

Bombay High Court

Emperor vs Ganesh Damodar Savarkar on 8 November, 1909

Equivalent citations: (1910) 12 BOMLR 105

Author: Chandavarkar

Bench: Chandavarkar, Heaton

JUDGMENT

Chandavarkar, J.

1. This is an appeal from the judgment of the Sessions Judge of Nasik, convicting the appellant Ganesh Damodar Savarkar, of the offences under Sections 124A and 121 of the Indian Penal Code, that is, of exciting disaffection towards His Majesty the Emperor and the Government established by law in British India and of abetting the waging of war against His Majesty. The appellant has been sentenced by the learned Sessions Judge to two years' rigorous imprisonment for the offence under Section 124A, and to transportation for life with forfeiture of all property to the Crown under Section 121.

2. The offences arise out of four, from among a series of eighteen, poems, published in a book entitled *Laghu Abhinava Bharata Mala*, i.e., *A Short Series for New India*, and recorded as exhibit 6 as part of the evidence in the case. The four poems are those numbered in the book as 5, 7, 9 and 17, respectively. Of poem No. 17 only verses 4 to 7 form the subject-matter of the offences proved.

3. When the appeal came on for hearing before us, on the 13th of October, Mr. Baptista contended that none of these four poems had or were intended by their writer to have any reference either to His Majesty the King-Emperor or to the British Government in India or to the present political condition of the country. On examining the series of poems in the book, exhibit 6, containing the four poems, it appeared to us that there were other poems in it than those four which threw light on the intent of the writer; and that, as the whole book had been allowed in the lower Court to go in as evidence without any objection, all the poems in the book could be referred to for the purpose of determining the intention, character, and object of the poems selected as the basis of the charges against the appellant in the lower Court. We adjourned the hearing for an official translation of the whole series of poems in the book into English and also to enable the appellant's legal advisers to argue the appeal with reference to the bearing of the whole series on the poems forming the subject-matter of the charges.

4. In supporting this appeal, Mr. Baptista, the learned counsel for the appellant, has raised two points. First, he contends that the poems charged as treason and sedition are either mythological or historical references and do not relate either to the British Government of India or the present times. I cannot accede to this argument. It is true that the writer has chosen either mythological or historical events and personages, but that is for the purpose of illustrating and emphasising his main thesis, that the country should be rid of the present rule by means of the sword. The innuendoes cannot be mistaken or misunderstood. For instance, the 5th poem purports to refer to the destruction of "foreign demons" by Kama, Krishna, and Shivaji. But that it is not a mere description of the past but is meant to be a covert allusion to the British is apparent from the frequent use of the term "black" referring to the people of this country. Any one can see that the frequent play upon the word "black" is intended as a contrast to the word "white" and the implication is that the "black" are ruled by the "white" and that the latter will and must be killed by "a black leader of the black." So also as to the next poem, No. 7. Under the guise of an invocation or prayer to Ganesh, the god who, according to Hindu belief, destroys evil, the writer calls upon him to take up the sword and be ready for war, because "the demons of subjection have spread lamentation all over the world". The "demons" are characterised as "dissembling, notorious, treacherous, cut-throat". "Applications and petitions," says the writer, "were frequently made, attended with abject submissions. But this meanest of the mean would not indeed be persuaded by begging." And he goes on to say that "this meanest of the mean" must be killed "by the blows of the sword". This poem is headed "the state of mind of the people at the time of Shivaji's birth." The people are supposed to after a prayer to the god Ganesh to take up the sword and exterminate the demon who has

subjected the country to dependence. The allusion to petitions rejected is obviously to what is called by some as "the policy of mendicancy." Ganesh is asked to take birth as Shivaji. The writer evidently has in mind the Ganapati melus of the present times and he who runs may read the animus of the lines and the lesson intended to be conveyed. The 9th poem, which is headed "who obtained independence without war," winds up with this remark: "He who desires awarajya (one's own rule) must make war." The 17th poem professes to be a "prayer of the Mavlas to the god Shiva," but one can plainly see that the sting of the verses lies in the covert allusion to the present rulers of British India. The translation of the poems into English brings out the sting clearly enough, but to those who know Marathi, who can either sing or understand the poems sung, the venom is too transparent to be mistaken for anything else than a call to the people to wage war against the British Government. It is idle for counsel to quibble about the meaning of certain words in the poems, such as parka andkala and argue that they have no reference to the present times.

