1914

Present: Pereira J.

PERIS *v.* GUNASEKERA.

672—P. C. Colombo, 47,815.

Charge—Omission in charge—Curable irregularity—Evidence that a person "publishes" a newspaper—Evidence that he "distributes" a newspaper.

The total absence of a charge or its equivalent in a summary trial in the Police Court is a fatal illegality, but a mere omission in it is a curable irregularity, unless it has occasioned a failure of justice. And so, when in a prosecution against a person for printing for sale and distributing an obscene paper, the obscene matter relied on was not, as it should have been, set forth in the charge, and it appeared that the accused had taken no objection on that score in the Court below, the Supreme Court refused to interfere with the conviction.

The evidence that an accused party "publishes" a newspaper is sufficient evidence that he "distributes" it.

THE facts are set out in the judgment.

Bawa, K.C., and *R. L. Pereira*, for accused, appellant.

Bertram, K.C., A.-G., van Langenberg, K.C., S.-G., and *V. M. Fernando, C.C.*, for respondent.

Cur. adv. vult.

August 24, 1914. PEREIRA J.—

Before arguing this case on the evidence, the counsel for the appellant took exception to the conviction on the ground that no charge had been framed against the accused. This is a case in which the accused appeared on a summons, and the Magistrate appears to have acted under sub-section (2) of section 187 of the Criminal Procedure Code, and to have explained to the accused the particulars of the offence contained in the summons. On this being pointed out to the learned counsel, he took the objection that the obscene words taken exception to by the prosecution were not specifically set forth in the summons, and he cited divers judgments of the English and the Indian Courts to the effect that in a prosecution like this it is essential that the actual words taken exception to as obscene should be made a part of the charge. There is little doubt that the charge as set forth in the summons is defective owing to the omission pointed out by the learned counsel, but, then, the question is whether the case is not covered by the provision of

section 425 of the Criminal Procedure Code. It has been held by this Court that the total absence of a charge is not a mere irregularity to which the provision of section 425 would apply, but a fatal illegality (*Gunewardene v. Pakeer Lebbe*[1]); but the same cannot be said of a mere omission in a charge. That may clearly be regarded as an irregularity curable by section 425, because that section expressly enacts that no judgment shall be reversed or altered on account of any omission in the charge, unless such omission has occasioned a failure of justice. The question thus resolves itself into this. Has the omission mentioned above in the charge set forth in the summons in the present case occasioned a failure of justice? I find no difficulty in answering this question. The accused was charged with having printed for sale and distributed an obscene paper. The obscene matter was referred to as the article in the issue of the Sinhalese newspaper known as the "Sinhala Baudhaya" of the 3rd May last headed "Denagathyuttu Karuna." That certainly was too general a description of the alleged obscene matter; but the accused, who was represented by counsel, took no objection to the charge. The presumption is that he knew well what the obscene matter referred to was. The fact that the accused took no objection to the charge in the court below has a bearing on the question as to whether he was prejudiced by the omission to set forth in the charge the obscene matter complained of. In the case of *The Queen v. Appuwa*,[2] cited for some inexplicable reason by the appellant's counsel, this Court held in effect that the absence of objection by the accused to the indictment or charge was an indication that the accused was not prejudiced by any omission in it, and that to such a case section 200 of the old Criminal Procedure Code (corresponding to section 425 of the present Code) applied. Moreover, in the present case the Police Inspector swore that the words relied on as obscene and indecent were those in passage A B, and the accused led evidence to controvert the contention that that particular passage (A B) was obscene. It is obvious that the accused was not prejudiced by the omission referred to, and I do not think that the appellant is entitled to succeed on his objection to the charge.

It has then been argued that there is no evidence that the accused "distributed" the paper referred to in it. There is direct evidence in the case that the accused is the printer and publisher of the newspaper in question, and in the accused's own statutory declaration marked C he declares that he is the printer and publisher of the paper. It has not been contended that the accused did not print the paper for sale. To publish a paper means surely nothing less than to distribute it. The omission of the word "publishes" in section 285 of the Penal Code is apparently due to the use in it of the word "distributes." The prosecution, by the evidence referred

[1] *(1911) 15 N. L. R. 183.*

[2] *(1896) 2 N. L. R. 6.*

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to above, has clearly made out a *prima facie* case of distribution, and that case has not been rebutted by the oath of the accused. This would have been the best evidence in rebuttal of the fact, but he has not ventured to get into the witness box to give that evidence.

Now, the main question in the case is whether the issue of the newspaper referred to in the summons can be said to be an obscene paper. Of course, as held in the case of *Empress of India v. Inderman*,[1] a book (the finding applies to a paper as well) may be obscene within the meaning of the Penal Code, although it contains but a single obscene passage. The passage alleged to be obscene in the paper in question is that marked A B. In my opinion there is little doubt that this passage is obscene and indecent. The statement of the Sinhalese scholars called as witnesses for the defence that there is nothing objectionable in the language used in this passage to convey what in their opinion was the inspiring and elevatng instruction intended to be conveyed is, I am afraid, an unworthy reflection on the Sinhalese language, which is so replete with words and phrases with different shades of meaning that it readily responds to calls for the most accurate expression of thoughts and ideas. After a careful consideration of the evidence of these witnesses, I cannot help thinking that they have simply lent their learning and talent to help the accused out of the unpleasant situation in which he found himself. I shall take one instance to illustrate my meaning. The expression " para suddha " has been translated by them by the words " foreign white man. " Of course, there is nothing obscene in this expression, but I take it as illustrating the methods of interpretation resorted to by the witnesses for the defence. There is no excuse for saying that " white man " is a correct rendering of " suddha. " As regards " para, " it is quite true that the word admits of the meaning " foreign, " but I am in entire agreement with Mudaliyar Weerakody in thinking that the meaning that will be attributed to the whole expression by the ordinary reader of a newspaper would be " the white pariah. " This, as I have observed already, is merely illustrative of the methods adopted by the witnesses for the defence in translating the obscene parts also of the passage. I agree with the Magistrate that Mudaliyars Goonewardene and Weerakody are more reliable witnesses than those for the defence, and there can be no question that the impeached passage as interpreted by them (it is not necessary that I should cite it here) contains matter that is filthy, indecent, and obscene, appealing to improper instincts and thoughts, and calculated (possibly not intended) to shock decent-minded persons and outrage their sensibilities, and to deprave and corrupt those whose minds are open to immoral influences.

I affirm the conviction and sentence.

Affirmed.

[1] *I. L. R. 3 All. 837.*