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tion must be drawn from the non-production of its witnesses. If, however, the witnesses in the present case are excluded only because the Public Prosecutor or the Court thought their evidence superfluous, it would still have been proper to tender them for cross-examination by the accused. In the state of the record indicated by the foregoing observations, it is obviously impossible to deal justly with the appeal; for, while there may not be sufficient evidence on the record to support the conviction, it is very possible that the Court has illegally excluded evidence which would have sufficed to prove the guilt of the accused, in which case the determination of the case as it stands might result in a deplorable miscarriage of justice.

Under these circumstances, it is necessary—and I make this order with great reluctance—to cancel all the proceedings in the Sessions Court, and to direct a new trial of the accused according to law with the least possible delay.

New trial ordered.

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EXTRAORDINARY ORIGINAL CRIMINAL.

Before Sir W. Comer Petheram, Kt., Chief Justice.

LAIDMAN *v.* HEARSEY.

Defamation—Justification—Express malice—Evidence of complainant having previously acted as alleged in the libel—Act XLV of 1860 *(Penal Code), s.* 499.

In a prosecution for defamation under s. 500 of the Penal Code, the alleged libel accused the complainant, who was a judicial officer, of (i) having, upon a particular occasion, used abusive language to certain respectable native litigants appearing before him in Court, and (ii) having, upon other occasions not specified, treated other respectable natives (not named), "in a similar manner." This latter accusation was contained in a postscript. The complaint filed by the complainant in the Court of the committing Magistrate, and the charge-sheet in which the Magistrate committed the defendant for trial, covered the whole of the document complained of, except the postscript. At the trial of the case, the defendant pleaded not guilty, and also relied on the first, eighth, and ninth exceptions to s. 499 of the Penal Code. The prosecution gave evidence to prove that, in making the charges contained in the alleged libel, the defendant was actuated by express malice toward the complainant.

Held, with reference to the terms of s. 499 of the Penal Code, that evidence of particular instances of abusive language applied by the complainant upon former occasions to natives appearing in his Court was admissible, first as relating to the question what was the reputation which the defendant was said to

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have injured, and secondly because it must be gathered from the document complained of *as a whole* whether it showed a malicious intention or not.

THIS was a prosecution for defamation under s. 500 of the Penal Code, which was brought by Mr. George J. Laidman, Subordinate Judge and Judge of the Small Cause Court at Dehra Dún, against Captain A. W. Hearsey. The alleged libel was contained in a letter which was admittedly written by the defendant on the 25th February, 1885, to the Government of India, and to the Government of the N.-W. Provinces, and published by him. The letter was in the following terms:—

"I was in the Court of the Sub-Judge of Dehra Dún and Mussoorie, on the 9th February, to give evidence in a law suit.

"Whilst waiting there, three respectable Rajpoot zamindars (nephews of the late Saroop Dass, Mohunt of Dehra) entered the Court, where a case in which they were interested, and which had been returned to the Sub-Judge's Court by the High Court for rehearing and revision was to be heard on that day.

"When Mr. Laidman, C. S., the Sub-Judge, looked up and saw them, he burst out into abuse in the following words:—'*Soors* (pigs), *badmashes* (bad characters), *haramzadas* (bastards), '*Tum hamare degree High Court ko appeal kiya*;' and then again repeated the three obnoxious and abusive epithets, ordering them out of the Court till their case was called on.

"As I left the Court, these three men (whom I have known for upwards of twenty years to be quiet, respectable, high caste Rajpoot zamindars), came and asked me if I had heard the Sub-Judge *gali karo* (abuse) them, and if I had noticed what he said. I replied that I had. They then inquired, "Where shall we get justice? This is the Magistrate (*Hakim*) who will have to re-hear our case. We are poor men: will you on our behalf report this *zulum* (injustice, oppression) that we have suffered from the Sub-Judge?" I said I would, as I thought it must be disgraceful and contrary to law that a Covenanted Bengal Civilian, holding the position of a Sub-Judge, should be guilty of such a gross abuse of authority whilst sitting on the Bench to administer JUSTICE! That the conduct of Mr. Laidman was a criminal offence, he having been guilty of criminal defamation of character by the use of offensive, abusive, and

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injurious expressions to respectable native litigants, who, in the ordinary course of business, had to appear before him for the purpose of urging a just claim in the prosecution of a civil suit: and also criminally, as such language, if used to any Englishman, would most undoubtedly have led to a breach of the peace.

