

DIRECTOR OF PUBLIC PROSECUTIONS v DHOOHARIKA D. & ANOR

2011 SCJ 356

Record No. 104495

THE SUPREME COURT OF MAURITIUS

In the matter of:-

The Director of Public Prosecutions

Applicant

v

1. Dharmanand Dhooharika
2. Contact Press Ltd, represented by
Mrs Goindamal Saminata Chetty

Respondents

JUDGMENT

This is an application by the Director of Public Prosecutions to commit the respondents for contempt of court for having publicly scandalised the Supreme Court and brought the administration of justice into disrepute by the editorial note, articles and interview published in the issue of Saturday 14 August 2010 of the weekly newspaper "Samedi Plus", of which the first respondent is the editor in chief and the second respondent is the owner and publisher.

It is not denied that -

- (a) the issue of "Samedi Plus" of Saturday 14 August 2010 contained extensive coverage of an alleged scandal in relation to the handling by the Chief Justice of an application by Paradise Rentals Co Ltd against Barclays Leasing Co Ltd;
- (b) the front page contained the juxtaposition of a photograph of the Chief Justice with that of a building carrying the logo of "Barclays", under the caption "*Scandale Barclays Leasing: Dev Hurnam réclame la prison pour le Chef Juge*" in bold characters;

- (c) the third page contained an editorial by the first respondent entitled "*De l'équité de la justice*" which after stating: "*Le CJ est comme nous tous, doté de nombreuses qualités et des défauts. Notre imperfection fait de nous des hommes. Notre plus grand défaut est notre passion du pouvoir et de l'avoir. Alors que notre vertu réside en notre intégrité et notre sagesse.*" referred to a letter sent by one Mr Dev Hurnam to the President of the Republic inviting the latter to consider the possibility of setting up a tribunal to investigate allegations of misbehaviour on the part of the Chief Justice and commented extensively on the standards of conduct expected from members of the Judiciary before concluding as follows -

"Mais comment peut-on dissiper les doutes de ceux qui croient qu'un juge aurait été influencé ou aurait volé la juridiction qui n'est pas la sienne. Dans des cas allégués de mauvaise conduite, il incombe certes au juge incriminé de défendre son intégrité en acceptant de comparaître devant un tribunal compétent qui est nommé par le président de la République. Les juges exercent leur liberté d'expression et d'association d'une manière compatible avec leur charge et qui ne doit ni affecter ni donner l'impression d'avoir affecté l'indépendance ou l'impartialité judiciaire"

- (d) the fourth page contained an article by the first respondent, under the caption "*Scandale Barclays Leasing*" and the heading "*Dev Hurnam réclame la prison pour le Chef Juge*" in bold characters and the sub-heading "*'Sik Yuen doit se retirer comme chef juge', affirme-t-il*", which made lengthy references to an application by the said Mr Dev Hurnam seeking an order committing the Chief Justice to jail for contempt of court;
- (e) the fifth page contained an article by the first respondent entitled "*Le Chef Juge aurait agi en 'excess' de sa juridiction*" which, after giving an account of the proceedings of 26 July 2010 before the Chief Justice in relation to the application of Paradise Rentals Co Ltd against Barclays Leasing Co Ltd, concluded by stating that according to Mr Hurnam, the Chief Justice had acted in excess of jurisdiction;
- (f) the eighteenth page contained an interview which was given by the said Mr Hurnam to the first respondent and published under the caption "*Me Dev*

Hurnam: Bernard Sik Yuen doit se retirer comme Chef Juge" and which included -

- (i) the following as a résumé of the contents of the interview in bold characters: "Dev Hurnam dénonce le chef juge Bernard Sik Yuen pour ce qu'il appelle **"plusieurs de ses abus et le non-respect des droits constitutionnels"** dans l'affaire de Paradise Rentals Co Ltd contre la Barclays Leasing Co Ltd et la Barclays Bank PLC. Selon lui, le chef juge aurait fait preuve d'une certaine **"partialité"** en faveur de la Barclays Leasing Co Ltd. Il invite le Président de la République, Sir Anerood Jugnauth, à instituer un tribunal pour mener une investigation sur le **"misbehaviour"** du chef juge. D'où sa requête pour la revocation du chef juge en attendant l'institution d'une enquête";
- (ii) the following extract in an "hors texte" in equally bold characters: "**Le chef juge a donné un mauvais signal à d'autres juridictions ou d'autres affaires sont en attente. Quoique le chef juge n'a aucune juridiction, il s'est substitué à la cour suprême"**;
- (iii) the following statements from Mr Dev Hurnam -

