CHAPTER XI.

INCIDENTS AND RULES OF PRACTICE.

It is a well-established rule that seditious matter may not be reproduced from other publications. This is as much an offence as the publication of original matter, presumably because in effect it is equally mischievous. The offence lies in the publication. This rule was laid down by Lord Fitzgerald in Sullivan's case in clear and emphatic language as follows:—"As to the articles extracted from other papers, it was recently contended that even if these articles were of a seditious or treasonable character, yet that the defendant was justified in publishing them as foreign news. I am bound to warn you against this very unsound contention, and I may now tell you, with the concurrence of my learned colleague, that the law gives no such sanction, and does not, in the abstract, justify or excuse the republication of a treasonable or seditious article, no matter from what source it may be taken."

His lordship then proceeded to state that there might be circumstances sufficient to rebut the inference of criminal intention, but in the absence of such circumstances it would be reasonable to infer from the fact of republication some seditious object.

"If the law," he added, "be powerless in the case of such publications, then we may as well blot out from the Statute book the chapter on seditious libel, which would take away from society the great protection which the law affords to their institutions. You see, therefore, how necessary it is to assert this part of the law, and therefore I again emphatically tell you that it is no justification or excuse for a publication, treasonable or seditious, that it appeared first in another paper, whether local or foreign" (see *Ch. ii*).

The same principle was applied by the Calcutta High Court in the case of *Apurba Krishna Bose* v. *Emperor* (35 Cal., 141), already referred to, though apparently on different grounds. In that case one of the charges against the accused, who was

the printer of the *Bande Mataram*, was that he had republished in his paper certain official translations of seditious matter which had appeared in the *Jugantar*, another local paper, the printer of which was also tried for sedition.

The articles in question, or one of them, had been the subject of the charge against the *Jugantar*, and the republication professed to be a report of the proceedings in that case. The rule laid down by Lord Fitzgerald would have been applicable here no doubt. The learned Judges, however, who decided the case appear to have based their conclusions on the fourth Exception to section 499 of the Penal Code which relates to defamation, an offence which was apparently not charged against the accused. They held that the articles in question did not "form part of the proceedings of a Court of Justice," because "the conviction for sedition in the *Jugantar* case was based on one article only." "There was therefore no excuse for the wholesale publication in the *Bande Mataram* of these translations."

This leaves it doubtful whether the accused would have been guilty if he had limited himself to the reproduction of the single article which formed the subject of the charge in the other case, instead of resorting to wholesale publication. Nor is it clear whether it may be taken as a rule that exceptions to section 499 of the Penal Code can be applied to cases under section 124A, when sedition is the only charge against the accused.

The learned Judges conclude their observations in the following terms:—"The dissemination of temptation is not excusable on any principle with which we are conversant." The dissemination of "temptation" is not expressly provided for in section 124A, and it is therefore to be regretted that no opinion is expressed as to whether it is within the mischief contemplated or not.

Finally, there are a few points of general importance which are usually impressed upon juries in trials for sedition. These may be gathered *passim* from the celebrated charge of Lord Fitzgerald in Sullivan's case (see *Ch. ii*), but they have also been summarised by Justice Strachey in Tilak's case in clear and precise terms. The learned Judge there said:—"In

considering what sort of effect these articles would be likely to produce, you must have regard to the particular class of persons among whom they were circulated, and to the time and other circumstances in which they were circulated. In judging what would be the natural and ordinary consequences of a publication like this, and what therefore was the probable intention of the writer or publisher, I must impress on you, as perhaps the most important point in my summing up, that you must bear in mind the time, the place, the circumstances, and the occasion of the publication."

"An article," his lordship continued, "which if published in England, or among highly educated people, would produce no effect at all—such as an article on cow-killing—might, if published among Hindus in India, produce the utmost possible excitement. An article which, if published at a time of profound peace, prosperity, and contentment would excite no bad feeling, might at a time of agitation and unrest excite intense hatred to the Government. When you are considering the probable effect of a publication upon people's minds, it is essential to consider who the people are. In my opinion it would be idle and absurd to ask yourselves what would be the effect of these articles upon the minds of persons reading them in a London drawing-room or in the Yacht Club in Bombay; but what you have to consider is their effect, not upon Englishmen or Parsis, or even many cultivated and philosophic Hindus, but upon the readers of the *Kesari* among whom they were circulated and read—Hindus, Marathas, inhabitants of the Deccan and the Konkan. And you have to consider not only how such articles would ordinarily affect the class of persons who subscribed to the *Kesari*, but the state of things existing at the time, when these articles were disseminated among them. Then you have to look at the standing and position of the prisoner Tilak. He is a man of influence and importance among the people. He would be in a position to know what effect such articles would probably produce in their minds."