"In my humble idea, I consider it a public duty to bring such a gross and wanton dereliction of duty to your notice, as a continuance of such unjust and oppressive conduct and language is liable, in the eyes and opinion of the natives of this country, to bring general discredit and contumely on the whole Civil Service of India, unless some wholesome example is made. I consider the conduct on the part of the Sub-Judge in question not only illegal and cruelly oppressive, but also ungentlemanly and cowardly in the extreme, as he would not have dared, under the circumstances we have related, to have addressed such language to any of his own countrymen. I have only further to add that the Sub-Judge Mr. Laidman, when officiating for the Superintendent of the Dun in the end of 1883, fined a gentleman in Mussoorie the sum of Rs. 300 for saying in a privileged conversation that the Municipality were a set of pigs: so he should have been the last person in India to have used the offensive epithet *soor* to any individual, still less to respectable Hindu zemindars who appeared before him for justice!!!

"In conclusion, I feel confident that after the perusal of this, you will grant these men full investigation and ample redress from the insults they have received from a member of the Covenanted Civil Service of India. Mr. Laidman, still more to annoy and distress these men, has already postponed the rehearing of their case on three occasions, thus causing them unnecessary expense and delay. I have the honor to be, your most obedient Servant, A. W. HEARSEY, *Captain, Retired List, Her Majesty's service.*"

"This is not an isolated case of Mr. Laidman's abusing respectable natives in his Court. When the time comes, I can produce several others whom he has treated in a similar manner."

Upon obtaining a copy of this letter, Mr. Laidman, to whom sanction was given by Government for the prosecution of Captain

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Hearsey, demanded an apology, and, this having been refused, instituted proceedings, which resulted in the committal of the defendant for trial by the High Court. The complaint filed by Mr. Laidman in the Court of the Assistant Magistrate of Dehra Dún, and the charge-sheet in which the Magistrate committed the defendant for trial, substantially covered the whole of the letter of the 25th February, with the exception of the postcript, which referred to alleged previous instances of abusive expressions applied by the complainant to respectable natives in his Court.

At the trial of the case before Petheram, C. J., and a jury, the defendant admitted having written and published the matter complained of, but pleaded not guilty, and also relied upon the first, eighth, and ninth exceptions to s. 499 of the Penal Code. The prosecution gave evidence suggesting the inference that, in making the charges contained in the alleged libel, the defendant was actuated by express malice. This evidence consisted of, (1) decisions passed by the complainant in cases in which the defendant was more or less directly interested, (2) a judgment in which the complainant commented in severe terms upon the defendant's conduct and demeanour in Court, and (3) a letter written by the defendant to the Registrar of the High Court, in which he imputed dishonesty to the complainant in the conduct of a particular case.

The complainant was the first witness called by the prosecution. In cross-examination, Mr. *J. D. Gordon*, for the defence, asked the following question :—

"Will you swear that you have never in Court used any offensive expression to any native of this country?"

Mr. *G. E. A. Ross*, (with him Babu *Dwarka Nath Banarji*), for the prosecution, objected to this question. He submitted that particular instances of abusive expressions used by the complainant on former occasions were not relevant under s. 138 of the Evidence Act; and that, assuming questions relating to such instances to be admissible as being directed to shaking the credit of the witness, under s. 146, it would not, under s. 153, be open to the defence to give evidence contradicting his statements.

[PETHERAM, C. J.—We are not trying the defendant for telling a falsehood, but for defaming the complainant in his character as a

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Judge. Upon this issue I am of opinion that the whole of the complainant's character as a Judge is relevant.]

The first witness called by the defence was Mr. E. G. Mann, who deposed to having practised for some time as a pleader in the complainant's Court at Mussoorie.

Mr. *Gordon*.—Have you ever heard the complainant use abusive language in Court to natives who had to appear before him?

