IN THE SUPREME COURT OF INDIA
(CRIMINAL ORIGINAL JURISDICTION)
I.A. No. of 2021
In
W.P. (Criminal) No. 106 of 2021

IN THE MATTER OF:

KISHORECHANDRA WANGKHEMCHA
AND ANOTHER ...PETITIONERS

VERSUS

THE UNION OF INDIA ...RESPONDENT

AND IN THE MATTER OF:

DR. SANJAY S. JAIN,

...APPLICANT/INTERVENOR

APPLICATION FOR INTERVENTION

TO,
THE HON'BLE CHIEF JUSTICE OF INDIA AND
HIS COMPANION JUDGES OF THE SUPREME COURT
THE HUMBLE APPLICATION ON BEHALF
OF THE APPLICANT ABOVENAMED

MOST RESPECTFULLY SHOWETH:

1. That vide the instant application, the Applicant seeks the permission of this Hon'ble Court to intervene in W.P (Criminal) 106 of 2021 which has been filed assailing the constitutional validity of Section 124-A of the Indian Penal Code (IPC), 1860.

2. The Applicant is an Assistant Professor of Law at the Indian Law Society (ILS) Law College at Pune, Maharashtra. Despite being visually challenged, with 100% loss of sight by birth, the Applicant went on to become the first disabled scholar to obtain a Ph.D. Degree from the Nagpur University in 2010, under the guidance of the Late Dr. Shirish Deshpande, who was himself a blind scholar, and a former Dean of the Department of Legal Studies at Nagpur University. During his studies, the Applicant was the recipient of the National Merit Scholarship awarded by the Government of India (1995-96), the National Association of the Blind scholarship (1987-1994) and the Social Welfare scholarship (1987-1994).

3. The Applicant has been teaching constitutional and administrative laws, jurisprudence and interpretation of statutes for the past twenty-five years. He was appointed as a Full-Time lecturer in Law at Bharati Vidyapeeth's New Law College, Pune in 1997-98. From 1998 to 2005, he was a Full Time Lecturer at the G.E Society's M.P Law College at Aurangabad. He is a full-time faculty at the ILS Law College, Pune since March 2008. In March 2020, he was appointed as the Acting Principal of the ILS Law College, Pune, which post he continues to hold as on date.

4. In the course of his teaching career, spanning over the past 25 years, the Applicant has been the recipient of several teaching awards: the Piloo Doraf Khambatta Memorial Award, the Ideal Teacher Award, 2004, the National Award for Best Teacher (2004), received by the Applicant from

the hands of the then President of India His Excellency Dr. A.P.J Abdul Kalam, the Shanti Bhushan Award for extra-ordinary social work (2010) to name a view.

5. As the issue raised by the Applicant involves a challenge to the constitutional validity of Section 124-A of the IPC on the ground that it violates Article 19(1) (a) of the Constitution. The Applicant supports the prayer sought for in this writ petition, and fervently believes, that the material sought to be placed by him may be of some assistance to this Hon'ble Court in deciding the instant case.

6. The offence of sedition found palace in Clause 113 of the very first draft prepared by of Lord Macaulay and Commissioners in 1837. That Bill, however, did not see the light of day for more than 20 years. When the Bill was finally added to the Draft Indian Penal Code in 1860, the clause that contained the offence of sedition was omitted for the reasons which were then stated to be "unaccountable". It was not until 1870 that the offense of sedition was inserted into the Indian Penal Code vide Special Act (XXVII of 1870). The clause as it originally stood incorporated Lord Macaulay's intended Clause 113 in the 1837 Code. This insertion was on account of what is now famously known as Wahabi conspiracy case. The imperial rulers therefore took the view that a stricter penalty was necessary to stamp out any attempt to excite or promote disaffection against the Government of the day. The law, as originally enacted, largely

based on the English common Law, which essentially consisted of three parts. The first part i.e., the statutory basis: was the Treason Felony Act. The second part: the common law was with regard to seditious liability: and the third part was with regard to seditious words.

