Privy Council Appeals Nos. 4, 5 & 6 of 1981

(Consolidated Appeals)

Lutchmeeparsad Badry – – – – – – *Appellant*

v.

The Director of Public Prosecutions – – – – *Respondent*

FROM

THE SUPREME COURT OF MAURITIUS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH NOVEMBER 1982

Present at the Hearing:

THE LORD CHANCELLOR (LORD HAILSHAM OF ST. MARYLEBONE)
LORD SCARMAN
LORD ROSKILL
LORD BRANDON OF OAKBROOK
LORD TEMPLEMAN

[*Delivered by* THE LORD CHANCELLOR]

These three consolidated appeals (Privy Council Appeals Nos. 4, 5 and 6 of 1981) from the Supreme Court of Mauritius arise from three motions to commit the appellant for contempt of court. These three motions will be referred to hereafter as No. 4, No. 5, and No. 6. All three motions arose out of words alleged to have been spoken by the appellant in the course of a single speech on 18th May 1980 to a regional congress of the Labour Party of Mauritius at the Social Welfare Centre of Mare d'Albert. There were three separate records before their Lordships, one in respect of each speech, but the motions were heard together and resulted in two separate judgments of the Supreme Court (P.Y. Espitalier-Noel J., and A.M.G. Ahmed A.J.) delivered on 23rd October 1980. In each of these judgments the appellant was found guilty of contempt. In the first, that relating to No. 4, the appellant was sentenced to six weeks' imprisonment. In the second, the appellant was sentenced to six weeks' imprisonment in respect of each of Nos. 5 and 6. The sentences in respect of Nos. 5 and 6 were to be served concurrently with one another, but consecutively to the sentence imposed in respect of No. 4, so that the total term of imprisonment imposed on the appellant was 12 weeks. There has been a stay of execution pending the appellant's appeal to Her Majesty in Council, leave to prosecute which was granted by the Supreme Court (on terms since complied with).

The appellant is a person well known in the public life of Mauritius. At the material times he was a Member of the Legislative Assembly and until a date in 1978 or 1979 had been Minister of Social Security in

the Government of Mauritius. In order to understand what follows it is necessary to state that on 21st December 1978 Mr. Justice Glover, of the Supreme Court of Mauritius, was appointed as sole Commissioner under the Commissions of Inquiry Ordinance Cap. 286 to enquire into allegations of fraud and corruption made against the appellant in his former capacity as Minister of Social Security and against another and on 2nd May 1979 Mr. Justice Glover, in his capacity as sole Commissioner, produced a report adverse to the appellant on the matters enquired into.

On the hearing of the three motions it was not disputed that the appellant had attended the meeting of 18th May 1980, and together with others, had made a speech to the assembled audience in the local Creole dialect of French. The affidavits in support of the three notices of motion attributed to the appellant the Creole words which follow, and which were found to constitute contempt of Court. The words attributed to the appellant in the notices of motion were:

Motion No. 4

(1) " Ainan aine dimoune fine touyer, li pas fine gagne narien parcequi li ainan galette-li fine aller-aine zenfant fine mort."

[These words attributed murder to an unnamed person but may be disregarded, since the Supreme Court held that they were not in fact a contempt of court since the Court was " not satisfied . . . that the respondent must have been referring and been understood to refer to a court case ". These is no appeal in respect of this decision.]

(2) " Aine creole travaille F.U.E.L. fine gagne aine accident travail, li fine vine 50% infirme, zaffaire fine alle en Cour Supreme, case fine dismiss, parcequi li F.U.E.L. parcequi Missie Series qui la-bas, aine sou li pas fine gagne. Alla la justice ici."

The translation of these words supplied to their Lordships (slightly altered), which for this purpose may be treated as accurate, is as follows:

" A creole working at F.U.E.L. [Sc. Flacq Limited Estates Ltd., a well-known commercial concern in Mauritius] met with an accident at work. He is now 50% incapacitated. The case went (or ' was referred ') to the Supreme Court. The case was dismissed. Because it is F.U.E.L. Because it is Mr. Series who is there, [It is admitted that M. Series was an important person in the management of F.U.E.L.], he did not get a sou (a ' penny ') in compensation. This is the kind of justice we have here."

On the part of the appellant it was pointed out that the punctuation of the translation did not correspond with the punctuation of the French, and that the words " in compensation " did not appear in the original French at all. In the opinion of their Lordships, nothing turns on this.

