APPELLATE CRIMINAL.

Before Mr. Justice Holmwood and Mr. Justice Sharfuddin.

1912

April

SURESH CHANDRA SANYAL

v.

EMPEROR.*

Sedition—Publication—Handwriting, proof of—Admissibility and value of expert opinion not based on comparison made in Court with admitted or proved handwriting of the person alleged—Penal Code (Act XLV of 1860), s. 124A—Evidence Act (I of 1872), s. 45.

On a charge under s. 124A of the Penal Code the sending of a pamphlet by post, addressed to a private individual not by name, but by designation as the representative of a large body of students, amounts to publication.

It is necessary for the admission of the evidence of a handwriting expert, under s. 45 of the Evidence Act, that the writing with which the comparision is made should be admitted or proved beyond doubt to be that of the person alleged, and that the comparison should be made in open Court in the presence of such person.

Cresswell v. *Jackson* (1), *Cobbet* v. *Kilminster* (2) and *Phoodee Bibee* v. *Gobind Chunder Roy* (3) referred to.

THE appellant was tried by the District Magistrate of Pubna on charges under ss. 124A and $\frac{124A}{109}$ of the Penal Code, and convicted and sentenced, under the former section, to two years' rigorous imprisonment, and acquitted under the latter. The facts were as follows. Babu Khirode Chunder Sen, the Head-master of the Rangpur Zilla School, received through the post at Rangpur, on the 12th September 1910, a manuscript pamphlet of a seditious character entitled *Matripuja* addressed to "The Captain, Zilla School, Rangpur."

* Criminal Appeal No. 1029 of 1911, against the order of J. G. Dunlop, District Magistrate of Pubna, dated Dec. 4, 1911.

(1) (1860) 2 F. & F. 24. (2) (1865) 4 F. & F. 490.

(3) (1874) 22 W. R. 272.

He forwarded both the cover [Ex. 2] and the pamphlet [Ex. 5] to the District Magistrate of Rangpur on the 20th January, 1911. The police obtained warrants and searched the houses of the appellant's father and uncle at Bera. In a room occupied by the appellant in the latter's house were found among other documents—

(i) A manuscript copy of another *Matripuja* issue, dated 3rd December 1910 [Ex. 15].

(ii) A private diary [Ex. 16] containing, at p. 73 [Ex. 17], a copy of a portion of Ex. 5.

(iii) A manuscript copy entitled "Association Rules" of a secret society [Ex. 21].

(iv) A manuscript copy of a Swadhin Bharat leaflet—Preparation for a free India—[Ex. 43].

(v) A number of letters, post-cards and money-order receipts.

At the end of March the first four papers were, with the cover and pamphlet, viz., Exs. 2, 5, 15, 17, 21 and 43, submitted to C. Hardless, Junior, who examined them by the aid of photographic enlargements, and expressed an opinion that they were all by the same hand. On the 26th June a complaint was filed, under the order of the Local Government, under s. 124A of the Penal Code, before the District Magistrate of Pubna, by the Superintendent of Police, and a warrant issued. The trial commenced on the 7th August, and the accused was convicted on 4th December 1911.

At the trial Hardless was examined as a witness and stated that in his opinion the exhibits, of which he had made photographic enlargements, disclosed the same characteristics of continued finger and wrist movement, pen presentation, shading, sizing and spacing, and "must have been done, and could only be done, by one hand—one writer." He further said that among the papers he had examined he was given no standard, that he took one writing as a standard for his own

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convenience, viz., the diary, as it was in the most natural hand of the writer. He admitted that he could not read Bengali, and that he did not ask for any admitted signature of the writer. Two Mahomedan boys were also examined who professed to be acquainted with the handwriting of the appellant. Evidence was also given establishing certain entries on the diary, other than Ex. 17, and certain post-cards said to be in the writing of the appellant were put in, but these were not put to Hardless in his evidence. No other evidence of handwriting was given by the prosecution.

Mr. J. N. Roy, for the appellant. I admit the seditious character of the pamphlet, Ex. 5. The only point is, did the accused write or publish it? There is no evidence that he wrote, composed, copied or published Ex. 5, or that he caused it to be posted. The evidence of the two fellow-students is utterly unsatisfactory; they could not be examined under section 164 of the Criminal Procedure Code. The diary bears the name of one Gyanendra Mohan Sanyal on its leaf edge. Mr. Hardless' evidence may be left out, as he had no standard of comparison. Even assuming that the alleged copy is in the handwriting of the accused, publication being the gist of the offence, it does not follow that the accused really posted it.