7. The law of sedition was thus inaugurated on continued in force till it was substituted with the new section on 18.02.1898. The offense of Sedition which was inserted in the Penal Code in 1870, remained in hibernation till the first recorded case for sedition came up in ***Queen Empress v. Jogendra Chunder Bose***[1]*.* Explaining the ingredients of the offence, Chief Justice W. Comer Petheram, Kt., laid down the distinction between 'disaffection' and 'disapprobation', in the following terms:

> *"It is sufficient for the purposes of the section that the words used are calculated to excite feelings of ill-will against the Government, and to hold it up to the hatred and contempt of the people, and that they were used with an intention to create such feeling."*

The matter did not go to trial since the accused issued an apology.

8. The next reported case was the trial of Bal Gangadhar Tilak who was ultimately found guilty and sentenced to eighteen months imprisonment. In ***Queen Empress vs. Bal Gangadhar Tilak*** reported in ***(1897) 22 Bom. 112***, he was charged with the offense of seditious libel through his journal "Kesari". Charging the jury, while rejecting the interpretation that an appeal to force was an essential ingredient of the offence, Mr.

Justice Strachey summed up the gist of the offence in the following terms:

> "*The offence consists in exciting or attempting to excite in others certain bad feelings towards the Government. It is not the exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small. Whether any disturbance or outbreak was caused by these articles, is absolutely immaterial. If the accused intended by the articles to excite rebelling or disturbance, his act would doubtless fall within S.124-A, and would probably fall within other sections of the Penal Code. But even if he neither excited nor intended to excite any rebellion or outbreak or forcible resistance to the authority of the Government still if he tried to excite feelings of enmity to the Government, that is sufficient to make him guilty under the section. I am aware that some distinguished persons have thought that there can be no offence against the section unless the accused either counsels or suggests rebellion or forcible resistance to the Government. In my opinion, that view is absolutely opposed to the express words of the section itself, which as plainly as possible makes the exciting or attempting to excite certain feelings, and not the inducing or attempting to induce to any course of action such as rebellion or forcible resistance, the test of guilt. I can only account for such a view by attributing it to a complete misreading of the explanation attached to the section and to a misapplication of the "explanation beyond its true scope*".
>
> (Emphasis supplied)

9. Soon thereafter, in ***Queen-Empress v. Ramchandra Narayan and another***, reported in ***22 Bom. 152***, the Editor and Proprietor of 'Pratod' magazine which was printed and published at Islampur in the Satara district, was charged with Sedition for publishing an article titled "Preparations for becoming Independent". It allegedly seditious article stated that the Canadians have gone independent, whereas "*We have become so callous and shameless that we do not feel humiliation, while*

we are laughed at by all nations for losing such a vast and gold like country as India. What manliness we can exhibit in such a condition is self-evident." The Full Bench of the Bombay High Court, (Sir Charles Farran, C. J., Justice Parsons and Justice Ranade), convicted the Editor and Proprietor. Most importantly it is significant to notice the manner in which Justice Ranade captured the meaning of the word "Disaffection". The same is extracted below:

> "Disaffection, as thus judicially paraphrased, is a positive political distemper, and not a mere absence or negation of love or good-will. It is a positive feeling of aversion which is akin to ' disloyalty,' a defiant in-subordination of authority, or when it is not defiant, it secretly seeks to alienate the people, and weaken the bond of allegiance, and prepossesses the minds of the people with avowed or secret animosity to Government, a feeling which tends to bring the Government into hatred or contempt by imputing base or corrupt motives to it, make^ men indisposed to obey or support the laws of the realm, and promotes discontent and public disorder."

The law was amended in 1897, substituting the provision as it exists on date.

