

IN THE PRIVY COUNCIL

No. 20 of 1979

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O N A P P E A LFROM THE COURT OF APPEAL OF THE SUPREME  
COURT OF JUDICATURE OF TRINIDAD AND TOBAGO

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I N T H E M A T T E R of THE CONSTITUTION  
OF TRINIDAD AND TOBAGO BEING THE SECOND  
SCHEDULE TO THE TRINIDAD AND TOBAGO  
(CONSTITUTION) ORDER IN COUNCIL 1962B E T W E E N :10 PATRICK CHOKOLINGO Appellant

- and -

THE ATTORNEY-GENERAL OF TRINIDAD AND  
TOBAGO Respondent

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CASE FOR THE APPELLANTRecord

1. This is an Appeal by final leave to appeal granted to the above-named Appellant by the Court of Appeal of the Supreme Court of Judicature of Trinidad and Tobago on 30th May 1979, and entered on 21st June 1979 against the dismissal with costs by the Court of Appeal (Hyatali C.J., Corbin and Kelsick JJA.) on 28th December 1979 of the Appellant's Appeal to the Court of Appeal against the dismissal with costs on 28th April 1975 by Cross J. of the proceedings commenced by the Appellant by Notice of Motion dated 31st January 1975 to the said High Court of the Supreme Court of Judicature wherein the Appellant sought inter alia for a declaration that an Order of Committal for contempt made by the High Court against him on 17th August 1972 was unconstitutional null and void and of no effect a further order that his imprisonment under the Order was illegal and a violation of his fundamental human rights and freedoms guaranteed by the Constitution of Trinidad and Tobago and for damages.

2. By an Order dated 31st March 1980 Her Majesty in Council directed that the Attorney-General of Trinidad and Tobago be substituted as Respondent for The Law Society of Trinidad and Tobago.

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3. The Appellant is the editor of the BOMB newspaper in Trinidad and Tobago and held that position on 26th May 1972 when in the weekly issue of the newspaper of that date there appeared a Short Story written by P. David Lincott under the title "THE JUDGE'S WIFE".

4. The publication was written in the vernacular and a copy appears in Appendix A.

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Lines 1-8

5. The Respondent whose Constitutional functions are set out in section 62 of the Trinidad and Tobago Constitution of 1962 considered whether the Appellant should be prosecuted for having committed a contempt of court by reason of the publication but he declined to prosecute.

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Section 62 is set out in Appendix B.

page 11-14

6. Subsequent to the consideration by the Respondent of the question whether a prosecution should be commenced, the Law Society of Trinidad and Tobago on the 10th June 1972 applied to the High Court for liberty to issue writs of Attachment or for the Committal of the Appellant and Ajodha Singh, the Proprietor, Publisher and Printer of the newspaper.

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The Law Society is a body incorporated by and under the Trinidad and Tobago Law Society (Incorporation) Act No. 29 of 1969, which includes the provisions set out in Appendix B.

7. The grounds on which the Law Society sought relief were set out in a statement supported by an affidavit of the Secretary of the Law Society, Mark Inskip Julien dated 10th June 1972. They were in short that "The Judge's Wife" was a scurrilous abuse of the judges of the Supreme Court of Trinidad and Tobago, that it lowered their dignity and the Court's authority and brought the administration of justice in Trinidad and Tobago into disrespect.

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Page 23

8. Liberty to apply was granted to the Law Society in the proceedings by the High Court (Achong J) on 12th June 1972 and on that day the Law Society gave Notice of Motion for an order that the Law Society be at liberty to issue Writs of Attachment or for the Committal of the Appellant and Ajodha Singh in respect of the impugned publication.

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9. The Motion was called before Hassanali J. on the 26th June 1972 and was adjourned to the 27th June 1972 when preliminary objections were made

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by Counsel for the Appellant and Ajodha Singh. One of the objections urged upon the Court was that the Law Society lacked the capacity or the power to bring the Motion. The High Court overruled the objections on the 10th July 1972, but gave leave to the Appellant and Adjoha Singh to file Affidavits. These were sworn on the 24th June 1972 and duly filed.

