[2014] UKPC 11

Privy Council Appeal No 0058 of 2012

JUDGMENT

Dhooharika (Appellant) vThe Director of Public Prosecutions (Respondent)

From the Supreme Court of Mauritius

before

Lady Hale

Lord Kerr

Lord Clarke

Lord Wilson

Lord Hodge

JUDGMENT DELIVERED BY

Lord Clarke

ON

16 April 2014

Heard on 10 and 11 February 2014

Appellant	Respondent
Geoffrey Robertson QC	Geoffrey Cox QC
Anya Proops	Rashid Ahmine
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LORD CLARKE:

Introduction

1.
This appeal centres on the existence and scope of a criminal offence known as scandalising the court or, in Scotland, murmuring judges. It originated as a common law offence in England and Wales but the last successful prosecution was R v Colsey, The Times, May 9, 1931. It was abolished, as from 25 June 2013, by section 33 of the Crime and Courts Act 2013, which provides:

“33(1) Scandalising the judiciary (also referred to as scandalising the court or scandalising judges) is abolished as a form of contempt of court under the common law of England and Wales.

(2) That abolition does not prevent proceedings for contempt of court being brought against a person for conduct that immediately before that abolition would have constituted both scandalising the judiciary and some other form of contempt of court”.

2.
The offence has, however, been acknowledged in recent years as still existing in a number of Commonwealth countries and, indeed, in Mauritius. The first question for decision in this appeal, as formulated in the Statement of Facts and Issues, is whether the offence still exists in Mauritius in the light of section 12 of the Constitution of Mauritius. If it does, the second question is what are the ingredients of the offence, the third question is whether the court refused to allow the appellant to give evidence and, if so, whether his trial was unfair as a result and the fourth question, which relates to the third, is whether the appellant was properly convicted of the offence. Finally, the fifth question is whether the appellant should have been sentenced to an immediate term of imprisonment having regard to all the circumstances of the case, including, in particular, the failure to invite the appellant to make submissions in mitigation.

The facts

3.
The appellant is, or was in 2011, a journalist and the editor-in-chief of a French language weekly newspaper published in Mauritius called Samedi Plus. On 17 October 2011, the appellant and Contact Press Ltd, which is the owner and publisher of Samedi Plus, were convicted by the Supreme Court (Matadeen SPJ and Caunhye J) of contempt by way of "scandalising the court" and sentenced to three months' imprisonment and a fine of R300,000 respectively. Only the appellant sought leave to appeal to the Board. On 10 May 2012 the Supreme Court (Matadeen SPJ and Angoh J) refused special leave to appeal to the Board but the Board subsequently granted leave, whereafter the Supreme Court stayed execution of the sentence pending the decision of the Board.

4.
The prosecution arose out of the publication of Samedi Plus on Saturday 14 August 2010 in which several pages were given over to allegations against the Chief Justice of Mauritius at that time, Bernard Sik Yuen. It was said that they amounted to the crime of scandalising the court, which is a form of contempt of court.

5.
The publications complained of arose out of hearings before the Chief Justice in the case of Paradise Rentals Co Ltd v Barclays Leasing Co Ltd (“the Paradise Rentals action”), in which Paradise Rentals, a car hire company, was being sued by Barclays Leasing, which claimed the return of many vehicles it

had leased to Paradise Rentals. Hamuth J had ordered that the cars be seized. Hearings took place in chambers before the Chief Justice, on 5, 19, 26 and 30 July 2010. At the first hearing, on 5 July, the Chief Justice refused leave for Mr Dev Hurnam, who was a disbarred barrister and a director of Paradise Rentals,to represent the company. On 27 July, Mr Hurnam wrote a letter to the President of Mauritius complaining about the Chief Justice's actions and requesting him to set up a tribunal to investigate the Chief Justice's conduct. Mr Hurnam sent copies of the letter to the Mauritian media and held a press conference criticising the Chief Justice. On 11 August the President replied saying that he found no merit in Mr Hurnam's complaints. He thus refused to set up a tribunal. On 13 August Mr Hurnam lodged a motion seeking to have the Chief Justice committed for contempt. He spoke to several organs of the media, alleging, inter alia, that the Chief Justice had acted wrongfully and beyond his powers by hearing the case in chambers and that he was biased. Mr Hurnam gave a long and live national radio interview on Radio One making these allegations. No action was taken against the radio broadcaster in respect of the interview.

6.
The Board notes that Mr Hurnam is well known both to the courts and to the public in Mauritius. He had been struck off the roll of barristers in 2008 when the Board restored his conviction for conspiring to hinder a police investigation: DPP v Hurnam [2007] UKPC 24. He is a former member of the National Assembly.

7.
The appellant also interviewed Mr Hurnam and on 14 August 2010 Samedi Plus published an extensive account of that interview under the title “Barclays Leasing Scandal”. On the front page it published a photograph of the Chief Justice beside a headline which declared “Dev Hurnam réclame la prison pour le chef juge”. Underneath it was said “Il réclame un ordre judiciaire ‘Committing Bernard Sik Yuen to jail’ pour outrage à la cour” and “‘Yuen doit se retirer comme chef juge’, soutient Dev Hurnam.”

