

DEFAMATION AS A CRIMINAL OFFENCE: AN ANALYSIS

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INTRODUCTION

In a democratic set up, free speech and expression is considered to a fundamental right which is not absolute but subject to reasonable restrictions; defamation being one of them. The law of defamation is based upon the fundamental principle that the reputation of a member of society, the esteem in which he is held by it, the credit and trust it reposes in his intelligence, honour and integrity, is his valuable asset, and that the love of reputation being a great moving principle of human action, must be encouraged and protected. The traces of offence will consequently be found in the earliest records of human history. As per Black's Law Dictionary, defamation means the offence of injuring a person's character, fame, or reputation by false and malicious statements. According to Chambers Twentieth Century Dictionary, defamation means to take away or destroy the good fame or reputation; to speak evil of; to charge falsely or to asperse. The classical definition of the term, however, has been given by Mr. Justice Cave in the case of *Scott v. Sampson*,¹ as a "false statement about a man to his discredit". This definition has been approved of in a series of decisions including that of *Sim v. Stretch*.²

A statement which disparages a man in his reputation in relation to his office, profession, calling trade or business may be defamatory, e.g. the imputation of some quality which would be detrimental to the absence of some quality which is essential to the successful carrying on of his office, trade or profession, such as want of ability, incompetence and, of course, dishonest or fraudulent conduct.³ Injurious statement which do not reflect on a person's reputation (e.g., that he has ceased to trade) are not defamatory but may be actionable if made maliciously.⁴

¹*Scott v. Sampson*, (1882) QBD 491

²*Sim v. Stretch*, (1936) 52 TLR 669 at p. 671; also *Mohan Charan Naik v. Syambhu Nath Khandagiri*, (1985) 60 CLT 252 at p. 255

³*Turner v. Metro-Goldwyn-Mayer Pictures Ltd.*, (1950) 2 All ER 449; *Angel v. H.H. Bushell & Co. Ltd.*, (1968) 1 QB 813; *Drummond-Jackson v. B.M.A.*, (1970) 1 WLR 688

⁴*Drummond-Jackson v. B.M.A.*, (1970) 1 WLR 688

DEFAMATION: DEFINITION AND ELEMENTS

Defamation in law, is attacking another's reputation by a false publication (communication to a third party) tending to bring the person into disrepute. The concept is an elusive one and is limited in its varieties only by human inventiveness. Although defamation is a creation of English law, similar doctrines existed several thousand years ago. In Roman law, abusive chants were capitally punishable. In early English and German law, insults were punished by cutting out the tongue. As late as the 18th century in England, only imputation of crime or social disease and casting aspersions on professional competence constituted slander, and no offences were added until the Slander of Women Act in 1891, made imputation of unchastity illegal. French defamation law, required conspicuous retraction of libellous material in newspapers and allowed truth as a defence only when publications concerned public figures. Modern German defamation is similar but generally allows truth as a defence. In Italy, truth seldom excuses defamation, which is criminally punishable there.

According to Salmond the wrong of defamation, consists in the publication of a false and defamatory statement concerning another person without lawful justification. The wrong has always been regarded as one in which the Court should have the advantage of the personal presence of the parties if justice is to be done. Hence, not only does an action of defamation not survive for or against the estate of a deceased person,⁵ but a statement about a deceased person is not actionable at the suit of his relative, however, great their pain and distress, unless the statement is in some way defamatory of them.⁶

Generally defamation requires that the publication be false and without the consent of the allegedly defamed person. Words or pictures are interpreted according to common usage and in the context of publication. Injury only to feelings is not defamation; there must be loss of reputation. The defamed person need not be named but must be ascertainable. A class of persons is considered defamed only if the publication refers to all its members particularly if the class is very small- or if particular members are specially imputed.

⁵Gatley's Libel and Slander, 6th Ed., 1960; Odger's Libel and Slander, 6th Ed. 1929. Duncan and Hoolahan's Guide to Defamation Practice, 2nd Ed., 1958. The Report of the Committee on the Law of Defamation (1948, Cmd. 7536).

⁶Porter Committee Report, para 27. For the interesting steps taken by the relative of Mr. Gladstone to defend his honour against the disgraceful aspersions of Captain Wright; Dean, Harred, Ridicule or Contempt: Walton, "Libel upon the Dead and the Bath Club Case", (1927) 9 JCL

Actual truth of the publication is usually a defence to a charge of defamation. Legal privilege arising from a special relationship or position also relieves liability and acts as a defence to the charge of defamation (US Senators, for instance, cannot be prosecuted for anything they say on the floor of the Senate). In certain areas the mass media have broad discretion under the doctrine of “fair comment and criticism”, but such comment must pertain to a person’s work and not private affairs, and must be factually accurate.⁷

LAW OF DEFAMATION IN INDIA

Constitutional Validity:

The Andhra Pradesh High Court in the case of K.V. Ramaniah vs Special Prosecutor stated that there is reasonable restriction on the freedom of speech and expression and it is not violating Article 19(1)(g) of the Constitution of India. Defamation is but an abuse of the freedom of speech and expression.⁸

Subramanian Swamy v Union of India⁹:

Two judge bench of Supreme Court consisting of Justice Dipak Mishra and Justice P.C. Pant decided to maintain constitutional validity of the country’s criminal defamation laws, deciding that laws are not in disagreement with freedom of right to speech. The Supreme Court held Sections 499 and 500 of the IPC dealing with criminal defamation as constitutionally valid and the following observations:

1. It recognized the right to reputation as a part of the right to life assured to citizens under Article 21 of the Constitution. It declared that the right to free speech under Article 19(1)(a) had to be balanced against the right to reputation under Article 21.
2. The Supreme Court said a free press is the heart and soul of political intercourse and is a public educator, but this freedom is not absolute and cannot be used by the media to cause injury to an individual’s precious reputation.