The gist of these salutary directions appears to be that in order to decide whether any publication is likely to excite disaffection or not, it is necessary to consider all the circumstances under which it was published. It is therefore important

to note the time, the place, and the occasion of its issue; the character of the people who are addressed, and even the position of the writer or speaker, because the effect must inevitably vary with the circumstances.

Moreover, the principle is the same whether sedition is preached from the platform or disseminated through the Press. "In estimating the natural consequences which will flow from particular language," says Mr. Mayne, "all the surrounding circumstances of the case are material, the excited state of public feeling, the ignorant or hostile character of the persons addressed, the critical condition of affairs, and the influence of the speaker." These remarks have been approved by the Madras High Court in the case of *Chidambaram Pillai* v. *Emperor* (32 Mad., at p. 30).

The last point to be noticed in the section is the provision regarding punishment. No alteration was made as to this by Act IV of 1898. It will be observed that three kinds of punishment are provided for the offence—transportation, imprisonment, and fine.

Transportation may be for life or any shorter term, but not less than seven years (8 W. R., Cr. 2). Imprisonment may be of either description, as the Court shall direct (s. 60, P. C.), but must not exceed three years. It had been proposed to extend the term to ten years, but, as has been already pointed out, the Select Committee decided to maintain the law as it stood.

Fine may be imposed either alone, or in addition to a sentence of transportation or imprisonment, and without limit.

The question of the amount and character of the punishment, which it is proper to award in any given case, is one of no small difficulty. The Code affords no assistance in this respect, beyond fixing the maximum penalties. Under these circumstances recourse must be had to judicial authority. The observations of Sir C. Farran, C. J., in the case of *Ramchandra Narayan* (22 Bom., 152) will afford a valuable guide to the solution of the difficulty. The facts of this case have been set out in Chapter VI, and his lordship's remarks on the criminal liability of the accused in Chapter IX. The two accused had

been sentenced, respectively, to transportation for life and for seven years, by the Sessions Judge.

His lordship there said :—"As to punishment, it should in each case be commensurate with the offence. As to the article itself, there is nothing practical about it. It sets nothing tangible before its readers. It is calculated, I think, rather to excite unrealisable dreams—abstract feelings of discontent than to spur to immediate action, and I do not think that the other articles, put in to show the intent of the writer, carry the case any further. This should be taken into consideration. The article also does not vituperate the Government at present existing. This is, I think, a feature to be borne in mind. It appears, after all, in but an obscure paper published in a small town, by an obscure person. The circulation of the *Pratod* is very small. The libel is written at a period when profound peace dwells in the land. At the same time the article certainly is calculated, and I think intended, to widen the slight breach or misunderstanding which in some parts of the country exists between the Government and its subjects, when the aim of all good writers should be to lessen and to close it. We alter the sentence on the first accused to one year's rigorous imprisonment. This will, I think, be commensurate with the offence, and will be amply sufficient to deter other newspaper managers from publishing similar articles. The accused No. 2 is an old man. His offence is rather one of negligence in permitting the publication of the article than of taking an active part in it. Three months' simple imprisonment will, I think, be an adequate punishment in his case—and we alter it accordingly. The more severe punishment, which the section admits of, ought, in my opinion, to be reserved for a more dangerous class of writing published in times of public disturbance."

To this may be added the remarks of Justice Ranade, in the same case, which were as follows :—"The Sessions Judge was right in convicting both the accused. At the same time he greatly overrated the influence and mischief of the publication. The proprietor's responsibility is of a very technical character, and even the writer, must be leniently judged because of the insignificance of his paper, its small circulation, and his poor education."

In direct contrast to this is the case of *Amba Prasad* (20 All., 55), already referred to (see *Ch. vi*), where the Sessions Judge had imposed a sentence of eighteen months' rigorous imprisonment, which the High Court found to be entirely inadequate. There the accused had tendered a belated apology, but their lordships found "that his object was to excite not merely passive disaffection," but "active disloyalty and rebellion."

"An apology," their lordships added, "particularly made after commitment, in such a case as this, need not be considered. Having regard to the gravity of the offence which Amba Prasad committed, and to the misery, ruin, and punishment which he might have brought upon ignorant people, the sentence which was passed upon him was entirely inadequate."

These may be taken as typical cases, and from the principles laid down in each, it would appear that the real test to be applied, in questions of punishment, is the amount of mischief which is calculated to result from the commission of the offence. This after all is the fairest test that could be employed.

Some objection was raised in Council to the maximum sentence of transportation for life, but it was pointed out by the Law Member that a safeguard was provided by an appeal to the High Court, and that, in the only case then on record, where such a sentence had been imposed by a Sessions Judge, the High Court had reduced it. This was the case of Ramchandra Narayan.

