CRIMINAL REVISION.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Mosely.

1939

Jan. 10.

THE KING *v.* SHWE HPI AND ANOTHER.*

Penal Code, ss. 153A, 295A, 298—Religious feelings, outrage of—Malicious and deliberate intention of insulting a class—Wounding religious feelings of an individual—Reply in answer to attack on writer's religion—Calling attention to reform.

The offence under s 295A of the Penal Code is more serious than the one under s. 298. To establish the former offence the prosecution must establish that the intention of the accused to outrage was malicious as well as deliberate, and directed to a class of persons and not merely to an individual. What is punishable under s. 295A is not so much the matter of discourse, written or spoken, as the manner of it. If the words used caused persons to feel insulted but were only such as might possibly wound and in fact did so, then there is no offence under this section ; if the words used were bound to be regarded by any reasonable man as grossly offensive and provocative, and were maliciously intended to be regarded as such, then an offence is committed. And it is no defence to a charge under s. 295A for anyone merely to say that he was writing a pamphlet in reply to one written by an adherent of another religion who has attacked his own religion.

Prior to the enactment of s. 295A in 1927, if the words were written, s. 298 had no application and recourse was had to s. 153A of the Penal Code.

If the intention of the accused is to wound the feelings of an individual orally by words or sound or gesture or by placing some object in the sight of such individual the offence falls under s. 298 of the Code, and it is no defence for the accused to say that he did so in order to call attention to some matter in need of reform, as this is not the proper way to secure reform.

Clark (with him *Aung Thin*) for the respondents. It is not suggested by the prosecution that intemperate language has been used in the book. This book is an attempt to refute the arguments of a Burman Buddhist who had attacked the Mahomedan religion ; in order to bring out the arguments clearly the authors have included the Buddhist's book as one of the parts of their own book. If isolated passages are taken out of their context and considered they might easily wound the feelings of some one or other. Reasoned and sober

* Criminal Revision Nos. 592B and 593B of 1938 from the orders of the District Magistrate, Mandalay, in Criminal Trial No. 2 of 1938.

arguments might wound feelings, but they cannot amount to an insult within s. 295A of the Penal Code. It is not an offence to make a temperate attack on religion in which the decencies of controversy are maintained. *Bowman* v. *Secular Society Ltd.* (1).

For a conviction under s. 295A the accused must have had the deliberate and malicious intention of outraging the religious feelings of a class. The word "outrage" is a very strong word and means much more than "wounding"; it means violence or excessive abuse. S. 153A of the Code is designed to prevent breaches of the peace and s. 295A to prevent writings of a grossly insulting character. S. 298 deals with wounding feelings.

S. 295A does not provide for any constructive intention like s. 297. Was there any deliberate and malicious intention in this case? The three parts of the book are merely a controversy between the exponents of two different religions. The riots that occurred were due not to the book itself, but to the agitation of the Burmese Press. If the riots are laid aside from consideration for the moment there is nothing in the book, which, incidentally, uses a figurative language as is commonly done in the East, which would bring it within s. 295A. The Lord Buddha is called "Shin Gautama"—a very respectful term. It is not enough to secure a conviction to show that some people think that the book is an insult to their religion. If it was an insult it is strange that no objection had been taken for seven years. Apparently it is not the book that has mattered, but the agitation set up against it some seven years after its publication. The book was written with the *bona fide* intention of refuting the arguments of the Buddhist writer who made an attack

(1) (1917) A.C. 406, 423.

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on the Mahomedan religion, and not with the deliberate intention of insulting the religion and wounding feelings. All the witnesses testify to this effect.

Tun Byu (Government Advocate) for the Crown. The word "Shin" merely indicates a religious devotee. The passages complained of show the Buddhist religion and its Founder in a very bad light, and very disparaging remarks have been made in it. It is no excuse to say that the book was written in answer to some one else; the writer must keep himself within the bounds of law and not transgress legitimate criticism. The fact that nothing happened for seven years is explained by the fact that copies of the book did not get into Buddhists' hands till recently when the book was republished. The book is capable of outraging feelings at any time.