8.
On pages 4-5 of the newspaper, under the same headline, there was an article written by the appellant reporting that Mr Hurnam had lodged a motion in the Supreme Court for the committal of the Chief Justice for contempt of court. That article purported to set out some of the history of the proceedings in the Paradise Rentals action. It detailed Mr Hurnam's allegation that the Chief Justice had made remarks in chambers that were intended to prejudge the issues in the action. It reported the allegation thus. “Il accuse Bernard Sik Yuen d'avoir influencé la conduite d'un litigant”. The article added that Mr Hurnam was also asking the Supreme Court to set aside a ruling of the Chief Justice refusing him leave, as its director and authorised representative, to appear to represent Paradise Rentals in the action. The article further asserted that Mr Hurnam was seeking a declaration that the Chief Justice had influenced “other jurisdictions” of the Supreme Court, which were to hear two related appeals.

9.
The grounds on which Mr Hurnam said that he considered the Chief Justice to be in contempt of court were further set out in two more articles in the same edition. The first was a piece appearing on page 5 under the headline: “Le Chef Juge aurait agi en ‘excess’ de sa jurisdiction". It was reported that at the hearing on 26 July 2010 counsel for Barclays Leasing had complained that, as of that date, 46 cars had not been returned to Barclays Leasing pursuant to an existing order of the court and that since 5 July no vehicle had been returned. He had sought clarification from the attorney, Mr Moutia, who was by then appearing on behalf of Paradise Rentals. Mr Moutia had responded that he did not have any

instructions in the matter. The Chief Justice enquired of Mr Moutia who was instructing him, to which the latter responded that, apart from Mr Hurnam, he was not aware who was instructing him. There was then reported an exchange between Mr Moutia and the Chief Justice in which the latter had directed that, at the next hearing, there should be produced a duly certified statement from the Registrar of Companies identifying all of the directors of Paradise Rentals and that the directors should appear before him. The Chief Justice was reported as observing:

“let it be made clear that I am not granting any injunction prayed for by the applicant which would hamper any judicial process pending before any jurisdiction for the moment. So all other jurisdictions have got free hands. That is clear.”

Mr Hurnam took objection to those remarks.

10.
In an interview with the appellant summarised on page 18 of the same edition of Samedi Plus, Mr Hurnam was reported as having made the following comments in response to various questions he was asked: (i) that the Chief Justice had committed “multiple abuses and non-respect for constitutional rights”; (ii) that there was a case for contempt based on the manner in which the Chief Justice handled the Paradise Rentals case and on the statements he made in court quoted above; (iii) that by making the statements, he had committed a contempt of court because, in Mr Hurnam's opinion, he “influenced subsequent decisions which would be taken by the competent courts”; (iv) that the Chief Justice had demonstrated partiality to Barclays Leasing and that in consequence Mr Hurnam was asking the President to constitute a tribunal to investigate the Chief Justice's “misbehaviour” and, in the meantime, had requested the removal of the Chief Justice; (v) that the investigation should examine the “abuse of authority by the Chief Justice while he was conducting chambers business”, that he had “demonstrated his complete partiality in the record (of that hearing)”, that he had “sent a bad signal to other jurisdictions where other cases are pending and that, even though the Chief Justice had no jurisdiction, he put himself in the position of the Supreme Court”; (vi) that “the Chief Justice had held on to the case instead of taking the normal course of transferring it to the Master and Registrar and, in doing so, he demonstrated his interest. …”; (vii) that the Chief Justice had violated section 12 of the Courts Act, section 10 of the Constitution, the provisions of the Supreme Court Rules and the IGCA among other things; and (viii) that he had demonstrated bias (“il a pris parti”) by “acting as the legal advisor to Barclays Leasing”, that he “gave the impression that he was in possession of a brief for Barclays Leasing and that he attacked the integrity of the judicial process by acting in complete violation of the Guidelines for Judicial Conduct.”

11.
The appellant’s conclusions were summed up in an editorial at page 3 of the newspaper entitled “On Equal Justice” in this way. “The Chief Justice possesses, as we all do, many qualities and defects.” Then, after making some observations on the importance of justice and the need for a judge to maintain complete control over himself “so as not to succumb to the temptations of money or other material benefits”, he wrote that “within the four corners of chambers or the court, judges and magistrates deliver justice according to their conscience. And those who allow themselves to be governed by their ego cannot be fair.” He added that it was incumbent on Samedi Plus to “hold our judges to account”, that the judges should “make public their assets and how they acquired them” and that “when the question involves deciding between the interests of one company to the disadvantage of another, the test of integrity applies. Only the judge, in his soul and conscience, knows if he has been fair.”

12.
The appellant then summarised Mr Hurnam's allegations and his formal request to the President for an investigative tribunal. He continued:

“We are not equipped to judge a Chief Justice. It is therefore incumbent upon the Chief Justice to defend the independence of his charge and the authority of the court. As far as we know, judges are not intended to exercise any activity which could be incompatible with their judicial duties and cause their independence to be doubted. Persons seeking justice correctly check to see that our judges are impartial and that this impartiality is reflected in the conduct of their duties whether this involves chambers business or court activity. Judges avoid all conflicts of interest, as well as situations which might reasonably lead one to find the existence of a conflict of interest.”

13.
The appellant concluded with what the respondent says was a call for the Chief Justice to submit to a tribunal of inquiry:

"But how can one dissipate the doubts of those who believe that a judge was influenced or that he assumed jurisdiction that was not his own.

Inalleged cases of misconduct, it is, of course, incumbent on the accused judge to defend his integrity by agreeing to appear before a competent court named by the President of the Republic.

Judges exercise their freedom of expression and association in a manner compatible with their charge and which must neither affect nor give the impression of having affected judicial independence or impartiality."

