[APPELLATE CRIMINAL JURISDICTION.]

1872.
Dec. 5.

REG. v. KIKA'BHA'I PARBHUDA'S.

Defamation—Charge—Strictness of proof—Powers of High Court as a Court of revision.

In framing a charge of defamation under Act XXV. of 1861, it is not necessary to negative the exceptions contained in Sec. 499 of the Indian Penal Code.

It is not an error in law for a Judge to require a person accused of defamation to prove the several distinct imputations contained in a libellous article published by him, with the same strictness with which he would be required to prove them if he were the defendant in a civil action.

The High Court, as a court of revision, cannot interfere with the findings of the lower appellate court on questions as to the truth of the allegations contained in a libel or the *bonâ fides* of the accused, but upon such questions are bound by the findings of the lower court.

THIS was an application for the exercise of the court's extraordinary criminal jurisdiction.

The accused, Kikábhái Parbhudás, the Editor of the *Guzerat Mitra* newspaper, was convicted of defamation by Mr. Jaggjivandhás Khusáldás, Magistrate Full-power at Surat, and sentenced to pay a fine of Rs. 500, or in default of payment, to undergo simple imprisonment for five months. From this conviction and sentence, Kikábhái Parbhudás appealed to the Session Judge at Surat (W. H. Newnham), who reduced the fine to one hundred rupees and the imprisonment in default of payment to one month's simple imprisonment.

The facts of the case were as follows:—

In the *Guzerat Mitra* of the 1st of October 1871, there appeared a communicated article, which, when translated, ran thus:—

RAILWAY POLICE.

With regret it is to be written that the police employed in the railway for the protection of the people and prevention of offences now-a-days, forget their duty, commit and abet offences.

We hear of many instances, and also personally notice them here, of numerous police peons themselves committing thefts of goods arriving at

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the station, or of abetting the same, and of many of them being arrested and punished. They do not only commit thefts or abet them, but ill-treat passengers in a great many ways. If any poor villager or ignorant person go on, after leaving the train and delivering his ticket, with a somewhat heavy bundle, a peon immediately stops or seizes him, and says, "Come, fool, where are you running with such a large bundle. It must be weighed and paid for." The poor and ignorant villager does not know the rule or practice, and thinks in his mind, what will be done after the bundle is weighed, and in a confounded state of mind from the appearance of a harsh messenger with a dark coat says, "Meeya-Saheb, its contents are not heavy, let me go, I am a poor man. What will be the amount of fare?" The Meeya-Saheb then observes: "Tell the truth. Are you a poor man?" That man says, "Yes, Sir." Meeya says, "The fare will amount to 10 or 12 annas, but from your appearance I pity you, so pay me 6 annas and I will settle everything." The poor man then takes out about two annas from his pocket. The Meeya Saheb then speaks thus: "Favour is not accepted with gratitude. I am going to settle the brother-in-law's 12 annas' work for 6 annas, when he offers 2 annas. Don't you understand that that master, seeing your bundle, sent me to get it weighed and to recover the fare, and what answer can be given to him about the matter?" Thus a quarter or half a rupee or two annas are extorted. In the same way, the ignorant parents of children under the age of 3 years, in case there is no ticket, are threatened, and small bribery is extorted from them for self-use. Many instances of the kind are seen. One recent instance is given. Last Sunday when the first train was to start from this place for Bombay, a Bania was coming down from the upper part of the station, and a Mussalman with a white coat and white cloth about his head was sitting at the gate down stairs. The latter stopped the former and required him to produce a pass, but he replied that he had no pass. The Mussalman said that a pass worth 2 annas must be given. The Bania asked him whether he required this knowing who he was, or without knowing anything, and told him who he was and that no pass or pice would be given to him. On hearing this, the Meeya-Saheb was offended, and observed, "I know you, you are come as a big Sowkar. Your pride will now be entirely exposed." He then called 2 or 3 peons, who were stopping at a distance, and said to them: "Arrest this man. He went up without a pass and was now running away." The Bania said that he was a Company's servant, and asked whether he was to be allowed to go or not. Fakirbhái (beggar) then said that although the Bania was servant of the Company or their father, he would not let him go without a pass. The Bania was really a servant of the Company, and he went up and informed another officer of the Police of the above, and he came down and allowed him to go, but said nothing to the peon, who sat in the disguise of a beggar, for not having his dress on. Such ill-treatment on the part of the Police is often seen.