Mr. *Ross*.—I object to the question. The charge as laid and to which the inquiry should be confined, is a charge of particular acts of misconduct alleged to have been committed at a specified time and place towards a specified individual. Upon this issue, instances of other acts committed at other times and towards other persons are not admissible in evidence either as facts in issue or as relevant facts. They do not fall within the definition of "facts in issue" given in s. 3 of the Evidence Act, because the general conduct of Mr. Laidman in Court is not in issue, and the truth of the specific charge as to the complainant's conduct in Court on the 9th February does not "necessarily follow" from anything he may have done upon other occasions. Nor do they come within any of the provisions of ss. 6—14 of the Evidence Act, showing what facts are relevant; and hence there is no section in the Act which warrants the introduction of the evidence. Under s. 5, therefore, it is inadmissible.

[PETHERAM, C. J.—The question is, whether the defendant's letter of the 25th February defamed the complainant or not. The prosecution have gone into the past relations of the parties to show that the defendant acted with a malicious intention. Mr. Gordon now seeks to show that Mr. Laidman, as a Judge, has no character to be defamed. This is a fact in issue. A statement which is defamatory of one person is not necessarily defamatory of another. The defendant is not being tried for telling a falsehood, but for filching a man's character. Upon this question it is necessary to consider what the complainant's character is.]

Mr. *Ross*.—Assuming that a man's character is bad, that cannot justify another in making false statements concerning him.

[PETHERAM, C. J.—If this were a civil action, the case might be different. But here you put the law in motion against a man

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whom you accuse of committing a crime, and with a view to his punishment.]

Mr. *Ross*.—The case of a civil action is closely analogous. In such an action, evidence of particular facts tending to show the plaintiff's misconduct might possibly be admissible in reduction of damages, but not to support a plea of justification. For the latter purpose, there is not a single precedent or provision of the law which warrants the admission of such facts in evidence. The case of *Scott* v. *Sampson* (1), and in particular the judgment of Cave, J., who fully reviewed the authorities on the subject, supports this contention. The grounds of the rule there laid down are, that statements of this description are so vague and general that to admit evidence upon them would be, in effect, "to throw upon the plaintiff the difficulty of showing an uniform propriety of conduct during his whole life," and "would give rise to interminable issues which would have but a very remote bearing on the question in dispute, which is to what extent the reputation which he actually possesses has been damaged by the defamatory matter complained of." These grounds are equally applicable to criminal proceedings, which, therefore, should be governed by the same rule; and hence it follows that evidence of this description, even assuming it to be admissible in mitigation of punishment, is not admissible for the purpose of justification.

[PETHERAM, C. J.—In that case there was no attempt on the part of the prosecution to prove express malice. In this case you charge express malice, and then seek to confine the inquiry to a particular part of the document, though the question is whether the defendant acted maliciously, and whether the document *as a whole* is true. If in *Scott* v. *Sampson* (1) the general character of the plaintiff had been attacked, I should think that the defence would have been entitled to give evidence adverse to his general character. The libel there charged a theatrical critic with abusing his position by attempting to extort money, and it was held that this charge could not be justified by showing that he had abused his position in other ways. All that the Court really decided was that if, for example, a libel charged a man with having been drunk on a particular

(1) L. R., 8 Q. B. D. 491.

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occasion, it could not be justified by evidence showing that on other occasions he had committed theft. There is nothing in the reports to exclude evidence of particular instances of the same kind of misconduct as that alleged in the libel. In the present case this document is only a part of the matters put before the jury to support the charge of malice, and which do prove malice if they are not contradicted. You virtually claim that the prosecution may go into these general matters, but that the defence may only contradict you as to a part. The case of *Lawson* v. *Labouchere* (1) appears to me to be more in point than *Scott* v. *Sampson* (2) In that case the complainant was cross-examined at great length upon his conduct as a journalist, and in order to contradict him files of the *Daily Telegraph* for some years back were put in. Apart from this, however, I am of opinion that, in the present case, Mr. Laidman's character is a fact in issue.]

Mr. *Ross*.—It is in issue, not generally, but with reference only to particular expressions said to have been used on a particular occasion. This is shown by the complaint filed by the prosecution, and by the charge framed by the committing Magistrate. The prosecution has not been instituted in respect of every allegation contained in the defendant's letter of the 25th February, but only in respect of such of the allegations as are sufficiently specific to admit of an answer. It was necessary to put in the whole document, but the defendant has not been required to plead to any points other than the statements relating to the 9th February and to the adjournments. The other imputations were not made the subject of charge, because they are so indefinite and general, specifying neither time, place, nor person, that it was impossible to bring evidence regarding them or to meet them in any way. Any evidence therefore upon these allegations must necessarily take the complainant by surprise, and subject him to great hardship.