⁷ Defamation, 3 Encyclopaedia Britannica (Encyclopaedia Britannica Inc., U.S.A., 2007).

⁸ Ramaniah K V, AIR 1961 AP 190: (1961) 1 Cri LJ 601 (AP),

⁹ Subramanian Swamy v Union of India, AIR 2016 SC 2728

3. The Court held that the press has to also observe reasonable restrictions and its purpose is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgments.
4. The Court said the reputation of an individual was an equally important right and stood on the same pedestal as free speech,
5. The Court held that criminalization of defamation to protect individual dignity of life and reputation is a reasonable restriction on the fundamental right of free speech and expression.
6. Defamation is a crime committed against society at large and the State has a duty to redress the hurt caused to its citizen's dignity.
7. The Supreme Court also rejected demands to strike down Section 199(2) to (4) of the Cr.P.C

Statutory Provision:

In India, law gives protection to a man's reputation. as it gives protection to his life and property. The Indian Penal Code contains provisions protecting a person's reputation. The defamation against state is contained in Section 124A¹⁰ and defamation of a class and community is contained in section 153¹¹ of the Indian Penal Code. The following is the text of the law of defamation incorporated in Chapter XXI of the Indian Penal Code, dealing with the defamation of the person.

Section 499 Defamation

Whoever, 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,

¹⁰ 124A. Sedition.—Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law in [India], shall be punished with [imprisonment for life], to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

¹¹ Wantonly giving provocation with intent to cause riot—if rioting be committed—if not committed.—Whoever malignantly, or wantonly, by doing anything which is illegal, gives provocation to any person intending or knowing it to be likely that such provocation will cause the offence of rioting to be committed, shall, if the offence of rioting be committed in consequence of such provocation, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both; and if the offence of rioting be not committed, with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter expected, of defame that person.

Explanation 1—It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2—It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3—An imputation in the form of an alternative or expressed ironically, may amount to defamation.

Explanation 4—No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.

There are instances when a man is allowed to speak out or write matters about others which would ordinarily be defamatory. These occasions are reduced to the following ten exceptions:

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- (i) Imputation of truth which public good requires to be made or published.
- (ii) Public conduct of public servants.
- (iii) Conduct of any person touching any public question.
- (iv) Publication of reports of proceedings of courts.
- (v) Merits of a case decided in court or conduct of witnesses and others concerned.
- (vi) Merits of a public performance.
- (vii) Censure passed in good faith by a person having lawful authority over another.
- (viii) Accusation preferred in good faith to an authorized person.
- (ix) Imputation made in good faith by a person for the protection of his or other's interests.

(x) Caution intended for the good of the person to whom it is conveyed or for public good.

The exceptions to sections 499 must be regarded as exhaustive to the cases which they purport to cover and recourse cannot be had to the English common law to add new grounds of exception to those contained in the statute.¹²

Section 500 is the penal provision for the offence of criminal defamation. It reads as follows:

500. Punishment for defamation: --Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Apart from this provision, Sections 501 and 502 are also related to defamation. They deal with printing or engraving matter known to be defamatory and sale of such matter.

501. Printing or engraving matter known to be defamatory: - Whoever prints or engraves any matter, knowing or having good reason to believe that such matter is defamatory of any person, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Ingredients

The offence under Section 501 is quite distinct from offence under Section 500, and it applies to the publisher and printer of a newspaper. It has two ingredients: -

- (i) printing or engraving any matter, and
- (ii) knowledge or belief that such matter is defamatory.

If the matter to be printed is in a language unknown to the printer, he would not be made liable because the second ingredient would not exist.¹³ One has to note that publication of a matter or an item of news without twisting the same or without an ulterior motive can never amount to defamation.¹⁴

Procedure

¹²Vergheese M C v. Ponnann T J, AIR 1970 SC 1876

¹³Sankaran v Ram Krishna, 1960 Cri LJ 479, as stated in B.M. Gandhi, Indian Penal Code, 2nd Edition (2006), Eastern Book Company (Lucknow), p. 730

¹⁴Chimanbhai Somabhai v Mithu Bara, 1984 GLH (4J) 107

The offence is punishable with imprisonment upto 2 years or with fine or with both. It is non-cognizable, bailable, compoundable with court's permission and triable by a court of session in case of public servant and in other cases, it is compoundable and triable by first class Magistrate.

502. Sale of printed or engraved substance containing defamatory matter: -- Whoever sells or offers for sale any printed or engraved substance containing defamatory matter, knowing that it contains such matter, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Ingredients

By this section selling of a defamatory matter is made punishable. It thus supplements the previous provisions. It has two ingredients:

- (i) selling or offering for sale any printed or engraved substance,
- (ii) knowledge that such substance contains defamatory matter.

Proof

To bring the offence home it is necessary to prove that the seller of the matter knew its contents. That is, publication is proved when he sells it. As observed in *Sardar Dayal Singh*¹⁵, a person who conducts a business in the course of which he has to sell books or papers, or the like, which may contain matter which is injurious to the reputation of another person, is bound by reason of the penalty imposed by this section, if not otherwise, to abstain from selling any book or the like, which to his knowledge contains the matter which is defamatory. If he sells in ignorance of its contents, he is not guilty under this section, but if he sells, notwithstanding knowledge of the contents, he is guilty under this section. The court may order destruction of all the copies or the things on which conviction was made (vide Section 455, Code of Criminal Procedure).

Procedure

¹⁵ P.R. No. 8 of 1891, pp. 25-26, as stated in B.M. Gandhi, *Indian Penal Code*, 2nd Edition (2006), Eastern Book Company (Lucknow), p. 730

The offence is punishable with imprisonment up to 2 years, or with fine or with both. It is non-cognizable, bailable, compoundable with court's permission and triable by a session court in case of a public servant and in any other case by first class Magistrate.