Motion No. 5

The words attributed to the appellant in the affidavits supporting No. 5 differed slightly from one another, but in the version of the main witness in support of the motion were:

" Quand zenfants coolies pou prendre so vengeance, est-ce qui missie Glover qui pou dirige ca pays la, nous bisin dechire so calecon dans ca pays la."

The translation supplied to their Lordships was:

" When the children of the coolies take their revenge is it M. Glover who is going to run this country? We must teach him a lesson, in this country, and expose him for what he is."

It is evident that this is a mistranslation, no doubt introduced to spare their Lordships' feelings. The correct translation, to anyone with even a modest aquaintance with the French language, obviously concludes with the words "We must tear off his trousers in this country" and not "We must teach him a lesson and expose him for what he is." In passing, it must be pointed out that the typed copy of the record supplied to their Lordships is innocent alike of all accents and the cedilla.

A slightly different and rather longer version was supplied by a supporting witness, but it was to the same effect. It referred to the taking of vengeance by the coolies and included the critical phrase: "bisoin (sic) dechire calecon missie Glover dans ca pays la."

Motion No. 6

The words deposed to in support of No. 6 were as follows:

> "Ape utilise rapport Glover pour detruire moi-pas tout ce qui li fine ecrire qui vrai—ainan aine paquet quiquechose qui li pas fine prend en consideration."

The supplied translation of this, which their Lordships are content to accept as correct, is as follows:

> "The Glover report is being used to destroy me—it is not everything he said that is true—there are a lot of things he has not taken into consideration."

At the hearing of the three motions, the deponents to the supporting affidavits were sworn and tendered for cross-examination and cross-examined. The appellant gave evidence and was cross-examined at length and two witnesses spoke on his behalf. He offered no innocent explanation of any of the words in question, but swore firmly that he had never uttered them at all. At the hearing before their Lordships it was argued strongly that the prosecution had failed to discharge the burden upon them to prove that the words in question were in fact spoken or bore the meanings alleged, and other questions were raised as to the admissibility of certain evidence introduced at the stage of re-examination. It may be necessary in part of the case to examine more closely the construction to be put on some of the words, but in general their Lordships, on the principles on which their Lordships' Board invariably acts and which will be shortly stated in greater detail, find themselves bound by the findings of fact of the Supreme Court, who, after all, saw the witnesses and observed their demeanour. These findings on No. 4 were as follows:

On Motion No. 4

> "We have considered the evidence of Mr. Ombrasine [the principal witness in support of the motion] and the complete denials by the respondent and find that the issues of fact raised in the present case are clear cut. The question of Mr. Ombrasine having possibly misunderstood or mistakenly reported what the respondent would have said, we find just does not arise. Either the respondent did utter the incriminated words or he did not, and Mr. Ombrasine would have deliberately fabricated evidence against him."

Earlier the Supreme Court dismissed the two witnesses called in support of the appellant in these words:

> "We have found them to be thoroughly unconvincing and unreliable and we have no hesitation in discarding their evidence."

On Mr. Ombrasine himself the primary fact found by the Court was as follows:

> "We . . . are fully satisfied of the good faith of Mr. Ombrasine. The absence, in the circumstances, of corroborating witnesses has not

shaken our unreserved belief that Mr. Ombrasine has spoken the truth and we are satisfied that the Respondent did utter the incriminated words."

Similar findings of primary fact were made in Nos. 5 and 6 by the Supreme Court. After discarding the witnesses supportive of the appellant's denials, they said:

> " We are satisfied that the respondent did utter the words which are the subject matter of the two motions before us."

By these findings of primary fact, on the ordinary principles which actuate this Board, their Lordships consider themselves bound, and since this appeal may be the first to be heard under the legislation (Courts (Amendment) Act 1980, section 7) extending the right of appeal to the Judicial Committee in appeals from Mauritius, their Lordships feel it right to reiterate the general principles on which they will continue to feel bound to tender their advice in criminal matters.

The *locus classicus* in which these principles are stated are the passages in the opinion of the Board given by Lord Sumner in *Ibrahim v. R.* [1914] A.C. 599 at pages 614, 615, where he said:

> " Their Lordships' practice has been repeatedly defined. Leave to appeal is not granted ' except where some clear departure from the requirements of justice' exists: *Riel v. R.* (1885) 10 App. Cas 675; nor unless ' by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done ': *Dillet's* case (1887) 12 App. Cas. 459. It is true that these are cases of applications for special leave to appeal, but the Board has repeatedly treated applications for leave to appeal and the hearing of criminal appeals as being upon the same footing: *Riel's* case *supra*; *ex parte Deeming* [1892] A.C. 422. The Board cannot give leave to appeal where the grounds suggested could not sustain the appeal itself; and, conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it. Misdirection as such, even irregularity as such, will not suffice: *ex parte Macrea* [1893] A.C. 346. There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future: *R. v. Bertrand* (1867) L.R.1. P.C. 520."