"j'ai informé Bernard Sik Yuen que la république de Maurice ne peut guère tolérer ses abus et le non-respect des droits constitutionnels";

"je réclame une enquête sur l'abus d'autorité de la part du chef juge pendant qu'il expédiait le 'chambers business' ... Il a affiché sa partialité totale selon les procès-verbaux dans l'affaire Paradise Rentals Co Ltd & Ors contre la Barclays Leasing Co Ltd (SCR 5A/148/10) en date du 26 juillet 2010";

"il a pris parti en agissant comme conseiller légal de la Barclays Leasing Co Ltd et a donné l'impression qu'il détient un brief pour la BLC."

It is the contention of the Director of Public Prosecutions that -

- (a) "the editorial, when read as a whole, was intended to cast doubts on the integrity of the Honourable Chief Justice in the performance of his judicial functions and the latter should therefore submit himself to a tribunal

appointed by the President of the Republic to clear his name, defend and restore his integrity";

- (b) in the interview Mr Dev Hurnam has not only cast aspersions on the integrity of the Chief Justice in the performance of his judicial functions and accused him of having abused his authority and violated the Constitution but has also alleged that the Chief Justice acted with lack of impartiality and independence in the discharge of his duties, interfered with the administration of justice in relation to the application of Paradise Rentals Co Ltd against Barclays Leasing Co Ltd, acted unlawfully and in excess of jurisdiction, and made his lack of impartiality and independence obvious by his conduct;
- (c) the allegations referred to in the articles and the interview "were intended and understood to mean that the Honourable Chief Justice, in the performance of his judicial duties -
- (i) has failed to discharge his judicial duties in accordance with his Oath of Office;
 - (ii) is not a person of integrity and is not impartial and independent;
 - (iii) has acted in excess of jurisdiction and substituted himself for the Supreme Court;
 - (iv) has made an abuse of his authority and has acted in breach of the Constitution and the guidelines for judicial conduct;
 - (v) as head of Judiciary, interferes with the independence of his fellow judges and influences them in respect of their decisions;
 - (vi) has been guilty of misbehaviour and should therefore submit himself to a tribunal appointed by the President of the Republic to clear his name, defend and restore his integrity"

and that they were "meant and were intended and understood to mean that the due and orderly administration of justice was being undermined and the public should be made aware of same, the more so since the Honourable Chief Justice had been guilty of improper conduct";

- (d) the statements were baseless, gratuitous, malicious and calculated to bring the administration of justice into disrepute and cast doubt on the authority,

independence, impartiality and integrity of the Judiciary and in particular the Supreme Court, thus causing public confidence in the administration of justice to be undermined;

- (e) in publishing the front page, the editorial, the articles and the interview, the respondents have publicly scandalised the Supreme Court and brought the administration of justice into disrepute and thereby committed a contempt of court.

The respondents have not denied the publication of the various allegations and the widespread public diffusion given thereto.

The first respondent has claimed that he wrote the editorial and the articles in good faith, that "*the question relating to the removal of the present Chief Justice for misbehaviour ought to be investigated*", that "*what was published in the interview was in good faith, newsworthy and in the public interest*", and that "*as a journalist he was duty bound in good faith to bring the grievances of Mr Dev Hurnam to the notice of the readers of Samedhi Plus without any so called judiciary – media confrontation*".

No affidavit was put in on behalf of the second respondent.

It is to be noted that the first respondent indicated in his affidavit that he was taking a preliminary objection to the effect that the contempt was not sufficiently particularised. However, at the hearing, his counsel was blissfully unaware of that part of the first respondent's affidavit until his attention was drawn to it by the court when he conveniently stated that he was not pressing it. In any event, the contempt, as indicated above, was more than sufficiently particularised in the applicant's affidavit.

The first respondent's counsel then indicated that he was going to raise three other preliminary objections, of which prior notice had been given to the other parties. Although no notice had been given to the court, learned counsel was granted leave to make his preliminary objections.