5. No doubt the writer has used several words, each having a double meaning, but that meaning only serves to emphasise the fact that the writer's main object is to preach war against the resent Government, in the names of certain gods of the Hindus and certain warriors such as Shivaji. Those names are mere pretexts for the text which is: "Take up the sword and destroy the Government because it is foreign and oppressive." For the purpose of finding the motive and intention of the writer it is unnecessary to import into the interpretation of the poems sentiments or ideas borrowed from the Bhagavad Gita. The poems afford their own interpretation, and no one who knows Marathi can or will understand them as preaching anything but war against the British Government. Mr. Baptista has conceded that if the poems be construed as referring to the British Government, they fall within the meaning of sedition under Section 24A of the Indian Penal Code. That they are such as to excite disaffection goes without saying.

6. The only question is whether these poems also fall within Section 121 of the Code and amount to an abetment of the waging of war against the King Emperor and his rule in India. Mr. Baptista's contention is that the word abet in this section must be construed as excluding all idea of mere instigation and that for the purposes of the offence of abetment under this section, there must be some actual insurrection; that, in other words, it must be shown that a large multitude was collected and had weapons for mischief. Under the English law "mere words spoken, however wicked and abominable, if they do not relate to any act or design then actually on foot against the life of the King, or the levying of a war against him, and in the contemplation of the speaker, do not amount to treason". And the same has been held to apply to writings: King v. Andrew Hardie (1820) 1 St. Tr. (N.S.) 610, 625. But under our Penal Code, the waging or levying of war and the abetting of it are put upon the same footing by Section 121. That is, the abetting of waging of war is under the Code as much an offence of treason as the waging of war itself. The word "abetment" is defined in Section 107 of the Code and one of its meanings, as given there, is "instigating any person to do anything." This meaning is not excluded by anything that occurs in Section 121. The general law as to abetment is laid down in Sections 107 to 120 of the Code. According to it "to constitute the offence of abetment it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused." This [- applies to the abetment of the waging of war against the King as much as to the abetment of any other offence under the Code. The only difference created between the former offence and other offences is that, while under the general law as to abetment a distinction is made for the purposes of punishment between abetment which has succeeded, and abetment which has failed, Section 121 does away with that distinction so far as the offence of waging war is concerned and deals equally with an abettor whose instigation has led to a war and one whose instigation has taken no effect whatever. And that for this simple reason that such a crime more than any other must be sharply and severely dealt with at its very first appearance and nipped in the bud with a strong hand.

7. But it is urged that in the present case there has been no instigation-by the appellant of any person or ascertained body of persons by means of these poems to wage war. It is in evidence and is admitted before us by appellant's counsel that the book containing the poems was exposed for sale and published-that copies of it were circulated among the public, that is, among a large number of persons. Because that number cannot be definitely ascertained or counted, it cannot be said that the publication was any the less to "a body of persons

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8. Mr. Baptista's last argument is that these poems do not instigate any one to wage war but merely prepare the minds of the people for war and constitute no more than constructive treason. That is asking us to put too mild a construction on the poems—a construction which is not supported by the plain words, not to say the innuendoes of the poems. The fifth poem does not indeed contain any direct instigation to war, but the seventh poem, in the name of the god Ganesha, is substantially an appeal to people to take up the sword and fight with "the demons" who, it is said, "have spread lamentation throughout the country" by subjecting it to their rule. And the ninth poem concludes by saying that he who wishes for swarajya must wage war. And that is the dominating idea or text of the whole book. We are entitled to look into the poems other than those forming the subject-matter of the charges for the purpose of finding out the intention of the writer and the design of the publication. In poem No. 6 the writer calls upon Aryans to devise some remedy against what he calls the slavery of foreign rule and says that the kingdom of independence can be obtained only through "pools of blood." Poem No. 2 is a most direct appeal to young men "to gird up their loins," "cast off foreign yoke," "take up sticks", and "cut out the cage of slavery." Merely saying that independence cannot be gained without fighting may not amount to treason, but here it is more than that. A spirit of blood-thirstiness and murderous eagerness directed against the Government and "white" rulers runs through the poems: the urgency of taking up the sword is conveyed in unambiguous language, and an appeal of blood-thirsty incitement is made to the people to take up the sword, form secret societies, and adopt guerrilla warfare for the purpose of rooting out "the demon" of foreign rule. All this is instigation.

9. For these reasons the convictions and sentences under Sections 121 and 124A must be confirmed and the appeal dismissed.

Heaton, J.

10. The appellant in this case has been tried for, convicted of, and punished for sedition and abetment of waging war against the King under Sections 124A and 121 of the Indian Penal Code, in that he published certain poems. The correctness or otherwise of the conviction depends entirely on the character of the poems. Certain of them are specifically referred to in the charge. The rest have been referred to in argument and a perusal of the whole is necessary in order to ascertain the true character of those specifically referred to in the charge.