14.
The DPP also placed some reliance at the hearing of the subsequent proceedings upon articles written by the appellant and published in Samedi Plus on 21 August 2010 and 4 September 2010. However they were not relied upon in the formal written case against the appellant and, in these circumstances, the Board does not think that they should be regarded as relevant, save perhaps as to sentence. In any event they contained similar material to that published in the edition complained of and add little or nothing to the case against the appellant.

15.
On 18 August 2010 the DPP brought these contempt of court proceedings against the appellant and the newspaper’s owner and publisher, alleging that the material published in the 14 August edition scandalised the Supreme Court and brought the administration of justice into disrepute. The Board notes in passing that the DPP has also brought contempt proceedings against Mr Hurnam, which have been long drawn out and, indeed, are still on foot. They are not relevant to this appeal.

The procedure before the Supreme Court

16.
Each party relied upon affidavit evidence before the Supreme Court. An affidavit in strong terms was made on behalf of the DPP on 18 August 2010. The DPP’s approach was justified in this submission which (according to the DPP’s case before the Board) was made to the Supreme Court:

“These kinds of articles, these kinds of aspersions, casting doubts, bring the judiciary into disrepute. The public lose confidence in the administration of justice and that is why the applicant decided, the DPP decided, to act immediately. That is why in view of the nature of the offence of contempt, we

don't go by way of information because it takes too much time. We lodge a case immediately by way of motion and affidavit, again not to protect the Honourable Chief Justice, but to protect the administration of justice which is for the good of the people."

No oral evidence was called on behalf of the DPP.

17.
On 17 September 2010 the appellant made an affidavit in response. The thrust of his case was that the editorial, articles and interview were written and published in good faith and in the public interest. He did not intend to cast any doubt or innuendo adverse to the Chief Justice. In short, his evidence was that he was simply reporting the views of Mr Hurnam and that he was justified in the public interest in doing so. As the Board reads his evidence, his case was that he was not endorsing (or intending to endorse) the views of Mr Hurnam as if they were his own. In so far as he reported that a letter had been sent to the President by Mr Hurnam inviting him to set up a Tribunal, the appellant accepted that that was true but denied the allegation that he had brought the judiciary into disrepute or that any reasonable person could have thought that he did. In short he denied that he intended to or had scandalised the court. In circumstances discussed below, the appellant did not give evidence before the Supreme Court.

Conclusions of the Supreme Court

18.
The Supreme Court gave judgment on 17 October 2011. It made the following findings which are relied upon by the DPP in this appeal. The appellant did not dispute that he had published the various articles but contended that he had published them in good faith in the public interest. The various articles were however highly defamatory of the Chief Justice. Any reasonable reader would have concluded from the front page that the Chief Justice must have been guilty of serious wrongdoing. The editorial at page 3 had expressed the personal views of the appellant and the only inference to be drawn from it by a reasonable reader was that the Chief Justice was not administering justice impartially and that he should explain his decisions in the Paradise Rentals case before a tribunal. There was nothing to justify the heading on page 14 that "the Chief Justice has acted in excess of his jurisdiction". The questions in the interview with Mr Hurnam had been couched in such a way as to give him an opportunity to say whatever he wanted against the Chief Justice. The references to Mr Hurnam, a convicted and disbarred barrister, as "Maitre"and to the Chief Justice as simply "Bernard Sik Yuen", were a significant indication of the appellant's attitude. The various articles and their presentation, taken as a whole, were intended to convey the message that the allegations of Mr Hurnam were justified and that the Chief Justice should resign and appear before a Tribunal of Inquiry. The appellant had failed to follow up and verify whether the President had accepted or rejected Mr Hurnam's request for a Tribunal to investigate the Chief Justice's conduct, whereas in fact three days before the first publication, on 11 August 2010, the President had sent a letter to Mr Hurnam stating that he had considered his representations but found "no merits in them". There had been no mention of the President's reply in any of the articles published by the appellant, even those published on 4 September 2010. Although contempt proceedings had by then been issued, the publication on 4 September had continued to cast doubt on the integrity of the Chief Justice and such allegations could only bring the administration of justice into disrepute. The allegations in the articles were baseless and malicious and calculated to undermine the authority of, and public confidence in, the judiciary and particularly the Chief Justice.

The case for the DPP

19.
The written case lodged on behalf of the DPP supports the findings of the Supreme Court and concludes by submitting that the administration of justice was more vulnerable in Mauritius than “in large and well established jurisdictions such as the United Kingdom”. It adds that from the language, presentation and contents of the articles, as well as the appellant's approach to the proceedings, they had not been published in good faith or purely because the subject was newsworthy and in the public interest, as contended by him. The contempt, the full extent of which could only be appreciated by examining the newspaper as a whole, including its visual impact, was grave and the appellant had shown no recognition of wrongdoing. Finally, the case concludes that a sentence of 3 months’ imprisonment was appropriate.

The appellant’s case

20.
The appellant’s case before the Board is that the offence should be declared no longer to exist in Mauritius, that, if it does exist the prosecution must prove that the defendant intended to cause damage to the administration of justice (or perhaps was reckless as to whether such damage would occur), that, whatever the test, the appellant did not receive a fair trial and that the appellant should not have been convicted. The Board turns to the five questions identified in para 2 above.

(1)
Scandalising the court – does the offence still exist in Mauritius?

