

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO AAU 0009 OF 1998S
(High Court Criminal Case No HBM3 of 1998)

BETWEEN:

MAHENDRA PAL CHAUDHARY

Appellant

AND:

ATTORNEY-GENERAL OF FIJI

Respondent

Coram: **The Rt. Hon. Sir Maurice Casey, Presiding Judge**
 The Hon. Sir Ian Barker, Justice of Appeal
 The Hon. Justice Ian R. Thompson, Justice of Appeal

Hearing: **Thursday, 4 February 1998⁹, Suva**

Counsel: **Mr R. Naidu for the Appellant**
 Mr S. Banuve, Mr S. Kumar for the Respondent.

Date of Judgment: **Tuesday 4 May 1999**

JUDGMENT OF THE COURT

On 7 April 1998 in the High Court at Suva, Fatiaki J found the appellant, Mr Mahendra Pal Chaudhary, guilty of contempt of court on the application of the respondent and ordered him to pay \$500 costs. He appeals against that finding and order.

The application was based on O.52, r1 of the High Court Rules 1988 which provides that the Court's power to punish for contempt may be exercised by an order of committal (inter alia) "otherwise than in connection with any proceedings" (O.52, r1(2)(b)). The appellant was described at the material time as a trade unionist and leader of the Labour Party in Parliament. The grounds on which the order of committal was sought were expressed in the Notice of Motion of 10 February 1998 as "his contempt of this Honourable Court in

publishing pamphlets (sic) and causing [it to be] published in the issue of the Daily Post dated 14 July 1997 under the heading "Judiciary Corrupt". The words complained of appeared in the following paragraph of the pamphlet alleged to have been published by the appellant:-

There has been public suspicion since the coups that many in our judicial system are corrupt. In several cases well known lawyers have been identified as receiving agents for magistrates and judges. A number of lawyers are known to arrange for them to appear before their preferred magistrates or judges.

It was claimed that this statement constituted a form of contempt recognised by the common law as that of 'scandalising' the court. It was included in a chapter relating to Law and Order as part of a wide-ranging social and political review of Fiji, expressed occasionally in robust language, and generally consistent with what could be expected in a party political report of such a nature.

The affidavit of Kamal Iyer, a journalist (which was not challenged by cross-examination) established that the appellant, as Secretary-General of the Labour Party, presented the pamphlet to a meeting of party delegates on 11 July 1997 and it was distributed to journalists and news media. It was a lengthy document over the signature of Mahendra Pal Chaudhary as Secretary-General, headed "Fiji Labour Party Report of the Secretary-General to the 12th Delegates Conference, Tokatoka Resort, Nadi - 11 July 1997". In spite of Mr Naidu's submissions in support of the ground of appeal alleging that publication of the report by the appellant had not been proved to the required standard of beyond reasonable doubt, we are satisfied that this was clearly established on the evidence and agree with His Lordship's conclusion to this effect. We also concur in his view that instead of alleging a single contempt of causing the pamphlet to be published in the newspaper (as contended for by Mr Naidu), the Notice of Motion alleged two separate contempts, one of publishing the pamphlet, and the other of causing it to be published in the Daily Post. His Lordship found the second allegation was not proved and the appeal is concerned only with Mr Chaudhary's own publication of the statement.

We saw no merit in Mr Naidu's submission that the Notice of Motion did not particularise sufficiently the details of the publication. No application was made for further particulars, and we reject any suggestion that Mr Chaudhary was uncertain of what was charged against him, or placed at any disadvantage in defending himself. Mr Naidu relied on

Harmsworth v Harmsworth [1978] 3 All ER 816 where the Divisional Court of Appeal held that a notice served on a person charged with contempt should contain enough information to enable him or her to meet the charge, and it was not sufficient to have this particularised in another document or affidavit.

O.52, r3 of the High Court Rules dealing with the Motion for a Committal Order has no requirement that the grounds be stated in it, as distinct from the comparable English O.52 r4 which contains such a direction. There is provision in our O.52 r3(3) for service, along with the Notice of Motion, of the affidavit and statement in support of the originating application for leave under O.52, r2, which was done here. This is clearly designed to give the respondent the information he or she needs to meet the contempt charged in the Motion. It was sufficient in this case. We see no need to introduce into our Rules the added refinement that the motion itself should contain similar particulars. Accordingly we are not prepared to follow Harmsworth and other English authorities suggesting this must be done as a matter of course. The contempt alleged in that case consisted of breaches of a non-molestation order, and it may be sensible in such situations for details of the episodes relied on to be included in the Notice of Motion, even though there is no requirement for that to be done. But there was no need for such particularity here.

