27, 1980

IN THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL No. 20 of 1979

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ON APPEAL

FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

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BETWEEN:

PATRICK CHOKOLINGO Appellant

- and -

THE ATTORNEY GENERAL OF
TRINIDAD AND TOBAGO Respondent

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SUPPLEMENTAL CASE FOR THE RESPONDENT

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RECORD

1. This Case is supplemental to the Case for the Respondent already lodged in this appeal. By this Supplemental Case, the Respondent (inter alia) takes prelininary objections to the Appellant's appeal.

2. The Respondent submits that it is not open to the Appellant to advance in argument before the Judicial Committee grounds of appeal raised but expressly abandoned before the Court of Appeal of Trinidad and Tobago.

The Respondent refers to paragraph 12 line 50 of the case already lodged. Three fundamental rights and freedoms were referred to in the Notice of Appeal, namely; p. 69-70

(i) deprivation of liberty without due process of law;

(ii) infringement of the freedom of the thought and expression;

(iii) infringement of the freedom of the press,

of which only (i) above was argued. Grounds (ii) and (iii) were expressly abandoned as appears from the p. 82 l.30

Judgement of the Learned Chief Justice. While it is acknowledged that the Board of the Judicial Committee has jurisdiction to hear argument on an issue dropped in the intermediate Court of Appeal it is only under very exceptional circumstances that such issue can be revived. There are no exceptional circumstances in this appeal and the Appellant's Case does not attempt to raise any.

3. It is further submitted that very exceptional circumstances indeed have to be shown to justify a concession by the Board permitting the revival of an abandoned issue where the issue concerns matters of public policy in the country in question. The Appellant alleged before the Court of Appeal in Trinidad that no contempt of court had been committed by him in writing and publishing the short story. The basis for such an argument is set out in the Particulars of the Grounds of Appeal as follows:- p.72 - 73

"(a)(i) The article did not relate to any Judge or Judge's in their judicial capacity;

(ii) The article did not relate to the Administration of Justice in the Courts of Trinidad and Tobago;

(iii) The article did not mean as the Honourable Mr. Justice U. Cross found that the Judges of the Supreme Court of Judicature of Trinidad and Tobago took bribes.

(d)(i) The elements of contempt by scandalising are to be determined by the Common Law of England and not by the Common Law as developed elsewhere".

4. The Appellant argued before Cross J. that "scandalising the Court is now obsolete". Support for the Appellant's proposition was substantially, if not exclusively, derived from a dictum of Lord Morris in Mc Leod v. St. Aubyn 1899 A.C. 549, 501. Before the Court of Appeal, Counsel for the Appellant "conceded that there was a category of contempt known as scandalising, but contended that this does not arise here since the article did not relate to any pending proceedings and was not referrable to a particular judge as a Court". (See Judgment of Corbin J.A. p. 120 l.43). It follows that the argument on obsolescence was effectively abandoned. p.59 l.30 p.60

It was certainly not argued before the Court of Appeal that soundly based reason and policy required that the Trinidad and Tobago Courts should uphold the dictum of Lord Morris as the law in Trinidad and Tobago. (See

paragraph 27 of the Appellant's Case). By this paragraph of his Case the Appellant advances by way of further argument in relation to the law of contempt in Trinidad and Tobago an invitation to the Board to consider the political and social situation in Trinidad and Tobago in 1962 and compare it with that which prevailed in 1899. Further, opinion is advanced as to the tolerance which democratic Trinidad and Tobago should be deemed to possess. None of these matters were ever raised below. In paragraph 34 of his case the Appellant submits in the alternative that even if the article was a contempt and his committal was lawful, then nevertheless, the application of the law was unjustifiable. Such an argument, amounting as it does to a criticism of judicial approach in an area of law essentially fashioned by the judiciary is wholly untenable at such a late stage. There was no evidence of any judicial or executive policy to support the claim of obsolescence. Such material as exists is wholly to the contrary, namely, the unanimous judicial opinion in this case, the unanimous opinion of all the parties and their Counsel. The Respondent will also rely upon the decision of the Court of Appeal of Barbados in the case of R. v. Hinds ex parte the Attorney General 3 W.I.R. 1960, 13, which held that scandalising the administration of justice existed in that jurisdiction in 1960. Other Commonwealth jurisdictions have held likewise.

