Privy Council Appeal No. 20 of 1979

Patrick Chokolingo – – – – – – – *Appellant*

v.

The Attorney-General of Trinidad and Tobago – – *Respondent*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH OCTOBER 1980

Present at the Hearing:

LORD DIPLOCK
LORD EDMUND-DAVIES
LORD KEITH OF KINKEL
LORD SCARMAN
LORD ROSKILL

[*Delivered by* LORD DIPLOCK]

On 26th May, 1972, there was published in a newspaper "The Bomb", of which the appellant was the Editor, what was described as a "Short Story by P. David Lincott" entitled "The Judge's Wife". P. David Lincott was a *nom de plume* of the appellant who was the author of the story. It was written in the vernacular current in Trinidad and purported to be an account by a servant recently dismissed from a judge's household of the way in which the judge and his wife and, it was suggested, his fellow judges habitually conducted themselves. A box heading to the story accurately summarised its contents:—

> "The old domestic was bent on exposing bribery, corruption and fraud in the household."

The Trinidad and Tobago Law Society took the view that, under a thin disguise of fiction, this was an attack upon the probity of the judiciary of Trinidad and Tobago as a whole. It charged them with corruption and was calculated to undermine the authority of the courts and public confidence in the administration of justice.

The Society, which is incorporated by an Act of Parliament, applied to the High Court for an order for committal of the appellant and the publisher of the newspaper for contempt of court. At the hearing of the application by Mr. Justice Hassanali, the appellant was represented by both senior and junior Counsel. After certain preliminary objections to the form of the proceedings had been over-ruled by the judge, the appellant filed an affidavit in which he stated that he had been advised that the short story amounted to a contempt of court for which he unreservedly apologised. His Counsel also conceded that the publication of the so-called short story was a criminal contempt.

On 17th July, 1972, Hassanali J. held the appellant and the publisher of " The Bomb " guilty of contempt of court and ordered the appellant to be imprisoned for 21 days, of which he in fact served 12, the remainder having been remitted by the Crown. He and the publisher, who was fined $500, were also ordered to pay the costs of the Law Society.

In 1972, no appeal lay to the Court of Appeal from committal by the High Court for contempt. An appeal lay directly to Her Majesty in Council by special leave of this Board (*Ambard v. Attorney General for Trinidad and Tobago* [1936] A.C. 322); but no such leave was sought by the appellant, no doubt in view of what in effect had been a plea of guilty on his part.

Two and a half years later, on 31st January, 1975, the appellant sought to resurrect the matter by applying to the High Court, under section 6(1) of the Constitution of Trinidad and Tobago, for declarations that the order of Hassanali J. for his committal was unconstitutional and void and that his subsequent imprisonment under that order was in breach of the human rights and fundamental freedoms guaranteed to him by section 1(*a*), (*i*) and (*k*) of the Constitution, viz:

> " (*a*) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;"
>
> " (*i*) freedom of thought and expression; "
>
> " (*k*) freedom of the press."

Against the Trinidad and Tobago Law Society who were (mistakenly) made respondents to the application, he also claimed damages for wrongful imprisonment and repayment of the costs of the contempt proceedings in 1972, which he had been ordered to pay. Notice of this application was given to the Attorney-General as is required by section 13 of the Supreme Court of Judicature Act, 1962, but he was not made the respondent to the application, as he should have been.

The application came on for hearing before Cross J. in March and April, 1975, some three years before the judgment of this Board in *Maharaj v. Attorney-General of Trinidad and Tobago (No. 2)* [1979] A.C. 385 had been delivered. He took the view that, upon an application under section 6 of the Constitution, it was incumbent upon him to re-open the whole question of whether the appellant had been guilty of criminal contempt of court in 1972, notwithstanding the unappealed judgment to that effect of Hassanali J. and the concession made at the hearing before that judge by the appellant's own Counsel that the appellant had been guilty of contempt. Cross J. accordingly proceeded to consider the various grounds on which the appellant's Counsel relied for their submission that Hassanali J. had erred in law in holding the appellant guilty. Of these the only ground to which their Lordships need refer is a submission that, whatever may have formerly been the law, " scandalising the court " by a scurrilous attack on the judiciary as a whole, impugning their probity and accusing them of corruption, was no longer capable of amounting to a criminal contempt of court in Trinidad and Tobago. Cross J., after a careful survey of the authorities from English and other Commonwealth jurisdictions, rejected this and the other submissions that had been made on behalf of the appellant and dismissed the application.

