have been responsible for these acts of excesses.

48. He also complained that: the police have effectively prevented me from collecting full information by terrorizing those who had cars to lend me for going to Nandurbar.

49. In another place, referring to a certain incident which he mentioned he said that the perpetrators of it "deserve nothing except hauling up for murder." These extracts are typical of the general tenor of the debate. We reproduce them, not as proof of the facts alleged in them but to illustrate the complaints and the accusations then being made throughout the country and thus to indicate the sense in which the words "on their part" were being used. They were not used to attribute shooting, killing and murder to Government, but to the troops and the police. The accusation against Government was that they were not making proper enquiries into the complaints made to them, and that in some cases they were virtually screening the offenders. It may be Government had good ground for doing so. It may be that the morale of the police and the troops at a time of dire peril with the enemy literally at the gates was of greater importance than the punishment of the few who were alleged to have committed excesses, even as it is said that it is better that a hundred guilty men should escape rather than that a single innocent man should be punished. It may be that an enquiry into these matters would have been most unwise and that it would still be unwise. It may be that the demand was wrong. It may be that the accusations were unfounded and false. It may be that there was considerable injustice in seeking an enquiry into the conduct of persons who through no fault or desire of their own were called upon to quell murderous and savage disorder, while on the other hand, the deaths of innocent passengers in trains and the sadistic burning of policemen and a Government official while still alive were glossed over in comparative silence without even the glimmer of a suggestion that that should also be investigated and the offenders brought to book. As to all that we say nothing. We are not here to judge the political issue but to set out the constitutional rights of the subject and to determine what the words complained of mean and whether the matter oversteps the bounds of law.

50. Now we have no doubt that Mr. Jamnadas Mehta and other members of the Assembly had the right to agitate these matters on the floor of the House. They did so and sought for redress according to their lights in a constitutional manner. They sought it in September 1942, and sought it again in February 1943. They did not obtain the redress they desired. Government may have been right in refusing or it may have been wrong, but the right to complain was there as also the right to bring to the notice of Government the wide-spread complaints arising from quarters which the speakers considered, and were entitled to consider, whatever others may think,

responsible. Having failed on the floor of the House, they were entitled to pursue their grievance before the electorate and make that a ground for seeking a change of Government, even a change of sovereignty. What members of the Assembly were entitled to do, others who supported them also had the right to do. The article complained of is nothing more than that. "Killing", "murder", "rape" are ugly words, but so are the facts to which they relate. If it is legitimate to demand an enquiry into the existence of such facts, it is legitimate to call a spade a spade and refer unequivocally to what is meant.

51. A reference to some English cases will, we think, be pertinent at this juncture. In The *King v. Burdett*[13] the Court was considering what in England is called a seditious libel. The nature of the attack is best given in the words of Bayley J. at p. 290. The words were uttered by Sir Francis Burdett in the course of an election campaign. Bayley J. said:

> The libel in question imports that the troops had killed men unarmed, unresisting and had disfigured, maimed, cut down and trampled on women.

52. And he added, If that were done, if unresisting men were out down, whether by troops or not, it is murder for which the parties are liable to be tried in a court of law.

53. Incidently that was almost what Mr. Jamnadas Mehta said in the Central Assembly. The Court held that the truth of the facts could not be enquired into in a case of seditious libel and they convicted Sir Francis. But that was in the year 1819 and the significance of the decision lies in Blake Odger's comment on it given at p. 487 of his treatise on Libel and Slander, edn. 4. He said writing, in the year 1905, "Sir Francis Burdett could not possibly be convicted in the present day for such an electoral address as he issued on 22nd August 1819." And this is substantially the view of the Federal Court. We have already quoted the passage where the learned Judges refer to and quote from a judgment of Lord Sumner in the House of Lords to the same effect. We confess we find it difficult to see how mere criticism of Government and its measures and acts, however strong and one-sided, and however ill-informed or ill-advised, can amount to sedition in the case of a people whose right to determine its own destiny has been conceded even to the extent of effecting a change of sovereignty if it so desires, unless the intention or attempt is to excite hatred etc., to a degree which will stir up people to disobey the laws of Government and paralyze its actions. It is, we think a matter of degree for as Blake Odgers points out, of course adverse criticism must excite disaffection of some sort; in fact that is the whole point of adverse criticism when one seeks to expel a party from power. And if it be held that only criticism of milder acts can be allowed, it would result in the position that whereas good governments could be criticized and turned out of power, bad governments which resort to excesses of the kind, for example, which the Hitler Government did, can never be criticized because their actions are themselves so evil that it becomes sedition even to mention them. That can hardly be the criterion in a free and democratic country. We cannot believe that the worse the Government and the more abhorrent its acts, the greater the protection the law affords it. We cannot think that the gravity of the subject-matter of the criticism is the true test. In our opinion, the test is whether there is an attempt to incite people to a disobedience of the laws and a flouting of rules. So long as the endeavor is to obtain redress by constitutional means we cannot see that it can be sedition.

54. Viewing the impugned article in that light we are of opinion, as a matter of fact, that it is not

seditious because its professed aim is to obtain a change of Government
[13](1821) 23 R.R. 284
through the ballot box and not to incite people to a disobedience of the laws of Government. Some extravagance of language there is, and there is the usual crude emotional appeal which is the stock in trade of the demagogue, as well as a blundering and ineffective attempt to ape the poets. But that is all. However, it is not enough to find that the writer is not guilty of sedition because we are concerned with Section 4, Press (Emergency Powers) Act which travels wider than Section 124 A. We have therefore further to see whether these words tend directly or indirectly to incite to sedition, or, in the words of the Ordinance, whether they are intended or are likely to produce that effect. We say deliberately whether the words are likely to incite to sedition because, as the Federal Court points out, the formula of words used in Section 4, as also in the Ordinance, is precisely the formula used in Section 124A, therefore to the extent of the formula the two things are the same. The only difference is that under the Press Act we have to consider not only whether there is sedition in fact but also whether the words tend, directly or indirectly, to excite to sedition and whether they are intended or are likely to produce that effect.

55. We pause to observe that here, as in the case of reasonable doubt in criminal cases, and as in the case of putting in fear of hurt in a matter of assault, we must use the standards of reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view. Using those standards we hold as a fact that the effects apprehended by the Crown and required by the section are not likely to be caused by this article, nor do the words used, viewed in their proper setting, tend to cause that effect. The paper is in English. It has a limited circulation. It is read by those who know and understand English. It is a party paper and is read mainly by persons who are politically minded. They are aware of contemporary political thought and occurrences. They realise as well as any one else that neither His Excellency the Governor nor his advisers went round shooting and killing persons. They know that these acts were done by the troops and by the police. They know that there was a demand for an impartial investigation and a judicial enquiry. They know that the demand was refused and they know that the whole complaint, so far as Government is concerned, lies there. They are therefore no more likely to attribute to Government any greater responsibility than Mr. Jamnadas Mehta and other members of the Central Assembly did. They are as much aware as the writer that the appeal is for a constitutional change of Government by constitutional means. They were not, in our opinion, likely to interpret it otherwise. Therefore, in our judgment, the article does not tend, directly or indirectly to sedition, nor is it likely to produce that result. In out view, the applications should be allowed and the orders of forfeiture set aside. The costs should, we think, in each case be paid by the Crown.
Application allowed.