Page 32  
Lines 35-6

10 10. The Appellant's Counsel conceded at the hearing that the publication "The Judge's Wife" though a Short Story was a scandalous and scurrilous attack on the Judges of Trinidad and Tobago in that it charged them with accepting bribes, and Hassanali J. agreed that it was a serious contempt of court and found that the Appellant must have realised that an average reader would have believed that the story referred to local judges.

Page 33  
Lines 6-16  
Page 39  
Line 34

20 11. In the result Hassanali J. on the 17th August 1972 ordered that the Appellant be committed to prison for twenty-one days without hard labour. He ordered Ajodha Singh to pay a fine of £500 or be imprisoned for 21 days without hard labour and ordered both respondents to pay the costs on a solicitor and client basis. The Appellant paid the costs which were taxed in the sum of \$11,364.27 (eleven thousand three hundred and sixty-four dollars and twenty-seven cents).

Page 41  
Lines 24-25  
Lines 24-30

30 12. Under the laws of Trinidad and Tobago as they stood at the time of the Appellant's conviction he had no right of appeal in the Courts of Trinidad and Tobago against the order of the High Court. Appeal lay to Her Majesty in Council only by leave of Her Majesty. The Appellant suffered imprisonment in accordance with the Order but was granted a remission of his sentence by the Crown after twelve days.

Page 6  
Lines 5-8

40 13. The Appellant who was aggrieved by his conviction and sentence for criminal contempt sought redress by invoking the provisions of the Constitution of Trinidad and Tobago 1962 which guaranteed fundamental human rights and freedoms to the people of Trinidad and Tobago and provided for their enforcement. The relevant provisions of the Constitution were:-

Page 5  
Lines 9-13

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"Recognition and declaration of rights and freedoms.

1. It is hereby recognised and declared that in Trinidad and Tobago there has existed and shall continue to exist.....the following human rights and fundamental freedoms namely:

(a) the right of the individual to.....liberty, security of the person..... and the right not to be deprived thereof except by due process of law:.....

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(i) freedom of thought and expression;.....

(k) freedom of the press

Protection of rights and freedoms.

2. Subject to the provisions of Sections 3, 4 and 5 of this Constitution, no law shall abrogate, abridge or infringe or authorise the abrogation, abridgement or infringement of any of the rights and freedoms hereinbefore recognised and delcared.....

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3. (1) Sections 1 and 2 of this Constitution shall not apply in relation to any law that is in force in Trinidad and Tobago at the commencement of this Constitution.

.....

6. (1) For the removal of doubts it is hereby delcared that if any person alleges that any of the provisions of the foregoing sections or section of this Constitution has been, is being, or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.

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(2) The High Court shall have original jurisdiction -

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(a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) thereof,

10 and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said foregoing sections or section to the protection of which the person concerned is entitled.

20 (3) If any proceedings in any court other than the High Court or the Court of Appeal any question arises as to the contravention of any of the provisions of the said foregoing sections or section the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless in his opinion the raising of the question is merely frivolous or vexatious.

30 (4) Any person aggrieved by any determination of the High Court under this section may appeal therefrom to the Court of Appeal

40 (5) Nothing in this section shall limit the power of Parliament to confer on the High Court or the Court of Appeal such powers as Parliament may think fit in relation to the exercise by the High Court or the Court of Appeal, as the case may be, of its jurisdiction in respect of the matters arising under this Chapter."

14. The Appellant pursuant to Section 6 of the Constitution of Trinidad and Tobago of 1962 gave Notice of Motion on the 31st January 1975 claiming a declaration that his committal was unconstitutional null and void, a further declaration that his imprisonment was illegal and a violation of the human rights and freedoms

Pages 2-3

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guaranteed by the Constitution and for damages against the Law Society. The Appellant claimed specifically that sections 1(a)(i) and (k) were contravened in relation to him by the order of committal which

- (a) deprived him of his liberty without due process of law;
- (b) contravened his right to freedom of thought and expression; and
- (c) contravened the freedom of the press.