21.
The criminal offence known as scandalising the court is a common law offence which is (or was) part of the law of contempt. It is generally regarded as having been invented by Wilmot J in the 18th Century in R v Almon in a draft judgment which was never delivered because the prosecution was dropped. It was subsequently published “because it was thought to contain so much legal knowledge on an important legal subject, as to be worthy of being preserved”: (1765) Wilm 243. The history of the offence is discussed in detail by Douglas Hay in Contempt by Scandalising the Court: a Political History of the first Hundred Years (1987) 25 Osgoode Hall Law Journal 431. It is also discussed in Arlidge, Eady and Smith on Contempt, 4th edition 2007, at paras 5-220 to 5-240. See also the 1st supplement, as at October 2013.

22.
It was submitted on behalf of the appellant in this appeal that the offence should no longer be treated as existing in Mauritius. The arguments for and against the offence were considered in the Law Commission Consultation Paper in England and Wales No 207 in 2012. In the event, as stated above, the common law offence was abolished in England and Wales in 2013.

23.
By the end of the nineteenth century, in McLeod v St Aubyn [1899] AC 549 the Privy Council regarded the offence as obsolete in England. In giving the advice of the Board, Lord Morris said at p 561:

“Committals for contempt of court by scandalising the court itself have become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them. But it must be considered that in small colonies, consisting principally of coloured populations, the enforcement in proper cases of committal for contempt of court for attacks on the court may be absolutely necessary to preserve in such a community the dignity of and respect for the court.”

The reference to “coloured populations” would be wholly inappropriate today.

24.
Contrary to the view of the Board in 1899, the offence proved alive and well the very next year. The classic definition of scandalising the court was stated by Lord Russell of Killowen CJ in the famous case of R v Gray [1900] 2 QB 36, where a journalist was found to be in contempt by scandalising the court for describing Darling J as “an impudent little man in horsehair, a microcosm of conceit and empty-headedness” and, adding that “no newspaper can exist except upon its merits, a condition from which the bench, happily for Mr Justice Darling, is exempt”. Lord Russell described the offence thus at p 40:

“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. The former class belongs to the category which Lord Hardwicke LC characterised as ‘scandalising a court or a judge’ [1] . 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 the public good, no court could or would treat that as contempt of court.”

25.
In Ambard v Attorney General for Trinidad and Tobago[1936] AC 322, Lord Atkin, giving the advice of the Board in another well-known judgment, after quoting the passage from McLeod v St Aubyn cited above, stressed the limitations of the offence at p 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.”

26.
Nearly 80 years have passed since that decision. As Lord Pannick (who was a proponent of the abolition of the crime in England and Wales) pointed out in a recent article published in January this year [2] , other distinguished judges have said much the same: see eg R v Commissioner of Police for the Metropolis ex p Blackburn (No 2) [1968] 2 QB 150 per Lord Denning MR at p 155, Salmon LJ at p 156 and Edmund Davies LJ at pp 156-7; and Secretary of State for Defence v Guardian Newspapers [1985] 1 AC 339, per Lord Diplock at p 347A, where he said that the offence was “virtually obsolescent in England”.

27.
Lord Pannick also noted that, in the light of the exceptions to free speech recognised in Ambard and Blackburn,prosecutions for contempt by scandalising the judiciary have continued to be brought over the last 40 years in many jurisdictions in the Commonwealth and many of them have succeeded. He added that although many of the courts emphasised that such prosecutions should be reserved for exceptional cases, none of them upheld contentions that the existence of the common law offence was of itself a breach of the right to freedom of expression.

28.
Lord Pannick identified four main points in support of abolition. First, the crime is based on dubious assumptions as to its necessity; for example that if confidence in the judiciary is so low that statements by critics would resonate with the public, such confidence is not going to be restored by a criminal prosecution in which judges find the comments to be scandalous or in which the defendant apologises. Second, the existence of the offence will deter people from speaking out on perceived judicial errors and freedom of expression helps to expose error and injustice and promotes debate on issues of public importance. Third, the modern offence recognises that some criticism of the judiciary is lawful. Fourth, where criticism deserves a response, there are other methods of answering it, as for example in appropriate circumstances by a public statement made by the Lord Chief Justice or by libel proceedings. Lord Pannick added that a wise judge follows the advice of Simon Brown LJ in Attorney General v Scriven, as quoted in Arlidge, Eady and Smith at para 5-207n: “a wry smile is, I think, our usual response and the more extravagant the allegations, the more ludicrous they sound.” And during the committee stage of the Bill that led to the recent Act Lord Carswell said that if judges were unjustly criticised, “they have to shrug their shoulders and get on with it”.

29.
There is considerable force in these points and it is readily understandable that the law in England and Wales has now been altered by statute. However, in this appeal the Board is concerned, not with the law of England and Wales, but with the law in Mauritius. This involves a consideration of decisions both in Mauritius and elsewhere, especially in the Commonwealth.

30.
In the context of Mauritius, the offence was most recently considered by the Board only about 15 years ago in 1999 in Ahnee v Director of Public Prosecutions [1999] 2 AC 294 in a judgment delivered by Lord Steyn. At pp 301-305 Lord Steyn considered what he called “Issue A: The existence of the power to punish for contempt”. For the reasons given in the judgment, which it is not necessary to repeat here, the Board held at p 304G that the Supreme Court of Mauritius had an inherent power to punish for contempt at common law and at p 305D that section 15 of the Courts Act as amended in 1981, was an additional sufficient basis for the power to punish for contempt. Those conclusions were not challenged in this appeal.

31.
By contrast, the reasoning of the Board at pp 305F to 307E under the heading “Issue B: The impact of the Constitution on the power to punish for contempt” was subjected to detailed scrutiny in the course of the argument in this appeal. Section 12 of the Constitution provides:

“12(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.”