The sole cause of the above ill-treatment appears to be that the peons, havildars and other servants of this department, generally belong to the

lower classes, and on getting a coat, consider themselves possessed of full power and behave with impertinence. What rule of the police allows one to be on duty without his dress!

The peons misappropriate excess-fares and cause loss to the Company, through its servants. In like manner the Company is obliged to compensate for goods stolen while under its charge. The Company spends a large sum of money, on account of the police department, to prevent losses, but the members of this department occasion such losses. Do the high officers of the Company then not give warnings to the officers of the police? If they do so, the irregularities of the kind may be attributed to neglect on the part of the officers of the police. If such is not the case, the peons should be held to be disregardful of their duty and officers. No other cause appears besides these two. We, therefore, only recommend that it is necessary for the Company to keep a little more supervision over this department.

Received from outside.

The Magistrate upon the evidence found, (1) that the charges made in the libel were not true; (2) that they were not made in good faith; and (3) that the accused could not claim the benefit of exceptions 1, 2, and 9, under Section 499 of the Indian Penal Code.

The Session Judge generally agreed with the Magistrate; but being of opinion that malice, in the vulgar acceptation of the term as opposed to its legal signification, was not shown, reduced the sentence.

The application was heard by LLOYD and KEMBALL, JJ., on the 2nd, 7th, and 8th October 1872.

Anstey (with him *Shántárám Nárayan* and *Nagindás Tulsidás*) for the applicant:—

The charge was improperly drawn up, inasmuch as it does not negative the exceptions contained in Sec. 499 of the Indian Penal Code, which must be taken to be incorporated in Section 500, as the word "defame" is used therein. The provisions of Sections 26 and 27 of Act XVIII. of 1862 are, in spirit, applicable to this case, though it has been tried in the Mofussil. The general rule of law is that proof of charges involving fraud, bad faith, and similar allegations, always lies

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on the person making them, and in this case the *onus* ought to have been thrown upon the prosecution by a properly drawn up charge.

As respects the merits of the case, it is not necessary to require the same strictness in proving the truth of the libellous allegations in criminal as in civil cases under the English law, and if a single case of each sort of misconduct attributed to the police is proved, that ought to be held to be sufficient. With regard to the question of good faith and public good, the Judge ought to have decided as a point of law whether the occasion of the publication was a privileged one or not; and if the privilege was exercised in the *bonâ fide* belief that the allegations were true, the publication of the article ought to have been held justified, particularly as the Judge has found that there was no actual malice. The following authorities were cited in support of the application: *Taylor* on Evidence, p. 71, 103, *Reg.* v. *Newman* (*a*); *The Maharaja Libel Case, Lister* v. *Perryman* (*b*), *Stace* v. *Griffith* (*c*), *Wason* v. *Walter* (*d*).

Pirozshaw Merwanjee Mehta (with him *Chunilal Mánekláll*) in support of the conviction :—

The charge was properly framed according to the clear and express wording of Sections 235-6-7 of the Criminal Procedure Code; and Section 26 of Act XVIII. of 1862 does not apply to Mofussil courts. As to the justification by truth, the criminal law in this respect, when it first allowed this plea, was rendered identical by 6 & 7 Vict., C. 96, Section 6, with the law in actions for defamation, which is that every allegation must be substantially proved by specific instances. The Judge has found as a matter of fact that the libellous imputations in this case were not so proved, and his finding is conclusive and cannot be questioned in this court. As respects the question of good faith and public good, both according to English and Indian law on this

(*a*) 1 E. & B. 558, 577.
(*b*) L. Rep. 4 Ho. Lo. 521.
(*c*) L. Rep. 2 P. C. 420.
(*d*) L. Rep. 4 Q. B. 73.