The surviving issue in the appeal is the effect on the law of contempt of the provisions of the 1990 Constitution then in force relating to freedom of expression. Under s4(b) that right was declared and protected, and s13 read:

Protection of freedom of expression

13(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 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 -

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- (b) for the purpose ofmaintaining the authority and independence of the courts.....*
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except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

Section 121 provided:

The superior courts shall have power to punish persons for contempt in accordance with the law.

We take this to be declaratory of the existing powers, both explicit and inherent, of the superior courts, but that the law they apply and the things done under its authority must still accord with the requirements of the Constitution and in particular with s13.

In the High Court Fatiaki J said he had not the slightest doubt that the law of contempt of court is a legitimate, necessary and reasonably justifiable law in a democratic society having as its sole purpose the maintenance and authority of the courts. He referred to Vijaya Parmananandam v Attorney -General (1972) 18 FLR 90 (CA) upholding a finding of contempt by the then Supreme (now High) Court in relation to a statement scandalising the court, but it seems that it did not have the advantage of considering the body of law which has since been developed in other jurisdictions with similar constitutional guarantees. His Lordship distinguished the decision of the majority in the Ontario Court of Appeal in R v Kopyto (1988) 47 DLR (4th) 213 holding there was no such contempt because of the effect of a provision similar to that in s13(2) relating to reasonable justification in a democratic society.

Contempt at common-law

In determining the extent to which the law relating to contempt by scandalising the Court is 'reasonably justifiable in a democratic society', it is appropriate to ascertain how that law is presently understood in common-law jurisdictions. Recent cases in England show the tension existing between the perceived need in the public interest to punish statements scandalising the Courts or judges, and the common-law values of freedom of speech and expression. The existence of this form of contempt, recognised in earlier cases, was confirmed in St. James Evening Post (1742) 2 Atk 469; 26 ER 642. There were few reported cases thereafter and in 1899 Lord Morris said it was obsolete in England (McLeod v St Aubyn [1899] AC 549, 561); however, in the following year it was applied in R v Gray [1890] 2QB 36 to punish those responsible for an article abusing a judge. After a series of cases dealing with publications alleging bias or partiality by the Courts, Lord Atkin emphasised in 1936 that

it was legitimate for members of the public to criticise judges or the administration of justice, even erroneously, so long as they abstained from imputing improper motives to them and were genuinely exercising a right of criticism and were not acting in malice or attempting to impair the administration of justice. 'Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.' (Ambard v Attorney-General for Trinidad and Tobago [1936] AC 322, 325 (PC)).

By 1985 contempt by scandalising the Court was described by Lord Diplock as 'virtually obsolescent' in Secretary of State for Defence v Guardian Newspapers Ltd [1985] AC 339, 347A, and it is said in Arlidge, Eady and Smith on Contempt (2nd edition) (London, Sweet & Maxwell 1999) at p341 that proceedings for contempt of this kind are rare, the Courts in the United Kingdom preferring to ignore attacks upon themselves.

An intention to interfere with the proper administration of justice was not seen as a necessary ingredient of the offence of contempt by scandalising the court in Attorney-General v Butterworth [1963] 1QB 696 (it was enough if the action complained of was inherently likely so to interfere), or by Lord Hewart in R v Editor of New Statesman ex parte DPP (1928) 44 TLR 301, and this view has been adopted in other common-law jurisdictions - see Attorney-General for NSW v Munday [1972] 2 NSWLR 887, 911 and Solicitor-General v Radio Avon Ltd [1978] 1 NZLR 225, 232.

Jurisdiction at common-law to punish for contempt has been recognised in other Commonwealth Courts as well as by this Court in Vijaya Parmanandam v Attorney-General on much the same basis as that current in the United Kingdom. But it is a jurisdiction to be exercised cautiously and with due regard for freedom of speech, as the New Zealand Court of Appeal acknowledged in Solicitor-General v Radio Avon Ltd, decided before the passing of the New Zealand Bill of Rights Act in 1990. After citing at p230 the passage referred to above from Lord Atkin's judgment in Ambard v Attorney-General, that Court said:

The courts in New Zealand, as in the United Kingdom, completely recognise the importance of freedom of speech in relation to their work provided that criticism is put forward fairly and honestly for a legitimate purpose and not for the purpose of injuring our system of justice.

However, it added that there was an area of uncertainty in Lord Atkin's statement, which could be interpreted as excluding from protection any form of criticism imputing improper motives to those taking part in the administration of justice, and went on to say:

If this were the law then nobody could publish a true account of the conduct of a judge if the matter published disclosed that the judge had in fact acted from some improper motive. Nor would it be possible, on the basis of facts truly stated, to make an honest and fair comment suggesting some improper motive, such as partiality or bias, without running the risk of being held in contempt.