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The Appellant based his claim in particular upon contentions that the publication was not a criminal contempt of Court, that the principles of law and practice relating to criminal contempt did not justify the proceedings and that the order could not properly have been made by summary process and without proceedings upon information or indictment. The Notice of Motion was supported by the affidavit of the Appellant and served on the Law Society and the Respondent.

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The Notice of Motion was duly served upon the Law Society and upon the Respondent. No evidence was filed on behalf of the Law Society or the Respondent but both appeared and were represented at the hearing of the Motion.

Page 55  
line 35  
Page 58  
line 20

15. The hearing of the Motion was determined in the High Court (Cross J) on the 28th April 1975. He rejected three preliminary objections by the Law Society: that the Appellant was estopped by record from denying that the article was a contempt; that the Appellant's conviction could not be challenged by collateral attack in constitutional proceedings under Section 6; and that Section 3 of the Constitution deprived the Court of jurisdiction to entertain the application.

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line 40-  
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line 6  
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line 26-

16. On the main issues Cross J. held that contempt by scandalising the Court was not an obsolete offence; and that it may be committed without reference to particular proceedings. He further held that this article did refer to the Judges of Trinidad and Tobago in their judicial capacity. He concluded that the offence of scandalising the Court did exist at the time the Constitution went into effect and therefore the Appellant's constitutional rights had not been infringed by his imprisonment

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for the offence. Cross J. also rejected an argument by the Appellant that the contempt proceedings had been irregular because they had been commenced by the Law Society rather than the Respondent.

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line 35  
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line 38-  
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line 38

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17. The Appellants motion was dismissed with costs to be paid to the Law Society.

Page 67  
line 1-  
Page 68  
line 11

18. By Notice of Motion dated 1st May 1975 the Appellant appealed against the Order of the High Court on grounds which as particularised were in summary as follows:

Pages 72 and 73

(a) The article had not been a contempt because

(i) it did not relate to any Judge in his judicial capacity;

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(ii) it did not relate to the administration of justice in Trinidad and Tobago;

(iii) it did not mean that the Judges of Trinidad and Tobago took bribes.

(b) The Law Society had lacked locus standi in judicio to initiate proceedings for contempt.

(c) The Appellant's trial and imprisonment had violated his rights as guaranteed by the Constitution and in particular

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(i) he had been denied his liberty without due process because he had committed no offence;

(ii) the article was justified by the right to freedom of thought and expression;

(iii) the article was in keeping with the freedom of the press.

(d) The High Court ought to have applied the common law of contempt as developed in England and not as developed elsewhere.

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19. The appeal first came up for hearing before the Court of Appeal (Hyatali C.J.,

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Phillips and Corbin J.J.A.) on the 8th November 1977 and the hearing continued to 24th November 1977 when judgment was reserved. At the time the appeal in Maharaj v. The Attorney General of Trinidad and Tobago No. 2 (1978) 2 A.E.R. 670 ("Maharaj No. 2") was pending in the Privy Council. In that case redress under section 6 of the Constitution was claimed following summary committal for contempt by the High Court. The decision in that case was delivered on 27th February 1978 whereupon the appeal in this case was restored for further consideration and Counsel were heard on the 25th April 1978 and judgment was further reserved. On the 24th May 1978 the parties were recalled to the Court because correspondence passing between the Judges of the Court of Appeal and the Attorney General concerning the prosecution of the Appellant for criminal contempt of court had been disclosed to the Chief Justice. (See Appendix C). At the sitting on 24th May 1978 Phillips J.A., decided to disqualify himself in the light of the correspondence and the Court ordered a hearing de novo. The appeal was reheard by a differently constituted Court (Hyatali C.J., Corbin and Kelsick J.J.A.) from the 9th to 12th October 1978 and judgment was delivered on 28th December 1978 dismissing the appeal with costs. It was ordered that the costs of the aborted hearing of the appeal be reserved to be brought on by notice.