subject, it is necessary to show that due care and attention have been exercised before good faith can be established. Section 52 of the Indian Penal Code must be taken to add an essential constituent element to the ordinary acceptation of the term "good faith." The Judge has found, as a fact, that due care and attention were not exercised, and was therefore right in holding that good faith, the burden of proving which lay in such a case as this upon the defendant, was not proved. The following authorities were cited in support of the argument; *Reg.* v. *Durzoolla and others* (*f*), *Sealy.* v. *Ram Narain Bose* (*g*), *Reg.* v. *Pursoram Doss* (*h*), *J'anson* v. *Stuart* (*i*), *Holmes* v. *Catesby* (*j*), *Clarkson* v. *Lawson* (*k*), *Helsham* v. *Blackwood* (*l*), *Weaver* v. *Lloyd* (*m*), *Willmett* v. *Harmer* (*n*), *Chalmers* v. *Shackell* (*o*), *R.* v. *Newman* (*p*), *Campbell* v. *Spottiswoode* (*q*), *The Maharaj Libel case*, *Howard* v. *Mull* (*r*).

PER CURIAM:—This is an application for the exercise of this court's extraordinary jurisdiction on behalf of one Kikábhái Parbhudás, who, as editor and publisher of the "Guzerat Mitra," was charged with, and convicted of, having in an article headed Railway Police, and published in his paper issued on the 1st October 1871, defamed the whole body of police employed on the B. B. and C. I. Railway by imputing to them theft, abetment of theft, extortion from passengers on the railway, and breach of trust. The Magistrate Full-power, who tried the case, found that the accused had failed to establish that the imputations made concerning the police were true, or that he had acted in good faith in publishing those imputations, and sentenced Kikábhái to pay a fine of Rs. 500 (five hundred), or to suffer five months' simple imprisonment. An appeal was preferred to the

(*f*) 9 Calc. W. Rep. Cr. R. 33. (*g*) 4 Ibid. 22.
(*h*) 2 Ibid. 36; 3 Ibid. 45. (*i*) 2 Smith's L. C. 57 (6th edn.)
(*j*) 1 Taunt. 543. (*k*) 6 Bing. 266.
(*l*) 11 C. B. 111. (*m*) 2 B. & C. 678.
(*n*) 8 C. & P. 695. (*o*) 6 C. & P. 475.
(*p*) 1 E. & B. 577. (*q*) 3 B. & S. 769.
(*r*) 1 Bom. H. C. Rep. App. lxxxv.

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Session Judge, who affirmed the finding of the Magistrate Full-power on the two points above noted, but reduced the sentence to one of Rs. 100 fine, or in default, one month's imprisonment (simple), on the ground that Kikábhái appeared from the evidence to have erred more through carelessness than of express malice. Dissatisfied Kikábhái asks for our interference on the following grounds :—

(*a*) That the conviction and sentence are contrary to law ;

(1stly) Because the B. B. and C. I. Railway Company's police was not definitely mentioned in the article complained of ;

(2ndly) Because the charge did not deny the existence of circumstances, bringing the article complained of within the exceptions to Section 499, Indian Penal Code.

(3rdly) Because, upon the evidence believed by the lower court, and upon the facts found, the assertions in the article in question contained ought in law to have been held to be true ;

(4thly) Because, even if not held to be strictly true, yet upon the evidence believed by the lower courts and upon the facts found, the assertions in the article in question contained, ought to have been held to have been made in good faith for the public good.

(*c*) The lower court applied the rules of pleading and procedure in civil suits under English law to this case in holding that, in establishing the truth of the allegations charged as a libel, the accused must prove strictly (and not substantially) that such allegations are true.

(*d*) The lower court excluded nearly the whole of the evidence from its consideration on the ground that Rattanshankar and Edalji Jehangirsha alone, out of the whole of the witnesses, say that they communicated instances of misconduct to the petitioner, whereas the whole of the evidence was useful to prove the *bonâ fides* of the petitioner.

(*e*) The Magistrate Full-power refused to receive certain evidence material to the case of the petitioner, and this

irregularity, even though complained against to the lower court, was not rectified.

(*f*) The lower court having found that there was no malice, ought to have reversed the conviction and sentence, especially, as the evidence tendered for the prosecution to prove a malicious motive was not believed by the lower court.