5. It is submitted -

(i) that the Appellant conceded that scandalising the court existed as a form of contempt in Trinidad and Tobago;

(ii) that obsolescence is essentially a matter of fact for the local court and as to that there are concurrent findings of fact;

(iii) that having admitted on affidavit that readers might gain the impression that it referred to local judges taking bribes it is not open to the Appellant to seek to persuade the Board that the local courts are not the final arbiters as to the effect such an article might have upon its readers;

(iv) that the Appellant should not now be permitted to advance before the Board as the substantial grounds of appeal allegations of infringements of fundamental rights and freedoms abandoned in the Court of Appeal, and further to urge in support of those abandoned grounds, abandoned contentions.

Respectful attention is drawn to the established principal upon which the Board acts where matters previously abandoned are sought to be raised (Ahamath v. Sariffa Umma 1931 A.C. 799) and to the underlying rationale of such a rule,

namely that the assistance of the local court is a vital factor in the due deliberation of the Board. It is submitted that it is impossible for the Board to consider the argument advanced by the Appellant's Case without such assistance.

6. Further, and by way of further preliminary objection to the Appellant's Case, reference is made to paragraph 13 of the Respondent's Case where it is stated that for reasons not material to this appeal, the Court of Appeal heard the Appellant's appeal "de novo". It is submitted that the reasons for the hearing de novo are and were truly immaterial, but nevertheless, the Appellant has lodged with his case copies of confidential letters dated 3rd June, and 12th June, 1972 passing between the then Attorney General and the then Acting Chief Justice.

The ground upon which Phillips J.A. disqualified himself was stated in open Court on 24th May, 1978 (A transcript of the hearing is lodged as Appendix A to this Supplemental Case). The letters have never formed part of the evidence in this case, and they are, it is submitted entirely irrelevant to this appeal. Their inclusion in the case was improper.

Further, on the same day (but the same is not apparent from the transcript) application was made by Counsel for the Appellant for the letter dated 12th June, 1972 (from the Attorney General to the Acting Chief Justice) to be included in the Record. In response to this, Chief Justice Hyatali ruled that the request could not be granted. In the circumstances, the Respondent submits that the letters should not be before the Judicial Committee of the Privy Council.

7. If contrary to the foregoing contentions the Appellant is permitted to advance argument on the lines set out in his case, the Respondent will rely upon the following submissions in addition to those already set out in his Case:

(a) It is submitted that "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". (Maharaj v. A.G. of Trinidad and Tobago No. 2 of 1979 A.C. 385 D-E. The Appellant's Case does not raise an allegation of deprivation of due process and in terms accepts that the grounds relied upon constitute allegations that fundamental freedoms have been infringed by an error or errors of substantive law.

(b) Alternatively it is submitted that whatever may be the true position so far as the doctrine of res judicata and issue estoppel are concerned in a case where it is alleged that due process has not been accorded, it is respectfully submitted that where, as here, an error of substantive law is relied upon, determination such as that by Hassanali J. that the Appellant committed contempt of court, followed by the Appellant's failure to appeal to the Privy Council constitutes a final and binding decision on the issue. Thus the legality of the Appellant's committal was finally determined on 17th July, 1972 when he was convicted (upon his own sworn admission together with other evidence). It is not open to the Appellant to cure his failure to appeal by relying upon section 6 of the Constitution.

(c) Further, and in the further alternative, the Respondent will contend that the Appellant is estopped from asserting that he was not guilty of contempt of court (See McIlkenny v. Chief Constable 1980 2 W.L.R. 689), and that the sentence imposed was harsh, oppressive or in any way an infringement of any fundamental right and freedom.

8. Further, it is respectfully submitted that as far as the Appellant alternatively contends that even if he were guilty of contempt his committal was unjustified such issue has also been finally determined against him by the conviction before Hassanali J.

9. The Respondent accordingly submits that this appeal should be dismissed for the following additional reasons -

REASONS

(1) BECAUSE the Appellant should not be permitted to raise issues abandoned in the Court of Appeal.

(2) BECAUSE the Appellant should not be permitted to raise issues of public policy relating to Trinidad and Tobago where those issues have not been raised adequately or at all in the Courts below.

(3) BECAUSE no fundamental human right or freedom is contravened by an error of substantive law.

