

(1878) 06 CAL CK 0018

Calcutta High Court

Case No: None

In Re: In the matter of
the petition of Shibo
Prosad Pandah

APPELLANT

Vs

RESPONDENT

Date of Decision: June 13, 1878

Acts Referred:

- Evidence Act, 1872 - Section 105
- Penal Code, 1860 (IPC) - Section 499

Citation: (1879) ILR (Cal) 124

Hon'ble Judges: Prinsep, J; Markby, J

Bench: Division Bench

Judgement

Markby, J.

The defendant in this case has been convicted and sentenced to simple imprisonment for two months by the Joint Magistrate of Balasore u/s 500 of the Penal Code of defamation, and he has applied to us to set aside the conviction and sentence as illegal. The defamation charged is contained in a petition to the Magistrate of Balasore, in which the defendant stated that Harnarain Mahapattur and others were preparing to bring false charges against him, and it was upon Harnarain Mohapattur's complaint that the allegations in this petition were injurious to his character that these proceedings were instituted. The defendant at the trial tried to prove that the allegations in the petition were true, and he called several persons who swore that they had heard conversations between Harnarain Mohapattur and other persons in which Harnarain Mohapattur had expressed his intention of getting up false charges against the defendant, and they had reported these conversations to the defendant. The Joint Magistrate convicted the defendant, but he does not state clearly in his judgment whether he disbelieves the witnesses when they state that they told the defendant these conversations took place, or only

when they state that these conversations did in fact take place: but he finds that the defendant did not act with good faith when he filed the petition. The Sessions Judge seems to consider that the only question is whether the defendant acted in good faith when he presented the petition; upon this point he considers what he has called "the English practice" more consistent with logic and the principles of criminal jurisprudence, but thinks that he is barred by a judgment in a case decided by Phear and E. Jackson, JJ. (14 W.R. Cr. Rul., 27) from following the English practice. I presume that what the Judge means by "the English practice" is a presumption that the defendant acted bona fide until the contrary is proved. I do not think that any Judge with a reasonable amount of common sense, and apart from any special statutory provisions, would doubt as to what course he ought to pursue in such a case. The course taken by the defendant was, if not a very unusual one, at least one which is not warranted by the law. The imputation made was a very serious one, and it was made in a very public manner. When, therefore, the complainant denied upon his own oath or by credible witnesses that the imputation was true, it would, I think, be proper to call upon the defendant to show that he had some reasonable ground for making the imputation, either by showing that the imputation was true, or that, if false, he had reasonable ground for believing it was true, looking to the source from which the information was obtained. But the matter has been dealt with by the Legislature and by provisions which are by no means altogether easy to comprehend.

2. The Penal Code contains a chapter relating to what are called general exceptions, such as mistake, infancy, lunacy, intoxication, consent, the right of private defence, and so forth. Certain sections of the Code also contain exceptions, some of which modify the definition of the crime, and others modify the punishment or show that it is not applicable.

3. The first Code of Criminal Procedure provided (Section 235) that it should not be necessary in a charge to allege circumstances showing that the case did not come within any of these general exceptions; also that it should not be necessary to allege, even generally, that the case did not come within those exceptions, but that every charge was to be understood to assume the absence of all such circumstances. By Section 237, "when the section referred to in the charge contains an exception not being one of such general exceptions, the charge shall not be understood to assume the absence of circumstances constituting such exception so contained in the section, without a distinct denial of the existence of such circumstances". These provisions, it will be observed, in terms contain rules of pleading only. Whether they would in any way affect the evidence to be adduced in support of the charge is a question of difficulty. Subsequently Act XVIII of 1862 was passed, which provides by Section 26 "that absence of circumstances bringing the case within the general exceptions under the Penal Code need not be alleged, but proof of their non-existence may be given by prosecutor if accused give evidence of their existence". Section 27 provides "that in indictments for defamation, where