With regard to the first two points but few words are necessary. As to the application of the imputations to the complainants, the Railway Police stationed about Surat, all the circumstances clearly indicate the intention of the accused so to apply his words. This has been definitely found by both the lower courts as a fact, and it is a matter of surprise to us that such an objection should have been taken here. On the second point, Mr. Newnham was perfectly right in holding that it was unnecessary that the charge should have negatived the exceptions contained in Sec. 499; the language of the Criminal Procedure Code is perfectly clear, and the section referred to in the charge is the section under which the offence is punishable, and not the section which defines the offence. The main objection contained in the remaining points is, that the Judge ought to have found that the imputations made by the accused were true, and that the accused in publishing them acted in good faith—and the question we have to determine is, whether the Judge committed any error in law in affirming the finding of the Magistrate F. P. on these points. It was strongly pressed upon us at the outset that Mr. Newnham was wrong in law in holding that the burden of proving good faith lay on the accused. Mr. Newnham however was in our opinion quite right in putting out of his consideration the provisions of Sec. 27, Act XVIII. of 1862, as having reference only to this court in its original jurisdiction, and though we are not prepared to endorse his reasoning and to hold that in every case of alleged defamation the onus is on the accused to prove good faith, still, we think that, bearing in mind the fact in this case that the accused imputed to the complainants particular criminal acts which injurious charges were capable

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of proof, Mr. Newnham rightly refused to presume good faith and ruled that it was for the accused to show affirmatively as matter of defence, that he came within those exceptions in Sec. 499, involving good faith under which he claimed to excuse himself.

It has not been disputed that the imputations on the complainants were libellous and consequently malicious but they have been justified on the grounds, that they were true, it being for the public good that they should be published, and that they were made in good faith as respecting the conduct of public servants in the discharge of their public functions, in other words accused pleaded the legal occasions and circumstances set forth in exceptions 1, 2 and 9 to Sec. 499 Indian Penal Code as excluding his responsibility. Two whole days were consumed in endeavouring to show on behalf of the accused that the Judge was wrong in law in his findings on the above points, but, whatever may be our own views as to the merits of the case, it appears clear to us that whether the Session Court rightly or wrongly decided as to the truth of the allegations and the *bona fides* of the accused's conduct, we have no power as a court of revision to interfere. As regards the truth of the imputations it was urged, that Mr. Newnham had failed to draw a proper distinction between a civil action and a criminal prosecution, and ought to have found that the charges were true in substance; but, in the first place, we are unable to perceive that the Session Judge was wrong, as a matter of law, in requiring the several distinct imputations contained in the libellous article to be proved, and, secondly, whether or no the said imputations were sufficiently justified by the facts proved was a matter of fact which cannot here be called in question. Fault has been found with the Judge's remark that the charges were "not proved as they should be," but this appears to us to mean that they were not substantially true, in other words, that they were not justified by the evidence.

So also, in the case of the judge's finding as to the good faith of the accused in making the imputations on the

character of the complainants, much has been said about a *justifying occasion* and the duty of the Judge to decide as a matter of law, whether the present was such an occasion as to rebut the inference of malice, and great stress was laid on the judgments of two learned Judges of the late Supreme Court of Bombay in the Maharaj Libel Case. No doubt where the occasion is pleaded by way of justification and excuse, the question whether or no the occasion gives the privilege is one of law for the Judge, but this is at best but a qualified protection dependent on the question whether the publication has been made in good faith, and this is a question of fact which the Judge has decided against the accused and which, whether rightly or wrongly decided, is conclusive so far as we are concerned. The law on the point is clearly laid down in all the text books relating to the subject, and we find the same rule enunciated in the judgments above referred to. Sir M. Sausse, after quoting the definition of a "justifying occasion" from the judgment of Baron Parke in *Toogood* v. *Spyring*, 1 C. M. & R. 193, says: "In cases of this kind when tried before a jury it is their province to find whether the communication was made *bonâ fide* or not, and, if in the affirmative, it becomes the duty of the Judge, as matter of law, to decide whether the occasion of the publication was such as to rebut the inference of malice or in accordance with the definition in *Bromage* v. *Prosser* (*s*) whether there was any legal justification or excuse for the wrongful act. I have thus to investigate and decide first whether the publication was made *bonâ fide* by the defendants, and next, if it were, whether then a legal justification or excuse is to be found in the surrounding circumstances proved in this case for the libel upon private character which the publication contains." And Sir Joseph Arnould similarly says: "The doctrine of justifying occasion as deduced from the authorities is this. The essence of libel is malice. *Primâ facie* every publication containing matter tending to defame or criminate another is held to be libellous; that is, malice, the essence of libel, is legally inferred from the mere fact of publishing of another that which tends to criminate