Accordingly, learned counsel moved that the proceedings should be stayed, first, as they constituted a breach of the doctrine of separation of powers as enshrined in our Constitution inasmuch as the applicant, a member of the Executive, was acting on behalf of the Judiciary when such proceedings should have been initiated by a complaint from

the member of the Judiciary who had been scandalised. Learned counsel for the first respondent referred to the fact that the affidavit in support of the motion for contempt did not emanate from the party who had allegedly been scandalised, namely the Chief Justice, but was sworn by an officer of the office of the Director of Public Prosecutions.

Secondly, learned counsel for the first respondent moved that the proceedings be stayed as they constituted an abuse of the process of the court and a breach of the rules of natural justice inasmuch as the applicant was acting both as complainant and as the prosecuting authority. He referred to the motion for contempt as a "self-generated complaint by the Director of Public Prosecutions" who was abusing his executive powers.

And, thirdly, learned counsel moved that the application be set aside in the absence of a statutory offence of contempt and in view of the express powers of the Director of Public Prosecutions under section 72 of the Constitution. However, after his attention was drawn to the fact that the Judicial Committee of the Privy Council had already in **Ahnee & Ors v The Director of Public Prosecutions [1999 2AC 294]** made a pronouncement on that issue, he decided not to press his third preliminary objection.

After hearing arguments, we rejected the two preliminary objections and indicated that we would give our reasons later. We propose to do so now.

It is clear, as submitted by learned counsel for the applicant, that the submissions of learned counsel for the first respondent stem from a confusion as to the nature and purpose of the law of contempt. The purpose of the law of contempt is not to protect the feelings of Judges but to protect the administration of justice and to ensure that public confidence in the administration of justice is maintained and that the Judiciary is not brought into disrepute.

The applicant derives his powers to institute criminal proceedings under section 72 of the Constitution. And he initiates criminal proceedings for contempt whenever he is of the view that it is in the public interest to do so. Accordingly there was no breach of the doctrine of separation of powers. Moreover, as indicated in **Director of Public Prosecutions v Boodhoo [1992 MR 282]**, "*it seems that in a case of criminal contempt, it is perfectly proper for the Director of Public Prosecutions as a public official*

who is not part of the political executive to conduct those proceedings". This position has been restated in the recent case of **Hurnam v Sik Yuen [2010 SCJ 373]**.

So much for the preliminary objections. It is now well-settled, since the decision of the Judicial Committee of the Privy Council in **Ahnee & Ors**, referred to above, that it is a contempt to publish a matter so defamatory of a judge or court as to be likely to interfere with the due administration of justice by seriously lowering the authority of the judge or court, that the offence of scandalising the court is not inconsistent with the protection of freedom of expression which is guaranteed by section 12 of the Constitution, and that the Supreme Court of Mauritius has power as part and parcel of its constitutional role to punish for contempt.

The respondents have not denied the publication of the various allegations highlighted above. The defence was that the editorial, the interview and the other articles were published in good faith and in the public interest. We have scrupulously scrutinised these articles. We take the view that the various articles published are highly defamatory of the Head of the Judiciary. Any reasonable reader who reads what has been published in bold characters on the first page of the newspaper would conclude that the Chief Justice must have committed a very serious wrong and that he should be sent to jail.

The editorial on the third page is equally contemptuous and shows the bad faith of the first respondent inasmuch as he was not only publishing what Mr Dev Hurnam had said but he was also expressing his own personal views. The only inference that any reasonable reader would draw is that the judges are not administering justice impartially and without bias. The editorial contains very serious allegations of impropriety and bias against the Chief Justice and calls upon him to explain his decisions in the case of *Paradise Rentals Co Ltd* before a tribunal.

The articles published on the fourth and fourteenth pages are equally highly defamatory of the Chief Justice and seek to lower the authority of the Judiciary and bring the administration of justice into disrepute. The fourth page repeats the same heading as on the first page and in equally bold characters, whilst there is nothing in the article on the fourteenth page to justify the heading "*Le Chef Juge aurait agi en excès de sa jurisdiction*".