defence is made under certain exceptions to Section 499 of the Penal Code, good faith is to be presumed". These provisions, it will be observed, apply both to pleading and evidence. Apparently they were only intended to apply to the Supreme Court. After this, Act I of 1872, Section 105, provided, "that when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances". The former Code of Criminal Procedure containing the provisions abovementioned has been repealed, and the new Code of Criminal Procedure does not contain any analogous provisions; but from Section 139, Illustration (a), it may be inferred that the absence of all general exceptions is to be assumed as before without allegation, and that the averment of the absence also of some other exceptions is to be assumed, but whether this applies to all exceptions is not clearly stated. It affects, however, only the statement of the offence in the charge, and the rule of evidence must, I conceive, in the Mofussil Courts be governed entirely by Act I of 1872, Section 105. At first sight, therefore, it would seem that the law upon this subject is directly the reverse in the Presidency-towns to that which is in the mofussil, unless the provisions of the Evidence Act override the provisions of Act XVIII of 1802, Sections 26, 27. I should very much doubt whether so sweeping a rule as is contained in Section 105 of the Evidence Act will be found to work well in all cases. But in the present instance the law in the Mofussil Courts is apparently that which common sense seems to me to teach, namely, that in a case of this kind the Court had a right to call upon the party making the imputation to show that he has some reasonable ground for making it.

4. It appears to me, however, that in this case the defendant did show reasonable grounds for making the imputation. He had been long at enmity with Harnarain Mohapattur; he had been falsely accused in 1868 and he had left the district; subsequently he returned on an assurance from some officer of Government that he would not be molested. He was again falsely accused in January of this year, and there is reasonable ground for believing that Harnarian Mohapattur was connected with all these accusations. Very soon after the last accusation, the defendant presented the petition which is the foundation of these proceedings. The defendant is probably a timid man, and nothing is more likely than that these conversations were got up expressly with the object that they might be reported to him, and so frighten him away again from the neighbourhood. This appears to me to be the true point of view from which this case had to be looked at. The Sessions Judge seems to have rather looked upon the question before him as one of law, whereas to my mind it is one purely of fact. In my opinion, the judgment of the Sessions Judge is erroneous in law in that he has not considered the true question which arose for his determination, but I do not think it necessary to send the case back. I have no doubt whatever that the defendant ought to have been acquitted.

5. The conviction and sentence of the Joint Magistrate will be set aside.

Prinsep, J.

6. One Shibo Prosad Pandah appears to have get involved in disputes with his zamindar and some of his own relations, which led to two cases being brought against him in the Criminal Courts. These were dismissed. He then presented a petition to the Joint Magistrate of Balasore on 14th December, stating that he had been informed, and had good reason to believe, that his enemies were conspiring together and would shortly bring some false charge of a serious nature against him. It does not appear that this petition was filed with any intention except to give general information to the Magistrate, and it should therefore have been returned by that officer. Harnarain Mohapattur, a mukhtear's mohurir, who was one of the persons named in that petition, at once took advantage of his knowledge of the Penal Code, and brought a charge of defamation u/s 500. There can be little doubt that the petition does prima facie amount to defamation as defined in Section 499. The Magistrate, in dealing with this case, required the accused to prove his allegation that the imputations were true, and finding that he had failed in this and also to prove "good faith" so as to bring himself within exceptions 8 and 9 to 8. 499, the Magistrate convicted the accused and sentenced him to simple imprisonment for two months, and to a fine of Rs. 150, or, in default of payment, to imprisonment for another month. The Sessions Judge of Cuttack dismissed the appeal, holding that the accused had failed to prove good faith, so as to get the benefit of exceptions 8 and 9, and agreeing with the Magistrate in thinking the evidence of the witnesses for the defence false.

7. Mr. Branson, who appears before us sitting as a Court of Revision contends that, as laid down in Act XVIII of 1862, Section 27, "good faith" should have been presumed unless the contrary appeared; and next, that neither the Magistrate nor the Sessions Judge had considered whether the accused had been informed by his witnesses, persons of respectability, of this conspiracy against him, and so had good reason for believing that information; but that they had rather only considered whether these witnesses had themselves heard the use of threats of injury to the accused. In order to understand rightly the first objection, it is necessary to consider the course of legislation. The Penal Code (Act XLV of 1860) has since 1st January 1861 been law throughout British India, and applies equally to Presidency-towns within the jurisdiction of the Supreme Courts or of the High Courts in their Original Criminal Jurisdiction as to Mofussil Courts without that jurisdiction. At the same time, Act XXV of 1861 prescribed a Criminal Procedure for all Courts except those in Presidency-towns.

