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RUKHANBAI v. ADAMJI.

Special Commissioner to pay the costs of the other parties out of the share of defendant 6.

Attorneys for the plaintiff: *Messrs. Jehangir and Seervai.*

Attorney for defendants 1 and 6: *Mr. N. B. Vakil.*

Attorneys for defendant 2: *Messrs. Mehta and Shomji.*

Attorneys for defendant 4: *Messrs. Jehangir and Seervai.*

B. N. L.

APPELLATE CRIMINAL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1908.

August 17.

EMPEROR *v.* TRIBHOVANDAS PURSHOTTAMDAS MANGROLE-WALLA.*

Criminal Procedure Code (Act V of 1898), sections 225, 233, 234, 235, 236 and 237—Charges—Joinder of charges—Misjoinder of charges—Indian Penal Code (Act XLV of 1860), sections 124A, 153A—Sedition—Promoting enmity, etc., between classes—Publication, what constitutes.

The accused was charged at one trial with having committed offences punishable under sections 124A and 153A of the Indian Penal Code, on two charges, one with respect to each of the two articles he published on different dates in his newspaper called the *Hind Swarajya*. At the trial there was no other evidence of the publication of the newspaper in Bombay except the declaration made by the accused under the Press Act, and the depositions of witnesses who received the newspaper in Bombay as Government servants in their capacity as such. The accused was convicted on both the charges and sentenced separately on each of them. It was contended in appeal that there was no evidence of the publication of the newspaper in Bombay, and that there was a misjoinder of charges vitiating the trial.

Held, that the evidence on record was sufficient to prove the publication of the newspaper in Bombay.

Held, further, that the trial was not bad as there had been no misjoinder of charges.

Per CHANDAVARKAR, *J.*:—It is true that the Magistrate framed two charges one with respect to each of the two articles. But in each charge the offences are mentioned as being those punishable under sections 124A and 153A of the

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Indian Penal Code, so that the accused had distinct notice of the charges he had to answer, and he could hardly have been prejudiced by the somewhat informal mode in which the charges were drawn up. The defect, if any, was no more than a mere irregularity, cured by the provisions of section 225 of the Code of Criminal Procedure.

There is nothing in the Criminal Procedure Code which directs that where an accused person is alleged to have done two or more acts, each of which may fall within the definition of an offence under one or another section of the Indian Penal Code, the section or sections in either case being the same, the joinder of the charges under those sections is illegal. Substantially the acts amount in such a case to offences punishable under the same sections of the Indian Penal Code and therefore they are offiences of the same kind.

Per HEATON, *J.* :—Section 234 of the Criminal Procedure Code does not say that at most, a trial must be limited to three charges : it says it must be limited to three offences and that the offences must be of the same kind. The "offence" as defined by the Code itself, is the act or omission made punishable. The offences in this case were two in number, namely, the publication of two articles on two different dates. These two offences were, as charged, punishable under the same section of the Indian Penal Code, and were, therefore, offences of the same kind. The word "section" in section 234 of the Criminal Procedure Code is not invariably to be read as singular. It is not the intention of the Code of Criminal Procedure, either express or implied, to exclude from the operation of section 234 of the Code, an offence because it is made the subject of more than one charge.

Charging one act or series of acts under more than one section of the Indian Penal Code, is a proceeding provided for in section 235 (clause 2) and in section 236 of the Criminal Procedure Code and is also provided for in section 71 of the Indian Penal Code. The Court may charge an offence twice over under two different sections but by so doing it cannot increase the sentence which may be imposed. That principle is not offended by trying together separate offences for each of which there is more than one charge.

APPEAL from convictions and sentences passed by A. H. S. Aston, Chief Presidency Magistrate of Bombay.

The accused was the editor, publisher and proprietor of a newspaper called the *Hind Swarajya* published in the Gujarati language. He was charged with two offences punishable under sections. 124A and 153A of the Indian Penal Code, with respect to an article entitled "Englishmen afraid of the pen" which appeared in an issue of his newspaper dated the 4th April 1908; and also with reference to another article entitled "A grave warning" which appeared on the 11th idem in his newspaper.

He was tried by the Chief Presidency Magistrate of Bombay where he was charged as follows:—

"I, A. H. S. Aston, Esquire, Chief Presidency Magistrate, Bombay, hereby charge you Tribhovandas Purshottamdas Mangrolevalla, as follows:—

"That you on or about the 4th day of April 1908 at Bombay by words intended to be read, namely, an article in the Gujarati which is headed when translated 'Englishmen afraid of the pen' published in the *Hind Swarajya* newspaper of which you were the editor, printer and proprietor brought or attempted to bring into hatred or contempt or excited or attempted to excite feelings of disaffection towards the Government established by law in British India and promoted or attempted to promote feelings of enmity or hatred between different classes of His Majesty's subjects, namely, between Native Indian and European subjects and thereby committed an offence punishable under sections 124A and 153A, Indian Penal Code.

