Privy Council Appeal No. 26 of 1913.

Channing Arnold - - - - - *Appellant,*

v.

The King-Emperor - - - - *Respondent.*

FROM

THE CHIEF COURT OF LOWER BURMA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH APRIL 1914.

Present at the Hearing.

LORD SHAW. SIR JOHN EDGE.
LORD SUMNER. MR. AMEER ALI.
LORD PARMOOR.

[*Delivered by* LORD SHAW.]

By leave granted by His Majesty in Council this appeal is brought from a conviction of and sentence upon the appellant by the Chief Court of Lower Burma, pronounced on the 19th October 1913. The charge was one of defamation or criminal libel, and the prosecution was laid under the 21st chapter of the Indian Penal Code. In that chapter Section 499 gives a definition of defamation, and sets forth categorically no fewer than ten exceptions, any one of which forms a proper defence to the charge. By Section 500 it is provided that the punishment of defamation shall be "simple imprisonment for a term which "may extend to two years, or with fine, or with "both."

The appellant was charged with having defamed Mr. G. P. Andrew, Deputy Commissioner

[28] J. 316. 150.—4.1914. E. & S. A

and District Magistrate of Mergui, by the publication of two articles in the *Burma Critic*, a Rangoon newspaper, on the 28th April 1912. These articles were entitled "A Mockery of "British Justice."

Mr. Arnold has had experience as a journalist; and it appears from the proceedings that he was at one time the chief editor of the *Rangoon Times*. He ceased to be editor of that journal in the end of September 1911, and in January 1912 he was registered as one of the proprietors and the editor of the *Burma Critic*. The articles bear witness to the writer's possession of great invective and declamatory power; and it ought to be said at once that his motives have not been challenged except in so far as that is necessarily involved in the contention that he published serious libels and did so otherwise than in good faith.

The proceedings against him were initiated on the 11th June 1912 by Mr. Andrew, the District Magistrate already mentioned. On the 3rd October 1912 the trial of the case began before Sir Charles Fox, the Chief Judge, with a jury. It was protracted and lasted from the 3rd to the 19th October. On the latter date the jury returned a unanimous verdict of guilty, and a sentence of one year's simple imprisonment was pronounced. The Board were informed that after undergoing four months' imprisonment the remainder of the sentence was remitted.

Their Lordships listened to a lengthy argument in support of this appeal, during which the entire history of three stages of proceedings or sets of circumstances was discussed. These were, first, the details of the conduct of one McCormick, a planter, who was charged with having abducted and committed rape upon a Malay girl of about 11 years of age;

secondly, the conduct and proceedings of Mr. Andrew as District Magistrate at the investigation which was conducted before him into this charge and which ended in his declining to commit McCormick for trial; and thirdly, the proceedings at the trial in the present case.

From one point of view the discussion might have been greatly shortened by the exclusion of the consideration of the two first elements mentioned. But their Lordships were unwilling, in view of the importance which is said to attach to the appeal, to adopt any step which would appear to prevent the fullest statement by the appellant's counsel of his entire position. And secondly, it has to be admitted that Sir Robert Finlay was justified in his observation that, although there was no justification of the libel pleaded still the circumstances demanded a prolonged investigation on this other issue, namely, whether the appellant, from the material placed before him when he wrote the libel, was acting in good faith. If he did so act he would stand within the exception under the Indian Penal Code, and the libel, otherwise unjustified, would be excused by Statute. In these circumstances the fullest investigation was permitted to take its course.

It is now important to see what are the provisions of the Penal Code which apply to the case.

"Whoever," says Section 498 of the Indian Penal Code, "by words either spoken or "intended to be read, or by signs or by "visible representations, makes or publishes "any imputation concerning any person intending "to harm, or knowing or having reason to "believe that such imputation will harm, the "reputation of such person, is said, except in "the cases hereinafter excepted, to defame that "person." Of the ten exceptions under the

section three were mentioned. The first exception is in these terms: "It is not "defamation to impute anything which is true "concerning any person if it be for the public "good that the imputation should be made or "published. Whether or not it is for the public "good is a question of fact." It was admitted by the counsel for the appellant at their Lordships' bar that their client claimed no benefit under this exception: he did not suggest that the series of libels or any one of them was true; on the contrary all of them in so far as they were assertions of fact were admitted to be false.