From this dismissal of his application, the appellant appealed to the Court of Appeal. The effective hearing of the appeal took place in October, 1978, after the judgment of this Board in *Maharaj v. Attorney-General of Trinidad and Tobago (No. 2)* (*ubi sup.*) had been reported. At the hearing the appellant's Counsel expressly abandoned any claim that his rights under section 1(*i*) or (*k*) had been infringed; reliance was placed solely upon section 1(*a*). All three members of the Court (Hyatali C.J.,

Kelsick and Corbin JJ.A.) held that the only grounds upon which the appellant's application under section 6 of the Constitution was based, consisted of allegations of errors of substantive law in the original judgment of Hassanali J. or mere irregularities in procedure; and that nothing that was alleged was capable of amounting to a failure to observe one of the fundamental rules of natural justice. Applying what was said in the majority judgment in *Maharaj (No. 2)*—the minority judgment was more restrictive of the scope of section 1(*a*)—the Court of Appeal held that such errors, even if they were established, were not capable of constituting an infringement of the appellant's right, under section 1(*a*), not to be deprived of his liberty except by due process of law.

All three Appellate Judges, however, did go on to consider whether Hassanali J. had made an error in substantive law in holding that scandalising the court, in the way that the so-called story complained of did, amounted to a criminal contempt of court. All three were of opinion that his judgment to this effect was correct, though Kelsick J.A. was of opinion that the proper procedure for dealing with this kind of contempt was by criminal prosecution rather than by the summary procedure that had in fact been adopted by the Law Society. Kelsick J.A.'s opinion on this matter was not shared by the majority of the Court of Appeal; nor has it been relied upon before this Board. Even if it were right, it would at most amount to a mere irregularity of procedure which, as this Board pointed out in *Maharaj (No. 2)* (at p. 399), does not of itself constitute an infringement of rights protected by section 1(*a*) unless it involves a failure to observe one of the fundamental rules of natural justice. There was no such failure here. The appellant had been fully informed of the charges against him in the contempt proceedings in 1972; he had ample opportunity to prepare his defence. He was represented at the hearing by both senior and junior Counsel; it was on their advice that, in effect, he pleaded guilty to the charge.

The appellant exercised his right under section 82(1)(*c*) of the Constitution to appeal to the Judicial Committee of the Privy Council from the decision of the Court of Appeal and by leave of this Board the Attorney-General was substituted for the Law Society as respondent, so that the application under section 6(1) should be properly constituted.

In dismissing the appellant's application under section 6(1) the Court of Appeal had relied upon the statement by this Board in *Maharaj (No. 2)* (at p. 399):

> ". . . . . 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 is to appeal to a higher court. Where there is no higher court to appeal to, then none can say that there was error."

It may be that technically this statement was *obiter*, but as the context indicates it had been the subject of careful deliberation by the Board in the light of the judgments of Hyatali C.J. and Corbin J.A. in the Court of Appeal and the minority judgment in the Judicial Committee itself.

The arguments addressed to their Lordships in the instant appeal, however, call for some expansion of that statement. Under a constitution on the Westminster Model, like that of Trinidad and Tobago, which is based on the separation of powers, while it is an exercise of the legislative power of the State to make the written law, it is an exercise of the judicial power of the State, and consequently a function of the judiciary alone, to interpret the written law when made and to declare the law where it still remains unwritten, i.e. the English Common Law and

doctrines of equity as incorporated in the law of Trinidad and Tobago by section 12 of the Supreme Court of Judicature Act, 1962. So when in Chapter 1 the Constitution of Trinidad and Tobago speaks of " law " it is speaking of the law of Trinidad and Tobago as interpreted or declared by the judges in the exercise of the judicial power of the State.