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –

(a) in the interests of defence, public safety, public order, public morality or public health; (b)for the purpose of … maintaining the authority and independence of the courts …

except so far as that provision or, as the case may be, the thing done under its authority is shown not to be reasonably justifiable in a democratic society."

32.
In Ahnee it was submitted that the continued existence of the offence of scandalising the court was inconsistent with section 12 of the Constitution. The Board rejected that submission. Lord Steyn noted at p 305H that in the first part of the judgment it had concluded that the offence of scandalising the court exists to protect the administration of justice, which left the question whether the offence is reasonably justifiable in a democratic society within the meaning of section 12 of the Constitution.

33.
In that regard Lord Steyn observed that in England such proceedings were rare and that none had been successfully brought for more than 60 years, but he added that it was permissible to take into account that on a small island such as Mauritius the administration of justice is more vulnerable than in the United Kingdom. The need for the offence is greater. He referred in that regard to Feldman, Civil Liberties & Human Rights in England and Wales (l993), pp 746-747 and Barendt, Freedom of Speech (l985), pp. 218-219.

34.
Lord Steyn added at p 306A-E:

“Moreover, it must be borne in mind that the offence is narrowly defined. It does not extend to comment on the conduct of a judge unrelated to his performance on the bench. It exists solely to protect the administration of justice rather than the feelings of judges. There must be a real risk of undermining public confidence in the administration of justice. The field of application of the offence is also narrowed by the need in a democratic society for public scrutiny of the conduct of judges, and for the right of citizens to comment on matters of public concern. There is available to a defendant a defence based on the ‘right of criticising, in good faith, in private or public, the public act done in the seat of justice:’ see Reg v Gray [1900] 2 QB 36, 40; Ambard v. Attorney-General for Trinidad and Tobago [1936] AC 322, 335 and Badry v. Director of Public Prosecutions [1983] 2 AC 297. The classic illustration of such an offence is the imputation of improper motives to a judge. But, so far as Ambard's case [1936] AC 322 may suggest that such conduct must invariably be an offence their Lordships consider that such an absolute statement is not nowadays acceptable. For example, if a judge descends into the arena and embarks on extensive and plainly biased questioning of a defendant in a criminal trial, a criticism of bias may not be an offence. The exposure and criticism of such judicial misconduct would be in the public interest. On this point their Lordships prefer the view of the Australian courts that such conduct is not necessarily an offence: Rex v Nicholls (1911) 12 CLR 280. Given the narrow scope of the offence of scandalising the court, their Lordships are satisfied that the constitutional criterion that it must be necessary in a democratic society is in principle made out. The contrary argument is rejected.”

35.
Under “Issue C: mens rea” Lord Steyn said this at p 307D:

“Counsel for the contemnors submitted that the Supreme Court was wrong to hold that mens rea was not an ingredient of the offence of scandalising the court. The publication was intentional. If the article was calculated to undermine the authority of the court, and if the defence of fair criticism in good faith was inapplicable, the offence was established. There is no additional element of mens rea. The decision of the Supreme Court on this point of law was sound.”

36.
In the course of the argument in this appeal there was some debate as to how those two quotations from the judgment can be reconciled. In particular there was argument as to the meaning of “good

faith” in the first quotation and as to the meaning of “fair criticism in good faith” in the second quotation. It is at least arguable that the latter imports an objective question, namely whether the criticism was fair, so that a person could be convicted on the basis that the criticism was not objectively fair even if he acted throughout in good faith.

37.
The Board does not however so construe the judgment. It appears to the Board that, if there is any difference between the two formulations, the first (and more detailed) analysis is to be preferred. Thus the question is whether the defendant was acting in good faith. If he was, he has a defence to the allegation of contempt by scandalising the court even if his criticism cannot be shown to be objectively fair. This view is supported by the authorities, many of which have stressed the necessity for a defendant who is convicted to have acted otherwise than in good faith. For the reasons given in para 48 below, although good faith is sometimes described as a defence, the true position is that the burden is on the prosecution to prove absence of good faith.

38.
The question remains that stated by Lord Steyn, namely whether, in Mauritius, the offence is reasonably justifiable in a democratic society within the meaning of section 12 of the Constitution. The Board answered that question in the affirmative only about 15 years ago. Moreover, it has existed at common law for very many years and, although it has been much criticised and has been abolished by statute in England and Wales, it continues to exist in many parts of the common law world. A list of examples is contained in Annex 1, which is taken from a number of sources, including Lord Pannick’s article, Arlidge, Eady and Smith and the case for the intervener, The Commonwealth Lawyers’ Association, to which the Board is much indebted. Those cases show that not all courts approach the issues in the same way. The specific ingredients of the offence may vary across different jurisdictions. It is interesting to note that, as shown in Annex 1, the offence was established in 26 of the 34 cases, albeit in varying contexts. It is not necessary to analyse the cases in any detail in order to resolve the issues in this appeal.

39.
The Board further notes that the European Court of Human Rights has not declared the existence of the offence incompatible with Article 10 of the European Convention on Human Rights provided that the restrictions on free speech are proportionate: see eg De Haes and Gijsels v Belgium(1998) 25 EHRR 1 and Zugic v Croatia (no. 3699/08, 31 May 2011).