In point of form the same course was taken in the Court below. But while this was so and while the plea of veritas was not openly or plainly made, their Lordships regret to observe that surreptitiously it did appear and reappear in the case by way of repeated innuendo. It may be as well to bring this matter to a point at once. In Sir Charles Fox's charge to the jury this passage occurs: "You will "observe that under the first exception the "only question, apart from the question of the "public good, that could arise was whether "what had been said was true or not. Now it is "noticeable that the defence does not rely on that "exception, although up to the end we have had "it reiterated that what was said was true." Upon being questioned the learned counsel for the appellant frankly admitted that the exception was not in point of fact pleaded as a defence, and their Lordships do not understand that they disputed that the learned Chief Judge's statement of what occurred at the trial by reiterated innuendo was correct. It was open to the appellant to defend his utterances as true. But he declined to take that course. Their falsehood stood as an admission in the case, the words

themselves being so plainly of a libellous character. This part of the case may accordingly be definitely dismissed.

The second exception is in these terms: " It is not defamation to express in good faith " any opinion whatever respecting the conduct " of a public servant in the discharge of his " public functions or respecting his character so " far as his character appears in that conduct, " and no further." The distinction between this and the first exception is that the former deals with allegations of fact, and this second exception deals with the expression of opinion. This also has nothing to do with the case as it now stands, because it was, as it must be, admitted that the articles did not confine themselves to expressing an opinion as to the conduct of Mr. Andrew, but in much detail made definite defamatory allegations of fact against him.

It is accordingly upon the ninth exception that the determination of the present appeal solely depends. That is in these terms:—" It " is not defamation to make an imputation on " the character of another provided that the " imputation be made in good faith for the " protection of the interest of the person making " it, or of any other person, or for the public " good." In connection with this exception it is necessary to take its language along with that of section 52 of the Code, which is to this effect: " Nothing is said to be done or believed " in good faith which is done or believed without " due care and attention."

Notwithstanding the elaboration of the arguments and the introduction of much matter affecting the conduct of McCormick and the conduct of Mr. Andrew, it was accordingly this question, and this question only, which the jury charged by Sir Charles Fox had to try, namely, whether in publishing the libels

admitted to be false Mr. Arnold did so in good faith because he believed them to be true, having given due care and attention to seeing that they were so. If the jury were satisfied that he did give that due care and attention, and that he acted in good faith, then the exception formed a good defence, and the accused would be found not guilty. If, on the other hand, they were not so satisfied, then no course, according to the Indian criminal law and the Indian Evidence Act, was open to them but to negative the exception and to find the accused guilty. No question is made that each of these propositions is sound.

It is contended, however, by the appellant that in the course of the charge there was misdirection by the Judge, and that the jury's minds were diverted from this, which it is admitted was the true and only issue, to other questions. What were these? They were the very things which the prisoner's counsel had throughout the trial insisted on introducing, namely, the question of the conduct of McCormick and of Mr. Andrew, the narrative as to Mr. Andrew being accompanied by the suggestion that it was after all indefensible and corrupt. Their Lordships recognise that this mode of conducting the defence, which it appears to have been difficult to repress, was not unlikely to lead to confusion; but it is at least satisfactory to find that the learned Judge in charging the jury made no mistake in stating what the true issue was. It is admitted by the appellant's counsel that this is so. "What you will have to consider," said the learned Judge to the jury, is "whether the imputations in these articles were published in good faith, after due care and attention had been exercised on the part of the writer of them. "What is 'due care and attention' must depend on the circumstances of each particular case."

It is also fair to the learned Judge to say that, while he felt constrained—a course which, in view of the conduct of the defence, is not to be wondered at—to go with some fulness into a narrative of fact, he concluded his charge to the jury by bringing their minds directly back to the exact issue which they had to try. He did so in this language: "It is now for you to consider "these matters, and to decide whether the "accused has satisfied you that he used the "reasonable care that he ought to have used. If "you are satisfied that he did, and that he did "not overstep the bounds of law as I have "explained the law to you, then you must acquit "him, but if he has not satisfied you that he has "exercised such due care and attention before "he committed himself to paper in this way, "then it is your bounden duty to convict him."

Before the exception and the alleged misdirection of the jury are dealt with, it is expedient to state what the libel contained. Being headed "A Mockery of British Justice," after a considerable amount of inflammatory matter, it proceeds to "speak out against those "officials who have forgotten their duty and "have dared to trifle with the fair fame of "England." Having made these very serious allegations the appellant added: "The facts "before us indicate that he (Mr. Andrew) "conspired with Mr. Finnie to burke the "case; that he conducted it *in camera*; that "he refused to heed the protest of the com-"plainants that the interpreter employed was a "paid parasite of McCormick, and did, in fact, "deliberately mistranslate; that of the witnesses "for the prosecution only those called by the "District Superintendent of Police, and not even "all of them, were allowed to give evidence; "that in a word the whole enquiry was an "outrageous make-believe and a mockery of

" what he is nominally representative, the fair " play and judicial honour associated with the " name of England. By what looks like the " meanest of tricks, the unfortunate com- " plainants were unrepresented by any lawyer " at this judicial farce."