"2ndly:—That you on or about the 11th day of April 1908 at Bombay by words intended to be read, namely, an article printed in the English and Gujarati languages which is headed when corrected and translated 'A grave warning' published in the *Hind Swarajya* newspaper of which you were the editor, printer and proprietor brought or attempted to bring into hatred or contempt or excited or attempted to excite feelings of disaffection towards the Government established by law in British India and promoted or attempted to promote feelings of enmity or hatred between different classes of His Majesty's subjects, namely, between Native Indian and European subjects and thereby committed an offence punishable under sections 124A and 153A of the Indian Penal Code and within my cognizance.

"And I hereby direct that you be tried on the said charges."

At the trial, the prosecution tendered into evidence the declaration made by the accused under the Press Act before the Chief Presidency Magistrate of Bombay, as the printer and publisher of the "*Hind Swarajya*." And there were two witnesses on behalf of the prosecution, the Oriental Translator to the Government of Bombay and a clerk in his office, who deposed to having received the copies of the newspaper in Bombay in their capacity as Government servants.

The Magistrate convicted the accused on both the charges, and sentenced the accused to two years' rigorous imprisonment on the first charge and to one year's rigorous imprisonment on the second charge: the sentences to run consecutively.

The accused appealed to the High Court.

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Baptista for the accused :—There is no evidence of publication of the newspaper in Bombay. The declaration by the accused under the Press Act is no evidence of publication: nor would publication be proved by depositions of two witnesses who received copies of the newspaper in Bombay merely as and in their capacity of Government servants.

Secondly, the trial is bad on the score of misjoinder of charges. The accused is charged with both under section 124A and section 153A of the Indian Penal Code in respect of each of the two articles that appeared in his newspaper on the 4th and 11th April 1908, respectively. The offence under section 124A is distinct from the one under section 153A: and a separate charge for each of them should have been framed. The Criminal Procedure Code positively enacts that two charges are necessary, this is an illegality and not an irregularity which could be cured under section 537 of the Code. See *Emperor* v. *Fattu*[1]; *Subrahmania Ayyar* v. *King-Emperor* [2]; *Sukh Lal Sheikh* v. *Tara Chand Ta* [3]; *Thomas* v. *Emperor* [4]; and *Queen-Empress* v. *Anant Puranik* [5].

The forms of charges in the schedule to the Criminal Procedure Code distinctly indicate that there ought to be separate counts for separate offences; and even a separate head of charge for each offence under the same section in the same transaction. See the form regarding the substantive offence and the attempt under section 241 of the Indian Penal Code. Furthermore, the form prescribes three heads of charge for section 382 of the Indian Penal Code. This is a clear indication that legislature requires that the charges should be very specific, definite and distinct for each offence.

Assuming that the Magistrate has complied with the provision of section 233 so far as charges are concerned, then the particulars as required by section 225 are not given. He ought to have pointed out the passages in the first article that came within the purview of section 124A and those that came under section 153A.

(1) (1903) 23 All. 195.
(2) (1901) 25 Mad. 61.
(3) (1905) 33 Cal. 68 at p. 72.
(4) (1906) 29 Mad. 553.
(5) (1900) 25 Bom. 90.

Section 233 of the Criminal Procedure Code says that each charge shall be tried separately. In this case there are four offences and two charges. Section 234 is an exception to section 233. But offences under sections 124A and 153A of the Indian Penal Code are not offences of the same kind, and the articles of the 4th and 11th April are not parts of the same transaction within the meaning of section 235 of the Criminal Procedure Code.

Branson (acting Advocate General) for the Crown:—Sections 234, 235, 236 and 239 of the Criminal Procedure Code are exceptions to section 233 of the Code. Section 235 is put after section 234 to meet with those cases where facts alleged show that they come under two or more different sections of the Indian Penal Code. There is therefore no irregularity in joining section 153A read with section 124A in the charge.

CHANDAVARKAR, J.:—This is an appeal from the judgment of the Chief Presidency Magistrate of Bombay, convicting the appellant of two offences one under section 124A and the other under section 153A of the Indian Penal Code arising out of each of two articles, published in a Gujarati newspaper called the *Hind Swarajya*. Several points of law have been urged by the appellant's Counsel, Mr. Baptista. The first of them is that the learned Chief Presidency Magistrate had no jurisdiction to try the case. This objection to jurisdiction is based upon the ground that there is upon the record no evidence of the publication of the newspaper in Bombay. But three witnesses examined for the Crown state that they received the newspaper in Bombay; and there is the declaration made by the appellant himself under the Press Act. The mere fact that two of the witnesses are servants of Government, who received the newspaper as its agents, cannot in law render their evidence inadmissible on the question of publication.

