Privy Council Appeal No. 36 of 1997

D. Hurnam *Appellant*

v.

S.S.V. Paratian *Respondent*

FROM

THE SUPREME COURT OF MAURITIUS

REASONS FOR DECISION OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, OF THE 17th December 1997, Delivered the 29th January 1998

Present at the hearing:-

Lord Lloyd of Berwick
Lord Steyn
Lord Hope of Craighead
Lord Saville
Mr. Justice Gault

*[Delivered by **Lord Lloyd of Berwick**]*

The appellant, Mr. Dev Hurnam, is a barrister with chambers in Port Louis, Mauritius. He is the defendant in defamation proceedings brought against him by Mr. Siva Paratian, a Superintendent of Police with over 35 years' service in the Mauritius Police Force. According to the statement of claim the defendant addressed a public meeting at Tombeau Bay on 6th September 1991 in the course of which he described the plaintiff as being a thief and as having taken bribes. The defence is justification and fair comment.

The case came on for hearing on 21st February 1995 before Forget J., the Senior Puisne Judge. He found in favour of the plaintiff, and awarded Rs.250,000 damages. The defendant appealed. The first and main ground of appeal was that he did not receive a fair hearing at the trial in breach of his rights under the Constitution of Mauritius. For reasons which will appear later, it is unnecessary to refer to the other grounds of appeal. The Court of Civil Appeal upheld the

judge's decision. They dealt with the first ground of appeal in a single brief paragraph.

With the leave of the Supreme Court of Mauritius the defendant was granted leave to appeal to the Privy Council. At the conclusion of that hearing their Lordships allowed the appeal and indicated that they would give their reasons later. Their Lordships' reasons for their decision now follow.

Before their Lordships the defendant repeated the arguments which he had advanced below. The ground on which it is said that he did not receive a fair hearing is as follows. At the start of the trial the defendant sought leave to conduct his own defence. He had informed the judge of his intentions by letter dated 20th February 1995. Mr. Sauzier on behalf of the plaintiff objected. He submitted that it would be most improper for a barrister to conduct his own defence. The judge ruled as follows:-

> "The defendant, Mr. D. Hurnam is praying for leave to defend the statement of claim in his own proper person.
>
> This is how I propose to deal with the matter. I think that Mr. Hurnam cannot wear two hats. He is allowed to appear as counsel for defendant Hurnam in which case he would take his seat normally as a barrister does; he must be properly dressed but defendant D. Hurnam will disappear and make default. On the other hand, defendant D. Hurnam, as a layman, is, I think, entitled to defend the statement of claim against him. He will then be acting as the defendant and represented by counsel (sic).
>
> In the circumstances defendant D. Hurnam will not be allowed to take his seat in the Bench reserved for Counsel; he will not be dressed up as a Counsel; he will make no opening speech, he will offer no argument in law and he will make no submission in law and on facts but he will be authorised to cross-examine, to give evidence in his own name and call witnesses.
>
> In my personal opinion, I find the situation rather unusual and rather embarrassing, but then I have to do it."

Their Lordships will refer to this as the first ruling. There was then a short break, at the end of which the defendant

indicated that he would conduct his own case in the light of the judge's ruling. The plaintiff then gave evidence-in-chief. He and other witnesses were cross-examined by the defendant. At the close of the plaintiff's case, the defendant gave evidence and called a number of witnesses. It was then for Mr. Sauzier to make his closing submission on behalf of the plaintiff. The defendant intervened. He sought leave to address the court at the end of Mr. Sauzier's submission. Mr. Sauzier again objected. He said it would be most improper, and would go against the earlier ruling. "Only plaintiff's counsel should be allowed to submit".