11. There are in all eighteen poems.

No. 1 is a prayer to God to grant independence.

No. 2 is a lament that India is enslaved and is without independence.

No. 3 is a dialogue between Shivaji and others, in which Shivaji exhorts his hearers to plant the banner of independence.

No. 4 is loving advice to a drunkard.

No. 5 recites how in the past the gods or heroes of the blacks punished the enemies of the blacks (or aliens) and that if hereafter foreign (or inimical) demons become arrogant they will be driven beyond the sea.

No. 6 is a hymn to the goddess of independence.

No. 7 describes how, prior to the birth of Shivaji, there was a desire that subjection should be overcome by making war, and how Shivaji came and conquered. The poem is suggestive of the need of similar action now.

No. 8 is a prayer for independence amongst other things.

No. 9 is a prayer with the refrain " who ever got independence without battle " ?

No. 10 is a lament that the country has fallen into servitude and an exhortation to get independence even by fighting.

No. 11 is an exhortation to the young to fight for independence.

No. 12 holds up those who are not in favour of independence to scorn and the patriot to reverence.

No. 13 is a prayer to God to put an end to the dependence and servitude of the country and to bring independence.

No. 14 is described as a morning song to dependence, and ends thus:-

O dependence! let the star of independence, the bestower of knowledge and joy, the wife of the Lord of the Universe, who is as the moon, rise again in the land of the Aryas.

No. 15 is a dialogue implying that the tyrant will be overcome and the land be free.

No. 16 inculcates that the patriot has no fear of prison and contains a good deal favourable to independence.

No. 17 is a prayer to Shiva to come to lead the people to battle.

No. 18 is described as the " Utterances of Nana Phadnavis" and is an incitement to war.

12. The poems specially referred to in the charge are Nos. 5, 7, 9 and parts of 17.

13. Briefly summarised, the teaching of this book is that India must have independence: that, otherwise, she will be unworthy of herself: that independence cannot be obtained without armed rebellion and that, therefore, the Indians ought to take arms and rebel. This is quite plain though the teaching is thinly veiled by allusions to mythology and history. It is sedition of a gross kind and very little attempt was made to show that the conviction under Section 124A of the Indian Penal Code was not correct.

14. But it was earnestly argued that the conviction under Section 121 was wrong.

15. It was argued that there was not any instigation and therefore there was not any abetment. With this I will deal later. Then it was argued that there was not any instigation of any known or definite person and that short of this there could not be abetment. The foundation of this argument is to me unintelligible. So far as I am able to understand the; meaning of the word ' instigate' as used in Section 107 of the Indian Penal Code, there may be instigation of an unknown person. Then it was argued that the instigation, if any, falls under Section 117 of the Code which provides a penalty for abetting the commission of an offence by the public or by more than ten persons. Three thousand copies of the book were printed and admittedly it was intended to sell as many as possible. Therefore the instigation was undoubtedly intended to be of the public or of more than ten persons. Consequently the offence committed is punishable under Section 117. But it was further argued that it was therefore not punishable under Section 121. That argument I am unable to accept. A prosecution under Section 121 requires a complaint by the Government (Section 196, Criminal Procedure Code). That complaint has been instituted. Having been instituted the accused had to be tried and it had to be determined whether he has committed an offence under Section 121. If he has, then he must be punished under that section, whether the offence also falls under some other section or not.

16. Therefore the question to be determined is whether the offence under Section 121 has or has not been committed. Briefly stated, the most cogent argument for the defence is this. So long as a man only tries to inflame feeling, to excite a state of mind, he is not guilty of anything more than sedition. It is only when he definitely and clearly incites to action that he is guilty of instigating and therefore abetting the waging of war. That is, it seems to me, a correct statement. Therefore it has to be determined whether the poems recited in the charge do clearly instigate to action. It is contended for the defence that they do not. In my opinion they do. In unmistakable language they tell the readers of the book to form secret societies, to take arms, and to revolt against the Government. That is clearly to my mind an instigation to action. Therefore I think the conviction is correct and should be confirmed.

17. I attach no importance to the means something less than that word as used in A. Cu. J. Section 107 of the Indian Penal Code. Section 7 of the Code refutes 1909 that argument. Nor am I impressed by the argument that the abetment meant by Section 121 means abetment of some war in progress. There may be and usually is instigation of rebellion before rebellion actually begins. Under the law of this country, instigation of that kind is abetting waging war against the King.