Who May Be Defamed?

Any person who is in being may be defamed. The law of defamation in respect of trading corporations is the same as for private individuals, except that, in the nature of things, they have no social reputation, but only a commercial one. In their case, therefore, a statement, "must attack the corporation one. In their case, therefore, a statement, its affairs, must accuse it of fraud or mismanagement, or must attack its financial position"¹⁶ So it is defamatory of a trading company to assert that it provides insanitary houses for its employees,¹⁷ or indulges in black-marketing activities.¹⁸ A trade union may sue "for an unjustified disparagement of its activities".¹⁹ A local authority can sue for defamation, which reflects upon it as a corporate body.²⁰

Mixed Question Of Law And Facts

The question whether an imputation or accusation is defamatory or not, is a mixed question of law and fact. If there is controversy as to whether the material complained of is defamatory or not, the Court will first have to decide, as a question of law, as to whether the said material is capable of being understood in a defamatory sense. If the Court decides the questions in the affirmative, it will then only proceed to determine whether the said material containing a defamatory potential had in fact harmed the reputation of the complainant. Court in every case is required to decide whether or not alleged words are reasonably capable of bearing

¹⁶South Hetton Coal Co. v. North-Eastern News Association Ltd., (1894) 1 QB 133, CA 5, at p. 141 (per Lopes, L.J.)

¹⁷South Hetton Coal Co. v. North-Eastern News Association Ltd., (1894) 1 QB 133, CA 5

¹⁸D. & L. Caterers Ltd., and Jackson v. D. Ajou, (1945) KB 364: (1945) 11 All ER 563 (CA); Holdsworth Ltd. v. Associated Newspapers Ltd., (1937) 3 All ER 872 CA (actionable to say that limited company, refused to accept interim wages award of joint conciliation board for the industry). A company may recover substantial damages even though it suffers no financial loss: Selby Bridge (Co. of Proprietors) v. Sunday Telegraph Ltd., (1966) 197 Estate Gazette 1077

¹⁹National Council of General and Municipal Workers v. Gillan, (1946) KB 81: (1945) 2 All ER 593 (CA); Wilis v. Brooks, (1947) 1 All ER 191 (rigging a ballot)

²⁰Bognor Regis Urban District Council v. Champion, (1972) 2 QB 169: (1972) 2 All ER 61 (refusing to follow a decision to the contrary in Manchester Corporation v. Williams, (1891) 1 QB 94; Street on Torts, 6th Ed., at p. 294

defamatory meaning in the particular circumstances in which they have been published, or spoken.²¹

Proposals for Reform

The Fifth Law Commission, endorsing the need to have defamation as an offence even though it, to some extent, restricts the freedom of speech and expression, suggested a very few changes in the definition of 'defamation' section 499 of the Indian Penal Code and in the sections 500, 501 and 502 providing punishment therefore. It proposed:

1. Explanation of the fourth exception to section 499 should be deleted.
2. The second sentence, that is 'whether or not it is for the public good is a question of fact', in the First Exception to section 499 should be deleted as it, owing to the abolition of jury trials in India, has lost its significance.
3. The Fourth Exception to Section 499 should be confined only to the reporting of proceedings in open court and of the court proceedings held in camera. It accordingly suggested adding words 'in open court' after the words 'report of the proceedings' in the Exception. In the light of the changes proposed by it in the definition of terms 'judge' and 'court of justice', it also suggested deletion of the explanation of the fourth exception.
4. The existing punishment (of simple imprisonment for a term up to two years, with or without fine) provided for 'defamation' under section 500, 501 and 502 should be necessarily be 'simple'. It therefore suggested that the 'simple imprisonment' (of a term up to two years) provided for defamation (under section 500), for printing or engraving a defamatory matter (under section 501), and for selling printed or engraved defamatory substance containing defamatory matter (under section 502) should be altered to 'imprisonment of either description' (of a term up to two years). It also suggested that, where the defamatory statement has been published in a newspaper, the fact of the offender's conviction should, in addition to the awarded punishment, be similarly made published and the cost of such publication, in the form of fine, should be recovered from the offender.²²

²¹Ismail Merchand v. State of Rajasthan, (1988) Cr LR 211 at p. 233 (Raj.): 1988 Raj. Cr. C 119: also Mukund Martand Chitnis v. Madhuri Mukund Chitnis, 1922 SCC (Cr.) 71 at p. 74

²² Law Commission of India, 'Forty Second Report: The Indian Penal Code', The Government of India, 1972, paras 21.3-21.6

However, the Indian Penal Code (Amendment) Bill 1978, sought to give effect to the Law Commissions proposals for reforms in sections 500, 501 and 502. It did not give any response to the changes recommended by the Commission in section 499 of the Indian Penal Code. The Fourteenth Law Commission also endorsed the changes sought by the clause 201²³. However these proposals for reform could not become effective as the 1978 Bill, owing to the dissolution of the Lok Sabha in 1979.

Chapter III - Exceptions to the Law of Defamation

The following are the occasions when a person is allowed to speak out or write matters about others which would ordinarily be defamatory:

EXCEPTION 1: IMPUTATION OF TRUTH WHICH PUBLIC GOOD REQUIRES TO BE MADE OR PUBLISHED

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 such imputation is for the public good is a question of fact. This exception recognizes the publication of truth as a sufficient justification, if it is made for the public good. Truth by itself is no justification in criminal law, although it is sufficient in the civil law of torts. In England, according to the Lord Campbell's Act 1843, it would be a good defense if the accused justified his libel on the ground that:

- i. It was true
- ii. That its publication was for the public benefit
- iii. Such defense cannot be enquired into, unless it is expressly pleaded

In this respect, the law is the same in India also. According to Section 106 of the Indian Evidence Act 1872, the burden is cast upon the person who set up the similar pleas in avoiding guilt. However, under English Law and Indian Law truth is no justification whatsoever against the defamation of the state known as sedition and against one's religion.²⁴

²³ Law Commission of India, 'One Hundred and Fifty Sixth Report: The Indian Penal Code', Government of India, 1997, para 12.91

²⁴ Vibhute, K I. P S A Pillai's Criminal Law. 12th ed., Lexis Nexis, 2016, pp. 916-917.

