REVISIONAL CRIMINAL.

Before Ross and Kulwant Sahay, JJ.

1926.

August, 10, 12.

NIRSU NARAYAN SINGH

v.

KING-EMPEROR.*

Penal Code, 1860, (*Act XLV of* 1860), *section* 499 *and* 500—*defamation—Advocate—privilege of, whether absolute or qualified—Crown, onus on, to prove malice—inference as to malice, whether question of law.*

The liability of an advocate charged with defamation in respect of words spoken or written in the performance of his professional duty depends on the provisions of section 499, Penal Code, 1860; the court will presume good faith unless there is cogent proof to the contrary.

The privilege is not absolute but qualified, but the burden is cast upon the prosecution to prove absence of good faith.

Satish Chandra Chakravarty v. *Ram Dayal De* (1), followed. In re. *Nagarji Trikamji* (2), *Upendra Nath Bagchi* v. *Emperor* (3), *Emperor* v. *Purshottamdas Ranchhoddas* (4), and *Nikunja Behari Sen* v. *Harendra Chandra Sinha* (5), referred to.

Per *Kulwant Sahay, J.*—The common law of England, under which an Advocate can claim absolute privilege for words uttered in the course of his professional duty, is not applicable to India.

An Advocate in this country, therefore, is not entitled to claim absolute privilege, and, in cases of prosecution for defamation, his liability must be determined on reference to the provisions of section 499, Penal Code, 1860.

* Criminal Revision no. 505 of 1926, from an order of Ananta Nath Mitter, Esq., Sessions Judge of Saran, dated the 30th of July, 1926, dismissing an appeal against the order of Babu Pushkar Thakur, Deputy Magistrate of Chapra, dated the 29th of June, 1926.

(1) (1921) I. L. R. 48 Cal. 388, S. B. (3) (1909) I. L. R. 36 Cal. 375.
(2) (1895) I. L. R. 19 Bom. 340. (4) (1907) 9 Bom. L. R. 1287.
(5) (1914) I. L. R. 41 Cal. 514.

Satish Chandra Chakravarty v. *Ram Doyal De* (1), followed. *Sullivan* v. *Norton* (2) and In re. *P. Venkata Reddy* (3), not followed.

The question whether upon the facts found or proved malice has been established is a question of law.

The facts of the case material to this report are stated in the judgment of the Court.

S. Sinha (with him *S. K. Banerji* and *S. M. Mullick*), for the petitioner.

Sultan Ahmed, Government Advocate for the Crown.

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Ross, J.—In 1923 there was an election for the Bihar Legislative Council. Two of the rival candidates were Nirsu Narayan Singh, the petitioner, and Rai Bahadur Chandraketu Narayan Singh. The latter was successful; and the former disputed the validity of the election on various grounds. One of these grounds was that Zainuddin Khan, the Sub-Inspector of Police of Masrakh thana, had used undue influence in procuring the votes of the chowkidari presidents of his thana for Chandraketu Narayan Singh. An enquiry was held by commissioners; and, in that enquiry, one Radhakant Prasad, a president, gave evidence for the petitioner to the effect that at the thana the head constable gave them a message from the Sub-Inspector to say that they were to support the candidature of Chandraketu Narayan Singh. The commissioners found that the charge of undue influence was untrue.

In December 1925, Zainuddin Khan prosecuted one Sheomangal Bari, a servant of Beni Prasad, a brother of Radhakant Prasad, for an offence under the Arms Act. The petitioner, who is an Advocate of this Court, defended the accused in that case. Part

(1) (1921) I. L. R. 48 Cal. 358, S. B. (2) (1887) I. L. R. 10 Mad. 28.
(3) (1913) I. L. R. 36 Mad. 216.

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of the defence was that the Sub-Inspector had an old grudge against Radhakant Prasad and, therefore, had concocted a false case against his brother's servant. Zainuddin Khan was cross-examined on the subject of the election; and Radhakant Prasad gave evidence for the defence stating that he gave his vote as desired by the Daroga to Chandraketu Narayan Singh, but that he advised his tenants to vote for the petitioner. He also said that he had given evidence for the petitioner in the case about the election. During his argument in that case, the petitioner said that

> "The Sub-Inspector might have been given silver tonic in the matter of election between him and Rai Bahadur Chandraketu Narayan Singh to side [sic] the latter."

The Sub-Inspector then laid a complaint of defamation against the petitioner on these words. The petitioner was convicted by the Deputy Magistrate of Chapra and sentenced to one week's simple imprisonment and a fine of Rs. 1,000 under section 500 of the Indian Penal Code. An appeal against the conviction was dismissed by the Sessions Judge of Saran. The present application in revision is directed against that conviction.

