
(1912) 01 MAD CK 0022

Madras High Court

Case No: None

G.G. Jeremiah

APPELLANT

Vs

F.S. Vas

RESPONDENT

Date of Decision: Jan. 1, 1912

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 342

Citation: (1912) 22 MLJ 73

Hon'ble Judges: Sundara Aiyar, J; Phillips, J

Bench: Full Bench

Judgement

Sundara Aiyar, J.

This is an appeal by the accused in C.C. No. 20 of 1910 in the Court of the District Magistrate and Justice of the

Peace, Bangalore. He was convicted of libelling the complainant by publishing in a Journal named the "" Army and Civil News"" on the 28th

September 1910 what purported to be a report of the proceedings in a civil suit in the Court of the District Judge of Bangalore. The defendant in

that suit was the uncle of the complainant, an Advocate of the Bangalore Court, who appeared for his uncle as counsel. The suit was for rent due

by that defendant for a house. The report contained the following statement:-"" His Honour facetiously remarked that the uncle, the Dental Surgeon,

(that is, the defendant in the suit) and the lawyer nephew, both combined, wanted to deprive the plaintiff of his rent by shifting the responsibility on

to the shoulders of the other nephew, the Dental Surgeon, who is now in Goa and beyond the reach of the "" arms of the civil law."" Two days after

the publication of this report a correction appeared stating that it was not ""His Honour"" that made the remark but Mr. Saldanha, the counsel for the plaintiff in the suit.

2. At the trial in the lower court the accused maintained that, notwithstanding the mistake mentioned above, the report was substantially correct

and that it was a privileged statement made without malice. The lower court held on various grounds that the report was not substantially correct

and further found that it was extremely improbable that the remark was made at all by Mr. Saldanha and that there was evidence of malice in the

tone of the report and of the correction notice.

3. On appeal the contention that the report was substantially a correct one was repeated ; but I have no doubt that no privilege can be claimed for

a mistake so palpable as the one that was admitted in this case and that the publisher published the statement attributed to the Civil Judge at his

own risk. The main contention in the appeal is that there is no legal evidence in the case that the accused published the libel complained of, and that

the prosecution altogether failed to adduce evidence that the accused published the issue of the 28th September 1910 of the ""Army and Civil

News"" in which the libel appeared or that he was the publisher of the journal known by that name. This contention I find to be well founded. A

copy of the issue of the paper containing the libellous statement was put in. Besides this, the only evidence of publication by the accused given after

the accused appeared before the court, was the, statement by the complainant in examination-in-chief "" I have complained about the article marked

Exhibit A in the "Army and Civil News" which appears to be printed and published by Mr. G. G. Jeremiah."" This does not amount to a definite

statement"" either that the accused published the article in question or that he was the editor and publisher of the journal, whether the sentence, as

contended by Mr. Osborne, means only that the particular issue of the journal put in bore the statement that it was printed and published by Mr.

Jeremiah, or whether, as contended by Dr. Swaminathan, the article or the journal appeared to the witness to be one printed and published by

Jeremiah. In the petition of complaint put in by the complainant it is stated that the accused reported the case in the "" Army and Civil News."" The

complaint was no doubt sworn to by Mr. Vas, the complainant. But the statement was not made in the presence of the accused and could not be

taken as evidence against him. There is no explanation, given why it was not repeated in the complainant's deposition at the trial. It is contended

that the accused never denied that he was the printer and publisher of the ""Army and Civil News,"" or that he published the issue of the 28th

September 1910 containing the libelous statement, and that as a matter of fact he admitted the fact before the lower court in the written statement

put in by him. But I am unable to find any such admission in that statement. Paragraph No. 3 thereof says "" what was published was a substantially

true report without any malicious intention."" There is no admission here that it was the accused that published the statement. It is in all probability

true that the accused did not deny that he published the libel. This is not sufficient. It is incumbent on the prosecution affirmatively to prove that the

defendant published the libel complained of, as that was one of the essential facts necessary to establish the guilt of the accused. It is unnecessary

to consider whether, if such admission were contained in the accused's written statement that would relieve the prosecution from the defect in

letting in evidence of publication. Mohiain Abdul Kadir v. Emperor ILR (1903) M. 238 Emperor v. Chinnapayan ILR (1906) M. 372; Basanta