The onus of proving the statement or at least of showing that he had reasonable ground for believing it to be true, and was actuated in making such statement not by malicious motives, but by an intelligent zeal for the public interest, lies on the person making the statement.²⁵ In the case of Chaman Lal²⁶, the appellant totally failed to establish that that imputation made by him was on reasonable grounds.. It was in evidence that the imputation concerning the respondent was not true but was motivated by animus of the appellant against the respondent.

In the case of John Manjooran v. Stephen C M²⁷, where the second accused, a printer and publisher of a newspaper, had published a report of a speech made by first accused criticizing the labour policies of the then Government in power, the then Labour Minister, as a salaried employee of the Marxist Communist Party, it was held that in absence of malice, it was in public interest to publish a report of a speech made by a prominent leader of a prominent political party, a burning question that was agitating the minds of the people, particularly the working class; the criticism or the comment was against the public affair and not against the private life of the Minister concerned. In a democratic setup it is usual that persons occupying public posts would be exposed to criticism which normally should not be taken as an attack on the individual personality, in the absence of malice; and as the speech had been reported without embellishment and it contained no unfair comment, the second accused was entitled to protection of justification by truth, falling under Exception 1 to section 499.

For getting benefit of the exception, it is necessary for the accused to prove that the statement made by him was substantially true and was for public good.²⁸ However, a good court while deciding veracity of such a statement and the protection of public good, is not expected to weigh it in a fine scale and it has to give some allowance to the accused.²⁹

EXCEPTION 2: PUBLIC CONDUCT OF PUBLIC SERVANTS

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

²⁵Atter Hoosein v. Tasud-dook Hoosein, (1867) 2 Agra 87

²⁶Chamal Lal v State, 1970 Cri LJ 1266 (SC)

²⁷*John Manjooran v. Stephen C M*, 1973 Cri LJ 1722 (Ker)

²⁸ Radha Govind Datta v Saila Kumar Mukherjee AIR 1950 Cal 343

²⁹ Sanatan Daw v Dasorthi Tah AIR 1959 Cal 677

character appears in that conduct, and no further. The first exception deals with the allegations of facts, while the second exception deals with expressions of opinion. What is protected is opinion and not assertion, as they are really fair comments upon public men on matters of public interest. Every citizen has a right to comment on those acts of public men, which concern him as a subject of the realm, if he does not make his commentary a cloak for malice and slander. A writer in public paper has the same right as any other person, and it is his privilege, if indeed not his duty, to comment on the acts of the public men, which concern not only himself, but also concern the public and the discussing of which is for the public good. Moreover, where a person makes the public conduct of a public servant the subject of comment, and it is for the public good, he is not liable to an action if the comments are made honestly, and he honestly believes the facts to be as he states them, and there is no willful misrepresentation of fact or misstatement, which he must have known to be misstatement, if he had exercised ordinary care.³⁰

Men in public positions, even though official, can claim no immunity from fair criticism. This is the essential nature of the rule of law in all democratic countries. Similarly, the authors and publishers of books have no special privileges and are in no better position than any other man. But the person who undertakes to criticize the acts of a public man, must take care not to assert that which is not true as the basis of criticism, and he is bound not conceal willfully anything which would show that the criticism is not well founded. Also the opinion expressed must be in good faith.³¹

The right does not mean that a man can invent facts and comment upon the facts so invented in what would be a fair and bona fide manner on the supposition that the facts were true. If the facts, upon which the publication is sought to be excused, do not exist, the foundation of pleas fails. Lord Herschell in *Davis vs Shepstone*³², while delivering the judgment of Privy Council, stated:

"That there is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press but by all the members of the public. But the distinctions cannot be too clearly borne in mind between comment or criticism and

³⁰ Supra Note 44, p.917

³¹ Ibid

³² *Davis v Shepstone* 11 App Cas 187.

allegations of facts, such as that disgraceful acts have been committed or discreditable language used. It is one thing to comment upon or criticize, even with severity, the acknowledged or proved acts of public man and quite another to assert that he has been guilty of particular acts of misconduct."

No opinion can be considered fair, unless it contained some substratum of truth. In *EI Howard v M Mull*³³, the plaintiff EI Howard, Director of Public Instruction in the Bombay presidency, had sued the partner of the Times of India for defaming in a series of articles, in which the defendant accused the plaintiff of prostituting his official position for the purpose of securing private gain made on the sale of school books of which he had improperly appropriated the copyright. The Bombay High Court held that the defendant gave no evidence of the truth of his allegation and the fact that he was a journalist did not clothe him with greater immunity than any other member of the public. The journalist was ordered to pay a sum of Rs 2500 to MI Howard.

Right of Press And Media

*A newspaper has a public duty to ventilate abuses and if an official fails in his duty, a newspaper is absolutely within its rights in publishing facts derogatory to such an official and making fair comment on them, but it must get hold of provable facts.*³⁴ *The editor, however, should be most watchful not to publish defamatory remarks upon individuals unless he first takes reasonable pains to ascertain that there are strong and cogent grounds for believing the information which is sent to him to be true - the proof is readily available and that in the particular circumstances his duty to the public requires him to make the facts known.*³⁵

EXCEPTION 3: CONDUCT OF ANY PERSON TOUCHING ANY PUBLIC QUESTION

This amounts to criticism on public questions. It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching ant public question, and

³³ *EI Howard v M Mull* (1866) 1 Bom HCR App 85.