[PETHERAM, C. J.—If the complainant had chosen to take civil proceedings, the difficulty would have been avoided. Not having done so, he must take the consequences.]

Mr. *Ross*.—The rules of the service practically made such a course impossible. The official reputation of a civil servant is considered as being in the hands of his superiors, and the complainant

(1) Not reported. (2) L. R., 8 Q. B. D. 491.

was bound, as a matter of fact, to take only such action as they approved. [The learned Counsel referred to the *Manual of Government Orders, North-Western Provinces*, Vol. I, p. 156 (Judicial Criminal):—"All officers must obtain the authorization of Government before having recourse to the Courts for vindication of their public acts or their character as public functionaries from defamatory attacks. This order does not affect an officer's right to defend his private dealings or behaviour in any way that may seem to him fit; but his official reputation is in the charge of the Government which he serves."]

[PETHERAM, C. J.—That rule does not appear to me to apply to charges of this kind, but to charges relating to a man's competency in his work, and to the fairness of his decisions. In using offensive expressions from the Bench, a man does not, in my opinion, act in his "official" character, but out of his own folly. I regard the matter as a vulgar little quarrel, and as having nothing of the character of a state trial about it.]

Mr. *Ross*.—It is not merely a prosecution brought by a private person, but a prosecution brought by a public official to vindicate his character. For this purpose he is entitled to use the remedy provided by law.

[PETHERAM, C. J.—I shall tell the jury that he cannot use a criminal prosecution for that purpose. The object of such proceedings is not to seek a remedy for an individual injury, but to punish a crime, and the complainant is only interested, like any other member of the public, in seeing that justice is done. With reference to the alleged hardship caused to the complainant, it will be for the jury to consider whether he has been so taken by surprise that they should regard the evidence with suspicion.]

Mr. *Ross* asked that the point might be reserved under the Charter for decision by the Full Court.

Mr. *Gordon*, for the defence, was not called on to reply.

PETHERAM, C. J.—The whole question which has been raised by this objection turns upon the construction to be placed upon the language of s. 499 of the Penal Code. That section creates the criminal offence of defamation, and whoever is guilty of the offence as therein defined, is liable to punishment in the public

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interests. The question of guilt is for the jury to consider, who must have before them all the evidence, and who must consider it without reference to the interests of any other person than the public and the prisoner. The words of s. 499 are as follows:—"Whoever, by words either spoken or intended to be read, or by signs, or by visible representations, makes or publishes any imputation concerning any person, intending to harm, or knowing, or having reason to believe, that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person."

The question here is whether, with reference to these words alone, and apart from the rest of the section, Captain Hearsey intended to harm the reputation of Mr. Laidman. Before this question can be answered, it is essential to see what Mr. Laidman's reputation is, and, moreover, Mr. *Ross* puts the case for the prosecution on the ground that Captain Hearsey acted with a malicious intention to injure the complainant by telling a falsehood and not with a genuine intention to furnish proper information to the public. Upon this issue, it must be material to ascertain whether Captain Hearsey, in his letter *as a whole*, was telling the truth or not.

For these reasons I rule that this evidence is admissible, that is to say, first, because it relates to the question what is the reputation which the defendant is said to have harmed; and secondly, because it must be gathered from the document *as a whole* whether it shows a malicious intention or not. I decline to reserve the point for the Full Court, being of opinion that to do so would not serve the interests of either party.

CIVIL REVISIONAL.

1885
July 23.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Tyrrell.

BALDEO DAS (PETITIONER) *v.* GOBIND SHANKAR (OPPOSITE PARTY.)*.

Act XL of 1858 (*Bengal Minors Act*), *s.* 3—*Certificate of administration—Right of holder of certificate to defend suits connected with minor's estate—High Court's powers of revision—Civil Procedure Code, ss.* 2, 622.

Under s. 3 of the Bengal Minors Act (XL of 1858), the Civil Court has no power to refuse to admit a person who has obtained a certificate of administration

* Application No. 147 of 1885, for revision under s. 622 of the Civil Procedure Code, of an order of Babu Kashi Nath Biswas, Subordinate Judge of Benares, dated the 5th June, 1885.