Kumar Ghattak v. Queen Empress ILR (1898) C. 49 are authorities in support of the appellant's contention that such an admission by the accused

made in answer to questions put by the court u/s 342, Criminal Procedure Code, could not be utilized by the prosecution to fill up a gap in its own

evidence. No doubt an admission by the accused may be proved in a criminal case just as much as an admission by the defendant in a civil suit u/s

21 of the Evidence Act. But an admission under that section is one made by the party against whom it is tendered before the proceedings in which

it is sought to be given in evidence. It does not refer to pleadings in the case or to an admission contained in such pleadings. The accused in a

criminal case may plead that he is guilty or not guilty. See Sections 255 and 256, 271 and 272, Criminal Procedure Code. But there are no

pleadings in a criminal case similar to those in civil proceedings which are conclusive against the party making them. The prosecution has to prove

all the facts necessary to constitute the offence charged against the accused. If it fails to do so, no charge could be framed at all against the accused

in a warrant case, and in sessions cases the court should, when the case for the prosecution has been closed, acquit the accused where no

evidence of any of the links necessary to establish the offence has been adduced by the prosecution. It is clear, therefore, that the appellant's

omission in his written statement before the lower court to deny the publication, or any inference of his intention not to deny it, cannot be urged by

the prosecution in answer to the appellant's contention of no evidence of publication. It is contended that u/s 81 of the Evidence Act the court is

bound to presume the genuineness of every document purporting to be a newspaper or a journal, and that inasmuch as Exhibit A in the case bears

the name of the accused as the printer and publisher, the presumption of its genuineness would include a presumption that the accused is the printer

and publisher of Exhibit A, and that therefore it was unnecessary for the complainant to let in any evidence of the publication of Exhibit A by the

accused Mr. Osborne for the appellant contends that the section applies only to public documents, and that in any event it provides only that the

court should presume that a document purporting to be a newspaper or journal is that it is the particular newspaper or journal and not that it was

printed or published by a particular person. His first contention appears to be supported by a note of Messrs. Ameer Ali and Woodroffe in their

Commentaries on the Evidence Act, 4th Ed., p. 425, that the section refers to public documents, but it is very doubtful whether the language of the

section supports it. If punctuation may be taken to throw any light on the question, the existence of a comma after the word "Journal" is against the

appellant's contention. Even otherwise, the natural import of the words of the section does not appear to favour the view that the phrase "" printed

by the Queen's printer"" not only qualifies the expression "" private Act of Parliament,"" but also "" newspaper or journal."" It is, however, unnecessary

in this case to discuss the question further, as I am of opinion that the presumption of the genuineness of a newspaper does not include a

presumption that it was printed and published by the person by whom it purports to be. Such apparently is not the English law. According to that

law the proper way to prove the publication of a libel, where evidence is not given that a particular paper complained of was published by the

accused, is to prove the statutory declaration made by the accused that he is the printer and publisher of the journal in question. In *Gathercole v.*

Miall (1846) 15 M. & W. 319 the plaintiff sought to prove that the defendant published several copies of a newspaper called the ""Nonconformist.

That the defendant was the editor and publisher of the journal of that name appears to have been admitted. The plaintiff's object in proving the

publication of many copies was to show the extent of damages sustained by him. A person of the name of Brookes was called, who stated that he

was the president of a literary association Consisting of 80 members, that he saw at the institution office a copy of the issue in question, that he

believed that the copy had been lost or destroyed, that he believed it to have been a copy of the paper produced in evidence and bore the same

heading, namely, "" Nonconformist,"" and that it contained the libellous article complained of. Objection was raised to the reception of secondary

evidence of the contents of the paper that the witness had seen. Parke. B was of opinion that, as the defendant had been proved by the regular