³⁴ *Jhabbar Mal*, AIR 1928 All 222; *Vishan Sarup v Nardeo Shastri*, AIR 1965 All 439

³⁵ *Muhammad Nazir*, AIR 1928 All 321

respecting his character, so far as his character appears in that conduct and no further. In order to succeed on a plea of fair criticism, the accused should prove that his expression of opinion was fair and honest and the alleged fact on which the opinion was based was true.³⁶

Right of Press And Media

Media and the media persons (covering both print and electronic media), in general have no higher or lesser rights or freedoms than what the ordinary citizen enjoys. However, the law is that where a matter is of public interest, the court ought not to weigh any comment on its golden scales, and that some allowance must be made for the heated passion and what the writer might consider righteous indignation. The fact that the language was exaggerated, or even grossly exaggerated, does not make the comment necessarily unfair, if, it was such as any fair man might have made in the circumstances. In the case of *Subroya v Abdul Kadar*³⁷ the accused published his view concerning a municipality that the members knew that there was not one among them fit to be a chairman and that the government had ordered the chairman should be a revenue divisional officer, which was a fact, the court acquitted the accused holding that his statement did not exceed the limit of the comment.

In *Jawaharlal Darda v Manoharrao Ganpatrao Kapsikar*,³⁸ the Supreme Court held the publisher of the newspaper who published a statement given by the minister on the floor of the House about misappropriation of government money not guilty of defamation.

In the case of *Mammen Mathew v Kuniel Kumar*,³⁹ the court stated that there cannot be a general rule governing liability of an editor of a newspaper as every case has its different set of facts and circumstances. Therefore, each case has to be decided in the light of facts and circumstances thereof.

The Madras High Court in the case of *P Ramaswamy v M Karunanidhi*,⁴⁰ the Madras High Court held that the plea of fair comment would be sustained, unless facts were proved which made it reasonable to make such a suggestion. Where biased and sordid motives, which are not

³⁶Supra Note 44, p.919.

³⁷ *Subroya v Abdul Kadar*, (1914) MAD WN 351.

³⁸ *Jawaharlal Darda v Manoharrao Ganpatrao Kapsikar* AIR 1998 SC 2117, (1998) Cr LJ 2928(SC).

³⁹ *Mammen Mathew v Kuniel Kumar* (2004) Cr LJ852 (Bom)

⁴⁰ *P Ramaswamy v M Karunanidhi*, (1970) LW 245 (Cri)

warranted by the facts, are imputed to a person, the defense that the publisher bona fide believed that he is publishing what is true, will not be a defense on point of time. Mere subjective belief, without any objective basis is not a dependable criterion for substantiating the publication on the ground that it was made in good faith and for the public good.

The Kerala High Court in the case of *G Chandrasekhara Pillai v G Raman Pillai*,⁴¹ pointed out that the plea of good faith implies making of a genuine effort to reach the truth and a mere belief in the truth, without there being reasonable grounds for such a plea, is not synonymous with good faith.

In *Kartar Singh v State of Punjab*,⁴² the accused persons were members of the Amritsar District Motor Union, which was protesting against the decision of the state government to nationalize motor transport by taking out a procession. During the procession, they allegedly shouted derogatory and defamatory statements against the transport minister and the chief minister. Hence, case came be filed against them under section 9 of the Punjab Security of State Act 1953. The trial court convicted the accused for offence under section 9 of the said enactment, which was confirmed by the High Court.

However, the Supreme Court held that while the slogans were indeed indecent and vulgar, and were directed against the transport minister and the chief minister respectively, their protest against the scheme of nationalization of transport services could not be said to be such as would undermine decency or morality. The strata of the society from which the accused hailed being one habituated to indulge freely in vulgar words without the slightest effect on the persons hearing the same. The court quoted two English cases to point out that 'whoever fills a public position renders himself open thereto. He must first accept an attack as a necessary, though unpleasant appendage in his office.' Further, 'public men in such positions may as well think it worth their while to ignore such vulgar criticisms and abuses hurled against them rather than give an importance to the same by prosecuting the person responsible for the same.' The conviction were, therefore, set aside.⁴³

⁴¹ *G Chandrasekhara Pillai v G Rama Pillai*

⁴² *Kartar Singh v State of Punjab*, AIR 1956 SC 541

⁴³ *Ibid.*

EXCEPTION 4: PUBLICATION OF REPORTS OF PROCEEDINGS OF COURTS

It is not defamation to publish substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings. The ground on which the privilege of accurately reporting what takes place in a court of justice is based on the fact that judicial proceedings are public. Thus, the publication of what takes place there, even if some matters happen to be defamatory to some individuals ought to be published, because such publication enlarges the area of the court and the public has a right to know what takes place inside the court. It follows that the report must fairly represent to the reader what he would have learnt for himself if he had been present.⁴⁴ It is not, however, necessary that the report should be complete, in the sense of being verbatim, if it is substantially fair and correct, it is immaterial whether the proceedings were ex parte or not, or even whether the court had jurisdiction or not.

The report of the proceedings should be kept distinct from comments, if there are any and the reporter should not mix up comments of his own. In *Stile v Nokes*⁴⁵ it was held to be libellous to publish a highly coloured account of criminal proceedings mixed with the reporter's own observations and conclusions upon what passed in the court, headed 'judicial delinquency' and insinuating that the plaintiff, described as 'our hero' had committed a perjury.

In the case of *Clement v Lewis*⁴⁶ it was stated that the a sensational headline to the report is a comment, and if it is not strictly justified, may constitute a libel. Thus, the paper 'Observer' published a true and correct account of some proceedings in the insolvency court, but headed it by a sensational headline 'shameful conduct of an attorney' which was not held justified.

In *Jatish Chandra v Hari Sadhan*⁴⁷, it was observed by the Supreme Court that this exception does not make any concession in respect of proceedings of a House of Legislature or Parliament. It is not necessary in law that the proceeding is to be published contemporaneously. All that is necessary is that the publication should be a substantially true report.

