[COURT OF CRIMINAL APPEAL]

**1953** *Present:* **Nagalingam S.P.J. (President), Gunasekara J. and H. A. de Silva J.**

M. S. ABU BAKR, Appellant, *and* THE QUEEN, Respondent

APPEAL No. 11 OF 1953

*S. C. 46—M. C. Colombo, 24,048*

*Evidence Ordinance—Speech delivered at public meeting—Electrically recorded and reproduced by instrument—Admissibility—Sections 11, 159, 160.*

*Sedition—Attempt to promote feelings of ill-will and hostility between different classes of the Queen's subjects—Meaning of term "class"—Misdirection—Penal Code, s. 120.*

In a prosecution under section 120 of the Penal Code, the charge against the accused was that he did, by means of certain words spoken by him during the course of a speech delivered by him at a public meeting, attempt to promote feelings of ill-will and hostility between different classes of the Queen's subjects. The indictment did not state what were the different classes that were contemplated in the charge. It was, however, stated to the jury by the prosecuting counsel that the classes were "capitalists" and "workers" respectively.

The prosecution adduced evidence to the effect that the speech in question was electrically recorded, and subsequently reproduced, by means of an instrument called the Webster wire recorder, and that when it was reproduced it was taken down in writing by a witness, W.

*Held*, (1) that the speech that was alleged to have been reproduced in witness W.'s hearing by means of the instrument was a fact that, in connection with the other facts alleged by the prosecution witnesses regarding the making of the speech by the accused and the recording and reproduction of it, made it highly probable that the accused made a speech in the same terms on the

occasion in question. Therefore, if it was not a fact that was otherwise relevant, it was relevant under section 11 of the Evidence Ordinance ; which provides that facts not otherwise relevant are relevant if by themselves or in connection with other facts they make the existence of any fact in issue or relevant fact highly probable.

(ii) that it was open to witness W. to give oral evidence of the words that were reproduced in his hearing by means of the instrument, using the writing that he made at the time of the reproduction to refresh his memory (Evidence Ordinance, section 159).

(iii) that an attempt to promote feelings of ill-will and hostility between different classes of the Queen's subjects cannot come within section 120 of the Penal Code unless the classes are reasonably well-defined, stable and numerous; and it is a question for the jury in each case whether a given class has these characteristics and is therefore a class that is contemplated by the section.

APPEAL against a conviction in a trial before the Supreme Court.

*Izadeen Mohamed*, with *K. C. Kamalanathan* and *A. S. Vanigasooriyar*, for the accused appellant.

*H. A. Wijemanne*, Crown Counsel, with *N. T. D. Kanakaratne*, Crown Counsel, for the Crown.

*Cur. adv. vult.*

April 10, 1953. GUNASEKARA J.—

The appellant, Mohamed Salem Abu Bakr, was convicted of an offence punishable under section 120 of the Penal Code and sentenced to six months simple imprisonment. The charge alleged that on or about the 5th June, 1951, he did by means of certain words spoken by him during the course of a speech delivered by him in Sinhalese at a public meeting held at the Municipal Playground at Dematagoda, " attempt to promote feelings of ill-will and hostility between different classes of the King's subjects ". The appeal was pressed on grounds of misreception of evidence and misdirection.

The prosecution adduced evidence to the effect that the speech in question was electrically recorded, and subsequently reproduced, by means of an instrument called the Webster wire recorder, and that when it was reproduced it was taken down in writing by an officer of the Criminal Investigation Department, named Wijesena, and that the document P4 contained the text of the speech as taken down by him. Wijesena gave evidence and both identified P4 and read it aloud to the jury. One of the grounds of appeal is that P4 was inadmissible.

There was evidence before the jury, about the working of the wire recorder, upon which it was open to them to hold that the instrument could accurately record a speech and reproduce it ; and there was also evidence that it was operated on the occasion in question by a police sergeant so as to record on a particular spool of wire (P1) almost the entirety of a speech made by the appellant and the whole of another speech that immediately preceded it and also the announcements that were made by the chairman of the meeting before these two speeches. According to Wijesena's evidence the speech that he took down purported to be one made by a person who was announced as Abu Bakr. The police sergeant who had operated the instrument at the time of the speeches gave evidence to the effect that it was he who operated it later to reproduce the sounds recorded on P1 so

that Wijesena might take down the appellant's speech as reproduced, and that he identified the appellant's voice on that occasion. Another police sergeant, too, gave evidence to the effect that he was present on both occasions and that he too identified the voice that was reproduced as the voice of the appellant.

The speech that is alleged to have been reproduced in Wijesena's hearing by means of the wire recorder is a fact that, in connection with the other facts alleged by the prosecution witnesses regarding the making of a speech by the appellant and the recording and reproduction of it, makes it highly probable that the appellant made a speech in the same terms on the occasion in question. Therefore, if it is not a fact that is otherwise relevant, it is relevant under section 11 of the Evidence Ordinance ; which provides that facts not otherwise relevant are relevant if by themselves or in connection with other facts they make the existence of any fact in issue or relevant fact highly probable. It was open to Wijesena to give oral evidence of the words that were reproduced in his hearing by means of the instrument, using the writing that he made at the time of the reproduction to refresh his memory (Evidence Ordinance, section 159). It was also open to him to testify to the facts there noted by him even though he may have had no specific recollection of the facts themselves, if he was sure that they had been correctly recorded in the document. (Section 160). He did nothing different when he read out the contents of P4 to the jury. Therefore, even if the document itself was inadmissible there was before the jury admissible oral evidence of what was heard by Wijesena, from which they could infer what was said by the appellant and was recorded on the spool of wire P1.