The worse is to come in the interview given by Mr Dev Hurnam on the eighteenth page where it is more than apparent that questions were couched in such a way as to give an opportunity to Mr Dev Hurnam to vent his feelings against the Chief Justice. In fact he was given a licence to say whatever he wanted against the Chief Justice. The interview impugns the impartiality of the Chief Justice and implies that the Chief Justice has been guilty of some wrong doing and that he has to resign and submit himself to a tribunal to be appointed by the President.

The attitude of the respondents is also very eloquent. They refer to Mr Dev Hurnam, a former barrister who has been convicted of a serious offence and whose name has, following disciplinary proceedings against him, been erased from the Roll of Barristers, as "*Me Dev Hurnam*" whilst the Chief Justice of this country is referred to simply as "*Bernard Sik Yuen*".

We take the view that the various articles as well as the manner of their presentation seek to convey to the reader the message that Mr Dev Hurnam has been speaking the truth and that it is for the Chief Justice to resign and appear before a tribunal. It is interesting to note that the various articles refer to the letter sent by Mr Dev Hurnam to the President and inviting him to appoint a tribunal but not to the reply sent by the President. The evidence placed before us shows that three days before the publication of the newspaper, the Office of the President had addressed a letter to Mr Dev Hurnam whereby the latter was informed that the President had considered his representations but had found "*no merits in them*". When in the course of the interview Mr Dev Hurnam was asked whether he had received a reply from the President, he chose not to answer, and the first respondent did not press for an answer either.

But there is more. In a subsequent issue of the newspaper published on Saturday 04 September 2010, the first respondent maintains, in bold characters, "*Le Chef Juge doit être soumis à un 'public scrutiny'*", and the one-sided information is perpetuated. There is a complete failure to inform the readers of the fact that a reply had already been received from the President. And the respondents not only went to the length of repeating their allegations made against the Chief Justice but, to add insult to injury, attempted to justify what they have published on 14 August 2010 by claiming that they were in duty bound to publish those allegations: "*nous avons le devoir de le rapporter*", they say. And they also continued referring to Mr Dev Hurnam as "*Me Dev Hurnam*" and to the Chief Justice as "*Bernard Sik Yuen*". Although, by then,

proceedings for contempt had already been issued against them, they continued deliberately to cast doubt on the integrity of the Chief Justice. Such allegations can only tend to bring the administration of justice into disrepute.

In view of what we have stated above, we find that the editorial, interview and other articles published in the issue of "*Samedi Plus*" of Saturday 14 August 2010 were baseless, gratuitous, malicious and highly defamatory of the Chief Justice and were calculated to undermine the authority, independence, impartiality and integrity of the Judiciary and in particular of the Chief Justice, thus causing public confidence in the administration of justice to be undermined. We need hardly state that in a small state jurisdiction such as ours, the administration of justice is more vulnerable than in large and well-established jurisdictions such as the United Kingdom and Canada. We also find that the language, presentation and contents of the various articles as well as the attitude of both respondents throughout the proceedings negate any *bona fides* on the part of the respondents. We further reject any suggestion that the publication was made in good faith or that it was newsworthy or in the public interest.

We accordingly find both respondents guilty of contempt of court.

We have for the purposes of sentencing considered the tenor of the editorial, interview and other articles published as well as the nature and extent of the scurrilous abuse of the Chief Justice and of the Judiciary. We have to state that the various excerpts reproduced above convey only an infinitesimal part of the intensity, vehemence and gravity of the contempt, the full extent of which can only be captured by a reading of the newspaper as a whole as well as by the visual impact of the publication. Moreover, both respondents have not at any time showed any sign of remorse or repentance for their wrongdoing. On the contrary they have sought to justify the publication. In the circumstances, we sentence the first respondent to imprisonment for a term of three months and the second respondent to pay a fine of three hundred thousand rupees. With costs.

K.P. Matadeen
Senior Puisne Judge

A.A. Caunhye
Judge

17 October 2011

Judgment delivered by Hon. K.P. Matadeen, Senior Puisne Judge

For Applicant : Chief State Attorney
Mr R.A. Ahmine, Senior Assistant Director of Public Prosecutions

For Respondent : Mr P. Rangasamy, Attorney-at-Law
Messrs R. Bhadain and R. Rutnah, of Counsel