40.
Moreover, the offence of murmuring judges in Scotland has not been affected by the abolition of the offence in England and Wales. In the Scottish case of Anwar, Respondent [2008] HCJAC 36 a solicitor made a statement to the media following the jury’s verdict in which he criticised the proceedings. The specific charge of murmuring was not used but contempt proceedings were brought against the solicitor. The court observed at para 37:

“It is quite possible to conceive of language which would be of such an extreme nature that it did indeed challenge or affront the authority of the court or the supremacy of the law itself, particularly perhaps where the integrity or honesty of a particular judge, or the court generally, is attacked. That would be true, whether or not it related to particular ongoing proceedings. For that reason, if for no others, we reject the submission of senior counsel for the respondent that there could not be a contempt of court following the conclusion of the particular proceedings in question. We believe that what we have just said is wholly consistent with the terms of art 10 of the Convention.”

41.
In conclusion, although the Board would not now distinguish between small islands and larger territories merely on the grounds of size, it recognises that local conditions are relevant to the continued existence of the offence. It concludes that it would be inappropriate to depart from the decision in Ahnee and that, if the offence is to be abolished in Mauritius, it should be abolished by statute. It accordingly answers question (1) in the affirmative.

(2)
Scandalising the court –ingredients of the offence

42.
What then of the ingredients of the offence? In the passage from R v Gray quoted at para 24 above Lord Russell described the actus reus thus:

“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.”

The word ‘calculated’ is ambiguous and could be understood as meaning ‘subjectively intended’. However the authorities have construed it as meaning ‘objectively likely’: see eg R v Kopyto (1987) 47 DLR (4th) 213, 257 and 298-299; Nationwide News Pty v Wills (1992) 177 CLR 1, 24; R v Hoser and Kotabi Pty Ltd [2001] VSC 443, para 40; R v Mamabolo [2001] ZACC 17, para 70; and Secretary for Justice v Choy Bing Wing [2011] UKPC 63, para 37. Further, as Lord Steyn put it in the passage from Ahnee at p 306 quoted above, the offence exists solely to protect the administration of justice rather than the feelings of judges. There must be a real risk of undermining public confidence in the administration of justice.

43.
What then of the mens rea? This question is considered by Arlidge, Eady and Smith on Contempt at paras 5-246 to 5-251. It was originally said by Wilmot J that “it is the intention which, in all cases, constitutes the offence: ‘actus non fit reum, nisi mens sit rea’. He did not however describe the mens rea he had in mind.

44.
As Arlidge, Eady and Smith observe at para 5-247, the decision of the Divisional Court in R v Editor of New Statesman Ex p DPP (1928) 44 TLR 301 proceeded on the basis that mens rea was not necessary. Lord Hewart CJ said at p 303 that the article complained of constituted a contempt:

“It imputed unfairness and lack of impartiality to a Judge in the discharge of his judicial duties. The gravamen of the offence was that by lowering his authority it interfered with the performance of his judicial duties.”

Immediately thereafter he added:

“If they had come to the conclusion that that was intended by the writer, who was also the editor, the only proper course would have been to commit him to prison for contempt.”

45.
As Arlidge, Eady and Smith observe, that suggests that no intention was required to establish liability but it might affect the appropriate penalty. They also observe, correctly, that that decision has been widely influential in Commonwealth decisions. They cite, no doubt simply by way of example, A-G for NSW v Munday [1972] 2 NSWLR 887 at 911-2; Solicitor General v Radio Avon Ltd [1978] 1 NZLR 225

at 232-4; Re Oullet (1976) 67 DLR (3d) 73 at 92 and A-G v Lingle [1995] 1 SLR 696. They also cite Ahnee, presumably referring to page 307 quoted above.

46.
By contrast Arlidge, Eady and Smith say that the issue of mens rea needs to be addressed in the light of the later decisions. They refer to A-G v News Group Newspapers Plc [1989] 1 QB 110, A-G v Sport Newspapers Ltd [1991] 1 WLR 1194 and A-G v Newspaper Publishing Plc [1997] 1 WLR 926 at 937. In the opinion of the Board these decisions, although not conclusive, give some support for the conclusion that the prosecution must prove that the defendant intended to interfere with the administration of justice.

47.
The editors of Arlidge, Eady and Smith, writing of course before the recent statute, conclude at para 5-248 that in England and Wales it would probably be necessary to prove an intention to interfere with the administration of justice. In support of that proposition they direct the reader to the remarks of Lord Atkin in Ambard quoted at para 25 above, where he says:

“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.”

48.
The Board agrees. As Lord Steyn made clear in Ahnee, if the defendant acts in good faith, he is not liable. Since the court is here concerned with a criminal offence, the burden must be on the prosecution to establish the relevant facts beyond reasonable doubt. There can be no legal burden on the defendant. Thus, at any rate once the defendant asserts that he acted in good faith, the prosecution must establish that he acted in bad faith. If the prosecution establish that he either intended to undermine public confidence in the administration of justice or was subjectively reckless as to whether he did or not, that would in the opinion of the Board, be evidence of bad faith. It is perhaps for this reason that Lord Steyn expressed the view that the defendant had to act otherwise than in good faith, that is in bad faith, and that there was no further element of mens rea required.

49.
The Board has considered whether a defendant might be guilty on the basis of some more general bad faith than is comprised in the intention or recklessness referred to above. While the Board would not entirely rule it out, it appears to the Board that, once it is accepted that, as Lord Steyn put it in the context of actus reus, there must be a real risk of undermining public confidence in the administration of justice, the relevant mens rea should be related to the creation of that risk and that, while it makes sense to hold that the defendant commits the offence if he intends to undermine public confidence in the administration of justice or is subjectively reckless as to whether he did so, it is not easy to see that any other, more general, state of mind would amount to relevant bad faith sufficient to support a conviction.

(3)
Did the appellant receive a fair trial?