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20. Hyatali C.J., relied principally on the decision of the Judicial Committee in Maharaj (No.2).

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Page 85  
line 3

Lord Diplock in that case had said that judicial error of law was not sufficient to ground a claim under Section 6 of the Constitution. Hyatali C.J. held that all the Appellant's complaints in this case were errors of law within the meaning of Lord Diplock's description. He rejected the argument that Lord Diplock's comments were obiter dictum and referred to the dissenting judgment of Lord Hailsham (Maharaj (No. 2) at p. 687-8). He also rejected a submission based on Thompson v. City of Louisville 362 U.S. 199 that the Appellant's contempt was unsupported by any evidence and that his committal had therefore been ordered without due process of law.

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line 17

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Page 88  
lines 32-41

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line 40 to  
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line 2

These conclusions he said were sufficient to dismiss the appeal but Hyatali C.J., further expressed his support for Cross J.'s rulings: The Law Society had had locus standi to commence the proceedings;



	scandalising the Court was a recognised branch of contempt at the time the 1962 Constitution had been adopted; and Cross J.'s decision that the article was a contempt was supported by the Appellant's confession on affidavit, a concession by his Counsel and the judgment of Hassanali J.	<u>Record</u> Page 92 line 3 to Page 94 line 10 Page 94 lines 11-26
10	21. Kelsick J.A., concurred in dismissing the appeal and rejected the analogy which the Appellant had tried to draw with <u>Bushell's Case</u> 124 English Reports at p. 1017 to establish that an order of committal for contempt may be declared illegal without being quashed or reversed on error. Relying on <u>Maharaj (No. 2)</u> , he also held that the Appellant's complaints were insufficient in that they only raised errors of law and fact and then these not amount to a denial of due process.	Page 98 line 36 to Page 100 line 17
20	Kelsick J.A., also agreed with Cross J. that the Law Society was competent to initiate proceedings for contempt even though not itself affected and he held that the Appellant had not been denied the benefit of the presumption of innocence. There had been adequate evidence to displace the presumption.	Page 103 line 46 to Page 106 line 37 and Page 113 lines 31-39 Page 112 line 37 to Page 113 line 30
30	However Kelsick J.A. decided in favour of the Appellant's contention that scandalising the Court was only a contempt if the matter referred to particular proceedings. In reaching this conclusion he relied on a statement by Lord Diplock in <u>A-G v. Times Newspapers [1973]</u> 3 All E.R. 54, 71.	Page 106 line 43 to Page 112 line 37 Page 110 line 1-10
40	22. Corbin J.A. decided that private persons generally were competent to enforce the law of contempt and that the Law Society had sufficient power under its statute of incorporation to do so. He held that contempt could be committed whether or not proceedings were pending and that the offence could be constituted by personal abuse of a judge. He also found that <u>Maharaj (No. 2)</u> disposed of the appeal. <u>Thompson v. Louisville</u> 362 U.S. 199 did not assist the Appellant since it conflicted with the decision of the Privy Council in the former case. He agreed with his brethren that all the complaints made by the	Page 117 line 26 to Page 119 line 43 Page 119 line 43 to Page 120 line 40 Page 120 line 41 to Page 121 line 20

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line 10.

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line 30

Appellant of Hassanali J.'s decision were allegations of errors of law. Maharaj (No. 2) had decided that Section 6 gave no redress for such defects. He also supported the view that the article was a contempt and that freedom of the press had to be qualified to prevent the administration of justice being subjected to abuse.

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23. All the Judges of the Court of Appeal also found that the proceedings against the Law Society were improperly instituted; and that they should have been instituted against the Respondent. By reason of the order made by Her Majesty in Council dated 31st March 1980, referred to in paragraph 1 above no point as to parties remains at issue in this appeal.

24. It is respectfully submitted:

(i) that the following identified rights and freedoms recognised by section 1 of the Constitution, namely freedom of thought and expression (section 1(b)) and freedom of the press (section 1(k)) protect the publication of the short story by the Appellant.