8. The Penal Code contained a chapter of general exceptions to offences (Chapter IV), and for certain offences (one of which is defamation) special exceptions were provided. The Code of Criminal Procedure made special provisions for these exceptions and the burden of proof to establish any of them. The effect of Sections

235 and 236 was that it was for an accused person to establish the existence of any of the general exceptions; while Section 237 provided that if the charge denied the existence of any of the special exceptions to an offence; the absence of circumstances constituting such exception was to be assumed. This was the state of the law without the Presidency-towns until the Evidence Act I of 1872 and the Code of Criminal Procedure of 1872 were passed, when Sections 235 and 237 were repealed with the rest of that Code, and in their place a. 105 of the Evidence Act was enacted, which threw the burden of proof on the accused to prove the existence of any general or special exception. Act XVIII of 1862, which came in force on 1st of May of that year, laid down the procedure on several points for High Courts in the exercise of original Criminal jurisdiction, and Section 26 of that Act laid down a rule similar to that contained in Sections 235 and 237 of the Code of Criminal Procedure of 1861. But Section 27 declared that, "on proving the existence of circumstances to a defence under the 2nd, 3rd, 5th, 6th, 7th, 8th, 9th or 10th exception to Section 499 of the Indian Penal Code, good faith shall be presumed unless the contrary appears." It is remarkable that though the greater portion of Act XVIII of 1862 was repealed by Act X of 1875, and though Section 26 of Act XVIII is identical with Section 105 of the Evidence Act of 1872, both Sections 26 and 27 still remain law. Act XVIII of 1862 was passed, so its preamble sets forth, pending the preparation of the Code of Criminal Procedure for Her Majesty's Supreme Courts of Judicature, and it therefore applies only to such Courts. The provision contained in Section 27 does not extend to Mofussil Courts, and I am not prepared to concede that what is expressed law for one set of Courts must necessarily be the law for another set. For some reason or other, the Legislature thought proper to make this provision for the Supreme Courts, or what are now the High Courts, in the exercise of their original criminal jurisdiction; but it is clear that this is not the law elsewhere in British India. I observe that this has been so held by the Bombay High Court in the case of *Reg. v. Kikabhai Parbhadas* (9 Bom. H.C. Rep. 451).

9. The question then remains, has the accused shown that he acted with good faith (that is to say, with due care or attention to Section 52, Penal Code) in making that petition to the Magistrate? It appears to me that this point has not been properly tried either by the Magistrate or by the Sessions Judge on appeal. The Magistrate confined his attention to determining whether the allegation of conspiracy was true, instead of finding whether the accused was told of it by his witnesses, and consequently had good reason to believe that it was true, unless we are to understand from his judgment that because the Magistrate did not believe the statements of the witnesses as to the existence of the conspiracy, the accused could have no sufficient reason for believing them, and therefore that he did not act on good faith, i.e., with due care and attention, in believing the mode of those persons' statements. I do not think that I should be justified in placing this construction on the Magistrate's judgment. The Sessions Judge seems to have indulged himself in theoretical speculations, instead of applying himself to a consideration of pure

questions of facts; and at the conclusion of his judgment he briefly endorses the conclusions of the Magistrate. For these reasons I am of opinion that the conviction and sentence as they stand cannot be maintained, and that the real question at issue has never been tried; but I do not think that it is necessary that this trial should be continued, since the facts seem to me to show that the accused, a comparatively ignorant and timid man, has been much harassed by the complainant in this case, a mukhtear's clerk, and others of superior intelligence and knowledge of the law, and though he would seem to have acted in a somewhat unusual manner in presenting this petition to the Magistrate, I have little doubt that he acted with a desire to protect himself by an appeal to the Magistrate, rather than to injure others; and I would remark that the Magistrate would have acted more properly had he refused to take the petition which has given rise to the present proceedings.

10. I therefore agree in setting aside the conviction and sentence.