The law on the subject has been full discussed by a special Bench of the Calcutta High Court in *Satish Chandra Chakravarty* v. *Ram Doyal De* (1). That was not a case about the position of an Advocate in defending a client; but all the cases on this subject were referred to. It was held that, if a party to a judicial proceeding is prosecuted for defamation in respect of statements made therein on oath or otherwise, his liability must be determined by a reference to the provisions of section 499 of the Indian Penal Code; that the question must be solved by the application of the provisions of the Indian Penal Code and not otherwise; that the Court cannot engraft thereupon exceptions derived from the common law of

(1) (1921) I. L. R. 48 Cal. 388, S. B.

England or based on grounds of public policy. Consequently a person in such a position is entitled to the benefit of the qualified privilege mentioned in section 499 of the Indian Penal Code. The cases dealing with Advocates were also referred to as ruling that the liability of a pleader charged with defamation in respect of words spoken or written in the performance of his professional duty depends on the provisions of section 499 of the Indian Penal Code; and that the Court would presume good faith unless there is cogent proof to the contrary. The privilege is not absolute, but qualified; no doubt the burden is cast upon the prosecution to prove absence of good faith. In re *Nagarji Trikamji* (1), which was followed in *Upendra Nath Bagchi* v. *Emperor* (2) their Lordships, without deciding whether Advocates have or have not an unqualified privilege from criminal prosecution, said: "In considering whether there was good faith, that is under section 52, due care and attention of the person making the imputation must be taken into consideration. That of an Advocate is well expressed by the Master of the Rolls in the passage cited above [i.e., *Munster* v. *Lamb* (3)]. He speaks from instructions; he reasons from facts sometimes true sometimes false. He draws inferences from these facts sometimes correct sometimes fallacious. He does not express his own inferences, his own opinions or his own sentiments, but those which he desires the Tribunal, before which he appears, to adopt. This duty the law allows, almost compels him to perform. Such being his duty it seems to us that where express malice is absent (and it ought not be presumed) the Court having due regard to public policy would be extremely cautious before it deprived the Advocate of the protection of exception 9". In *Upendra Nath Bagchi's* case (2) their Lordships referred to *Emperor* v. *Purshottamdas Ranchhoddas* (4) where it was said that "when a

(1) (1895) I. L. R. 19 Bom. 340.
(2) (1909) I. L. R. 36 Cal. 375.
(3) (1882) 11 Q. B. D. 588.
(4) (1907) 9 Bom. L. R. 1287.

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pleader is charged with defamation in respect of words spoken or written while performing his duty as a pleader, the Court ought to presume good faith and not hold him criminally liable unless there is satisfactory evidence of actual malice and unless there is cogent proof that unfair advantage was taken of his position as pleader for an indirect purpose". This decision was followed in *Nikunja Behari Sen* v. *Harendra Chandra Sinha* (1) where it was held that a pleader is entitled to the presumption of good faith and that, to rebut that presumption there must be convincing evidence that the pleader was actuated by improper motives personal to himself, and not by a desire to protect or further the interests of his client's case. These cases were referred to without being dissented from in the decision of the Special Bench. The law therefore is this that while a case of defamation against an Advocate is governed by section 499 of the Indian Penal Code, good faith has to be presumed in his favour; and it is for the prosecution to prove that he was actuated by malice and by indirect motives personal to himself.

That the words which form the subject of the charge were used by the petitioner is not disputed. It was argued on his behalf that the prosecution ought to have shown the context in which the words were used. It seems to me that if the defence relied upon the context as minimising the effect of the words, that ought to have been established by the defence. The first question for decision is whether the words are defamatory. The meaning of the words is plain although it is not expressed grammatically. The words mean that the Sub-Inspector actively supported the candidature of Chandraketu Narayan Singh and that he might have been doing this for money. Both the Courts below have interpreted this as meaning that the Sub-Inspector was bribed. If this means that the Sub-Inspector was taking a gratification in the sense of section 161 of the Indian Penal Code,

(1) (1914) I. L. R. 41 Cal. 514.