Mr. Arthur Caspersz, for the Crown. Exs. 2 and 5 are proved to have been sent through the post from Bera to Rangpur. If the accused copied Ex. 5 or wrote Ex 2, he is guilty. Publication may be indirectly proved, throwing the onus on the accused: Folkard, 7th edition, pp. 265-7; Russell on Crimes, 7th edition, Volume I, p. 1033; *Reg.* v. *Lovett* (1) followed in *Surendra Narayan Adhicary* v. *Emperor* (2). Under

(1) (1839) 9 C. & P. 462. (2) (1911) I. L. R. 39 Calc. 522.

section 73 of the Evidence Act the Court may compare Exs. 2, 5, 15, 17, 21 and 43 with the entries in the diary and the post-cards which are proved to be accused's. Under section 45 Hardless' opinion is relevant to show that Exs. 15, 17, 21 and 43. found in the accused's possession, are written by the same hand as the cover and pamphlet (Exs. 2 and 5). The conduct of the accused is such that the inference is raised that he wrote and was aware of the contents of Exs. 15, 17, 21 and 43. which are equally seditious, found in his exclusive possession; and in fact Ex. 17 is a copy of a portion of Ex. 5: *Barindra Kumar Ghose* v. *Emperor* (1), *Lalit Chandra Chanda Chowdhury* v. *Emperor* (2). Then Ex. 15 is a leaflet similar to Ex. 5 on the same kind of paper, and if Hardless is right, the accused must have copied both. He is also proved to have written Ex. 9 on the 1st October, ordering the *Matripuja* from a firm in Calcutta. A special knowledge and course of behaviour being brought home to the accused, the question is whether a prudent man would not believe that the accused despatched the pamphlet after copying Ex. 5 [section 16 of the Evidence Act, illustration (*a*) and (*b*), section 114, illustration (*f*)] or whether it is merely a case of high probability [section 11, illustration (*b*)]. The evidence of the boys and of Hardless should be accepted. I rely on the concluding sentences of Ex. 5 which show that the writer wished others, whoever might receive it, to make copies secretly and circulate it unknown to the Government. Ex. 43 contains similar instructions.

Cur. adv. vult.

HOLMWOOD AND SHARFUDDIN JJ. This is an appeal from the judgment and sentence passed by the District

(1) (1909) I. L. R. 37 Calc. 467. (2) (1911) I. L. R. 39 Calc. 119.

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Magistrate of Pubna upon the appellant, Suresh Chandra Sanyal, under section 124A of the Indian Penal Code. He has been convicted of forwarding a certain seditious leaflet called *Matripuja* to the Captain of the Rangpur school, and sentenced to two years' rigorous imprisonment.

There is no doubt as to the highly seditious nature of the leaflet, and it is fully admitted by the defence that no question arises on this point.

We also think on full consideration of the facts that the sending of this leaflet by post, addressed not to a private individual by name but to the representative of a large body of students, amounts to publication, and that the intention of the sender was undoubtedly to stir up disaffection to the Government among the students of the Rangpur Zilla School.

But the case entirely fails on the point of proof of handwriting, and we may dispose of it quite shortly on that ground. Two Mahomedan boys, who appear to be on bad terms with the accused, give vague evidences as to their belief that the incriminating documents and others, which were used for purposes of comparison, are in the handwriting of the accused. Their knowledge of his handwriting is largely based on having seen him write on the black-board at school and having overlooked his exercise books. As to this test their evidence is discrepant, and in our opinion worthless; and as regards the writing in chalk on the black-board the expert witness, Mr. C. Hardless, Junior, himself says that such a comparison is in his opinion impossible, as it obviously is.

The expert was given certain writings found in accused's possession to compare, and he has stated that in his opinion all these writings are by one hand. Now, although the writings appear to us to differ very considerably in character, even on the points on which

Mr. Hardless places most reliance, we are quite prepared to receive his evidence with every respect, and might have acted upon it, had any documents that were either proved or admitted to be in the accused's handwriting been placed in his hand. But in this case we are met with the curious anomaly that no such document has been used for purposes of comparison.

Now it is settled law that the one thing that is required for the admission of the evidence of an expert witness as to handwriting is that the writing with which the comparison is made should be proved beyond question of doubt to be that of the person alleged.

The Statute 28 and 29 Vict., c. 18, s. 8, lays down in express terms that the comparison by a witness of the disputed writing, for the purpose of giving an expert opinion, must be with any writing proved to the satisfaction of a Judge to be genuine: see *Cresswell* v. *Jackson* (1) and *Cobbett* v. *Kilminster* (2); and though this condition is not expressly laid down in section 45 of the Evidence Act, which is only a general section as to the admissibility of expert evidence, yet it is clearly indicated in the illustration (*c*) to the section where the comparison is assumed to be made in all cases with a document which is proved or admitted to have been written by the alleged writer of the document in question.