It would serve no good purpose to cite further from the libels; they mention disgusting details and incriminate other officers besides Mr. Andrew, as engaged in a corrupt plot. They contain not one, but a series of libels of the grossest character. These libels were at least seven in number. First, of conspiracy with Finnie to prostitute justice by saving McCormick. Secondly, of having apparently knowingly and as part of the partisanship, bailed out McCormick for a non-bailable offence. Thirdly, of having misled the Malay girl, her parents and friends, by leaving them without professional advocacy, which they had been led to expect. Fourthly, of having perverted the course of truth by a partisan interpreter. Fifthly, of having tried the case *in camera*. (Very little was made of this in argument.) Sixthly, of not having called certain witnesses in the inquiry; and Seventhly, of Mr. Andrew having heard the case knowing that certain people objected to his doing so.

Of these libels the first was the real basis of all. It imputed corruption. Several of the others might not appear but for their resting upon that basis of corruption to be of so serious a type. But in their Lordships' opinion this cannot be said of the third and fourth, for if it were true that the magistrate had designedly deprived the complainants of legal assistance, and provided them with a false interpreter, then such wicked conduct would not only be itself indefensible but would colour all the rest. Upon the whole it cannot be denied that

if any substantial part of this defamation was true, it meant ruin to the career of Mr. Andrew and any others engaged in conspiring with him as alleged.

The points put forward in the appellant's favour as establishing that although the charges were false yet he was excused by statute because he believed them *bonâ fide* and had given due care and attention to their truth, were substantially three. In the first place it was urged that he relied upon a letter published with the signature of "Vigilance," and addressed to the *Rangoon Times*. It is dated the 31st August 1911, and at that time the appellant was connected with that paper. It contains a long narrative incriminating McCormick and also Mr. Andrew and others.

The second element proponed in support of Mr. Arnold's good faith is of a different and an important character. It is this: In the district of Tenasserim referred to, the position of Subdivisional Magistrate was occupied by Mr. Buchanan. It is alleged that Mr. Buchanan had been on unfriendly terms with McCormick, but their Lordships do not think that there is anything substantial in this allegation, and they further think it right to put on record their opinion, which is in entire concurrence with that of the Chief Judge, that Mr. Buchanan in his investigations and conduct was actuated by entire good faith. Although his conclusions and suspicions may have been erroneous, their Lordships see no reason to think that from beginning to end he did not act in accordance with the best traditions of the service. He had been absent on leave from the middle of April to about the middle of May 1911, and on his return he heard rumours of misconduct by McCormick. Towards the end of June Mahomed Din, who had had legal differences with McCormick, made

allegations which amounted to a charge that the crimes of abduction and of rape had been committed. Mr. Buchanan himself made enquiries and came to the conclusion that McCormick should be put upon his trial. It is a point in the accused's favour that the Sub-divisional Magistrate thought that there was a case for committal.

The third point in these protracted proceedings, which is more important than either of the foregoing in support of the contention that the writer of the libels believed them to be true, is the admitted conduct of McCormick himself. Their Lordships do not attach much weight to the question of abduction, because it appears to be the case that the child had formerly lived in McCormick's house for a short period, and the evidence is somewhat confused as to the conduct of the mother of the child in regard to her absence from the house. But the allegation made by McCormick was that he had been informed that this child was suffering from gonorrhœa, that he had taken her to his house, and himself (there being a hospital eight miles away) had personally examined her, and had then passed her on for treatment by the mistress of one of his male servants. But their Lordships find themselves in entire agreement with the learned Judge when he says: "It is not surprising that "there should be indignation and hot feeling on "the part of the sympathisers with the mother "of the child Aina, and good reason for feeling "of indignation at some of the conduct—the "admitted conduct—of McCormick. . . . "However strong his inclination for amateur "doctoring may have been, there could have "been no justification for that. It was a thing "that no man with a proper sense of decency "should have done."

Although accordingly it is no part of the submission of the Counsel for the appellant at their Lordships' Bar that McCormick was guilty, their Lordships think it is an element relevant to the consideration of whether Mr. Arnold was acting in good faith in these libels to shew that he believed that McCormick's own admissions would have justified his committal for trial.

The last matter which their Lordships reckon to be a perfectly relevant one in the category of elements in the case which bore upon the point of the accused's good faith was this. Importance is attached to a pronouncement by the Magistrate. After investigating the facts, and declining to commit, he went on to say that in his opinion McCormick's conduct was pure and philanthropic. Their Lordships cannot agree with such an opinion, and their views coincide with those of the Chief Judge upon that subject.