It appears that at the trial the speech that is alleged to have been made by the appellant was reproduced in the hearing of the jury by means of the wire recorder, and it is contended for the appellant that this procedure was contrary to law. In the view that we have taken about the admissibility of the evidence given by Wijesena it is not necessary to consider this ground of appeal.

It was next contended that the trial Judge misdirected the jury in that he had " failed to direct the jury as to what was meant by (1) ill-will and hostility and (2) between different classes of the King's subjects ".

The charge sets out the passage in the speech that is alleged to be seditious, together with a translation of it into English. The appellant was also charged, in other counts of the indictment, with having by means of the same words attempted to excite feelings of disaffection to the Government and to raise discontent or disaffection among the King's subjects. With these charges we are not concerned in this appeal, which relates only to the charge of attempting to promote feelings of ill-will and hostility between different classes of the King's subjects.

The indictment does not state what are the different classes that are contemplated in the charge. It was stated at the Bar, however, that the acting Solicitor-General, who appeared for the Crown at the trial, stated to the jury that the classes were " capitalists " and " workers " respectively. Upon the case that was presented by the prosecution, then, the jury had to decide whether these groups formed " different classes of the King's subjects " within the meaning of section 120 of the Penal Code.

The term " class " in ordinary usage signifies " a number of individuals (persons or things) possessing common attributes, and grouped together under a general or ' class ' name ; a kind, sort, division " (*Shorter Oxford English Dictionary*). Not all classes of persons, however, are among those contemplated in the section. They must, of course, be classes of the Queen's (or King's) subjects. But the context and the object of the enactment, which appears to be to avert civil commotion, limit the sense further, and they must be classes that can be readily distinguished one from another and have a reasonably clear dividing line between them ; for it is not possible to conceive of hostility between two classes that can result in a violent conflict between them unless they are sufficiently distinct from each other. For a similar reason their composition must be reasonably stable and not continually shifting, and they must not consist of a few individuals merely but must be numerous. In other words an attempt to promote feelings of ill-will and hostility between different classes of the Queen's subjects cannot come within the section unless the classes are reasonably well-defined, stable and numerous ; and it is a question for the jury in each case whether a given class has these characteristics and is therefore a class that is contemplated by the section. That an intention to excite ill-will and hostility between different classes of the Queen's subjects is not necessarily a seditious intention was pointed out in the case of *R. v. Burns and Others* [1] which was cited to us by Mr. Wijemanne. Cave J. said to the jury in that case :

> Any intention to excite ill-will and hostility between different classes of Her Majesty's subjects may be a seditious intention ; whether in a particular case this is a seditious intention or not, you must judge and decide in your own minds, taking into consideration the whole of the circumstances of the case.

Mr. Izadeen Mohamed has referred us to three cases decided by the High Courts of Bombay, Allahabad and Calcutta, respectively, where it was held that " capitalists " did not form a " class of His Majesty's subjects " within the meaning of section 153A of the Indian Penal Code, the terms of which are almost identical with the material words of section 120 of our Code. The earliest of these is *Maniben Liladhar Kara v. The Emperor* [2]. There Beaumont C.J., with whom Nanavati J. agreed, said :

> I think that any definite and ascertainable class of His Majesty's subjects will come within the section, although the class may not be divided on racial or religious grounds. But I differ from the learned Chief Presidency Magistrate when he says that capitalists are a sufficiently defined class. " Capitalists " in the literal sense of the word is, I suppose, anyone who possesses any accumulated wealth, and practically every one possesses some accumulated wealth, though some people do not possess very much. On that definition practically everybody will be within the capitalist class. No doubt in the region of economic discussion capitalists are referred to in a more limited sense. In reference to divisions between capital and labour, the capitalist generally means a person with a considerable amount of property invested in industry. But if you take any definition of that sort,

[1] *(1886) 16 Cox 355 at 361.*
[2] *A. I. R. 1933 Bombay 65 ; 57 Bombay 253.*

it is impossible to say what amount of capital would bring a man within the class. He might be within the class one day, and without it the next. He may be a capitalist in one country and not in another. It seems to me " capitalist " is altogether too vague a phrase to denote a definite and ascertainable class so as to come within S. 153A.