The second and the third point urged by Mr. Baptista have hardly any substance. It is contended that the trial is rendered illegal because the learned Magistrate did not frame a separate charge for every distinct offence, as required by the first part of section 233 of the Code of Criminal Procedure. It is true that

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the Magistrate framed two charges—one in respect of the article of the 4th of April and the other in respect of the article of the 11th of April, 1908. But in each charge the offences are mentioned as being those punishable under sections 124A and 153A, so that the appellant had distinct notice of the charges he had to answer, and he could hardly have been prejudiced by the somewhat informal mode in which the charges were drawn up. The defect, if any, was no more than a mere irregularity, cured by the provisions of section 225 of the Code of Criminal Procedure. It is further contended that the trial is illegal because the particulars in respect of each of the charges were not given by the Magistrate by the specification in the charge sheet of the passages in each of the articles, which, according to the case for the Crown, brought those articles within sections 124A and 153A of the Penal Code. But the case for the Crown was in the Court below, as it is here, that each of the two articles taken as a whole brought the act of the appellant within each of these sections. Under those circumstances no specification of any particular passages was called for.

I pass on now to Mr. Baptista's argument that the trial is illegal on the ground of misjoinder of charges. The misjoinder complained of is that the offence charged under section 124A of the Indian Penal Code, arising out of the article of the 4th of April, being distinct from, and not an offence of the same kind as, the offence charged under section 153A of the same Code, arising out of the article of the 11th of April, and that the offence charged under section 153A as arising out of the former article being distinct from and not an offence of the same kind as the offence charged under section 124A as arising out of the latter article, the learned Magistrate ought not to have tried these charges together at one trial. It is admitted by Mr. Baptista that the charge for the offence under section 124A of the Penal Code in respect of one of the two articles in question could be legally joined to the charge for the offence under the same section in respect of the other article. And in such a case it is equally clear from sections 236 and 237 of the Code of Criminal Procedure that, if in respect of each of the articles the evidence recorded substantiated the offence under section 153A, instead of the offence

under section 124A, the accused could be legally convicted of the former offence, even though it did not form the subject-matter of the charge. That being the case, the addition of the offences under that section in the charge sheet cannot be held to be illegal. On the other hand, it was an advantage to the appellant in that he had notice of the additional offence charged, of which he could have been under the Code convicted without any notice in the charge sheet. It is true that, as urged by Mr. Baptista, the offence under section 124A of the Penal Code is not an offence of the same kind as an offence under section 153A of the Code. And the Criminal Procedure Code no doubt provides that those two offences cannot be tried together. But there is nothing in the Code which directs that where an accused person is alleged to have done two or more acts, each of which may fall within the definition of an offence under one or another section of the Penal Code, the section or sections in either case being the same, the joinder of the charges under those sections is illegal. Substantially the acts amount in such a case to offences punishable under the same sections of the Indian Penal Code and therefore they are offences of the same kind.

Mr. Baptista has not denied the seditious character of the article of the 4th of April. On the other hand, he has candidly admitted before us that he cannot defend the article in question so far as the offence under section 124A of the Penal Code is concerned. The other article, that of the 11th of April, he contends, is a mere republication of what came into the appellant's hands from outside, and was published by the appellant with remarks showing that he did not approve of the sentiments in the article. It is clear, however, from the evidence of surrounding circumstances that the so-called disapproval was feigned and ironical and that the appellant published the article in question because it gave him an opportunity of bringing the established Government of the land into hatred and contempt.

Under these circumstances it is unnecessary to consider whether either of the articles can rightly come under section 153A of the Penal Code.

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We affirm the conviction under section 124A, and as to the sentences we decline to interfere on the ground that they cannot be considered too severe.

HEATON, J. :—Mr. Baptista's first argument was that publication in Bombay was not proved. There is no substance in that.

His main arguments were directed to the charge and were to the effect that as the charge was contrary to law the trial was illegal: a general proposition which he sought to make good by the authority of the Privy Council judgment in *Subrahmania Ayyar's* case [1].

In order to understand the argument it is necessary to set out the charge. It reads as follows :—

"I, A. H. S. Aston, Esquire, Chief Presidency Magistrate, Bombay, hereby charge you Tribhovandas Purshottamdas Mangrolewalla as follows :—That you on or about the 4th day of April 1908 at Bombay by words intended to be read, namely, an article in the Gujarati which is headed when translated 'Englishmen afraid of the pen' published in the *Hind Swarajya* newspaper of which you were the editor, printer and proprietor brought or attempted to bring into hatred or contempt or excited or attempted to excite feelings of disaffection towards the Government established by law in British India and promoted or attempted to promote feelings of enmity or hatred between different classes of His Majesty's subjects, namely, between Native Indian or European subjects and thereby committed an offence punishable under sections 124A and 153A, Indian Penal Code.