The normal way in which this interpretative and declaratory function is exercised is by judges sitting in courts of justice for the purpose of deciding disputes between parties to litigation (whether civil or criminal), which involves the application to the particular facts of the case of the law of Trinidad and Tobago that is relevant to the determination of their rights and obligations. It is fundamental to the administration of justice under a constitution which claims to enshrine the rule of law (Preamble, paras. (*d*) and (*e*)) that if between the parties to the litigation the decision of that court is final (either because there is no right of appeal to a higher court or because neither party has availed himself of an existing right of appeal), the relevant law as interpreted by the judge in reaching the court's decision *is* the " law " so far as the entitlement of the parties to " due process of law " under section 1(*a*) and the " protection of the law " under section 1(*b*) are concerned. Their Lordships repeat what was said in *Maharaj No. 2*. The fundamental human right guaranteed by section 1(*a*) and (*b*), and section 2, of the Constitution is not to a legal system which is infallible but to one which is fair.

It was argued on behalf of the appellant that, if he could persuade the Board that, because it had become obsolete long before 1962, no such offence as " scandalising the court " was known to the common law in force in Trinidad at the commencement of the Constitution, this would entitle the appellant to redress under section 6 for his having been imprisoned by the State for exercising his constitutional rights of freedom of expression and freedom of the press. But giving a separate label to what Hassanali J. held in the contempt proceedings to be a species of the genus of offences known as " contempt of court " does not, in their Lordships' view, assist the appellant. " Scandalising the court " is a convenient way of describing a publication which, although it does not relate to any specific case either past or pending or any specific judge, is a scurrilous attack on the judiciary as a whole, which is calculated to undermine the authority of the courts and public confidence in the administration of justice. Even if it were possible to persuade their Lordships that publication of written matter which has these characteristics no longer constituted a criminal contempt of court in Trinidad and Tobago in 1972, it would merely show that the judge had made an error of substantive law as to a necessary ingredient of the genus of common law offences which constitute contempt of court. In their Lordships' view there is no difference in principle behind this kind of error and a misinterpretation by a judge, in the course of an ordinary criminal trial, of the words of the Act of Parliament creating the offence with which the accused is charged. If the former is open to collateral attack by application to the High Court under section 6(1) of the Constitution so must the latter be.

Acceptance of the appellant's argument would have the consequence that in every criminal case, in which a person who had been convicted alleged that the judge had made any error of substantive law as to the necessary characteristics of the offence, there would be parallel remedies available to him: one by appeal to the Court of Appeal, the other by originating application under section 6(1) of the Constitution to the High Court with further rights of appeal to the Court of Appeal and to the Judicial Committee. These parallel remedies would be also cumulative since the right to apply for redress under section 6(1) is stated to be " without prejudice to any other action with respect to the same matter which is lawfully available ". The convicted person having exercised unsuccessfully

his right of appeal to a higher court, the Court of Appeal, he could nevertheless launch a collateral attack (it may be years later) upon a judgment that the Court of Appeal had upheld, by making an application for redress under section 6(1) to a court of co-ordinate jurisdiction, the High Court. To give to Chapter I of the Constitution an interpretation which would lead to this result would, in their Lordships' view, be quite irrational and subversive of the rule of law which it is a declared purpose of the Constitution to enshrine.

For the sake of completeness their Lordships will deal briefly with the other argument addressed to them on behalf of the appellant. It was that he had been convicted by Hassanali J. without there being any evidence that he had committed an offence and that accordingly his conviction was not obtained by " due process of law ". But this, on analysis, is only another way of saying that the judge made an error of substantive law in holding that to constitute a criminal contempt of court it is not necessary that a publication attacking the judiciary should refer to a specific case or to a specific judge. The publication of the issue of " The Bomb " containing the so-called short story " The Judge's Wife " was proved, the appellant's authorship was admitted. The only fact of which evidence was missing was one which on Hassanali J.'s view of the substantive law was unnecessary viz. that the short story related to a specific case or a specific judge.

The application under section 6(1) was misconceived.

The appeal must be dismissed with costs.

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In the Privy Council

PATRICK CHOKOLINGO

v.

THE ATTORNEY-GENERAL OF TRINIDAD AND TOBAGO

DELIVERED BY
LORD DIPLOCK

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