They are of opinion that there were thus several elements in the case which were all with perfect propriety submitted to the jury in support of the defence. Their Lordships, however, do not attach so much importance to the other allegations. That as to bail having been granted to the accused rests on a slender foundation. It is held by the Judges on the spot, and it was proved to be also the opinion of the civil authorities, that the discretion of granting bail applied to this case. It was evidently a case, unless forbidden by Statute, for discretion being exercised, and it would rather appear to their Lordships looking to the great distance to be traversed before the authority claimed by the appellant as requisite for granting bail could be obtained, that much practical hardship would ensue to prisoners unless such a discretion existed. They are not

prepared to say that the humane view which was taken of an accused's rights was mistaken. It is unnecessary in this case to decide or dwell upon the point, because their Lordships' opinion is very clear to the effect that this difficult and delicate point of law could never have been viewed as a substantial element weighing with any reasonable writer in justification of his belief in the truth of the libel. The same observation applies to the other elements in the case which need not be entered upon but all of which have been fully considered. Their Lordships are of opinion that a fair and statable case in support of the statutory defence and of the belief in the wickedness of Mr. Andrew was put forward on the points which have been already enumerated, but that no others were of any real weight. In putting forward, however, the points mentioned, their Lordships think that a case was made which demanded an answer.

Such an answer was given, and it also was both fair and statable.

In the first place a serious and weighty reply was made on the subject of the letter signed "Vigilance." It was not confined to the remark that the letter was no valid excuse for a belief in gross slander. The points proved were these: When that letter was received by the *Rangoon Times* a most proper course was taken, and that with the appellant's knowledge. It was forwarded by Mr. Stokes, the assistant editor, to the Chief Secretary to the Government of Burma, so that there might be official confirmation of its allegations prior to its being published. These allegations were examined into, and on the 31st October the Chief Secretary wrote stating that the Lieutenant-Governor had caused inquiry to be made and had found that the allegations against the officers were without foundation. By this time the

appellant had ceased to be editor of the *Rangoon Times*, but on the 2nd November 1911 Mr. Stokes forwarded a reply to the Chief Secretary stating that the incident, so far as the *Rangoon Times* was concerned, was closed.

This was not so, however, with regard to the appellant, for in the following spring, namely, on the 7th March 1912, an article appeared in the *Burma Critic*, of which he was then editor, entitled "Alleged Grave Scandals in Tenasserim." On inquiry being officially made of the appellant, asking for particulars, the answer given was that the case referred to was that inquired into and disposed of in the previous autumn. The appellant's attention was at the same time called to the fact that Mr. Stokes had accepted the reply of the Lieutenant-Governor. All this took place before the libels in question were published.

Their Lordships cannot see their way to hold this part of the appellant's case to be satisfactory.

An investigation in the department of a Lieutenant-Governor of great experience having resulted in exonerating Mr. Andrew from blame, the appellant assumed the grave responsibility for re-opening the matter. He gave the authorities no inkling of any fresh information which had come to his hand, and in answer to their enquiry he simply stated that it was the old incident which he was reviving. Up to the present the appellant has not given at their Lordships' Bar or in any Court any statement of any fresh facts which he had discovered. This circumstance was, in their Lordships' opinion, well worthy of consideration by the jury.

In the second place, both Judge and jury had seriously to consider the attitude of Mr. Arnold himself. He neither defended the articles as true nor did he give any assistance on the subject of what were the actual things upon which he founded his own beliefs nor

finally upon what the steps were, if any, which he took to investigate their truth before giving them to the public.

Thus, although the true issue in the case was as to his own *bona fides* and the care and attention which would verify that, Mr. Arnold's action when charged gave no help to the Court and must to some extent have embarrassed even his own defence. Having admitted that he assumed responsibility for the articles, he was asked by the Magistrate as follows: "*Q.* Do you wish to "make any explanation of your position in the "case as to your *bona fides*, &c.? (I pointed "out to the accused that, under Section 105, the "burden of proof lies upon him)." "*A.* No. I "have nothing to say. Everyone, from the "Lieutenant-Governor downward, knows my "character, and I leave it at that." But of course it was quite impossible to leave it at that, because the libels were there, in all their number and seriousness; the charge was made under the Statute, and the law had prescribed that the author of such libels could only be excused by showing good faith after due care and attention. It is not in accordance with the due or proper administration of justice for an accused to brush all the statutory regulations affecting his position aside in this manner. The attitude and absence of the accused may well have been considered by the jury rather destructive than helpful to the defence set up.