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(ii) that there was not in force in Trinidad and Tobago at the commencement of the Constitution any law which by virtue of section 3 of the Constitution debarred the Appellant from asserting that his committal abrogated, abridged or infringed those rights and freedoms.

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(iii) that if (contrary to (ii)) there was such a law in force at that time, nonetheless its application in the present case constituted an unjustifiable interference with the Appellant's aforesaid rights.

(iv) that, accordingly, the Appellant's committal constituted an infringement of the Appellant's rights guaranteed by section 1 of the Constitution and that he is entitled to a declaration in respect thereof pursuant to section 6 thereof.

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25. The law which was held to justify the Appellant's committal was the common law of contempt of Court, and, in particular, that branch of the law which has been called "scandalising the Court" (In re Reid v. Huggonson (St. James's Evening Post case) (1742) 2 Atk 469 per Lord Hardwicke LC at p.469).

It is respectfully submitted:

(i) that the relevant law was the law that obtained in the colony before independence, that is to say, the English common law.

(ii) that the offence of scandalising the Court did not exist at the material date.

10 (iii) alternatively to (ii) that it was an essential element of the offence that (a) the scandalising referred to specific proceedings and/or (b) the scandalising referred to a specific judge or Court, and, inasmuch as the short story did not in the material passages refer to specific proceedings and/or to a specific judge or Court, it was not as a matter of law capable of constituting contempt of the Court.

20 (iv) alternatively to (iii) that the offence of scandalising the Court must be clearly established, and, in all the circumstances, having regard to its form and content no reasonable judge could have held that publication of the short story constituted contempt, alternatively that it did not do so.

30 26. It is respectfully submitted that the law in force in Trinidad and Tobago at the commencement of the Constitution "was the English common law." (Maharaj (No. 2) per Lord Diplock at p.678). This was the result of the colonial status of Trinidad and Tobago prior to independence. Accordingly, if and in so far as the English common law of contempt and the common law of contempt in other Commonwealth jurisdictions for example India, differed in matters material to the present case, it is the former law only which is relevant.

40 27. It is respectfully submitted that the offence of contempt by scandalising the Court was not known to the common law of England at the date of the coming into force of the Constitution. It is accepted that this submission is contrary to various Commonwealth authorities, to the dicta in leading English cases, and to the views of leading academic writers. However, the offence was described by the Privy Council in McLeod v. St. Aubyn

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(1899) AC 549 per Lord Morris at p.561 as "obsolete in this country" (i.e. the United Kingdom) "Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them". It is true that in the next year the Divisional Court appeared to recognise its continued existence in R. v. Gray (1900) 2 QB 36. Lord Russell of Killowen CJ said at p.40 "any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of Court..." 10  
The (former) class belongs to a category which Lord Hardwicke LC characterised as "scandalising a court or judge". However, McLeod v. St. Aubyn does not appear to have been cited to the Divisional Court; and in any event, the existence of the contempt was conceded by the contemnor. (See also Hughes "Contempt of Court and the Press" 1900-16 LQR 292). It is submitted that the subsequent English authorities, based on R. v. Gray (1900) 2 QB 36 20  
are, accordingly, to be disregarded; or, that if and in so far as there are two lines of inconsistent authority, McLeod v. St. Aubyn is to be preferred as being more soundly based in reason and policy.

The Privy Council, it is accepted, reserved a role for contempt proceedings for scandalising the Court in the following circumstances (per Lord Morris at p.561).