By these words their Lordships, notwithstanding any new legislation in the territories of the Commonwealth from which appeals may be brought in criminal matters, continue to feel themselves bound and, in the instant appeals, their Lordships consider that they have been guided by them. Their Lordships also desire to repeat the practice direction issued by Lord Dunedin in 1932 (48 T.L.R. 300) as follows:

> " Their Lordships have repeated *ad nauseam* the statement that they do not sit as a Court of Criminal Appeal. For them to interfere with a criminal sentence there must be something so irregular or so outrageous as to shake the very basis of justice. Such an instance was found in *Dillet's* case (12 App. Cas. 459) which has all along been held to be the leading authority in such matters.
>
> In the present case [an Indian petition for special leave to appeal against conviction and sentence of death for murder] the only real point is a point for argument on a section of a statute, and all that the petitioner can say is that it was wrongly decided. That is to ask the Board to sit as a Court of Criminal Appeal and nothing else."

In all that their Lordships say hereafter in discussing the merits of the instant consolidated appeals their Lordships believe that they remain bound by, and have stayed within, the confines of these precepts.

Contempt of court may consist of conduct of different kinds. The classical description relevant to this class of contempt is contained in the judgment of Lord Russell of Killowen C.J. in *R. v. Gray* [1900] 2 Q.B. 36 at page 40 when he said:

> " 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. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court."

In the United Kingdom the latter class must now be considered as modified in a liberal direction by the Contempt of Court Act 1981. Lord Russell went on:

> " The former class belongs to the category which Lord Hardwicke L.C. characterised as ' scandalising a Court or a Judge '. (*In re Read and Huggonson* (1742) 2 Atk. 291, 469). That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or public good, no Court could or would treat that as a contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen."

This qualification must be considered to have been amplified and emphasised, though not altered, by the famous passage in Lord Atkin's opinion when he gave the advice of the Board in *Ambard v. Attorney-General for Trinidad and Tobago* [1936] A.C. 322 at page 335:—

> " But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."

Their Lordships' attention was drawn to many cases before and after the decision in *Gray*, including *McLeod v. St. Aubyn* [1899] A.C. 549, where Lord Morris' statement that the first class of contempt had in this country become obsolete unfortunately proved incorrect (*R. v. Gray* (*supra*); *R. v. New Statesman ex parte Director of Public Prosecutions* (1928) 44 T.L.R. 301; *Ambard v. Attorney-General for Trinidad and Tobago* (*supra*); *R. v. Freeman* (1925) Times Newspaper 18 November; *R. v. Wilkinson* (1930) Times Newspaper 16 July and others). But, whilst nothing really encourages courts or Attorneys-General to prosecute cases of this kind in all but the most serious examples, or courts to take notice of any but the most intolerable instances, nothing has happened in the intervening eighty years to invalidate the analysis by the first Lord Russell of Killowen in *R. v. Gray* (*supra*).

This leads inevitably to the conclusion that the instant appeal on No. 4 falls to be dismissed. On this matter, the Supreme Court reached the conclusion:

> " By his latter remarks, [i.e. excluding those relating to the dead child] on the other hand, relating to the man who had been incapacitated at 50% we have no doubt that the respondent meant and could only have been understood to mean that this man's claim for damages or compensation had been unjustly dismissed by the Supreme Court because the other party to the case happened to be a wealthy company. It was, we find, nothing else but a serious accusation of bias being levelled at the Supreme Court and can in no way be possibly considered, as was suggested by counsel, as having been a comment on the difficulties poor litigants may encounter in having their cases adequately presented in Court."