It is to be observed, further, that sentences are regulated, by Chapter III of the Criminal Procedure Code, according to the jurisdiction of the Courts. An Assistant Sessions Judge is not empowered to pass a sentence of transportation exceeding seven years. Neither a Chief Presidency Magistrate, a District Magistrate, nor a Magistrate of the First Class specially empowered to try the case, can pass any sentence of transportation at all, and their jurisdiction is otherwise limited to two years' imprisonment and a fine of one thousand rupees.

Section 408, cl. (*c*), provides that an appeal from the conviction of a Magistrate under Section 124A, shall lie to the High Court, but from clause (*b*) it would seem that an appeal from a conviction by an Assistant Sessions Judge would only

lie to the High Court if the sentence passed by him was one of transportation or of imprisonment for a term exceeding four years. It would otherwise lie to the Court of Session, which seems anomalous.

Section 410 provides that an appeal from a conviction by a Session Judge, or an Additional Sessions Judge shall lie to the High Court. No other Courts are empowered to try sedition cases. So that an appeal would seem to lie to the High Court in every case but the one mentioned in section 408. It may be, however, that if an Assistant Sessions Judge tried a sedition case, he would try it as a Court of Session, in which case section 410 would apply, and give a right of appeal to the High Court.

Sedition being an offence against the State no prosecution can be instituted except under the authority of the Government. This provision was made in 1870, by section 13 of the Act which first introduced the offence into the Penal Code, as has been already shown in Chapter II. It was re-enacted in 1882, and again, at the time of the amendment of the section by Act IV of 1898, as section 196 of the present Criminal Procedure Code (Act V of 1898).

"Under Section 196 of the Code," said Justice Strachey in Tilak's case, "no Court is to take cognisance of any offence punishable under Chapter VI of the Penal Code, in which section 124A occurs, unless upon complaint made by order of, or under authority from, the Governor-General in Council or the Local Government."

As to how this may be proved at the trial the learned Judge continued :—"In this case a complaint was made by the Oriental Translator to Government, an order by the Local Government to the complainant for the prosecution of the prisoner under section 124A is produced, and the complainant in the witness-box has shown that he instituted the prosecution in respect of these articles by order of the Government." This his lordship held was sufficient to prove the fact.

Two objections were taken, by the defence, to the form of the order : one, that by the use of the word "articles" it did not sufficiently describe the matter which was charged as seditious, and the other, that it did not specify, by dates or otherwise, the extracts in respect of which action was to be taken.

His lordship's answer to this was :—"It is only necessary to see whether the complaint relates to matters falling within the words 'certain articles appearing in the said newspaper,' and it is obvious that it does, and the order is therefore complied with."

"It may be desirable," he added, "and I think it is, that orders under section 196 should be expressed with greater particularity, but I cannot read into the section restrictions which are not there. The section does not prescribe any particular form of order, and does not even require the order to be in writing. I am therefore of opinion that the order is sufficient."

His lordship held further that even if it were otherwise, and the Magistrate had in fact no jurisdiction to commit the accused for trial, section 532 of the Criminal Procedure Code creates an exception, "and provides that in such a case the High Court may accept the commitment if it considers that the accused has not been injured thereby, unless during the proceedings before the Magistrate he objected to the Magistrate's jurisdiction." After citing the Full Bench decision in *Queen-Empress* v. *Morton* (9 Bom., 288) he continued :—"In this case no objection was taken in the Magistrate's Court, and I cannot hold that the accused has been in any way prejudiced. The object of section 196 is to prevent unauthorised persons from intruding in matters of State by instituting State prosecutions, and to secure that such prosecutions shall only be instituted under the authority of the Government. I have no doubt that these proceedings have been authorised by the Government, and I disallow the objection."

These views were endorsed by the Full Bench that sat to hear the application for leave to appeal to the Privy Council. Sir C. Farran, C. J., on that occasion, said :—"As to the question of jurisdiction, we are all of opinion, without doubt, that this prosecution was instituted under the authority of Government, and that, to use the words of the present Code, this complaint was made 'by order of or under the authority of Government.' There is no special mode laid down in the Code whereby the order or sanction of Government is to be conveyed to the officer who puts the law in motion. nI this

case the prosecution was conducted by the Government Solicitor, it was instituted by the Oriental Translator to Government, and he produced the written order of Government to institute the complaint. Now though the complaint must undoubtedly contain the article complained of, to give information to the accused of the charge against him, there is nothing in the Code to show that the written order to make the complaint—if written order is required—must specify the exact article in respect of which the complaint is to be made.''