In the third place, this has to be borne in mind. Every officer, judicial or administrative, who investigated this case, except Mr. Buchanan, had agreed with the conclusion at which Mr. Andrew had arrived, namely that the charge should be dismissed. This circumstance was one peculiarly suited for the appraisement of a local jury.

The next circumstance in the case is one to which their Lordships do not conceal that

they attach serious importance. They were moved by the allegation that the prosecutors and those in that interest were alleged to have been led on to the trial by Mr. Andrew, and that Mr. Andrew had wickedly conspired suddenly to leave them in the lurch without an advocate, and to furnish them with a false interpreter. This allegation was, as it turned out, not only untrue, but was, as was made abundantly clear at the trial, particularly cruel. Letters were produced showing that instead of Mr. Andrew having taken up such an attitude, his desire, and indeed his endeavour and entreaty, throughout were that in the enquiry before him an advocate should not only be employed for the prosecution, but should, in fact, be paid by the Government. Letter after letter was written to this effect —to engage a pleader. On the 3rd August 1911, Mr. Andrew had intimated to Mr. Buchanan that he would engage an advocate to prosecute, and that his presence and the presence of Mr. Sherard, the investigating officer, would also be required. On the 4th he specially wrote to Mr. Buchanan, " Can you bring " up interpreter trusted by all parties? Ask " complainants to choose between," two advocates named, " to conduct their case." On the 7th, Mr. Buchanan having been unable to get such an interpreter, but having stated that the complainant wished to consult a certain vakil in Rangoon before choosing a lawyer to conduct the case, Mr. Andrew wrote to Mr. Buchanan, " Kindly " do so, and name advocate early. As regards " interpreter, your Court interpreter must come " along to assist at any rate." On the 10th sanction was asked to engage Mahomed Ayoob " on the terms he asks." It most clearly appears from the letters that the arrangement as to legal assistance broke down, because upon the 12th August the Commissioner at Mergui declined

to sanction the proposal to retain an advocate, he having demanded of Mr. Andrew to state whether he thought the charges could be substantiated, and Mr. Andrew having stated in answer to this difficult question that he thought the abduction charge alone could be made out. In short the refusal to provide an advocate was made neither by Mr. Andrew nor by connivance or consent of Mr. Andrew, but in spite of him. With regard to the interpreter it should also be added that Mr. Andrew's anxiety upon that subject was manifest, and it was entirely in the right direction. Mr. Buchanan objected to one Chean Gee and he recommended Musaji. As mentioned Mr. Andrew wanted an " interpreter trusted by all " parties " and Musaji, Mr. Buchanan's nominee, was employed. Mr. Buchanan was present at Mergui during the investigation and he made no objection to this. There was, of course, no proof that a single word was interpreted falsely. In their Lordships' opinion these two parts of the libel were very gross, and they can see no justification for the proposition that the appellant had any reasonable ground for believing them to be true.

It does not appear that in any view of the case there could have been a defence under the Statute in regard to these substantial portions of the libellous matter, and the case of *The Queen* v. *Newman*, 1 E. and B. 558, was founded upon to this effect. But their Lordships are very anxious, however, not to have the case disposed of on what may be considered a narrow ground. They take these points as included in the sum of the matter to be considered before the jury as relevant to the general case of Mr. Arnold's justification on the ground of having, after due care and attention, and so in good faith, believed that these things were true.

One final matter has, however, to be kept in view. Some of the letters last cited were

undoubtedly not before Mr. Arnold when he wrote the libels. But they were before him in the course of his trial. In their Lordships' opinion, when it was discovered that the truth with regard to Mr. Andrew had not been that in these particulars he wickedly conspired to defeat justice, but that he was, on the contrary, anxiously endeavouring to secure that justice should be furthered and guarded, then the duty of the accused, Mr. Arnold, was plain. Their Lordships make every allowance for the heat of advocacy which, as noted by the Chief Judge, seems to have been in this case great. But when a gross mistake of that kind on a matter of fact—the truth of which when exposed would have ruined any administrative or judicial officer's career—was discovered, the libel should not have been adhered to for a moment. The mistake should have been acknowledged and an apology tendered. This was not done, but upon the contrary the case was conducted to its close upon the footing that an unstated defence was the real and good defence, namely, that the libels and all the libels were true. Nobody is to be blamed in these circumstances for thinking that the plea of good faith on the part of Mr. Arnold had sustained a serious shock.