⁴⁴ Supra Note 44, p.922

⁴⁵ *Stile v Nokes* 7 Enst 493

⁴⁶ *Clement v Lewis* (1821) 4 B and Ald 218

⁴⁷ *Jatish Chandra v Hari Sadhan*, AIR 1961 SC 613

EXCEPTION 5: MERITS OF CASE DECIDED IN COURT OR CONDUCT OF WITNESSES OR OTHERS CONCERNED

It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further. This exception protects bona fide comments on cases adjudicated, but not when they are still sub judice. Everyone has a right to discuss fairly and bona fide the administration of justice as evidenced before courts.⁴⁸

However, the comment must be confined to the merits of the case including the conduct of parties, their agent and witnesses since the expression of such opinion must be made in good faith. It follows that it must be fair and honest, based upon reason or discussion and not merely declamation and invective, written not with a view to advance public good, but solely to bring into contempt and hatred the administration of justice or injure the character of individuals. So, it is not fair comment to say that the prisoner was acquitted, though he was really guilty, though of course, it would be fair to give reasons showing on what points, the judge had erred and why there had been a failure, of justice. So again, the critic may lament the state of the law, the administration of which leads to such startling result, but he cannot direct his shaft personally against the judge calling him a knave or a fool or implying as such, though it is quite different to say that the judges had misunderstood or misapplied the law or omitted to consider or apply it correctly. Such criticisms are daily made in the public press, and though they have a remote tendency to bring the administration of justice into contempt they are not defamatory, because are equally protected by this exception and the Second Excpetion.⁴⁹

It has been pointed out by the Delhi High Court in *Ashok Kumar v Radha Kishan*,⁵⁰ following the Supreme Court decision in *Basir-ul-Haq v State of West Bengal*⁵¹ that section 499 of the Indian Penal Code, confers only qualified privilege within the corners of that section. Section 499 confers only qualified privilege on certain occasions. It is common to speak of the statement as having privilege, but it is an occasion and not the statement, which is privileged.

⁴⁸ Supa Note 44, p.924

⁴⁹ Hari Singh Gour, *Penal Law of India*, vol 4, eighth edn, Law Publishers, Allahabad, p 3686

⁵⁰ *Ashok Kumar v Radha Kishen* (1983) Cr LJ 48 (Del).

⁵¹ *Basir-ul-Huq v State of West Bengal*, AIR 1953 SC 293

A party to the a judicial proceedings enjoys only qualified privilege, because that is what is statutorily enumerated in the ninth exception to the section 499. No absolute privilege can be claimed, which is available in the common law. The law of crimes in India is not a mosaic of statute and common law; it is pure and unalloyed codified law.

EXCEPTION 6: MERITS OF PUBLIC PERFORMANCE

It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no further. The object of the is exception is that the public should have the benefit of free criticism of all public performances submitted to its judgement. Lord Ellenborough in the case of *Tabart v Tipper* observed:

"Liberty of Criticism must be allowed, or we should neither have purity of taste nor of moral. That publication therefore I shall never consider as a libel, which has for its object, not to injure the reputation of any individual, but to correct misrepresentations of fact, to refuse sophistically reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality."⁵²

Fair discussion is essentially necessary for the truth of history and advancement of science. This is exception is intended specially to refer to literary and dramatic criticism of the words of literary mean and dramatists. The essential conditions are:

- i. That the author must have expressly or by implication invited public criticism, which he may do by the mere act of publication, though he may not distribute his work for review.
- ii. The criticism must relate to the merits of the performance as distinct from the general capacity of the performer.
- iii. It must be made in good faith.⁵³

⁵² *Tabart v Tipper*, (1808) 1 Camp 350

⁵³ *Supra* Note 44, p.924

EXCEPTION 7: CENSURE PASSED IN GOOD FAITH BY PERSON HAVING LAWFUL AUTHORITY OVER ANOTHER

It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates. This exception allows a person under whose authority others have been placed, either by their own consent or by the law, to ensure in good faith, those who are so placed under his authority, as far as regards matter to which that authority relates. However, the privilege does not justify publication in excess of the purpose or object which gives rise to its. A man may in good faith complain of the conduct of a servant to the master, even though the complaint amounts to defamation, but he is not protected if he publishes the complaint in a newspaper. Excess of publication destroys the privilege. The essential conditions for the application of this exception are:

- i. That the censure must be on the conduct of the person within the scope of the critic's authority.
- ii. The censure must be passed in good faith.⁵⁴

In the Madras case of *Sukrantendra Thirtha Swamiar v Prabhu*⁵⁵, where a swami issued a temporary interdict against two members of his cast, on the ground of their alleged inter-dining with pariahs (member of the dalit schedule case community), and the interdict was issued ex parte in view of the apprehension that they might take part in the temple feasts to be held shortly thereafter, there was nothing to show that the swami was not going to follow up the temporary interdict with his final decision after hearing the person affected. It was held that swami was not guilty of defamation. Caste associations are autonomous, the powers vested in their constituted heads being, subject to any custom, those necessary for the protection of interests committed to their charge. The court's only duty is to see that those powers are exercised in accordance with the principles of natural justice, that is, after the person to be affected by their exercise had been heard and his defence has received fair consideration.

⁵⁴ Supra Note 44, p. 925

⁵⁵ *Sukratendra Thirtha Swamiar v Prabhu*, (1945) Mad LJ 116.