satisfactory evidence to be the printer and publisher of the paper, the witness's evidence that the copy he saw was similar to the one produced in

court was sufficient to show that it was published by the defendant. The learned Judge observed: "" There was general evidence that it was a paper

called the "" Nonconformist"" containing, according to the best of the witness's recollection, the libel, the subject of the action. I thought that was

ample evidence to show that one of the copies of the newspaper, of which the defendant was the publisher, and of which of course he did not print

one copy but many, had been sent by some person not the defendant, to that room."" Pollock C.B. observed: "" But then it is said that this paper is

not proved to have been issued by the defendant ; that is a question entirely for the jury ; and I think there is evidence to prove that this was one of

the copies printed at the same time with the libel which is laid before the jury. It is not like the publication of a written libel. The jury must be aware

that many copies of a newspaper are issued at the same time and they are issued for the purpose of publication and distribution. No doubt a

suggestion may be made that the plaintiff in order to enhance the damages may have procured some papers to be printed. The jury are to consider

whether that is a reasonable suggestion or not. There was some evidence for the jury to consider ; and I think the reasonable conclusion is, that this

paper was originally issued by the defendant."" Alderson B. said: ""Now we must consider what the nature of the instrument is It is a copy of the

newspaper. We must use our own common sense, and remember that with respect to newspapers, not one copy, but a great variety of copies, are

published for general circulation among the public at large. If you compare the instrument in one or two parts and find the one is an exact copy of

the other, you would have no difficulty in saying it was printed from the same materials and from the same type. So I say here with respect to a

newspaper: if you find it in general corresponds, it is evidence from which the jury may infer that the newspaper is printed from the same type as

the paper which is produced ; and if so, it is printed by the defendant." It will be observed that in that case it was proved that the defendant was

the publisher of the journal called the "Nonconformist.", Proof was given that one copy of the issue in question produced before the court was in

fact issued by the defendant. Some similarity between that copy and the copy seen by the witness (Mr. Brookes) was also proved by him. It was

held that this was evidence sufficient to go to the jury that the copy seen by the witness was also published by the defendant. In my opinion the

object of Section 81 of the Evidence Act, taking it to refer to every newspaper, is to dispense with evidence of two out of the three facts proved in

that case provided the first is proved, viz., that the defendant is the publisher of the newspaper. The court is then to presume that what purports to

be a newspaper of a particular name is that paper, and that every copy of it was issued by the publisher of that paper. According to Section 7 of

Act XXV of 1867 the production of an authenticated copy of a declaration made under that Act is admissible to prove that the person mentioned

in the declaration is the publisher of the journal to which the declaration relates. Section 81 would apparently authorise and require the court to

presume that any document purporting to be a copy of the journal in question is in fact such and this would prove that the declarant under Act

XXV of 1867 is the publisher of the paper produced in court. The case of R. v. Forsyth (1814) R. & R. 274 would seem to show that the

presumption extends no further with regard to the London Gazette, which also is to be presumed to be genuine u/s 81 of the Evidence Act. The

reporters say : " The Judges seem to think that the production of the Gazette would be sufficient without proof of its being bought of the Gazette

printer, or where it came from." In an earlier case, Watts v. Fraser (1837) 7 Ad. & E. 223 deposit of a copy of a newspaper at the stamp office as

required by the statute is not sufficient evidence that others of that kind were circulated. This is not in accordance with the view taken in *Gathercole*

v. *Miall* (1846) 15 M. & W. 319. In *WIGMORE* on Evidence, Vol. III, Section 2150, the learned author says with regard to the mode of proving

the defendants' publication of a newspaper: "" Here the process would be to bring home to him the issuance on that day of a certain copy (either by

the testimony of one who bought at an office proved to be the defendant's or by some statutory method) ; then the identity between that copy and

the one read by the person to whom it is complained to have been communicated will suffice as evidence that the two issued from the same press,

i.e., from the defendant's."" Again the learned author says in 2151 : "" The intolerable inconvenience of having to prove the genuineness of printed

matter purporting to be published by the Government has led to a general concession, by judicial decision or by statute, that such purporting

publications, at least when in the form of the standard official documents constantly issued and referred to, are to be assumed genuine. Two

principles, however, are in fact usually involved, first, the admissibility of a copy proved to be printed by official authority, as hearsay evidence of

the contents of the original, and, secondly, the presumption of genuineness of a particular printed document purporting to be of such official origin.