The speeches of the learned counsel for the accused have not been printed, but their Lordships had the advantage of hearing Mr. Wilson, who had been in communication with those engaged in the case and who informed their Lordships that the views presented by the senior and junior counsel for the appellant somewhat diverged. It is, however, unnecessary to labour this matter, because no doubt was thrown upon the narrative of the proceedings given by Sir Charles Fox in his charge. There is enough disclosed in the case to show that no light task was thrown upon the

Judge in disentangling relevant from irrelevant topics and in presenting the true issue to the minds of the jury. The real objection taken at their Lordships' Bar to this charge was that the jury were misdirected in this sense, and that the narrative of the learned Judge must have left the impression upon the mind that Mr. Andrew had not acted wickedly as the libel alleged. But it was, looking to the advocacy, necessary for the learned Judge to state his own view, and their Lordships do not see anything in the charge to give countenance to the idea that he withdrew this question from the jury or from their province. With a large portion even of the narrative their Lordships see no occasion to quarrel. Some portions of it here and there might be the subject of difference of opinion.

A charge to a jury must be read as a whole. If there are salient propositions in law in it, these will, of course, be the subject of separate analysis, But in a protracted narrative of fact, the determination of which is ultimately left to the jury, it must needs be that the view of the Judge may not coincide with the views of others who look upon the whole proceedings in black type. It would, however, not be in accordance either with usual or with good practice to treat such cases as cases of misdirection, if, upon the general view taken, the case has been fairly left within the jury's province. Their Lordships do not say that upon any particular in this case they would differ from the views laid down by Sir Charles Fox, but these observations are made in order to discountenance the idea that in the region of fact, unless something gross amounting to a complete misdescription of the whole bearing of the evidence has occurred, this Board will interfere. The separate and peculiar position of this Committee under the Constitution will be afterwards dealt with.

Their Lordships regret to find that there appeared on the one side in this case the time-worn fallacy that some kind of privilege attaches to the profession of the Press as distinguished from the members of the public. The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but, apart from statute-law, his privilege is no other and no higher. The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful; but the range of his assertions, his criticisms, or his comments, is as wide as, and no wider than, that of any other subject. No privilege attaches to his position.

Upon the other side it would appear from certain observations of the learned judge that this false and dangerous doctrine may have been hinted at, that some privilege or protection attaches to the public acts of a judge which exempts him, in regard to these, from free and adverse comment. He is not above criticism, his conduct and utterances may demand it. Freedom would be seriously impaired if the judicial tribunals were outside of the range of such comment. The present case affords a good illustration of what is meant. When the examination before Mr. Andrew concluded with his declaration that in his judgment the action of McCormick was pure and philanthropic, the whole trial would seem to have been laid open to searching and severe observations, and no blame could be attached to these. But when the criticism was converted into an attack upon the Magistrate as a conspirator against justice, a traitor to his oath, a trickster, a man who had manœuvred his procedure so as to defeat truth and protect an associate, then, of course, it is for

the person who has uttered these things to justify them, or, under the Indian Penal Code, to establish affirmatively that he believed them to be true, and that on reasonable grounds. On both of these matters last mentioned the learned Judge seems to have properly directed the jury.

This also has to be said. A large part of the criticism directed against the charge of the learned Judge in this case was to the effect that the narrative of the proceedings led up to the conclusion inevitably that Mr. Andrew was innocent of the wicked dereliction of duty which was alleged. If it was so, the result upon the case is somewhat remarkable. For then the charge had in fact impressed the jury's minds with the innocence of Mr. Andrew, and it is that very innocence which is in the foreground of the admissions made in this case. The foregoing narrative in this view might have been spared, because it is now seen that nearly all, if not all, of the items in the narrative which are said to constitute misdirection are parts of a narrative which leads to a conclusion that that is in accordance with fact which has all along been admitted to be true.

It is here that the peculiarity of the procedure becomes evident, for the narrative thus criticised was undoubtedly, as it appears to their Lordships, the narrative given by the learned Judge to the jury in order to counteract an improper use which was being made of the procedure. While the truth of the libels was not asserted formally, and while the admission of their falsehood was formally granted, an endeavour was repeatedly made to withdraw all this and to persuade the jury to take all that was asserted as true. Such things may occur; but it is the duty of Judges to put what check they can upon them, and in the

present case their Lordships see no occasion to think that the learned Judge failed to exercise that duty with propriety.

From what has been said it will, their Lordships think, clearly appear that there was material before the jury on both sides of this case, and that the determination was on a subject peculiarly within the jury's province. In their Lordships' opinion the case was not improperly withdrawn from the jury's domain on fact, and they were not misdirected in law. But even if it were conceded that upon a meticulous examination of the Judge's charge or conduct of the case certain flaws could be discovered, it is the duty of their Lordships to consider the special position and function of the Board, in criminal cases as the advisers of the King. The frequency of applications made to the Board for leave to appeal against the judgments of criminal tribunals in various parts of the empire, as well as the thoroughness with which the powers and practice of the Judicial Committee were discussed in this case incline their Lordships to make a deliberate survey of this important topic.