then the construction is certainly wrong, because it is not suggested that anything that he did in the matter of the election was doing or forbearing to do an official act or in the exercise of official functions. On the contrary, as the Magistrate has pointed out, Government servants are strictly prohibited under their rules from helping candidates in elections. The words therefore come to this that the Sub-Inspector was acting as an election agent for Chandraketu Narayan Singh and might have been paid for his work. Used of a private person, such language would not be defamatory; but, it is said that, inasmuch as Government servants are prohibited from taking an active part in elections, these statements would have got the Sub-Inspector into trouble with his superiors. But the mere statement that he canvassed for a candidate would also have had this effect; and, as has been shown above, there was evidence on the record to justify the Advocate in making that statement at all events. The argument of the petitioner in the case under the Arms Act appears to have been this that the Sub-Inspector was acting on behalf of Chandraketu Narayan Singh in the election and that Radhakant Prasad had not carried out his directions; and, therefore, the Sub-Inspector had got up a false case against a servant of his brother; and, to strengthen the argument, it was suggested as a link in the chain of reasoning that the Sub-Inspector might have had a pecuniary interest in the matter.

This leads to the consideration of the main question in the case, viz., whether the petitioner in advancing this argument was actuated by malice and indirect motives of his own. His own statement was that whatever he suggested in cross-examination of the prosecution witnesses and commented in argument was based upon instructions he received from his client and on the record of the case; and that statement is supported by the evidence of one of his colleagues, Rai Bahadur Birendra Chandra Chakravarti, an Advocate, who was examined in the trial as a prosecution witness. It was objected that no suggestion

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was made to the Sub-Inspector either in the trial of the case under the Arms Act or in the present trial, or to Radhakant Prasad, that the Sub-Inspector had been paid and that no such suggestion was made before the commissioners in the election case. As the Sub-Inspector denied throughout that he had acted at all for Chandraketu Narayan Singh, it is not clear that anything would have been gained by putting any further question. Neither side thought fit to put the question to Mr. Chakravarti. But it is not clear that it was for the petitioner to put the question when he made the statement that the petitioner acted and said everything on instructions; while it was for the prosecution to establish malice by positive evidence. The prosecution mainly relies on the relations between the Sub-Inspector and the petitioner arising out of the election. The Sub-Inspector says that the petitioner's impression was that Rai Bahadur Chandraketu Narayan Singh had succeeded through his efforts and hence the malice of the accused against him. It is not clear from what his knowledge of this impression was derived and it seems in the last degree improbable that the petitioner should have thought anything of the kind: he himself denies that this was his impression. It is also said that, after the decision of the commissioners, this statement must have been malicious; and that is the ground upon which both the Courts below have proceeded. But the question before the commissioners was as to the exercise of undue influence over the chowkidari presidents by the Sub-Inspector in his official position. The present statement has no connection with any such idea. In fact the trial Court based its finding entirely on the result of the election petition. The learned Sessions Judge seems to have deduced malice from the absence of instruction on this particular point and from the fact that the commissioners had decided in favour of the Sub-Inspector. But even if it be true that, in making his comments on the evidence the petitioner went beyond his instructions, this would not in itself amount to

proof of malice; and the decision on the election petition is wholly immaterial. Consequently I am unable to find any evidence that the petitioner was actuated by malice or indirect motives of his own in arguing as he did; and would therefore hold that he is entitled to the benefit of the ninth exception. It follows that the conviction and the sentence must be set aside and the petitioner must be acquitted and released from bail.

KULWANT SAHAY, J.—I agree. Learned Counsel for the petitioner commenced his argument by referring to the common law of England that no action, civil or criminal, lies against Judges, counsel, witnesses, or parties, for words spoken in the ordinary course of any proceeding before any court or tribunal recognized by law, and a reference was made to *Munster* v. *Lamb* (1).

Now, under the common law of England, an Advocate can claim an absolute privilege for words uttered in the course of his duty as an Advocate. But this law is not applicable to this country. The question was considered at great length by a Special Bench of the Calcutta High Court in *Satish Chandra Chakravarti* v. *Ram Doyal De* (2) where it was held that if a party to a judicial proceeding is prosecuted for defamation in respect of a statement made therein, on oath or otherwise, his liability must be determined by reference to the provisions of section 499 of the Indian Penal Code. The Court cannot engraft thereupon exceptions derived from the common law of England, or based upon grounds of public policy. Consequently, a person in such a position is entitled only to the benefit of the qualified privilege mentioned in section 499 of the Indian Penal Code. This was a case of a party to a judicial proceeding and not of an Advocate. But the case of an Advocate does not stand on a different footing, and all the authorities bearing on the subject were cited in the decision of the

(1) (1882) 11 Q. B. D. 588. (2) (1921) I. L. R. 48 Cal. 388, S. B.