This rule was taken for granted in India in what appears to be the earliest reported case after the passing of the Evidence Act: *Sreemutty Phoodee Bibee* v. *Gobind Chunder Roy* (3), where the Judges (Markby and Romesh Chunder Mitter JJ.) say that under ordinary circumstances they would assume that the comparison took place in open Court, and that a

(1) (1860) 2 F. & F. 24. (2) (1865) 4 F. & F. 490.
(3) (1874) 22 W. R. 272.

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comparison having been made without any objection by the party affected by it, the signature on the *vakalatnama*, which was used for comparison, must have been in fact admitted.

But on a finding that this was not so, the decision of the lower Appellate Court was reversed, and the Judges said that they considered, according to their experience, that a comparison of signature is a mode of ascertaining the truth which ought to be used with very great care and caution.

It is evident that this is doubly so in a criminal case where a large quantity of apparently very different handwriting is under comparison.

The assumption here is that a note-book found in the accused's possession is entirely in his handwriting. Now, there is internal evidence in the book itself that it is not, and the expert was not even asked to say whether all the writing in this book was by the same hand.

Nor was he asked to make any comparison in open Court with proved or admitted handwriting which was then available.

It is claimed by learned counsel for the Crown that the comparison made by the expert months before, when the documents were first discovered and when nobody knew whether they were in the same hand or not, is a strong proof of his impartiality, and should give greater weight to his evidence.

But unfortunately when there is no comparison in open Court before the accused with documents proved or admitted to be in his handwriting, such evidence is inadmissible, and having regard to the minute and scientific investigations which are now in practice made by handwriting experts by means of photographic enlargements and detailed measurements made out of Court, we must emphasize the necessity for

strictly complying with the law as to what has to be done in the Court itself. These preliminary enquiries and scientific researches may be very necessary and very desirable, but they cannot be allowed to supersede or in any way take the place of comparison in open Court with proved or admitted writings which alone renders the expert's testimony admissible. To justify our finding on this point, which is, of course, based on wholly independent legal considerations, we may remark that in this case a very remarkable instance of the danger of relying on inspection made out of Court has come to our notice.

There is an address copied into the accused's note-book at page 73 in which the word "Rungpore" twice occurs. This has been greatly relied upon by the expert for comparison with the same word occurring on the envelope, Ex. 2, in which the incriminating document was sent. Now, not only is this entry wholly unproved, but it appears to us to be an interpolation in the note-book made in a different handwriting to the rest of the page, and the last curve of the "R" is of a wholly different character to that on the envelope, being curved in and rounded instead of outwards, as we have written it above and as it appears on the envelope. On the other hand, the unusually elongated tail of the "g" and the unusually short shaft of the "p" seem to be laboriously imitated in the note-book from the writing on the envelope, and it is obvious that it would be quite possible to put matters before the expert in a private examination which were not in the original document at all, and so deceive him into giving evidence in all good faith upon writing which really had no connection with the case.

We do not say that this is so in this particular case, but the suspicion an entry such as this in the note-book *primâ facie* arouses, illustrates the danger of

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substituting that which is not evidence, namely, the expert's private examination of the documents out of Court, for that which the law has, under the safeguards of extreme care and caution, made admissible as evidence on condition that the examination is made in open Court in the presence of the party affected.

It is clear that on this ground the finding that the accused either wrote, or forwarded by post, the incriminating document falls to the ground. That he was in possession of highly seditious literature and that he habitually sent for, purchased and read such literature is certain, and may give rise to a strong suspicion that he was engaged in disseminating such pernicious writings among his friends and associates. But he is only one of a secret society in the village of Bera which has been deposed to by the District Superintendent of Police, and the publication of this particular missive has not been brought home to him.

Whether he could have been arraigned under section 108 of the Criminal Procedure Code or under section 153A of the Indian Penal Code, it is not for us to enquire. But we have to consider whether or not there should be a re-trial in this case, and we think that, having regard to the fact that the accused has been eight and-a-half months in jail as an under-trial prisoner and as a convict combined, his conduct, even if it could be shown to be criminal, has been amply punished, and we may hope that he will realise the folly and wickedness of tampering with sedition, and, as he is young enough to reform and become a useful member of society, that this will be a sufficient warning to him for the future, there is no need for a re-trial. We set aside the conviction and sentence, and order the acquittal and release of the accused.

E. H. M. *Conviction set aside.*