The question is not truly one of jurisdiction. The power of His Majesty under his Royal authority to review proceedings of a criminal nature, unless where such power and authority have been parted with by Statute, is undoubted. Upon the other hand, there are reasons both constitutional and administrative, which make it manifest that this power should not be lightly exercised. The over-ruling consideration upon the topic has reference to justice itself. If throughout the Empire it were supposed that the course and execution of justice could suffer serious impediment, which in many cases might amount to practical obstruction, by an appeal to the Royal Prerogative of review on judicial

grounds, then it becomes plain that a severe blow would have been dealt to the ordered administration of law within the King's dominions.

These views are not new. They were expressed more than 50 years ago by Dr. Lushington in his judgment in *The Queen* v. *Mukerji* (1 Moore N. S. 272), and Lord Kingsdown, in the case of *The Falkland Islands Company* v. *The Queen* (1 Moore N. S. 312) stated the matter compendiously in these words: "It may "be assumed that the Queen has authority by "virtue of Her Prerogative to review the "decisions of all colonial courts, whether the "proceedings be of a civil or criminal character, "unless Her Majesty has parted with such "authority. But the inconvenience of enter- "taining such appeals in cases of a strictly "criminal nature is so great, the obstruction "which it would offer to the administration of "justice in the colonies is so obvious, that it is "very rarely that applications to this Board "similar to the present have been attended with "success." Their Lordships desire to state that in their opinion the principle and practice thus laid down by Lord Kingsdown still remain those which are followed by the Judicial Committee.

There have been various important cases in recent times to which, naturally, reference has been made. The first is the case of *re Dillet* (12 A.C. 459). It should be observed that while Dillet's case was in form an application within the ambit of criminal law, the matter of substance which was truly brought before the Judicial Committee was a civil matter. The appeal was by a barrister and solicitor against a verdict convicting him of perjury, but there had been a consequential order of the Court directing him to be struck off the roll of practitioners, and special leave was granted to appeal in reference to the consequential

order. Lord Blackburn referred to Lord Kingsdown's judgment in the Falkland Islands case as authoritative and binding. After citing that learned Judge, Lord Blackburn added: In "this statement of the general practice their "Lordships agree. They are not prepared to "advise Her Majesty to make this conviction for "perjury an exception if it were not made the "sole foundation for the subsequent Order of "the 27th March 1885," and liberty accordingly was granted "to appeal against the order of the "27th March 1885, striking him off the roll, and "also to the extent above stated, and no further, "against conviction for perjury."

While accordingly the familiar sentences again about to be quoted from Lord Watson are frequently cited with reference to criminal review in general by this Board, this outstanding circumstance just alluded to ought not to be forgotten. It appears to dispose of the argument that the practice of the Board was in purely criminal matters in any respect either advanced or distorted from the position that it occupied under the judgments of Dr. Lushington and Lord Kingsdown pronounced about a quarter of a century before. Lord Watson in Dillet's case observed that "the rule has been repeatedly "laid down and has been invariably followed "that Her Majesty will not review or interfere "with the course of criminal proceedings unless "it is shown that by a disregard of the forms of "legal process or by some violation of the "principles of natural justice or otherwise "substantial and grave injustice has been "done."

The present case brings prominently before the Board the question of what is the sense in which those words are to be interpreted. If they are to be interpreted in the sense that wherever there has been a misdirection in any criminal case,

leaving it uncertain whether that mis-direction did or did not affect the jury's mind, then in such cases a miscarriage of justice could be affirmed or assumed, then the result would be to convert the Judicial Committee into a Court of Criminal Review for the Indian and Colonial Empire. Their Lordships are clearly of opinion that no such proposition is sound. This Committee is not a Court of Criminal Appeal. It may in general be stated that its practice is to the following effect: It is not guided by its own doubts of the appellant's innocence or suspicion of his guilt. It will not interfere with the course of criminal law unless there has been such an interference with the elementary rights of an accused as has placed him outside of the pale of regular law, or, within that pale, there has been a violation of the natural principles of justice so demonstratively manifest as to convince their Lordships first, that the result arrived at was opposite to the result which their Lordships would themselves have reached, and secondly, that the same opposite result would have been reached by the local tribunal also if the alleged defect or mis-direction had been avoided. The limited nature of the appeal in Dillet's case has been referred to, and their Lordships do not think that its authority goes beyond those propositions which have now been enunciated.