(4) BECAUSE an error of substantive law or fact cannot be challenged in an action brought under section 6 of the Constitution rather than by way of appeal against the Judgment containing such an error.

(5) BECAUSE the claim that he was convicted wrongly or otherwise unjustifiably has been finally determined against him or he is otherwise estopped from contending his conviction and/or sentence to have been wrong in law or unjustified.

JEAN PERMANAND

GEORGE NEWMAN

TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal
No. 39 of 1975.

IN THE MATTER OF THE APPLICATION OF PATRICK CHOKOLINGO UNDER SECTION 6 OF THE SAID CONSTITUTION FOR RELIEF ON THE GROUND THAT THE HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS ENSHRINED IN THE SAID CONSTITUTION AND IN PARTICULAR SECTION 1 THEREOF HAVE BEEN CONTRAVENED IN RELATION TO HIM BY AN ORDER OF THE HIGH COURT MADE IN PROCEEDINGS NO. 1281 OF 1972 FOR CRIMINAL CONTEMPT.

BETWEEN

PATRICK CHOKOLINGO — Appellant

AND

THE LAW SOCIETY OF TRINIDAD AND TOBAGO — Respondent

Coram: Sir Isaac E. Hyatali, C.J.
C.E. Phillips, J.A.
M.A. Corbin, J.A.

May 24, 1978.

For further consideration in open Court in pursuance of a notice issued by the Court in that behalf.

Statement by Sir Isaac Hyatali, C.J.:

Mr. Wharton, Mr. Wooding, Dr. Ramsahoye and Mr. Brooks:

You will recall that the Court met with you in Chambers on Friday last and brought to your attention a letter dated 16 May 1978 which was addressed to me in my capacity as Chief Justice by Mr. Karl Hudson Phillips, Q.C. former Attorney General and Minister for legal

/Affairs. That

Affairs. That letter was written to explain a news item which appeared in the press on 26 April 1978 on the role pursued by him when the question of prosecuting the appellant herein for contempt was first raised in consequence of the publication of an article in the weekly newspaper The Bomb, under the caption "The Judge's Wife".

Following the meeting held in Chambers on Friday last aforesaid, the Court intimated to you that the appeal will be restored to the list for further consideration.

We have met today for this purpose and Mr. Justice Phillips will now make a statement on his own behalf and on behalf of the Court.

Statement by Mr. Justice C.E. Phillips, J.A.:

The hearing of this appeal commenced on November 8, 1977. It concluded on April 25, 1978 after an interruption caused by the necessity of hearing further argument as a result of the delivery of the decision of the Privy Council in Maharaj v. The Attorney General on February 27, 1978. No objection has at any time been taken by either of the parties to the constitution of the Court.

On May 17, 1978 the learned President brought to my notice the contents of a letter (which he had received on the previous day) to the effect that on May 30, 1972 (i.e. some 5½ years before the commencement of the hearing of this matter ) I had had, in my capacity as acting Chief Justice of Trinidad and Tobago, an interview with the then Attorney General and Minister of Legal Affairs in connection with the publication of the article which gave rise to the proceedings resulting in this appeal. Also present were the three other Judges who were then members of the Court of Appeal.

The purpose of the interview was to call the Attorney General's attention to the article with a view to his taking whatever legal action he might consider desirable. Various views were

/expressed. It was

expressed. It was certainly not possible for me on that date to form any firm opinion on the matter.

Since this appeal came on for hearing I have had no recollection of that interview. Had it been otherwise I would have disqualified myself from sitting on the case. This is not because there has been any actual bias on my part in any direction.

In the present circumstances, however, I consider that it is imperative that I should refrain from taking any further part in the adjudication of the case. I have arrived at this decision with regret, as it must result in inconvenience to all concerned. The Court, however, is unanimously of the view that this course is dictated by the principle that it "is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done". (See De Smith, Judicial Review of Administrative Action, (3rd edn.) p.218).

Adherence to this principle is, in the Court's opinion, crucial to the perpetuation of respect for the concept of the Rule of Law, which is enshrined in the Constitution of the Republic of Trinidad and Tobago.

ORDER: The appeal will be heard de novo by a differently constituted Court. Costs to be reserved for consideration when the decision is given by that Court.

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B E T W E E N:

PATRICK CHOKOLINGO Appellant

- and -

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# SUPPLEMENTAL CASE FOR THE RESPONDENT

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