The two questions are seldom separate, either in decisions or in statutes."" The author points out in a note that the distinction was recognized in *R.*

v. *Forsyth* (1814) R & R. 274. already referred to. The question whether the copy of a Government Gazette or any other publication can be

treated as evidence of the contents of the original is not one relating to the proof of documents but to the admissibility of secondary evidence. The

other sections contained in the chapter headed "" Presumptions as to Documents"" seem to support the same conclusion. Section 87 provides, in the

case of certain books produced in evidence, that ""the court may presume that they were written and published by the person and at the time and

place by whom or at which it purports to be written or published."" Section 90 provides specifically that where a document purporting or proved to

be 30 years old is produced from proper custody, the court may presume the signature and every other part of such a document which purports to

be in the handwriting of any particular person, is in that person's handwriting and in the case of a document executed or attested that it was duly

executed and attested by the persons by whom it purports to be executed or attested. Section 81 does not expressly lay down that the court is to

presume that a document, purporting to be a newspaper was printed and published by the person by whom it purports to be. Section 79 provides

for a presumption not only that certain certificates or certified copies are genuine but also that the officer purporting to sign or certify held that

character when he signed or certified. Section 80 also makes a distinction between the genuineness of a document and the truth of the statements

as to the circumstances under which the record or memorandum to which that section relates was made. Section 7 of Act XXV of 1867 expressly

provides the mode of proving that a particular person is the printer and publisher of a newspaper. On the whole it appears to be clear that the

complainant cannot ask the court to presume that the appellant is the printer and publisher of the ""Army and Civil News."" He could easily have

proved the fact by producing a copy of the ""appellant's declaration made under Act XXV of 1867. He failed to do so. The result is that the

appellant's contention that there is no legal evidence to prove the publication of the libel must be upheld, and the conviction of the appellant cannot

be sustained.

4. Dr. Swaminadhan who appears for the complainant asks us to direct additional evidence to be taken u/s 428, Criminal Procedure Code. But, in

my opinion, that section does not enable us to do so in this case. It provides that "" the appellate court, if it thinks additional evidence to be

necessary, shall record its reasons and may either take such evidence itself or direct it to be taken, etc."" It requires that the appellate court should

consider additional evidence to be necessary. The language seems to indicate cases where, there being already evidence on the record, the court

considers it to be unsatisfactory or where the evidence on record leaves the court in such a state of doubt that it considers it necessary to enable it

to decide the case to have further evidence. See the case of Woodoy Chand Mookhopadhyaya (1872) 18 W.R 31. At any rate it does not appear

to be applicable where the prosecution having had ample opportunities to produce evidence has failed to do so, No reason is given in this case

why evidence of publication of the libel was not given. The prosecutor had no right to expect the accused to waive the proof of any fact, assuming

that such waiver could be availed of by him. Moreover the case is not one in which I can say the interests of public justice would justify the use of

the provisions of Section 428, Criminal Procedure Code. I must therefore decline to accede to Dr. Swaminadhan's request.

5. It remains to consider what is the proper order to pass in the case. It appears to me that this is not a proper case for directing a retrial. Section

423, Criminal Procedure Code, provides that in an appeal from a conviction the court may ""reverse the finding and sentence and acquit or

discharge the accused or order him to be retried by a court of competent jurisdiction subordinate to such appellate court or committed for trial.