10. The interpretation of the amended Section 124-A came for consideration before the Federal Court in ***Niharendu Dutt Majumdar vs. King Emperor*** reported in ***AIR 1942 FC 22***, where the Court overruled the judgement in ***Bal Gangadhar Tilak*** (*supra*) holding that an appeal to force was an essential ingredient of Section 124-A. Sir Maurice Gwyer, CJ, speaking for himself, S. Varadachariar and Sir Shah Sulaiman, JJ, laid down the test in the following words:

"*The first and most fundamental duty of every Government is the preservation of order, since order is the condition precedent to all civilization and the advance of human happiness. This duty has no doubt been sometimes performed in such a way as to make the remedy worse than the disease; but it does not cease to be a matter of obligation because some on whom the duty rests have performed it ill. It is to this aspect of the functions of government that in our opinion the offence of sedition stands related. It is the answer of the State to those who, for the purpose of attacking or subverting it, seek (to borrow from the passage cited above) to disturb its tranquillity, to create public disturbance and to promote disorder, or who incite others to do so. Words, deeds or writings constitute sedition, if they have this intention or this tendency; and it is easy to see why they may also constitute sedition, if they seek as the phrase is, to bring Government into contempt. This is not made an offence in order to minister to the wounded vanity of Governments, but because where* Government *and the law cease to be obeyed because no respect is felt any longer for them, only anarchy can follow. Public disorder, or the reasonable anticipation or likelihood of public disorder, is thus the gist of the offence. The acts or words complained of must, either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency.*"

(Emphasis supplied)

11. However, the decision in ***Niharendu Dutt Majumdar*** (*supra*), was overruled by the Privy Council in ***King Emperor vs. Sadashiv Narayan Bhalerao*** reported in ***1947 PC 82*** and the law laid down in ***Bal Gangadhar Tilak*** (*supra*), was restored.

12. It is submitted that the debate of the Governor General in Council, reveals that the amended Section 124-A was inserted in 1897 by a foreign government with a precise intention of repressing the nationalist sentiments and the Indian Press. As a matter of fact, the amendment itself, as would be demonstrated through the materials placed on record, was necessitated with a precise object of altering the law, which was then

in sync with the Law of England, to provide for more drastic offense keeping in mind that the requirements of a foreign government, then ruling the country. The debates reveal that the object of enacting Section 124-A in the present form was to keep revolutionary movements of the "natives" at bay, and to ensure that foreign rule progressed smoothly.

13. One of the settled principles relating to the application of test of whether the law has become arbitrary is that the object of the law no longer survives, whereby the operation of the law does not have or serve an existing purpose (***Malpe Vishwanath Acharya & Ors vs State Of Maharashtra & Anr*** reported in ***(1998) 2 SCC 1*** and ***Mardia Chemicals Ltd. Etc vs U.O.I. & Ors*** reported in ***(2004) 4 SCC 311).***

14. In these cases, this Hon'ble Court has affirmed the principle that a legislation which was valid when enacted, could, by circumstances, become arbitrary and irrational. It is submitted that a provision, which was enacted in 1897 for the purposes of repressing the national movement of the day, and ringfencing foreign rule, is anathema to a republican government in free India. Therefore, whatever may have been the rationale for Section 124-A, they no longer hold good today. Thus, keeping in mind the changed circumstances, the constitutional validity of Section 124-A. Almost six decades have lapsed since the decision of this Hon'ble Court in ***Kedar Nath.*** In view of the changed circumstances, the decision may require re-consideration.

15. Post the decision of this Hon'ble Court in ***Shreya Singhal Vs. Union of India*** reported in ***AIR 2015 SC 1523***, it is no longer a doubt that a criminal law can be annulled for being void-for-vagueness. This principle has been applied by Hon'ble Court since the decision in in ***State of Madhya Pradesh and Anr. Vs. Baldeo Prasad*** reported in ***(1961) 1 SCR 970***. The question however is whether Section 124-A, as it stands today, is vague and imprecise and is, thus, an infringement of the right guaranteed under Article 19(1)(a) of the Constitution.

16. In ***Shreya Singhal***, this Hon'ble Court was pleased to approve the principles set out in the decisions of the U.S Supreme Court for construing the scope of Article 19(1)(a). A significant interpretation of the First Amendment to the United States Constitution was given by the Supreme Court of United States in ***New York Times Co. v. Sullivan, 376 U.S. 254 (1964)***, and in ***GARRISON Vs. STATE OF LOUISIANA*** reported in ***379 U.S. 64***, on a question whether the Constitution "*limits state power to impose criminal sanctions for criticism of the official conduct of public officials*" as it does in respect of "*civil sanctions*".