The sentence passed on the accused is undeservedly lenient. Two persons had joined together deliberately to formulate an attack. The book contains passages that are scurrilous, and that the book was dangerous is amply proved by subsequent events. The sentence must be such as would deter other persons from attempting to write such books.

ROBERTS, C.J.—These are two connected applications in revision made on behalf of the Crown, and praying for enhancement of sentences passed upon U Shwe Hpi and U Sin. The respondents were each convicted on November 3rd last of an offence against section 295A of the Penal Code by the District Magistrate, Mandalay; he took into consideration the fact that they had already been in custody for thirteen weeks or more, ten weeks of which had been spent in Mandalay Jail, and ordered that they should each be imprisoned until the rising of the Court.

The High Court in hearing this application applies the provisions of section 439, Criminal Procedure Code,

and accordingly the respondents may not only show cause against enhancement of sentence, but are entitled (by virtue of sub-section 6) to show cause against their conviction : we have heard Mr. Clark who represents them on this matter as well, and he has urged upon us that their convictions ought not to be sustained.

Section 295A of the Penal Code runs as follows :

" Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of His Majesty's subjects, by words, either spoken or written, or by visible representations, insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

This section first became law in 1927. Up to that time such conduct, if the words were spoken, fell within section 298, which still forms part of the Penal Code and which runs as follows :

" Whoever, with deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person, or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both."

The two sections still stand together in the Code but the offence under section 295A is the more serious. " Outraging " is a stronger word than " wounding "; and the intention to outrage must be malicious as well as deliberate, and must be directed to a class of persons and not merely to an individual. It is no defence to proceedings under section 298 that religious feelings were deliberately shocked or wounded by the defendant in order to draw attention to some matter in need of reform ; because that is not the proper way to secure reforms. There is a constitutional way which the

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Courts will support, and an unconstitutional way which the Courts will condemn, of giving effect to every legitimate grievance which any one of His Majesty's subjects may entertain. Under section 295A, however, the prosecution must prove more than under section 298; they must show insult for the sake of insulting and with an intention which springs from malice and malice alone. To a charge under this section therefore it would be a defence to say "I had no malicious intention towards a class, but I did intend to wound or shock the feelings of an individual so that attention might, however rudely, be called to the reform which I had in view."

Now, in the state of the law before 1927, if the words complained of were not spoken but written, as here, section 298 could have no application, and generally prosecutions took place in respect of written words, and in some cases convictions ensued, under section 153A. That section runs :

> "Whoever by words, either spoken or written, or by signs, or by visible representations, or otherwise, promotes or attempts to promote feelings of enmity or hatred between different classes of Her Majesty's subjects shall be punished with imprisonment which may extend to two years, or with fine, or with both."

The writings complained of not seldom represented an attempt to promote such feelings of hatred or enmity, but it was necessary to prove that fact in order to establish that an offence had been committed. Accordingly section 295A was placed upon the Statute Book.

What is punishable under section 295A is not so much the matter of the discourse, written or spoken, as the manner of it. We must therefore look with great care at the words used. If the words used caused persons to feel insulted but were only such as might possibly wound and in fact did so, then there would be no offence under the section ; if the words used were bound to be regarded by any reasonable man as grossly

offensive and provocative, and were maliciously intended to be regarded as such, then an offence would have been committed.

Now the facts here are that the respondent U Shwe Hpi caused a book to be printed in 1931 at the National Press in Mandalay. He distributed a thousand copies of it free of charge amongst the inhabitants of Mandalay, Shwebo, Katha, Namme, Wuntho, Kawlin and Kanbalu. It consisted of three parts. Part 1 was written by U Pan Nyo, who has since died, and was a criticism of or attack upon the Mohamedan religion. Part 2 was written by the respondent U Sin and part 3 by the respondent U Shwe Hpi, and these parts were in the nature of a refutation, or attempted refutation, of U Pan Nyo's arguments and a counter attack upon the Buddhist religion. It is quite clear that parts 2 and 3 were written by the respondents to deal expressly with what U Pan Nyo had written. This first part had been written first and was in circulation before the second and third parts were written. Nevertheless the second and third parts were not published independently but the first part was incorporated with them and all three parts were published together.