50.
The Board answers this question in the negative. Article 10 of the Constitution guaranteed the appellant’s right to a fair hearing. The Board understands that it may be necessary for the DPP in an appropriate case to take summary action and that a classic form of trial may not always be necessary,

but the Board is of the clear view that the alleged contemnor is always entitled to a fair trial and that, depending upon the circumstances, he will almost certainly be entitled to call oral evidence on his behalf, including his own evidence. In the instant case the Board has formed the view that the appellant was, as a matter of practical fact, deprived of his right to give evidence on his own behalf.

51.
The context is important. The DPP was represented at the hearing before the Supreme Court by the Senior Assistant DPP and two Senior Crown Counsel. On 31 March 2011 Matadeen SPJ expressed some exasperation with counsel for the appellant and asked him how long he had been practising at the Bar, to which he replied “over one and a half years”. A little later he was asked whether the affidavits were on record and he said that they were but that he would like to call the appellant. The following exchange between the court and counsel then took place:

“COURT: No, he has put in an affidavit. You should know your procedure. At the beginning of the case, I said all affidavits, I don't know whether you were present or not, but somebody was replacing you, I would wish to have all affidavits on record as quickly as possible.

COUNSEL: Well, in that case, I will not call Mr Dhooharika.

COURT: Whatever he has to say would be in the affidavit. Do you agree or not? It mustbe in affidavit.

COUNSEL: Yes, my Lords.

COURT: You should not be interrupted.

COUNSEL: I do agree, My Lords.

COURT: Where is your attorney? Your attorney is next to you. You can talk to your attorney [and] get instructions.

COUNSEL: Yes, My Lords, I do agree that everything has ….

COURT: You agree that everything should be by way of affidavit and you have put your case in the affidavit. Yes, anything else you have to say?

COUNSEL: Notat this stage, My Lords.”

The court then proceeded to hear the submissions of the parties.

52.
It was submitted on behalf of the appellant that he had been treated unfairly by the court and that he should have been permitted to give evidence. It was, however, submitted on behalf of the DPP that counsel had accepted the point made by the court that the evidence was in the affidavits and that he had been given the opportunity to take instructions on the point.

53.
The Board has reached the conclusion that the appellant should have been permitted to give evidence. Somewhat inexperienced counsel was put under some pressure to accept the court’s view that everything the appellant could say was or would be in his affidavit. In the opinion of the Board the court should have considered whether justice required that the appellant should have been given the opportunity of giving oral evidence in circumstances where his good faith was in issue and where, if he was convicted, he would or might be sent to prison. If the court had considered that question it

would surely have concluded that it was not sufficient to say that all relevant material must be in the affidavits. For these reasons the Board concludes that the trial was unfair to the appellant.

(4)
Was the appellant properly convicted of the offence?

54.
The Board answers this question in the negative because of its answer to question (3). It nevertheless turns to the substance of the matter. As explained above, in order to convict the appellant the court must be satisfied beyond reasonable doubt that the appellant acted in bad faith in publishing the articles and the editorial and that there was a real risk of causing damage to the administration of justice. Assuming, contrary to the Board's view, that it was permissible to determine the matter on the documents without hearing evidence from the appellant on the question whether he acted in good faith, the Board concludes that the Supreme Court was not justified in holding that he was acting in bad faith. In particular, it does not agree that any reasonable reader would have concluded from the front page that the Chief Justice must have been guilty of serious wrongdoing or that the only reasonable inference to be drawn from the editorial on page 3 was that the appellant was expressing his own view that the Chief Justice was not administering justice impartially and that he should explain his decisions before a tribunal.

55.
The appellant's case was that he was simply reporting the views of Mr Hurnam on a matter of public interest. The material must be read as a whole. There is no part of the publication in which the appellant espoused the views of Mr Hurnam as his own view or the views of the paper. The article on page 18 summarised in para 10 above essentially set out points made by Mr Hurnam, not the views of the paper or the appellant.

56.
The editorial at page 3 of the newspaper, which is summarised at para 11 above, being an editorial, is essentially somewhat different. However, it too centred on the allegations made by Mr Hurnam. It did so in the context of Mr Hurnam's request to the President of Mauritius that he set up a tribunal of inquiry into the allegations against the Chief Justice. That request was contained in a letter dated 27 July 2010 and was based on similar allegations to those made by Mr Hurnam in his interview. It is important to note that, under section 78(4)(a) of the Constitution, where in relation to the removal of the person holding the office of Chief Justice, the President considers that the question of removing the Chief Justice should be investigated, he must appoint a tribunal to investigate the matter. Under section 78(4)(b), the tribunal must investigate the matter and recommend whether the question of his removal should be referred to the Judicial Committee. By section 78(4)(c), where the tribunal so recommends, the President must refer the question accordingly.

57.
The Board does not agree with the Supreme Court that the various articles and their presentation, taken as a whole, were intended to convey the message that the allegations of Mr Hurnam were justified and that the Chief Justice should resign and appear before a tribunal. The thrust of them was rather that the allegations were such that they should be investigated and that the Chief Justice should put his position before the tribunal. The editorial expressly conceded that the paper was not equipped to judge a Chief Justice. It was for that reason that it expressed the view that the allegations should be judged by a tribunal, concluding that "in alleged cases of misconduct, it is incumbent on the accused judge to defend his integrity by agreeing to appear before a competent court named by the

President of the Republic". It was properly conceded on behalf of the appellant before the Board that some of the comments were perhaps ill-judged. The Board would go further and say that they were plainly ill-judged but the Board does not think that they prove bad faith on the part of the appellant.