17. In view of the following global developments, Section 124-A and the law of Sedition requires a careful, sober deliberation keeping in mind the changed circumstances today. For ease of reference the legal position in other countries is set out hereinbelow:

Sl. No.	Jurisdiction	Status of Sedition Laws
		1. The first comprehensive legislation that contained sedition offence was the Crime Act 1920 and defined the offense as under.
1.	Australia	"A person, who engages in a seditious enterprise with the intention of causing violence or creating public disorder or a public disturbance, is guilty of an indictable offence punishable on **conviction by imprisonment for not longer than three years."** 2. Section 24 of the Crimes Act 1920 defined seditious intention as intention to commit the following purposes: ● to bring the Sovereign into hatred or contempt. ● to excite disaffection against the Government or Constitution of the Commonwealth or against either the House of the Parliament of the Commonwealth. ● to excite Her Majesty's subjects to attempt to procure the alteration, otherwise than by lawful means, of any matter in the Commonwealth established by law of the Commonwealth;

		● to promote feelings of ill-will and hostility between classes of Her Majesty's subjects so as to endanger the peace, order or good Government of the Commonwealth. 3. The Hope Commission constituted in 1984 recommended that the Australian definition of sedition should be aligned with the Commonwealth definition. 4. 1991- Gibbs Committee recommended that the offense must be retained, but convictions confined to 'incited violence for the purpose of disturbing or overthrowing constitutional authority. 5. Following the enactment of Anti-Terrorism Act 2005, Section 80.2 of Anti-terror Act 2005, stood amended by penalizing five offenses, that will be given force in the Criminal Code Act, 1995. 6. The Anti-Terrorism Act was criticized for introducing new offenses. Thus, based on the recommendations of Australian Law Reforms

		Committee dated 05.07.2006 (Fighting Words, A Review of Sedition Laws in Australia, Report 104) National Security Legislation Amendment Act 2010 was enacted. 7. By virtue of National Security Legislation Amendment Act 2010, the term 'sedition' replaced with 'urging violence offenses' etc. For detailed changes, see National Security Legislation Amendment Act 2010 and recommendations accepted by the government.
2.	Canada	Seditious words **Criminal Code (R.S.C., 1985, c. C-46)** • **59 (1)** Seditious words are words that express a seditious intention. (Seditious Libel) **(2)** A seditious libel is a libel that expresses a seditious intention. (Seditious conspiracy) **(3)** A seditious conspiracy is an agreement between two or more persons to carry out a seditious intention. (Seditious intention)

		(4) Without limiting the generality of the meaning of the expression *seditious intention*, every one shall be presumed to have a seditious intention who **(a)** teaches or advocates, or **(b)** publishes or circulates any writing that advocates, the use, without the authority of law, of force as a means of accomplishing a governmental change within Canada Section 60: Good Faith as an exception Section 61: **Punishment of seditious offences- Not exceeding 14 years.** 1. The Law Reform Commission of Canada in 1986 saw the offences of sedition as outdated and unprincipled. In its view: "*it is essential to the health of a parliamentary democracy such as Canada that citizens have the right to critcize, debate and discuss political economic and social matters in the freest possible manner*"

		2. In 1989 the Canadian Law Reform Commission proposed that seditious offences be abolished because they overlapped with other provisions, were uncertain as to scope and meaning (especially as to intention), were out of date and may well infringe the Charter. 3. The Supreme Court in ***Boucher vs. The King ([1951] SCR 265),*** held that there must be an intention to incite violence or resistance or defiance, for the purpose of disturbing constituted authority. Similar views were echoed in ***Irwin Toy v Quebec (AG) [1989] 1 SCR 927***. 4. The Law of sedition still exists in Canada, without any effective prosecutions.
3.	New Zealand	Sedition was codified under Sections 81 to 85 of the crimes Act, 1961. Sedition Law was abolished in 2007, under the crimes (repeal of Seditious offences) amendment Act 2007.