The views of Justice Strachey were also endorsed by the Calcutta High Court in the case of *Apurba Krishna Bose* v. *Emperor* (35 Cal., p. 149), already referred to. The learned Judges, however, who decided that case, while expressing their 'entire agreement with Strachey, J.,' observed that, "the section does not use the word *sanction*," and that "orders under section 196 should be expressed with sufficient particularity, and with strict adherence to the language of the section." This would seem to suggest that the word *sanction* ought not to be used, as, in fact, it had been in the Government orders which authorised the prosecution in that case. But in the very same passage, their lordships were constrained to use it themselves, as being a "convenient word." The Full Bench also used it, as an equivalent for authority. Indeed, it is difficult to avoid using it, as the learned Judges would seem to have found, for to authorise is to sanction.

The section, then, appears to contemplate that no prosecution for sedition can be entertained by any Court, unless the complaint has been either ordered or authorised by the Government, and, further, that the order, or authority, or sanction, need not be—though it usually is—in writing.

More recently the Madras High Court have followed the ruling of Justice Strachey, in the case of *Chidambaram Pillai* v. *Emperor* (32 Mad., p. 9). In that case the order of Government directing the prosecution (under s. 196) purported to authorise the institution of criminal proceedings against Chidambaram Pillai and two others, under section 124A, and other sections of the Penal Code, in respect of speeches delivered by them at Tuticorin and Tinnevelly in the months of February and March 1908. The prosecuting Inspector of Tinnevelly

was further directed to prefer complaints of offences under the sections named without delay against the three persons named in the order. The substance of this order was telegraphed by the Government to the District Magistrate, who orally communicated it to the prosecuting Inspector and instructed him to file a complaint, which was done the same day.

In commenting on these facts Sir A. White, C. J., said :— "The order states the sections under which the institution of the criminal proceedings is authorised, and, in general terms, the times when the speeches in respect of which the proceedings were authorised, were delivered. In our opinion there is nothing in the section to warrant the construction that the actual complaint must be expressly authorised by the local Government. The only question which the Court has to consider with reference to section 196, Criminal Procedure Code, is—'Is the complaint which I am asked to entertain a complaint made by order or under authority of Government?'"

Their lordships, however, dissented from the view expressed by the Full Bench that "the complaint should contain the article complained of to give information to the accused of the charge against him." Their lordships considered this to be unnecessary. It may be, however, that the learned Judges who constituted the Full Bench only meant that the complaint should *specify* the article complained of, which certainly seems reasonable.

It is clear, then, that section 196 of the Criminal Procedure Code renders the sanction of Government imperative, and there is no remedy for the want of it, except as provided by section 532. If, therefore, section 532 be for any reason excluded, there is an end of the question of jurisdiction.

The sanction of the Government, which has been made a condition precedent to every prosecution for sedition, was stated in Council to have been provided as a safeguard against the possible abuse of the section.

Another safeguard was provided in section 95 of the Code, which is one of the "General Exceptions." By the Act of 1870 (s. 13) the provisions contained in Chapter IV of the Penal Code, relating to "General Exceptions," were made applicable

to section 124A. This, it would appear, was hardly necessary in view of section 6 of the Code, which provides :— "Throughout this Code every definition of an offence, every penal provision, and every illustration of every such definition or penal provision, shall be understood subject to the exceptions contained in the Chapter entitled 'General Exceptions,' though those exceptions are not repeated in such definition, penal provision or illustration." In any case, the only one of them which would seem applicable to section 124A, is the one referred by the Law Member as contained in section 95.

At the time of the legislation of 1898, a note of dissent was formulated by one of the opponents of the Bill in these terms :— "It is quite possible to punish a journalist or public speaker who is only guilty of using indiscreet language calculated at most to give rise to trifling feelings of irritation." The answer to this, it was pointed out, was to be found in section 95 of the Penal Code, which provides that "Nothing is an offence by reason that it causes, or is intended to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm." In such a case therefore a journalist would have nothing to fear.

A further safeguard against abuse is provided by the Criminal Procedure Code in the restrictions imposed on the Police, who are not empowered to arrest without a warrant. Again the jurisdiction to try offences under section 124A is restricted to Courts of Session, Chief Presidency Magistrates, District Magistrates, and Magistrates of the First Class specially empowered by the Local Government in that behalf.

The offence is stated to be not compoundable. This would seem to mean not compoundable by the complainant or prosecutor; but the Government are obviously entitled to withdraw a prosecution, as they did in the *Bangobasi* case, and in other cases subsequently.

Sedition is a non-bailable offence, but even so relief may be obtained under the provisions of ss. 497—8 of the Criminal Procedure Code.