58.
The Board understands that the Supreme Court were somewhat displeased with the appellant and his willingness to give publicity to the allegations and not to give publicity to the President's reply to Mr Hurnam's letter, which was dated 11 August 2010. There is certainly no evidence that the appellant enquired what reply had been received from the President. However, there is equally no evidence that the appellant knew that the President had replied or in what terms. The reply to Mr Hurnam, perhaps unsurprisingly, simply stated that the President had considered his representations, but that he found no merit in them and that he did not intend to proceed further with the matter.

59.
In all these circumstances the Board concludes the appellant was not proved to have acted in bad faith. He should certainly not have been held to have done so in circumstances in which, as explained above he did not give oral evidence. It follows that the appeal against conviction must be allowed.

(5)
Sentence

60.
In the light of the Board's conclusions set out above, the appeal on sentence does not arise. The Board has however considered it and has reached a clear conclusion. It would have allowed the appeal against sentence on the simple ground that the appellant should have been afforded an opportunity to make submissions in mitigation before a conclusion as to the correct sentence was reached. The transcript shows that the court proceeded to sentence immediately after delivering its judgment on the merits. There were a number of points which could have been advanced on his behalf in support of the conclusion that a custodial sentence was not necessary. The experience of this case shows that the prosecuting authorities should be careful to remind the trial court of the need to hear and consider submissions that go to possible mitigation of the sentence before sentence is pronounced.

Conclusion

61.
For these reasons the appeal against conviction is allowed. It appears to the Board that it follows that the respondent should pay the costs of the appellant both before the Supreme Court and the Board. However, if the respondent wishes to make submission to the contrary, he should do so in writing within 21 days of this judgment being handed down.

ANNEX A

Cases on scandalising the court

In addition to Mauritius (Ahnee v DPP (supra); Badry v DPP of Mauritius [1983] 2 AC 297), there have been modern examples of the use of the offence in:

i)
Australia e.g. Gallagher v Durack [1983] HCA 2; (1983) 152 C.L.R. 238 (High Court of Australia)*; Re Colina Ex P. Torney [1999] HCA 57; (1999) 200 C.L.R. 386 (High Court of Australia); Nationwide News Pty Ltd v Wills (1992) 177 CLR 1; R. v Hoser & Kotabi Pty Ltd [2001] VSC 443 (November 29, 2001);

[2003] V.R. 194 (Supreme Court of Appeal of Victoria)*; Director of Public Prosecutions v Francis and Anor (No 2) [2006] SASC 26*; Attorney General for the State of Queensland v Colin Lovatt QC [2003] QSC 279*; Fitzgibbon v Barker (1992) 111 FLR 191*; McGuirk v University of NSW [2009] NSWSC 1058; Xuarez v Vitela [2012] FamCA 574*; Lackey v Mae [2013] FMCAfam 284*;

ii)
Canada e.g. R. v Kopyto (1987) 47 DLR (4th) 213 (Court of Appeal of Ontario); Nicol, Re (1954) 3 DLR 690*; R v Murphy (1969) 4 (3d) DLR 289*;

iii)
Hong Kong e.g. Wong Yeung Ng v The Secretary for Justice [1999] 2 HKLRD 293 (CA)*; Secretary for Justice v Choy Bing Wing [2011] HKEC 63*;

iv)
India e.g. Narmada Bachao Andolan v Union of India (1999) AIR SC 3345 (Supreme Court of India);

v)
Malaysia e.g. Hiebert v Chandra Sri Ram [1999] 4 MLJ 321 (Court of Appeal of Malaysia)*;

vi)
New Zealand e.g. Solicitor-General v Radio Avon Ltd [1978] I N.Z.L.R. 225 (Court of Appeal of New Zealand)*; Solicitor-General v Smith [2004] 2 N.l.L.R. 540 (High Court of New Zealand)*; Attorney-General v Blundell [1942] NZLR 287*; Attorney General v Butler [1953] NZLR 944*;

vii)
South Africa e.g. The State v Mamabolo (CCT 44100) [2001] Z.A.C.C. 17; (2001) 3 S.A. 409 (CC) (Constitutional Court of South Africa);

viii)
Belize e.g. Director of Public Prosecutions v. The Belize Times Press Ltd and Another (1988) LRC (Const) 579*;

ix)
Singapore e.g. Shadrake v Attorney General [2011] S.G.C.A. 26 (Court of Appeal of Singapore)*; Attorney-General v Wain [1991] SLR(R) 85*; Attorney General v Lingle [1995] 1 SLR 696*; PT Makindo (formerly known as PT Makindo TBK v Aperchance Co Ltd [2011] SGCA 19; Attorney-General v Hertzberg [2008] SGHC 218*; Attorney-General v Tan Liang Joo John [2009] SGHC 41*; You Xin v Public Prosecutor and Anor [2007] SLR(R) 16; Attorney-General v Chee Soon Juan[2006] 2 SLR(R) 650*;

x)
Fiji e.g. In re Application by the Attorney General of Fiji [2009] FJHC 8 (High Court of Fiji)*;

xi)
Swaziland e.g. King v Swaziland Independent Publishers [2013]SZHC 88 (High Court of Swaziland)*;

xii)
Zimbabwe e.g. Re Chinamasa (2001) 2 SA 902 (25) 2 (Zimbabwe Supreme Court)*.

* indicates that the offence of contempt by scandalising was successfully invoked.

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[1] In re Read and Huggonson (1742) 1 Atk 291,469.

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