(*s*) 4 B. & C. 247.

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or defame him. But the *primâ facie* inference may be repelled; it may be shown that the circumstances under which the publication took place were such as to preclude the legal inference of malice arising from the mere fact of publication, and constitute a *justifying occasion* for publishing that which tends to defame and criminate another. * * * As to what will constitute a justifying occasion the points principally to be attended to are these.—First, the publication must be *bonâ fide, i.e.,* at the time of publication the writer must honestly and upon fair reasonable grounds believe that which he publishes to be substantially true. Secondly, the publication must be with regard to a subject matter in which the party publishing has an *interest,* or in reference to which he has a *duty.* Thirdly, those to whom the publication is addressed must have an interest and a duty in some degree corresponding to his own."

Exception has been taken to Mr. Newnham's observation (after declaring the truth of the allegations to be not proved) that "If however they were made in good faith; it is undeniable that they would be for the public good." But in saying this he appears to us clearly to recognize the principle of qualified exemption as comprehending the case of a communication made honestly with a view to the discharge of a legal or moral duty. It must be borne in mind that we are not trying this case, we shall, therefore, confine ourselves strictly to the law of it. The whole case was open before the judge in appeal, and he has held that instead of acting with good faith on an occasion recognized by the law, the accused acted carelessly and negligently in publishing the imputations, though without any fixed malicious motive; and upon this finding we are unable to say that he committed any error in law in affirming the conviction by the Full Power Magistrate, the question of civil and criminal liability being indeed clearly identical though it was argued to the contrary. It seems hardly necessary for us to observe in conclusion that the Session Judge was right in looking to Sec. 52 of the Indian Penal Code for the defamation of good faith, though the point has been disputed in argument.

With regard to the remaining objection of exclusion of evidence, we think that the Judge was not wrong in law in rejecting evidence of general reputation where the question of the truth of definite charges was in issue, and also in refusing consideration to what had been published on former occasions in the same paper by another editor.

The result is that we must reject this application.

Petition Rejected.

In re GEORGE BLACKWELL.

Insolvency—European British born subject—Jurisdiction—11 & 12 Vic., c. 21., s. 5—Letters Patent of High Court, Cl. 18.

A European British born subject, residing in the Bombay Presidency but outside the local limits of the jurisdiction of the High Court, is entitled to come to Bombay and present a petition in the Court for the Relief of Insolvent Debtors and obtain the benefit of the Indian Insolvent Act, as the original jurisdiction of the Supreme Court is in that respect continued to the High Court by Clause 18 of its Letters Patent.

THE petitioner in this case was a British born subject. He had a house in Puna in which he used to reside with his family. He came to Bombay about the month of September 1871, being then out of employment, leaving his family at Puna and resided sometimes at an hotel and sometimes with his friends; and on the 15th December 1871, while so temporarily resident in Bombay, he filed his petition and schedule; when the case came on for hearing he had left Bombay to take up an appointment at Sattara.

Marriott for the opposing creditors opposed the insolvent's discharge on the grounds (*inter alia*) that he was not resident within the local jurisdiction of the High Court, and therefore was not entitled to his discharge. He cited *in re Cockburn* (*a*); *in re Tietkins* (*b*).

Starling for the Insolvent cited *Holroyd* v. *Gwynne* (*c*).

(*a*) 2 Ind. N. S. Jur. 326. (*b*) 1 Beng. Law Rep. O. C. 84.
(*c*) 1 Rose 113; S. C. 2 Taunt. 176.