The judge then gave a second ruling as follows:-

> "Since the question is cropping up now I may as well tackle it once and for all. Mr. Hurnam has intimated his wish to address the Court at the end of the day now that all the witnesses have been examined and cross-examined. Mr. Hurnam has drawn my attention to Section 12 of the Courts Act which indeed lays down that any party to proceedings may address the Court with leave of the Court.
>
> My reading of Section 12 is that in certain circumstances when a party to proceedings is represented by Counsel or even when he is not represented by Counsel certain matters may have to be elucidated and the Court may very well call upon the party to say certain things to take a certain stand but to my mind Section 12 does not open the door to a party at the end of the day when he is not represented by Counsel but where he has been allowed to defend in his own name to stand up and address the Court and make submissions or to enlighten the Court. In this particular case the choice was wide open to the defendant to have counsel to assist him with all the privileges which Counsel enjoys before our Courts but he chose deliberately with the leave of the Court to defend in his own name. The case has lasted several days and not once the Court interfered to prevent the defendant from calling his witnesses, from examining his witnesses, from re-examining his witnesses and produce all documents. I would say that in those circumstances the defendant having made his choice not to be represented by Counsel would be precluded from addressing the Court any more.

> On the other hand if there is any document which still has to be filed or information which the defendant may provide in defence of the claim against him he is of course entitled to furnish and to produce such documents but I should think that there is none to come since the case has been going on for quite some time."

So the defendant was shut out from addressing the court altogether.

When the case reached the Court of Civil Appeal, the defendant was represented by counsel. Counsel addressed a full argument in support of the main ground of appeal, citing, *inter alia*, section 10 of the Constitution and section 12 of the Courts Act. But the Court of Civil Appeal did not deal with any of counsel's arguments. What the court said was as follows:-

> "This ground is, in our opinion, misconceived. The appellant had the choice to be represented by counsel of his choice or to represent himself during the course of the trial. Having elected to conduct his own case and having been granted full latitude to cross-examine the respondent and his witnesses and to depone himself and call his own witnesses, the appellant could not claim the rights of Counsel and make submissions to the court as he could be granted only those rights enjoyed by a member of the public - Vide Halsbury's Laws of England, 4th ed. vol. 3 page 601, para. 1117 and the English and Empire Digest vol. 3 (1920) at page 355, para. 472."

Their Lordships regret that they can derive little assistance from the reasoning of the Court of Civil Appeal. The questions for decision were whether, having elected to conduct his own defence, the defendant ought (1) to have been allowed the same rights as any other litigant in person and (2) if so, whether those rights included the right to address the court. The reference to Halsbury's Laws, vol 3, 4th ed. page 601 answers question (1) in favour of the defendant. It does not touch question (2). The English and Empire Digest vol. 3, page 355, para. 472 cites a ruling of the Recorder of London in *Reg. v. Philips* (1844) 1 Cox C.C. 17 as authority for the proposition that a barrister conducting a criminal prosecution on his own behalf will not be allowed to comment on the evidence or address the jury. But the case

was decided over 150 years ago, and is very scantily reported. It can hardly be regarded as carrying much authority today. It was not suggested that in England today a barrister, acting on his own behalf in a civil case, would not be entitled to address the court like any other litigant in person.

And so their Lordships come to the relevant Mauritius legislation. Chapter II of the Constitution provides as follows:-

> "3. Fundamental rights and freedoms of the individual.
>
> It is hereby recognised and declared that in Mauritius there have existed and shall continue to exist ... the following human rights and fundamental freedoms -
>
> (a) the right of the individual to life, liberty, security of the person and the protection of the law;
>
> ...
>
> 10. Provisions to secure protection of law ...
>
> (8) Any court or other authority required or empowered by law to determine the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial, and where proceedings for such a determination are instituted by any person before such a court or other authority the case shall be given a fair hearing within a reasonable time."

The Courts Act provides as follows:-

> "12. Rights of audience.
>
> In any proceedings before the Supreme Court, any of the following persons may address the court -
>
> (a) any party to the proceedings, with leave of the court;
>
> (b) a barrister ..."