Nanavati J. said :

The object of the section is to prevent breaches of the public tranquillity which might result from exciting feelings of enmity between different classes of His Majesty's subjects ; but when the persons included in any group are not readily ascertainable, it is difficult to see how any criticism of such an ill-defined group can lead to a tumult or breach of tranquillity . . . . As far as I can see, the first and most important ingredient in the connotation of the term is that the words used must point to a well-defined and readily ascertainable group of His Majesty's subjects . . . . In the second place some element of permanence or stability in the group would have to be present before you can have an attempt to excite enmity against that group . . . . Thirdly, there is a question of numbers. The group indicated must, I think, be sufficiently numerous and widespread to be designated " a class " . . . . The reason for this requirement is that unless a group is numerous and widespread the excitement of feelings against it is not likely to be of consequence from the point of view of tranquillity. Now, if the speaker meant to indicate by the word " capitalists" the " idle rich ", it may be doubted if persons who answer to the description in Bombay, or even in India, are sufficiently numerous to form a class of the kind contemplated in this section.

The decision in this case was cited with approval in *Gautam v. The Emperor* [1], decided by Sulaiman C.J., Allsop J. and Bajpai J. In the latter case the learned Chief Justice of Allahabad said :

Again feelings of enmity and hatred should be aroused between two classes of His Majesty's subjects, that is to say, between two sections of the people which can be classified as two groups opposed to each other. A vague, indefinite and nameless body, even though given one name, may not in certain circumstances be considered as a class by itself, particularly if individuals overlap indiscriminately. But it may also be conceded that it is not necessary that the classes should be so distinct and separate as to make it easy to put an individual in one class or the other.

*Maniben's Case* [2] was also cited with approval in *Nepal Chandra Bhattacharya v. The Emperor* [3], which was decided by Bartley and Henderson JJ. In this case Bartley J. said :

If the word " capitalists " is susceptible of accurate definition at all, that definition must be with reference to a world system of economics. We are in agreement with Beaumont C.J. when he said in 57 Bom. 253 that—

Capitalist is altogether too vague a phrase to denote a definite and ascertainable class so as to come within S. 153A.

[1] *A. I. R. 1936 Allahabad 561.* [2] *A. I. R. 1933 Bombay 65 ; 57 Bombay 253.*
[3] *A. I. R. 1939 Calcutta 306.*

Literally, the common factor in such a case is accumulated wealth. Economically, the common factors are, possibly, wealth plus investment. Practically, it is impossible to define the limits of any such classification or to say how any speech would affect any given proportion of its components.

We respectfully adopt as applicable to section 120 of the Ceylon Penal Code the tests laid down in these cases for determining whether a given class comes within section 153A of the Indian Code. It must be appreciated, however, that in each case the decision as to whether " capitalists " were such a class must be understood in the light of its own circumstances. It may well happen that a term that does not ordinarily denote a class such as is contemplated in the section does in a particular context mean such a class. This possibility is adverted to in the judgment of Nanavati J. in *Maniben's Case* [1] :

> You may refer to people as diehards, or extremists, or nationalists ; as free traders or fair traders ; as nationalists or communalists ; as militarists or pacifists, as imperialists or little Englanders ; and it would be difficult to regard the people designated or meant to be designated by these and like expressions as forming classes sufficiently precise for the purposes of the criminal law. What is a well-defined class will of course depend on circumstances. There may arise circumstances in which people designated by any of the expressions I have mentioned may be so well-defined that it might be possible to say that they form a class against whom hatred or enmity could be excited. But the Courts would have to be very careful in ascertaining who were the persons attacked before holding that an attempt had been made to excite enmity against a class of people within the terms of S. 153A, I. P. C.

The second case cited by Mr. Mohamed, *Gautam v. The Emperor* [2], furnishes an instance of a decision that " capitalist classes " and " working classes " fall within the section. The question in that case was whether there was in either of both of two books that were the subject of the proceedings any matter the publication of which was punishable under section 153A of the Indian Penal Code, and it was held that one of them contained such matter. After summarising the contents of that book, Sulaiman C.J., who delivered the judgment of the Court, said :

> There can, therefore, be no doubt that this translation of an old Manifesto directly aims at promoting class hatred and enmity, and in fact incites working classes to overthrow the capitalist classes even with the use of force and so it undoubtedly contains matter which is objectionable under S. 153A.

In the present case, having regard to all the evidence that was placed before the jury we are unable to say that it was not reasonably open to them, upon a proper direction, to hold that the appellant intended to promote feelings of ill-will and hostility between different classes of the King's subjects. They were not directed, however, that the term " classes "

[1] *A. I. R. 1933 Bombay 65 ; 57 Bombay 253.* [2] *A. I. R. 1936 Allahabad 561.*

as used in the section must be given a restrictive interpretation and not its ordinary meaning. . Indeed, they were given a direction which suggests the contrary, for the learned Judge said in his summing-up :

> Well gentlemen of the jury, there is no such thing as a capitalist class in Ceylon but some people are referred to by that phrase and in the context you will ask yourselves who is the capitalist class referred to here and who is the class referred to in contradistinction with regard to that term.

The summing-up contains no further discussion of the term " class " and gives no definition of it. In our opinion this omission constitutes a vital misdirection, and it cannot be said that upon a proper direction the jury would, without doubt, have arrived at the same verdict. We therefore quash the conviction of the appellant and set aside the sentence.

*Conviction quashed.*