EXCEPTION 8: ACCUSATION PREFERRED IN GOOD FAITH TO AUTHORIZED PERSON

It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation. This exception refers to a complaint made to a superior touching conduct of his subordinate. The two conditions for the protection under this exception are that the accusation must be made to a person who has authority over the party accused and that the accusation must be preferred in good faith.⁵⁶

*It was observed in the case of Krishna Row v Appaswami Aiyer that where a public servant, in the course of a departmental enquiry, made a statement to the head of his department that the complainant, another public servant, borrowed money for his immediate superior, it was held that such a statement would be defamatory, if it was untrue and if it was made under such circumstances, as would lead the officer to believe that the complainant had borrowed money for his superior from persons connected with the department.*⁵⁷

*It was stated in the case of Hari Shankar Joshi v Shyam Sunder that when an advocate, duly instructed by his client, states certain facts in a petition for the purpose of affording redress to his client, states certain facts in a petition for the purpose of affording redress to his client, he would be protected under this exception.*⁵⁸

EXCEPTION 9: IMPUTATION MADE IN GOOD FAITH BY PERSON FOR PROTECTION OF HIS OR OTHER'S INTERESTS

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 interests of the person making it, or of any other person, or for the public good. The ninth exception rests on the ground that honest

⁵⁶ Supra Note 44, p. 926

⁵⁷ Krishna Row v Appaswami Aiyer, (1891) 1 Weir 585

⁵⁸ Hari Shankar Joshi v Shyam Sunder Ch, 1972 All Cr R 486

communications made in the course of business and of social intercourse should be duly protected so long as the parties act in good faith.

The Supreme Court, in *Harbhajan Singh v State of Punjab*⁵⁹, has explained the true scope of the ninth exception to section 499 and the distinction between the First Exception and the ninth exception. The complaint was that the accused, who was the State Secretary of the Punjab Praja Socialist Party, had published in *Blitz Weekly*, an article highly defamatory of the complainant, Surinder Singh, son of the then Chief Minister Pratap Singh Kairon. One of the alleged defamatory statements was that he was not only a leader of smugglers, but he was also responsible for a large number of crimes in the State of Punjab. The statement added 'that because the culprit happens to be the Chief Minister's son, the cases are also shelved up.' The accused pleaded that the imputation made against the complainant were made in good faith and for public good falling under exception 9 of section 499. The Supreme Court, after examining in detail the evidence, held that to establish a claim of defence under exception 9, the accused will have to prove the element of both good faith and public good. Lack of personal malice was held to be one of the indicators of good faith, which was held to be proved in the facts of the case. Similarly, both the trial court and the high court had come to a concurrent finding that the publication was for public good. Since both the elements had to be established for claiming protection under exception 9, and in the instant case, both had been proved, the Supreme Court acquitted the accused.

The privileges enjoyed by various professionals like counsels, doctors, accountants, as also judges and so on are covered by the ninth exception to section 499. However, whether it is judges or counsels, there is no absolute privilege or protection accorded to them in law. They will be covered by the principles governing the operation of the ninth exception, namely, that they will have to prove good faith. Thus, there is only qualified privilege limited by good faith.⁶⁰

The Madras High Court in the case of *Ayesha Bi v Peerkhan Sahib*,⁶¹ held that a counsel owes a duty to his client and he must carry out faithfully his client's instructions. If the client makes serious allegations against a party in suit, it is the counsel's duty to plead those allegations in

⁵⁹ *Harbhajan Singh v State of Punjab*, Air 1966 SC 97, (1966) Cr LJ 82 (SC).

⁶⁰ *Supra* Note 44, p.929

⁶¹ *Ayesha Bi v Peerkhan Sahib* AIR 1955 MAD 741, (1955) Cr LJ 1239 (Mad).

the plaint or written statement or other pleadings. The counsel could not be expected to be a judge and it is not for him to judge the correctness or otherwise of the statement made by the client. If serious and untrue allegations are made, he brings himself open to a prosecution for defamation, but he cannot be successfully prosecuted unless it is clearly shown that he had acted in bad faith or maliciously. The counsel can rely on the ninth exception to section 499, but he would lose that defence, if he abused his position and made allegations maliciously or for his own purpose.

EXCEPTION 10: CAUTION INTENDED FOR GOOD OF PERSON TO WHOM CONVEYED OR FOR PUBLIC GOOD

It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.

The Supreme Court in the case of *M A Rumugam v Kittu*⁶² held that a person cannot claim privilege by merely writing on his letter, 'Private and Confidential'. But two persons may make a communication confidential in the large sense of the term, if there is, in fact, such a relationship between them. Such relationship exists between counsel and client, husband and wife, guardian and ward, master and servant, teacher and pupil and even between intimate friends.

In the case of *Jeffrey J Diermeier v State of West Bengal*,⁶³ the Supreme Court held that when a person seeks to get protection of the Tenth Exception, it is for him to establish that the imputation in question was in good faith and for the public good. A mere plea that he believed that what he had stated was in good faith is not sufficient to get benefit of this exception. He, however, is not required to prove it beyond reasonable doubt. His onus gets discharged the moment he succeeds in proving a preponderance of probability.

⁶² *M A Rumugam v Kittu* @ *Krishnamoorthy* (2009) 1 SCC 101, JT 2008 (11) SC 638.

⁶³ *Jeffrey J Diermeier v State of West Bengal* (2010) 6 SCC 243, 2010 (5) SCALE 695

Chapter IV- Distinction between English Law and Indian LAW

The distinction that the English criminal law makes between written and spoken defamation is generally defended on the ground that written defamation is likely to be more widely spread and to be more permanent than a spoken defamation. These considerations do not hold much ground in the Indian law. In the first place, it is by no means necessary that written defamation is more widely circulated than spoken defamation. Written defamation maybe contained in a letter intended for a single eye. Spoken defamation can be heard by an assembly of many thousands.