In spite of earnest endeavours by the appellant's counsel to pursue before their Lordships the line of alternative interpretation suggested in the last sentence, their Lordships find it impossible to accompany him in this journey. It seems impossible to attribute any meaning to the words spoken other than attribution to an actual case, real or fictitious, and the worse if fictitious, in which the justice of the case was overborne by bias and the overweening influence alleged to have been exerted by F.U.E.L. and their powerful official, M. Series. Even if their Lordships were not disposed to this view by the internal logic of the words, the fact that the Supreme Court, with knowledge of the conditions local to Mauritius and the nuances of the Creole expressions, is in a position far more qualified to understand its meaning than their Lordships, situated in the United Kingdom and bound by the self-denying ordinance formulated by Lord Sumner in *Ibrahim v. R.* (*supra*) and in Lord Dunedin's practice direction, would make them hesitate to differ from their conclusion. As it is, their Lordships can only confirm the conclusion of the Supreme Court when they said:

> " The fact remains that we find that the grave and unwarranted accusation which he [the appellant] chose to level at the Supreme Court on the 18th May was clearly meant to shake public confidence in the administration of justice in Mauritius."

It follows that the appeal in respect of No. 4 should be dismissed.

The situation is quite different in respect to the appeals in respect of motions Nos. 5 and 6 and, in their Lordships' view, these appeals must be allowed. In their Lordships' opinion, the easier of these two to determine is No. 6. Quite apart from considerations common both to Nos. 5 and 6, the words complained of in No. 6 appear to mean no more than that the appellant's opponents had used the Glover report to destroy him (an assertion, false or true, which cannot on any view be construed as contemptuous of Mr. Justice Glover), and that the Glover report contained a number of statements which were incorrect, and failed to take into account a whole bundle of considerations which ought to have been considered relevant. In the absence of any express finding by the Supreme Court that these criticisms were made maliciously or made otherwise than in good faith by the person impugned by the report (which may or may not have been the fact) their Lordships find it quite impossible to say that these words by themselves do not come squarely within the " important qualification " postulated by Lord Russell of Killowen C.J. in *Gray* (*supra*) at page 40.

This leads their Lordships to a discussion of the appeal on No. 5, the reasons for which are contained in the same judgment as that on No. 6. It must be said at once that the words found to have been uttered by the appellant in either variant version are vulgar, scurrilous, abusive and

lacking in respect to the person of a judge which would be expected, though, were they uttered in this country, it may be doubted whether they would be calculated to lower the authority of the judge rather than the reputation of any public man who uttered them so as to bring them within the condemnation of Lord Russell's definition of contempt. Nevertheless, bearing in mind the self-denying ordinance accepted in this Board by *Ibrahim v. R.* (*supra*) and the practice direction of Lord Dunedin, it may be doubted whether, if the Supreme Court had simply said that in the circumstances prevailing in Mauritius these words were " calculated to bring a judge of the Court into contempt or to lower his authority ", this Board would have felt it proper to differ from their opinion.

Unhappily, although there are words in the judgment which could be construed in this sense if taken by themselves, a more careful reading of the judgment leads their Lordships to the conclusion that these words are taken simply as aggravation of an offence which the Supreme Court treated as having been established on wholly different grounds which their Lordships can only describe as based on a fundamental error of law.

Put simply, in their judgments on No. 5 and No. 6 (the latter of which has now been disposed of separately) the Supreme Court decided that the words in both cases were directed against Mr. Justice Glover not in his judicial capacity, but as a Commissioner, indeed the sole Commissioner, in the Inquiry into the appellant's conduct and that, at common law, the law of contempt applied to such a commission and a commissioner, appointed under the Ordinance as amended, as it would have done to a court of justice. They did so on the supposed authority of *D.P.P. v. Masson* [1972] Mauritius Reports 47, where the point was neither argued, nor expressly decided, but simply assumed. In the view of their Lordships this doctrine, for which no other authority exists, is plainly untenable. That commissions of inquiry do require some protection of this nature is, of course, not to be doubted. But such protection only exists when conferred by statute. A limited protection of this kind is indeed conferred in Mauritius by section 11(3) of the amended Ordinance. But this is limited to contempts at any sitting of the commission, and to a fine not exceeding Rs500 to be imposed by the commissioners, and levied as if it were a fine of the District Magistrate of Port Louis. Since the appellant's speech was delivered long after the Commission was *functus officio*, it need not be said that this disciplinary power was not, and could not have been, used in the present case. The corresponding United Kingdom statute, the Tribunals of Inquiry Evidence Act 1921, by section 1(2)(*c*), accords a wider power of committal on certification by the chairman of the tribunal to be exercised by the High Court in England and by the Court of Session in Scotland, and the value of this extended power was expressly indorsed both by the Report of the Royal Commission on Tribunals of Inquiry, 1966 (Cmnd. 3121), Ch. XIII and that of the Interdepartmental Committee, under the chairmanship of Lord Justice Salmon, on the law of contempt as it affects tribunals of inquiry in 1969 (Cmnd. 4078) Ch. VII, to the latter of which reference is made in the judgment of the Supreme Court. These statutory provisions, however desirable as they may be, only serve to illustrate the fact that, without them, commissions and committees of inquiry are not protected at common law. Driven up against this difficulty, it was seriously argued for the respondent that their Lordships should extend the law of contempt to such bodies by a bold act of judicial legislation. This their Lordships resolutely decline to do, particularly as the sole authority relied on in support of the invitation was the Ladies' Directory case, *Shaw v. Director of Public Prosecutions* [1962] A.C. 220 where, so far from purporting to indulge in such legislative activities, the majority in the House of Lords claimed to be following a line of authority in