The argument for the appellant was to an entirely contrary effect. In the forefront of it the case of *Makin* v. *The Attorney-General for New South Wales* was cited (1894, A.C. 57.) Makin's case in truth did not raise the question at issue in the present case. It depended upon the construction of Section 423 of the Criminal Law Amendment Act of 1883 (a New South Wales Statute). That section set up the Judges of the Supreme Court as a tribunal to determine

questions submitted to them in a case stated by the Judge at the trial, and there was a proviso that there should be no quashing "unless for "some substantial wrong or other miscarriage of "justice." It was stated by this Board that under that section the Judges have not been substituted for the jury. As they said, "In "their Lordships' opinion substantial wrong "will be done to the accused if he were "deprived of the verdict of the jury on the facts "proved by legal evidence and there were "substituted for it a verdict of the Court founded "merely upon the perusal of the evidence."

The second case founded on is that of *Pillai* v. *The King-Emperor* (L.R. 40, I R. 193), in which this Board sustained an appeal. The circumstances of the case, however, were of the most extraordinary character, and were such as appeared to the Board imperatively to demand that it should interpose, because the very foundations of justice seemed to have been attacked in the proceedings. A whole body of inadmissible evidence had been received in the case. The one witness whose evidence was relevant and who remained in the case was supporting another witness who was a confessed perjurer. The remaining witness himself had given under oath conflicting and contradictory accounts in previous judicial proceedings before the Magistrate and certain officials. "If true," observed Lord Atkinson, "they show that these officials, or at least the "Sub-Inspector, induced the witness to forswear "himself and found in him a pliant instrument "ready to give false evidence upon oath to "secure the conviction of his own father; and if "false they show that the witness was ready to "commit deliberate perjury whenever he was "confronted with the inconsistencies in his "former statements. There is no alternative."

The simple case accordingly confronting the Board was a case of a subject sentenced to death upon no evidence at all. In these circumstances, although the principle of *Dillet's* case was again re-affirmed, their Lordships did not see their way to refrain from interfering.

The third case referred to is that of *Lanier* v. *The King* (L.R. 1914, A.C. 221) and, fortunately, it is seldom that such a travesty of justice can be witnessed. One of the notable features of the case had reference to the Judge himself. He, as narrated in the report, was a member of the family council which instigated the proceedings and himself was a party to appointing two barristers to conduct the prosecution and arranged about their fee. The facts need not be referred to. The indictment was altered by drastic amendments; the trial was hurried on; but the narrative need go no further, for, as the report states, "In short, counsel for the "Crown at the Bar of this Board very properly "admitted that he could not contend that any "jury upon the evidence submitted would have "convicted the appellant of crime." The Board were of opinion that the sentence pronounced against the appellant "formed such an invasion "of liberty and such a denial of his just rights "as a citizen that their Lordships feel called "upon to interfere." But the Board took care to repeat that it did not lightly interfere, and the language of Lord Watson in *Dillet's* case was again cited. It was pointed out that the interference was not on any matter of form, but because of matters lying at the very foundation of justice (the judge had been a judge in his own cause), justice had "gravely and injuriously miscarried." Lanier stands as a fair type of almost the only case in which this Board would advise the interposition of His Majesty the King with the course of criminal justice in the colonies or

dependencies. That extreme case is this, that it must be established demonstrably that justice itself in its very foundations has been subverted, and that it is therefore a matter of general Imperial concern that by way of an appeal to the King it be then restored to its rightful position in that part of the Empire.

Their Lordships were referred to the dicta of Judges and the rules set up with regard to the procedure of the Court of Criminal Appeal in England; but they are not the rules adopted by this Board, which, as already stated, is not a Court of Criminal Appeal. And the authority of these decisions, which apply to a different system, a different procedure, and a different structure of principle, must stand out of the reckoning of any body of authority on the matter of the procedure of this Board in advising His Majesty. This view is in entire accord with the recent proceedings of this Board on applications for leave to appeal. One instance of this is that of *Clifford* v. *The King-Emperor*, (L.R. 40, I.A. 241), on the 17th November last, and their Lordships refer to the Judgment of the Lord Chancellor in this and the other refusals referred to.

The application to the present case is simple. Even had this Committee been a Court of Criminal Appeal it is hardly doubtful that the appeal would fail. *A fortiori* their Lordships are left in no doubt as to their own duty in conformity with the practice of the Board. They will humbly advise His Majesty that the Appeal be dismissed. There will be no order as to costs.

In the Privy Council.

CHANNING ARNOLD

v.

THE KING-EMPEROR.

[DELIVERED BY LORD SHAW.]

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