Rule 60 of the Rules of the Supreme Court of Mauritius provides:-

> "Any party may make application to the Court by motion, or to a judge, praying leave to prosecute, or defend, a suit in his own proper person; and the Court or judge may, on sufficient cause shown to its, or his, satisfaction by such party, make order that such party may sue, or defend, as the case may be, in such Court, in person, without the assistance of an attorney, subject to such conditions as the said Court or judge may think fit in each particular case to impose on such party."

Mr. De Speville for the plaintiff points out, correctly, that whereas a barrister under section 12 of the Courts Act has an unfettered right to address the court on behalf of his client, a litigant in person requires the leave of the court. Under rule 60 of the Rules of the Supreme Court the court may impose on a litigant in person such conditions as the court may think fit.

How did the judge apply these provisions when he came to make his first ruling? He was clearly right to rule that the defendant should not appear robed, or sit in counsel's row: see Halsbury's Laws 4th ed. (Reissue) (1989) vol. 3, page 313, para. 402, footnote 13. But he gives no reason for prohibiting the defendant from making an opening speech, or from offering any argument on the law or the facts. Indeed he may even have thought that he had no discretion in the matter. This may be the explanation for his curious comment "I find the situation rather unusual and rather embarrassing, but then I have to do it".

Similarly, in his second ruling, the judge said:-

> "... but to my mind Section 12 does not open the door to a party at the end of the day when he is not represented by Counsel but where he has been allowed to defend in his own name to stand up and address the Court and make submissions or to enlighten the Court."

This again suggests that the judge may have been under some misapprehension as to the scope and effect of section 12 of the Courts Act.

But it is unnecessary to enquire too closely into the judge's reasoning, since section 12 on its face clearly confers a discretion, but a discretion which, in their Lordships' opinion, the judge was bound to exercise in such a way as to secure the defendant a fair hearing in accordance with the

overriding requirements of section 10(8) of the Constitution. A trial in which one party has the opportunity to address the court on the facts and the law, and the other party is denied that opportunity, cannot be a fair trial. It makes no difference whether one or other or both parties are litigants in person.

Of course there may be occasions when a litigant in person abuses his right to address the court. In such a case the court may do what is necessary to prevent an abuse of its process, without being in danger of infringing the litigant's rights under section 10(8) of the Constitution. Mr. De Speville suggested that it may have been for reasons of that kind that the judge denied the defendant the opportunity to address the court in the present case. But this is mere speculation. There is not a hint of any such reason in either of the judge's rulings.

Nor would such a reason be consistent with allowing the defendant to cross-examine the plaintiff and his witnesses. If there was a risk of the proceedings becoming acrimonious, or of some other abuse of the courts' process, it would surely have occurred during the defendant's lengthy cross-examination of the plaintiff, a cross-examination which started on 21st February 1995 and continued throughout the whole of 22nd February 1995. Yet the cross-examination appears to have been conducted with propriety. The court never found it necessary to restrain or rebuke the defendant at any stage.

Their Lordships consider that there was no justification for the judge's initial ruling whereby the defendant was denied the right to address the court; but even if there had been some legitimate concern at that stage, the judge should certainly have reconsidered the question in the light of the defendant's conduct of his defence before giving his second ruling. The conclusion is inescapable that the defendant did not have a fair hearing, contrary to the requirements of section 10(8) of the Constitution.

The only other argument advanced by Mr. De Speville was as follows. The defendant was offered a choice at the beginning of the trial whether to appear by counsel or to conduct his defence in person on terms imposed by the court. Since he chose the latter course, he is bound by his election. This seems to have been the argument which was

accepted by the Court of Civil Appeal. But for the reasons already discussed, the court was not entitled to impose terms which deprived the defendant of his constitutional right to a fair trial. It follows that he should never have been forced to make the choice as presented.

It was for these reasons that their Lordships allowed the appeal and set aside the orders of the Court of Civil Appeal and the trial judge. It will be open to the plaintiff to apply for a fresh trial which, in the circumstances, should be before a different judge. The respondent must pay the appellant's costs before their Lordships' Board and in the Court of Civil Appeal. He must also pay any costs thrown away at the trial.