We have read all the relevant passages to which our attention has been directed both on behalf of the Crown and on behalf of the respondents in all three parts of this work. Some of the passages were unobjectionable, but other passages in each of the three works made use of most intemperate and provocative language. The trouble has been that the respondents were incensed by the manner and method of U Pan Nyo's controversy and became resolved to retort with even less restraint. By doing so they brought themselves within the reach of the Criminal law.

We do not propose to quote verbatim any of the passages complained of, since an extended publication

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of them through the medium of this Court or indeed through any other medium would be undesirable. It is enough to say that in part 2 written by the respondent U Sin there is a reference to the manner of the death of the Lord Buddha which must be held to constitute the offence charged. We also agree that the portion which the District Magistrate marked in blue pencil on pages 16 and 17 of the book falls within a similar category. With regard to U Shwe Hpi we also agree with the District Magistrate's conclusions and we consider that the parts which he has selected as constituting an offence against this section, and those parts alone, do constitute an offence.

There can be no question of matter of this kind being published in the heat of the moment ; all three books were the subject of deliberation by their authors, and we agree with the District Magistrate that it is no defence to a charge under section 295A of the Penal Code for anyone merely to say that he was writing a pamphlet in reply to one written by an adherent of another religion who has attacked his own religion. If he chooses to write such a pamphlet he must take care of the language which he employs.

It is urged by the defence that the prosecution were quite unable to call a single witness to say that the publication and distribution of this book in 1931 caused any resentment or outraged the religious feelings of anyone, and that a man's intentions must be judged by the consequences of his acts. Neither of the respondents followed up by the publication of this book, when they saw that it had aroused no serious adverse comment, by any further writings of a similar nature ; and it is said that this shows they had no malicious intention to insult religion or to outrage religious feelings when they published the book of which complaint is made.

In our opinion this is a wrong view to take of the matter. We think that if there had been a prosecution in 1931 after dissemination of the copies of this book it must have been successful even in the absence of proof that any class of persons were actually insulted. The attempt to insult them would none the less have been proved from the language employed. In the course of the argument the learned Government Advocate said "These are very bad books. If their contents had been widely known it would have outraged the feelings of the Buddhist community at any time," and we must agree with that contention. Accordingly the convictions against each of the respondents must be affirmed. Perhaps the reason that no actual harm was occasioned in 1931 was that none of the three books were of any real importance, nor were they written by persons of learning or special influence. They attracted no attention beyond a limited circle of persons, happily tolerant, who treated them with the contempt which they deserved.

In those circumstances it is quite clear that no service whatever was done to the cause of any religion by reprinting and republishing books such as these. It was a great disservice to the community and it was a thousand pities that they were not allowed to remain in well deserved oblivion. Indeed, this republication, which took place comparatively recently, was just as much a calculated outrage upon the feelings of the Buddhist community and an insult to their religion and (consequently) an offence against the Penal Code as their original publication.

It was the republication of the books and the attention drawn to their contents, apparently long since forgotten, which ensured that the ashes of religious controversy should be fanned into flame.

With this reprinting and republication, it is important to observe, the respondents were in no-way

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concerned. We are not told whether any prosecution for this offence was instituted, as it well might have been, against some person or persons not now before the Court, for we are satisfied that the republication was infinitely more harmful than what took place in 1931. And it is right, in considering what is the proper penalty to inflict upon the respondents, to bear this fact steadily in mind.

Now it is true that when the respondents saw that no serious notice was taken of their work after its distribution in 1931 and that there was nothing to show that any class of persons had been actually insulted they made no further effort to persist in their attempted insults; and it is also true that at the time of the original publication they had been goaded or provoked into this unjustifiable manner of retorting by the intemperate expressions in the book to which they were seeking to reply. These two factors are both of considerable weight.

Even so, we consider that the sentence of imprisonment till the rising of the Court would still have been quite inadequate but for the fact that each of the respondents had already undergone ten weeks in prison awaiting trial and a further period in police custody. This circumstance was the governing factor in the Magistrate's decision, and we hold that he rightly took it into consideration, and we therefore reject the application for enhancement which has been made before us.

The special circumstances of this case should afford no ground for any illusion that an offence against this section is one which is likely to receive lenient treatment, by whomsoever, and against whatsoever religion or class of the community it is committed.

MOSELY, J.—I agree.