the Court of King's Bench as far back as the tenure of office of Best C.J. Happily, though not in time to be cited before the Supreme Court, their Lordships find themselves sustained in their view, to which in any case they would have adhered, by the conclusive authority of the House of Lords in *Attorney-General v. B.B.C.* [1981] A.C. 303. In that case, to which in their Lordships' view the present appeal succeeds *a fortiori*, the House of Lords refused to apply the law of contempt to a local valuation court, which at least enjoyed the designation, if not all the functions, of a court of law. In their Lordships' view it is plainly established by this authority that, in the absence of statutory provision to the contrary, the law of contempt of court applies by definition only to courts of justice properly so called and to the judges of such courts of justice. It would be invidious to supply quotations at length. But reference may be made to the speeches of Viscount Dilhorne at pages 337 and 339, Lord Salmon at page 342, Lord Edmund-Davies at pages 347, 351, Lord Fraser of Tullybelton at page 352 and Lord Scarman at page 362. It accordingly follows that, when in their judgments on Nos. 5 and 6 the Supreme Court founded their opinion on an affirmative answer to the question whether the law of contempt applies to a commission or commissioner appointed to hold an inquiry under the Commissions of Inquiry Ordinance (as amended), they erred in a respect which, to quote Lord Sumner in *Ibrahim v. R.* (*supra*), " deprives the accused of the substance of a fair trial and the protection of the law (and) which in general tends to divert the due and orderly administration of the law into a new course which may be drawn into an evil precedent in future ".

In the view of their Lordships, both the decision on No. 6, which they have already disposed of on other lines, and that on No. 5, with which they are now concerned, were infected with this error, and therefore cannot stand. If confirmation were required of this view in relation to No. 5, their Lordships would find it in the finding of the Supreme Court that the words complained of as spoken by the appellant constituted

" . . . . scurrilous abuse of Mr. Justice Glover *as commissioner* "

and, as regards No. 6, in the findings that the words complained of there were a " clear attack on the integrity and impartiality *of the Commissioner* ". (Emphases added)

There remains the disposal of these appeals. Since the conclusion reached by their Lordships involves the dismissal of the appeal on No. 4, and allowing those on Nos. 5 and 6, logic would seem at first sight to involve that the sentence on No. 4 should stand and those on Nos. 5 and 6 should be quashed. But sentencing is a delicate matter and in their Lordships' view it is possible that the Supreme Court imposed a custodial sentence on No. 4 on the footing that it was one of a sequence of three offences of which two have now disappeared, and their Lordships are therefore of the opinion that the better course would be to refer back the question of the appropriate sentence on No. 4 to be considered by the Supreme Court in the light of the advice tendered to Her Majesty on all three appeals. The appeal on No. 4 should therefore be dismissed as regards the conviction but their Lordships will humbly advise Her Majesty that the question of sentence be remitted to the consideration of the Supreme Court in the light of this appeal, and that the appeals in relation to Nos. 5 and 6 be allowed and the convictions and sentences set aside.

So far as regards costs, the costs of the hearing before the Supreme Court should follow the event, those of No. 4 being awarded to the Director of Public Prosecutions, those of Nos. 5 and 6 being awarded to the appellant. The appellant already has to bear the cost of a short adjournment granted at his request owing to the lateness of his instructions to counsel. As regards the costs of the hearing before this Board, in

principle, of course, the questions are severable, and in principle costs could be awarded with mutual set-offs on the issues on which the respective parties have succeeded. In the event, however, their Lordships conclude that substantial justice will be done if each party be left to bear their own respective costs.

Their Lordships will humbly advise Her Majesty accordingly.

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In the Privy Council

LUTCHMEEPARSAD BADRY

v.

THE DIRECTOR OF PUBLIC PROSECUTIONS

DELIVERED BY

THE LORD CHANCELLOR

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