"It must be considered that in small colonies, consisting premarily of coloured populations, enforcement in proper cases of committal for contempt of Court for attacks on the Court may be absolutely necessary to preserve in such a community the diginity of and respect for the Courts". It is respectfully submitted that this proviso was based on an attitude towards racial differences that no longer commands informed allegiance. Further it was made in the context of a political and social situation in a colony that was distinct from that which obtained at the coming into force of the Constitution in the independent state of Trinidad and Tobago. In any event modern democratic societies including Trinidad and Tobago are more tolerant of strong langauge than was the case at the end of the nineteenth century. This change in public views is a material factor in a branch of the law which is "founded entirely on public policy" (Attorney General v. Times Newspapers Limited (1974) AC 273 per Lord Reid at p.294. See further Borrie & Lowe. The Law of Contempt. p.156. Miller, Contempt of Court. p.190). 30  
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28. It is respectfully submitted, alternatively, that it is an essential element of the offence that the scandalising referred to specific proceedings. It is accepted that this submission too is contrary to various Commonwealth authorities, to the dicta in leading English cases, and to the view of the leading academic writers. However it is submitted that there is no English case where it has been held that abuse of a judge or court unrelated to any particular proceedings was a contempt of court. Further, if and in so far as there are two lines of inconsistent authority, that which insists on the link between the comment complained of and specific proceedings is to be preferred, on the grounds that it does less damage to the right of freedom of speech "Freedom of speech should not be limited to any greater extent than is necessary" (ibid per Lord Reid at p.294). Reliance is placed on the dictum of Lord Diplock who spoke of the offence as being one of "scandalising the court after judgment" (ibid 309). See also Attorney General v. Butterworth (1962) 3 All ER 326 per Donovan J at p.332.

29. It is respectfully submitted further or alternatively that it is an essential element of the offence that the scandalising referred to a specific judge or court. It is accepted that there is Commonwealth authority to the contrary which imposes no such restriction (see e.g. Re Tushar Kanti Ghosh AIR (1953) Calcutta 419 relied on by Cross J in the present case). However, it is submitted that the English common law on this point at the material date was accurately summarised in Halsbury's Laws 3rd ed. Vol.8 para 8 "any act done or writing published which is calculated to bring a court or judge into contempt or to lower his authority or to interfere with the due course of justice or the lawful process of the court is a contempt. The punishment is inflicted not for the purpose of protecting the court as a whole or the individual judges from a repetition of the attack, but of protecting the public ... from the mischief they would incur if the authority of the Tribunal ... is undermined or impaired" (see also Halsbury's Laws 4th ed. Vol.9 para 27, where the passage quoted also appears with the additional sentence "thus scurrilous abuse of a judge or attacks on the personal character of a judge are punishable as contempt").

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30. The offending parts of the short story (a) do not refer to specific proceedings, past or pending, (b) do not refer to specific judges or to a specific court. It has not been contended otherwise at any stage of the proceedings.

31. It is respectfully submitted that before finding that the offence of scandalising the court has been established, the court must be certain that it has been committed, and be cautious about exercising its summary powers, both because of the nature of the sanction and because the court is uniquely in a case of this kind judge in its own cause. Reliance is placed on the dictum of Lord Russell of Killowen CJ in R. v. Gray (1900) 2 QB 36 at p.41 "It is a jurisdiction to be exercised with scrupulous care, to be exercised only when the case is clear and beyond reasonable doubt" (see further McLeod v. St. Aubyn per Lord Morris p.561. R. v. Metropolitan Police Commissioner ex parte Blackburn No. 2 (1968) 2 QB 150 per Lord Denning M.R. at p.155).

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The test to be applied in any case is derived from the classic rationale of the offence set out by Wilmott J in Almon's case (1765) Wilm 243 at p.255 "(it) excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and dangerous obstruction of justice, and, in my opinion, calls for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the judges, as private individuals, but because they are the channels by which the King's justice is conveyed to the people. To be impartial and to be universally thought so, are both absolutely necessary".

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32. It is respectfully submitted that it has not been established beyond reasonable doubt that the short story published by the Appellant weakened judicial authority, or that the jurisdiction to commit should have been exercised; indeed it is submitted that no reasonable judge or court could have concluded that the short story had such an effect, or that the jurisdiction should have been so exercised. The following aspects of the offending story are particularly relied on:

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(a) it did not refer to any specific set of proceedings pending or concluded.

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(b) it did not refer to any particular judge, tribunal or court (see Borrie & Lowe op cit p.154).

(c) it was expressly stated to be, and manifestly is, a work of fiction.