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Special Bench referred to above. We must, therefore, accept the proposition that an Advocate in this country is not entitled to an absolute privilege and in cases of prosecution for defamation his liability must be determined on reference to the provisions of section 499 of the Indian Penal Code. The Madras High Court has taken a different view. In *Sullivan* v. *Norton* (1) a Full Bench of that Court held that an Advocate in India cannot be proceeded against civilly or criminally for words uttered in his office as Advocate. In re: *P. Venkata Reddy* (2) a similar view was expressed as regards the common law doctrine of absolute privilege. But all the other Courts are agreed in holding that this doctrine is not applicable to this country. Mr. Sinha, although he began by a reference to this doctrine of the common law of England, subsequently accepted that the law laid down by the Special Bench of the Calcutta High Court was the correct law. We have, therefore, to consider whether the petitioner is entitled to take protection under the ninth exception to section 499 of the Indian Penal Code.

Mr. Sinha has raised four points in defence of his client: First, that the petitioner was acting on instructions; secondly, that the words uttered by the petitioner and forming the subject matter of the charge, detached from the context do not convey any adequate idea of the meaning of the expression used by the petitioner, and they are not in themselves such as to make the petitioner liable on a charge of defamation; thirdly, the meaning to be attached to the words used by the petitioner does not necessarily amount to defamation; and lastly, that there was a presumption of bonafides in favour of the petitioner, and it was for the prosecution to prove malice, and that they have failed to do so.

It has been held by the learned Sessions Judge that in using the expression forming the subject

(1) (1887) I. L. R. 10 Mad. 28. (2) (1913) I. L. R. 36 Mad. 216.

matter of the charge, the petitioner was not acting on instructions. Learned Counsel for the petitioner draws our attention to the deposition of Rai Bahadur Birendra Chandra Chakravarti, an Advocate of this Court, practising in the Courts at Chapra, who was examined as prosecution witness no. 4. This witness was the colleague of the petitioner in the case against Sheomangal Bari, and he stated in his deposition

> "My colleague Nirsu Babu acted and said everything on instruction."

The petitioner when examined under section 342 of the Criminal Procedure Code stated that whatever comment he made in the course of the argument was based upon instructions received from his client. It is contended by the learned Government Advocate that if the petitioner wanted to escape liability on the ground of his uttering the words forming the subject matter of the charge upon instructions received from his client, it was incumbent upon him to prove such instructions. The learned Sessions Judge observes that the prosecution witness no. 4 was not specifically asked whether Nirsu Narayan Singh had instructions regarding the "silver tonic". It is contended by Mr Sinha that it was not for the petitioner to cross-examine the witness upon this point, but it was for the prosecution to do so, and he refers to section 126 of the Indian Evidence Act. I am of opinion that, having regard to the nature of the charge against the petitioner, the answer elicited from the prosecution witness no. 4 in cross-examination, as quoted above, discharged the onus that lay upon the accused, and the evidence of the prosecution witness no. 4 that the petitioner said everything on instruction must be held to refer to the charge brought against the petitioner. It is contended that there was no suggestion in the examination of the Sub-Inspector as a witness in the Arms Act case as regards his taking any remuneration for his taking the side of Rai Bahadur Chandraketu Narayan Singh in the election matter and, therefore,

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the petitioner could have no instruction upon the point. The mere fact that no question was put to the effect would not necessarily lead to the conclusion that the petitioner had no instruction. The petitioner had elicited the point in the cross-examination of the prosecution witnesses, and it was not necessary for him to adduce any further evidence upon the point. The question, however, as to whether he was acting under instructions or not is of importance in connection with the question as to whether the petitioner was actuated by malice, and this is the really important question to be decided in this case.

It is conceded by the learned Government Advocate that the onus lies on the prosecution to prove malice in the case of Advocates. The learned Magistrate also placed the onus upon the prosecution. He, however, found that malice had been proved. It is contended that this is a finding of fact, which cannot be interfered with in revision. I am of opinion that the question whether upon the facts found or proved malice has been established is a question of law. The only evidence of malice consists of the deposition of the Sub-Inspector Zainuddin Khan. He stated: "Babu Nirsu Narayan Singh's impression was that Rai Bahadur Chandraketu Narayan had succeeded through my efforts and hence the accused's malice against me". I fail to see how he could speak of what the impression of the accused was. The evidence is that he never met the accused after the election dispute. The election dispute had ended about 18 months previously. I am of opinion that the prosecution have failed to prove malice, and the petitioner is entitled to acquittal. I would, however, desire to observe that Advocates in discharge of their onerous and sacred duties must be very careful not to give rise to the faintest suspicion of a personal element in their speech or action as Advocates.