In the second place, it is not necessarily the fact that the harm caused by defamation is proportional to the extent to which the defamation is circulated. Some slanders, - and those of a most malignant kind, - can produce harm only while confined to a very small circle, and would be at once refuted if they were published. A malignant whisper addressed to a single hearer, and meant to go no further, may indicate greater depravity, may cause more intense misery, and may deserve more severe punishment than a satire which has run through twenty editions. A person, for example, who in private conversation, should infuse into the mind of a husband suspicions of the fidelity of a virtuous wife, might be a defamer of a far worse description than who should insert the lady's name in a printed lampoon.

It must be allowed that, in general, a printed story is likely to live longer than a story which is only circulated in conversation. But, on the other hand, it is far easier for a calumniated person to clear his character, either by argument or by legal proceedings, from a charge fixed in printed form, than from a shifting rumour, which nobody repeats exactly as he heard it. In general, we believe, a man would rather see in a newspaper a story discreditable to him which he had the means of refuting, than know that such a story, though not published, was current in the society

There is no universal rule that the accused cannot be convicted unless the actual words used by the accused are proved. The question, whether certain words used are defamatory, depends solely on the shade of their meaning in the context in which they are used. Then it is very essential to prove the exact words used by the accused as also the context in which they were spoken. When the exact words used and their context are not material, a sufficient clear account of the purport of the defamatory remarks would be enough to find the accused guilty.⁶⁴

⁶⁴*Mohanlal Murlidhar v. Ramchandran Devi Prasad*, AIR 1957 MP 689

‘WORDS SPOKEN’

An essential difference between the Indian and the English law is that the former recognizes ‘words, spoken’ as a model of defamation but the latter does not. Under the English law, defamation is a crime only when it is committed by writing, printing, engraving or some similar process. Spoken words reflecting on private character, however atrocious may be the imputations which these words convey, however numerous may be the assembly before which such words are uttered, furnish ground only for a civil action. Under the English law, “no indictment will lie for words spoken and not reduced into writing... unless they are seditious, blasphemous, grossly immoral or obscene or uttered to a magistrate in the execution of his office or uttered as a challenge to fight a duel, or with an intention to provoke the other party to send a challenge.”⁶⁵ The Penal Code makes no distinction between written and spoken defamation; and classify both as punishable.⁶⁶

CONCLUSION

The Law of Defamation seeks to protect an individual's reputation because every person has an inherent right to protect and preserve his reputation intact. However, it's central problem is how to reconcile this purpose with the competing demands of free speech. Both of these interests are highly valued in our society, reputation perhaps the most dearly prized attribute of civilized human beings while the free speech is the very foundation of a democratic society. The right to protect and preserve reputation intact has close affinity with the right of freedom of speech and expression guaranteed by the Constitution under Article 19(1)(a) to all the citizens. However, as there is a freedom of speech and expression so there is a law of defamation which curtails, restricts and regulates the unchartered liberty of speech and expression claimed by men.

The restrictions imposed upon the right of freedom of speech and expression are the restrictions imposed in the interests of: the sovereignty and integrity of India,⁶⁷ the security of the State,

⁶⁵ Archbold 35th Edn., p. 3630, as stated in Ratanlal & Dhirajlal, *Law of Crimes*, Vol. II, 26th Ed. (2007), Bharat Law House (New Delhi), p. 2759

⁶⁶ *Parvathi v. Mannar*, (1884) 8 Mad 175; *Mohunt Pursoram Dass*, (1865) 2 WR (Cr) 36

⁶⁷ Ins. by the Constitution (16th Amendment) Act, 1963, w.e.f. 6-10-1963

friendly relations with foreign States, public order, decency, morality, in relation to contempt of court, defamation, or incitement to an offence⁶⁸ and by provisions contained in Article 51-A.⁶⁹

The law of defamation thus works as a break on the unrestrained liberty of freedom of speech and expression. Punishment for defamation does not mean restriction on free speech and expression; it is the result of breach of the restriction from which the accused cannot escape.⁷⁰

The expression freedom of speech and expression, since the advent of the Constitution has been given a larger meaning so as to include in its fold the freedom of propagation of ideas, enlarged by freedom of its circulation.⁷¹

A section of people unlike the Law Commission believe that this chapter requires to be struck down as defamation must be treated as a tort and not as a crime. However, the Law Commission in its report⁷² has opined to retain this chapter because the civil remedy for a suit of damages is not only expensive but also in many cases useless. Still however, it cannot be denied that the provisions of this chapter are more often resorted to against press reporters and editors not to vindicate one's honour and credit but to harass and intimidate them. The height of this proclivity was seen when the Union Government attempted to introduce a Bill to amend the law of defamation but due to criticism the same had to be shelved

Decriminalizing the law of defamation can be detrimental to society because defamation is a tool that can be used by any person in a way that can harm the interest of the society. However, the problem occurs when it makes journalists and comedian under the ambit of facing criminal action for their alleged defamation of power individuals or corporations. Under section 499 and 500 of the Indian Penal Code, the law of defamation is a double edged sword because if a false suit is filed for defamation, the respondent can file a counter claim. The balancing of the right of freedom of expression with the right of reputation should be done with objective of

⁶⁸ Article 19(2), The Constitution of India

⁶⁹ Ins. by 42nd Amendment to the Constitution in 1976

⁷⁰ *K. V. Ramaiah v Public Prosecutor*, AIR 1961 AP 190

⁷¹ *Ramesh Thapar v State of Madras*, AIR 1950 SC 124

⁷² 42nd Report Ch. XXI, p. 330, as stated in B.M. Gandhi, *Indian Penal Code*, 2nd Edition (2006), Eastern Book Company (Lucknow), p. Ins. by the Constitution (16th Amendment) Act, 1963, w.e.f. 6-10-1963

⁷² 42nd Report Ch. XXI, p. 330, as stated in B.M. Gandhi, *Indian Penal Code*, 2nd Edition (2006), Eastern Book Company (Lucknow) 710

allowing an individual to exercise its freedom speech and expression without compromising with the person's reputation in the eyes of public.