(d) it was published in a journal which is satirical in character. (see Borrie & Lowe op cit p.172-3. Attorney General of New Zealand v. Blomfield (1914) 33 NZLR 545 per Williams J at p.502).

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(e) the allegations made are of a generalised nature, i.e. the taking of bribes.

(f) the imputations were put into the mouth of a domestic employee of limited education, who had a grudge against her employer.

(g) the passages were a small portion of the whole, and were given no special prominence.

33. It is also respectfully submitted that the court of Appeal did not pay sufficient attention to the guiding principle that it is only when the facts of the case require, that freedom of speech should be infringed by committal of an author or publisher for "scandalising the courts". In Attorney General v. Times Newspapers Lord Reid said at p.294: "the law on this subject is and must be founded entirely on public policy. ... It is there to prevent interference with the administration of justice and it should, in my judgment, be limited to what is reasonably necessary for that purpose. Public policy generally requires a balancing of interests which may conflict. Freedom of speech should not be limited to any greater extent than is necessary, but it cannot be allowed where there would be real prejudice to the administration of justice." Lord Morris of Borth-y-Guest said at p.302: "In an ordered community courts are established for the specific settlement of disputes and for the maintenance of law and order. In the general interests of the community it is imperative that the authority of the courts should not be imperilled and that the course to them should not be subject to unjustifiable interference. When such unjustifiable interference is suppressed, it is not because those charged with the responsibility of justice are concerned with their own dignity;

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it is because the very structure of ordered life is at risk if the recognised courts of the land are so flouted that their authority wanes and is supplanted. But as the purpose in the existence of courts of law is to preserve freedom within the law for all well disposed members of the community, it is manifest that the courts must never impose any limitation upon free speech or free discussion or free criticism beyond those which are absolutely necessary".

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34. It is further respectfully submitted that, even on the assumption (contrary to the Appellant's primary contention) that his committals was lawful according to the law of contempt, and in particular the branch thereof known as scandalising the court, as it existed at the date of the commencement of the Constitution, the Court of Appeal gave too broad a construction to section 3 of the Constitution. The effect of section 3 is not to prevent an applicant from claiming redress under section 6 in every case where the respondent establishes that the alleged infringement was perpetrated in reliance on the law in force at the commencement of the Constitution. Its effect is to prevent such an applicant from alleging that such a law could not be relied upon simply because it qualified or purported to qualify a right or freedom specified in section 1. It is always open to an applicant to allege that in certain circumstances his fundamental rights or freedoms were infringed by an application of such a law which was unjustifiable. It is essential function of the judiciary to secure the effective enjoyment of the fundamental rights and freedoms guaranteed by the Constitution and to determine whether the application of such a law was justifiable, having regard inter alia to the purposes of the law, the degree to which those purposes were served by its application to him, and the extent of the interference with the right or freedom in question. It is submitted that the interpretation contended for is required by the nature and purpose of Constitutional provisions of this kind, and that the construction relied upon by the Court of Appeal would permit the unnecessary curtailment of the fundamental rights and freedoms referred to in sections 1 and 2 of the Constitution.

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It is therefore respectfully submitted, that even if the short story published by the Appellant did "scandalise the court", it was nevertheless unjustifiable to take proceedings and to punish the Appellant for it. Reliance is placed, mutatis mutandis, upon the facts and matters set out in paragraphs 37 and 38 hereof.

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35. In the Court of Appeal the Appellant's Counsel raised in his Notice of Appeal and the Particulars supplied thereof allegations of infringements of his rights to freedom of thought and expression, and freedom of the press, as well as of a denial of liberty without due process (ibid). Indismissing his allegation of denial of liberty without due process, the Court relied upon the dictum of Lord Diplock in Maharaj (No. 2) at p.679-80.

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Lord Diplock there said: "... No human right or fundamental freedom recognised by Chapter 1 of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law - even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds to appeal to a higher court. When there is no higher Court to appeal to none can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by s.1(a) and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice".