4.	United States of America	1. Sedition as first made punishable by the Sedition Act of 1798, repealed in 1820. 2. Again in 1918, by series of amendments to the 1917 Espionage Act, Sedition was made punishable to protect the State from WW-I. 3. The SC in ***Schenck vs. United States (249 U.S. 47 (1919))*** restricted the scope and laid that "clear and present danger" test must be satiated to restrict free speech and expression. 4. The Alien Registration Act of 1940 (Smith Act) which penalized advocacy of violent overthrow of the government also punished Sedition. It was unsuccessfully challenged in ***Dennis vs. United States (341 U.S. 494 (1951)***). 5. Subsequent change in law narrowly constructed these restrictions. ***Yates vs. United States*** (***354 U.S. 298 (1957)***) distinguished advocacy to "overthrow as

		an abstract doctrine from an advocacy to action". It was held that the difference between these two forms of advocacy is that 'those to whom the advocacy is addressed must be urged to do something, now or in the future, rather than merely to believe in something'. 6. IN New York Times v. Sullivan ***(376 U.S. 254, 273-76 (1964)),*** the Supreme Court remarked that speech must be allowed a breathing space in a democracy and government must not be allowed to suppress what it thinks is '***unwise, false or malicious***. 7. Pursuant to the judgement in ***Brandenburg v. Ohio (395 U.S. 444 (1969)***), where the Supreme Court categorically held that '*freedoms of speech and press do not permit a State to forbid advocacy of the use of force or of law violation except where such*

		advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action', restrictions on expression are subject to intense scrutiny. Thus, criticism or advocacy must lead to incitement of immediate lawless action in order to qualify for reasonable restriction of first amendment. 8. Sedition as an offense still exists in the USA with narrow construction of restrictions to free speech and the First Amendment.
5.	United Kingdom	1. The Law of Sedition against the Crown was first codified in Statute of Westminster in 1275 AD (flows from Divine Right theory). 2. ***De Libellis Famosis*** case established that 'seditious libel', whether 'true or false' was made punishable. 3. ***R. vs. Sullian*** (R v. Sullivan (1868) 11 Cox C.C. 44 at p. 45)

		"*edition in itself is a comprehensive term and it embraces all those practices, whether by word, deed or writing, which are calculated to disturb the tranquillity of the State, and lead ignorant persons to endeavour to subvert the Government and the laws of the Empire. The objects of sedition generally are to induce discontent and insurrection and to stir up opposition to the Government, and bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion*." 4. The 1977 Law Commission's working paper, Codification of the Criminal Law: Treason, Sedition and Allied Offences‖, Working Paper no. 72, referred to the Supreme Court of Canada's ruling in ***R. vs. Boucher***, and declared that only those acts that incite violence against the government could be considered as seditious, the movement to abolish seditious libel began.

		5. Finally with the advent of Human Rights Act 1998, the offense of Sedition was viewed as contrary to the European Convention of Human Rights. 6. <u>In 2009, by virtue of Section 73 of Coroners and Justice Act 2009, seditious libel as an offence was scrapped from the law of United Kingdom.</u>

18. In view of the above, the Applicant seeks the permission of this Hon'ble Court to intervene in this writ petition to place on record the relevant material in support of the prayer(s) made therein.

19. That the present application by the Applicant is bona fide and in the interest of justice.

<u>PRAYER</u>

It is therefore, most respectfully prayed, that this Hon'ble Court may graciously be pleased to:

i. Permit the Applicant herein to intervene in W.P (Criminal) 106 of 2021; and/or

ii. Any other order this Hon'ble Court may deem fit in facts and circumstances of the case and in the interest of justice.

AND FOR THIS ACT OF KINDNESS THE APPLICANT AS IN DUTY BOUND SHALL EVER PRAY

FILED BY:

FILED ON: 07.07.2021

NAMIT SAXENA

Place: New Delhi (COUNSEL FOR THE APPLICANT)