An order for retrial would be proper where the trial was illegal, irregular or defective. I agree with the Calcutta High Court that the power to direct

a retrial is not confined to cases where the trial was held by a court having no jurisdiction. See Kumudini Kanta Guha v. The Queen-Empress ILR

(1900) C. 104 where it was held by Prinsep and Handley JJ. that a retrial may be ordered where the trial is held to be illegal on the ground of

misjoinder of charges. A retrial would be proper also where evidence is improperly rejected by the lower court or where, though the accused was

rightly acquitted of one offence, the appellate court comes to the conclusion that he ought to have been tried for another offence. Such an order

may also be made in every case of irregularity in the trial; such as where persons who ought not to have been tried together have been so tried. It

would seem to be necessary that the court should come to the conclusion that the trial was not held properly for some reason or other. It appears

not to be enough that the prosecution by its own negligence failed to produce evidence which it was its duty to do. In a case similar to this the

learned Chief Justice no doubt ordered a retrial, but the question whether he could do so does not appear to have been considered.

6. In the result I would acquit the accused and direct that the fine, if paid, be refunded.

Phillips, J.

7. I agree with my learned brother that for the reasons given by him the conviction should be set aside, but I do not agree that the appellant should

be acquitted. If publication of the libel can be proved, and in this case there is not likely to be any difficulty in proving publication, the appellant is

certainly guilty of defamation, and I do not think that in this case he should be allowed to escape the consequences of his misconduct, if he is really

guilty. No doubt the prosecution could have adduced additional evidence and we see that a witness had been summoned to prove that the accused

published the newspaper in question, but was not examined. For what reason he was not examined there is nothing on record to show, but it does

appear that the District Magistrate thought that a prima facie case of publication had been made out against the accused, for he framed a charge on

the evidence on record. Whether the District Magistrate acted on the complaint or on Exhibit A one cannot say, but he was satisfied that a prima

facie case of publication had been made out. We have found that in that view he was mistaken, and therefore seeing that the court itself was

mistaken as to the sufficiency of the evidence on record I think that additional evidence is necessary in this case in order that the accused's guilt or

innocence may be determined. Section 428 of the Criminal Procedure Code merely says that evidence may be taken when ""necessary,"" and in

each case the necessity must be determined on the particular facts of the case. The evidence is, I think, necessary in this case. I can find no case in

which this court has held a view contrary to the one I now hold, and in a case very similar to the present the learned Chief Justice ordered a retrial

Mohideen Abdul Kadir v. Emperor ILR (1903) M. 238. I would adopt the same course unless I thought the taking of additional evidence would

be a more convenient mode of disposing of the case. I would therefore ask the District Magistrate to record additional evidence on the question of

publication and certify it to this court.

8. On reference to a third Judge on account of this difference of opinion A, Mr. Justice Benson before whom the case was posted made, on the

30th October 1911, the following.

9. Since this case was referred to me for decision u/s 429, Criminal Procedure Code, it has been made clear by the affidavit of the complainant's

counsel in the Magistrate's court and by the report of the Magistrate that the prosecution was prepared to adduce evidence of the publication of

the libel, but that when counsel proceeded to adduce his evidence the Magistrate intervened and stated that it was unnecessary, the matter being

already proved by the production of the newspaper and that to adduce the evidence of the clerk to prove the declaration by the accused under

Act XXV of 1867 would only be wasting the time of the court.

10. In these circumstances I think the case is one in which retrial may properly be ordered or in which the court may properly call for evidence u/s

428, Cr. P.C, on the question in regard to which the Magistrate, in effect, improperly refused to take the evidence which the prosecution

attempted to adduce. The accused's counsel deprecates a new trial owing to the delay and expense involved, and, of the two courses, prefers that

additional evidence should be called for. I also think this will be the most convenient course. I will therefore direct the Magistrate to take such

further evidence in regard to the alleged publication of the libel as either party may adduce and certify the same to this court as soon as

conveniently may be

11. After the receipt of the additional evidence, Mr. Justice Benson delivered the following.

12. The additional evidence, now recorded proves that the accused did publish the libel complained of He is, therefore, clearly guilty of the offence

charged. Looking to all the circumstances of the case as set forth in the Magistrate's judgment I do not think the sentence of fine of Rs. 300 is

excessive. I dismiss the appeal.