"2ndly :—That you on or about the 11th day of April 1908 at Bombay by words intended to be read, namely, an article printed in the English and Gujarati languages which is headed when corrected and translated 'A grave warning' published in the *Hind Swarajya* newspaper of which you were the editor, printer and proprietor brought or attempted to bring into hatred or contempt or excited or attempted to excite feelings of disaffection towards the Government established by law in British India and promoted or attempted to promote feelings of enmity or hatred between different classes of His Majesty's subjects, namely, between Native Indian and European subjects and thereby committed an offence punishable under sections 124A and 153A of the Indian Penal Code and within my cognizance.

"And I hereby direct that you be tried on the said charges."

(1) (1901) 25 Mad. 61.

First, it is said that this charge is unlawful because it does not follow the form given in Schedule V to the Criminal Procedure Code for charges with two or more heads, but instead of doing so combines in one whole in each case the charges under sections 124A and 153A. The defect is a very formal one, and is cured by section 225 of the Code which says:—"No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice." The Privy Council case referred to is not an authority for saying that such an error in the charge is an illegality vitiating the trial. It is only necessary to read the judgment in that case to see that their Lordships of the Privy Council were dealing with a grossly illegal trial; and there is apparent throughout that judgment as strict an adherence as possible to the facts of that particular case; and as little generalization as is compatible with a true presentment of their reasons.

Mr. Baptista's next objection was that though it was not illegal to charge the appellant on the articles as a whole, yet when charged in respect of each article under sections 124A and 153A, he was prejudiced as he did not have notice of the particular passages in each article on which the prosecution relied to bring it first under section 124A and secondly under section 153A. To this the answer is that as regards these charges the prosecution did not proceed on seperate passages but on the articles as a whole. But Mr. Baptista argues in effect that his client ought to have had notice, before he was required to enter on his defence, of the process of reasoning by which the prosecution brought each article under section 124A and also under section 153A of the Penal Code. Whatever application such an argument may have to cases in general, it fails in its application to this case, because the process of reasoning which the prosecution followed, was to deal with the articles as a whole and not with particular passages and the accused had notice that he was charged under section 124A and under section 153A in respect of each article as a whole.

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The last of Mr. Baptista's technical arguments was that the joinder of the charges relating to the two publications of the 4th and 11th April, was illegal and vitiated the trial. He assumes for the purpose of this argument that there were four charges, two relating to each article; and he urges that as each of the four charges did not relate to an offence of the same kind, they could not be tried together. He bases his argument mainly on sections 233 and 234 of the Code of Criminal Procedure which run as follows:—

"233. For every distinct offence of which an y person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in sections 234, 235, 236 and 239.

"234. (1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, he may be charged with, and tried at one trial for, any number of them not exceeding three.

"(2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code or of any special or local law."

Section 234 does not say that at most a trial must be limited to three charges: it says it must be limited to three offences and that the offences must be of the same kind. The "offence" as defined by the Code itself, is the act or omission made punishable. The offences in this case were two in number, namely, the publication of the 4th April and the publication of the 11th April. These two offences were, as charged, punishable under the same sections of the Indian Penal Code and were, therefore, it seems to me, offences of the same kind. If the word "section" in the second clause of section 234 be read as incapable of meaning "sections," that is, if it be read as invariably singular, then Mr. Baptista's argument is good, not otherwise. But I do not think it is the intention of the Code, either expressed or implied to exclude from the operation of section 234 an offence because it is made the subject of more than one charge.

Charging one act or series of acts under more than one section of the Indian Penal Code is a proceeding provided for in section 235 (cl. 2) and in section 236 of the Criminal Procedure Code and is also provided for in section 71 of the Indian Penal Code which

says: "where anything is an offence falling within two or more separate definitions . . . . . the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences." You may charge an offence twice over under two different sections but by so doing you cannot increase the sentence which may be imposed. That principle is not offended by trying together separate offences for each of which there is more than one charge. Therefore I do not think the joinder of charges in this case was contrary either to the express words or the principle of the law.

On the merits there is little to be said. A careful perusal of the article of the 4th April shows a deliberate design to excite feelings of disaffection towards the Government established by law in British India, or to bring that Government into hatred and contempt. The nature and tone of the article or letter of the 11th; the general character of *Hind Swarajya* as evidenced by its own publications; the circumstance that the letter said to be received from outside was translated into Gujarati; and the introductory words printed before the translation, taken together, convince me that the publication of the 11th also was deliberately designed to do the same. It is not very material to consider whether the offences also fell under section 153A of the Indian Penal Code. The convictions are, in my opinion, good under section 124A; and the sentences, I consider, are not too severe. So I concur in the order confirming the conviction and sentences.

Conviction and sentence confirmed.

R. R.