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It is respectfully submitted that this dictum is not to be construed as rendering the Appellant's claim for redress under section 6 of the Constitution incompetent in respect of the infringements of his right to freedom of thought and expression and freedom of the press as distinct from infringements of his right to liberty without due process of law, on the basis that no allegation of a breach of natural justice is relied on, but should be read as referring to claims for redress in respect of section 1(a) rights only for these main reasons:

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(i) Lord Diplock expressly refers to such rights in the body of the dictum.

(ii) The claim in Majaraj (No. 2) was for an infringement of section 1(a) rights only.

(iii) There is a material difference in the language of the subsection of section 1 of the Constitution which deals with the right of the individual to liberty etc., (section 1(a)) and the subsections thereof which deal with the right to freedom of thought and

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expression (section 1(i)) and freedom of the press (section 1(a)). The right of the individual to liberty etc. is inexorably linked to "the right not to be deprived thereof except by due process of law." Accordingly it is clear that no claim can be made for infringement of such a right, unless it can be established that the infringement involved a denial of due process. By contrast the rights to freedom of thought and expression and freedom of the press are not linked to a right not to be deprived thereof except by due process of law. Accordingly, as a matter of natural and ordinary construction, claims can be brought for the infringement thereof per se, and without the need to allege that the infringement constituted a denial of due process.

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- (iv) There are no reasons of policy why redress should be refused under section 6 where infringements of freedom of thought and expression or freedom of the press have been established in the absence of breaches of fundamental rules of natural justice. On the contrary to require an applicant to establish serious violations of procedural, as well as of substantial law, would severely restrict the value of entrenching these rights.

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Page 122  
lines 32-38

It is submitted that Corbin JA correctly interpreted the dictum when he observed: "Only errors in procedure entitle a person to complain under section 6 that there has been a deprivation of his life, liberty and property without due process of law. In other cases where there has been a deprivation by error of substantive law there is no remedy under section 6. This is the effect of a decision in Maharej's case".

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The Appellant accordingly respectfully submits that the judgment of the Court of Appeal of the Supreme Court of Trinidad and Tobago should be set aside and this appeal should be allowed and it should be declared that the order of the Honourable Mr. Justice Hassanali, whereby the Appellant was committed to prison for contempt of court was unconstitutional and for such further relief as may be appropriate, including an order that the Appellant be awarded the costs of this appeal and his costs in the courts below for the following amongst other

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R E A S O N S

- (1) The publication of the short story by the Appellant was an exercise of his right of freedom

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of thought and expression and freedom of the press within the meaning of section 1 of the Constitution.

(2) The Appellant's committal as a result of his said publication and by way of punishment therefor constituted an infringement of his said freedom under section 2 of the Constitution.

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(3) There was not in force in Trinidad and Tobago at the commencement of the Constitution any law which by virtue of section 3 thereof prevented him from asserting that his said committal infringed his said rights or freedoms.

(4) If (contrary to (3)) there was such a law in force at that time, nonetheless its application to him was an unjustifiable interference with his aforesaid rights and freedoms.

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(5) Accordingly, the Appellant is entitled to a declaration in respect of the said infringement pursuant to section 6 of the Constitution.

(6) The decisions of Cross J, and of the Court of Appeal, were wrong.

ANTHONY LESTER

MICHAEL BELOFF

ANDREW NICOL

No. 20 of 1979

IN THE PRIVY COUNCIL

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O N A P P E A L

FROM THE COURT OF APPEAL OF THE  
SUPREME COURT OF JUDICATURE OF  
TRINIDAD AND TOBAGO

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I N T H E M A T T E R O F THE  
CONSTITUTION OF TRINIDAD AND  
TOBAGO BEING THE SECOND SCHEDULE  
TO THE TRINIDAD AND TOBAGO  
(CONSTITUTION) ORDER IN COUNCIL  
1962

B E T W E E N :

PATRICK CHOKOLINGO Appellant

- and -

THE ATTORNEY-GENERAL OF TRINIDAD AND  
TOBAGO Respondent

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CASE FOR THE APPELLANT

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