The Court referred to published works suggesting that a defence of justification or fair comment could be an answer to this dilemma, citing in support of fair comment the judgment of Griffith J in the High Court of Australia in R v Nicholls (1911) 12 CLR 280, 286; and R v Fletcher (1935) 52 CLR 248, 257-8, and other Australian State judgments to the same effect. Lord Denning also upheld the right of fair comment in Metropolitan Police Commissioner ex parte Blackburn [1968] 2 QB 150, 155. The Court noted in Solicitor-General v Radio Avon Ltd that there were 'greater difficulties' with a defence of justification. One problem could be that airing in court a disputed claim of truth could do more harm to public confidence in a judge or court than the original publication (see para 165 of the U.K. Phillimore Committee's Report). However, truth was recognised as a defence in Nationwide News Pty Ltd v Wells (1992) 177 CLR 1, 39 per Brennan J who said:

.....the revelation of truth - at all events when its revelation is for the public benefit and the making of a fair criticism based on fact do not amount to a contempt of court though the truth revealed or the criticism made is such as to deprive the court of public confidence.

The logic in recognising truth as a defence is compelling and accords with current attitudes of the common law relating to this form of contempt. On the other hand, the use in this judgment of such terms as 'unjustified', 'baseless' and 'unwarranted' in referring to statements scandalising the court indicate an objective test, so that a mistaken belief in the truth of the allegations would not avail the defendant.

This summary indicates that the common-law offence of contempt scandalising the Court involves attacks upon the integrity or impartiality of judges or Courts, the mischief aimed at being a real risk of undermining public confidence in the administration of justice, which must be established beyond reasonable doubt (See Solicitor-General v Radio Avon Ltd at p234). We accept that in respect of such attacks, a defence is available of honest and fair

comment on the basis of facts truly stated, and of justification or truth. Mr Chaudhary did not invoke either by way of defence, and we consider his counsel's concession that his remarks amounted to contempt on purely common-law principles was rightly made.

The Constitutional Impact

As recorded earlier in this judgment, s13(2) of the 1990 Constitution provided that nothing contained in any law should be held to be inconsistent with, or in contravention of, s13(1) protecting freedom of expression, to the extent that it made provision for the purpose (among other things) of maintaining the authority and independence of the courts. We have no doubt that such laws would include the common-law provisions relating to contempt under its various headings such as disobedience of a court order, conduct prejudicing a fair trial and statements scandalising the court, except so far as they are shown not to be reasonably justifiable in a democratic society, this being the overall qualification to s13(2). There may be a question of where the onus lies of persuading the court on this qualification, but this was not argued on the appeal. We incline to the view that the answer should not depend on narrow considerations of the burden of proof, but should be resolved by having regard to all the material before the Court in the light of judicial knowledge and experience, and in accordance with the Constitution's manifest intention.

Neither the Canadian Charter of Rights and Freedoms (in force since 1982) nor the New Zealand Bill of Rights Act 1990 contains a specific provision corresponding to s13(2) upholding laws maintaining the authority and independence of the courts, but in both jurisdictions the same result has been achieved by the provisions subjecting the guarantees of rights in the Charter and the Act to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. These are sufficiently close to the final qualification to s13(2) of Fiji's 1990 Constitution as to make decisions in those jurisdictions relevant in determining how it should be applied.

In Canada the principles to be adopted in determining the limits were enunciated in R v Oakes (1986) 26 DLR (4th) 200 and summarised by the Supreme Court of Canada in R v Chaulk (1991) 2 CR (4th) 1, 27-28 as follows:

- 1. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to*

concerns which are pressing and substantial in a free and democratic society before it can be characterised as sufficiently important.

2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass the proportionality test; that is to say they must:

- (a) be 'rationally connected' to the objective and not be arbitrary, unfair or based on irrational considerations;*
- (b) impair the right or freedom in question 'as little as possible'; and*
- (c) be such that their effects on the limitation of rights and freedoms are proportionate to the objective.*

In New Zealand Richardson J adopted broadly similar considerations in Ministry of Transport v Noort [1992] 3 NZLR 260 (CA). There have been no reported cases of scandalising contempt there since the passage of the Bill of Rights Act, but the courts have had to consider its impact on other forms of contempt likely to interfere with a fair trial: see Solicitor-General v Radio New Zealand Ltd [1994] 1 NZLR 48 and Duff v Communicado Ltd [1996] 2 NZLR 89.

R v Kopyto is the leading Canadian authority on the effect of the Charter on the offence of scandalising the Court. In that case, the majority (3-2) of the Ontario Court of Appeal allowed an appeal by a lawyer against his conviction for contempt in respect of an emotive statement that the courts were warped in favour of the police. Cory and Goodman JJA held that the offence as charged did not meet the proportionality test referred to above. To do so, they said it would have to be proved that the words complained of produced real, substantial and immediate danger to the proper administration of justice. This is much the same as the 'clear and present danger' test adopted in the United States (see for example Craig v Harney 331 US 367 (1947)) in applying its constitutional guarantees of free speech. In their view the offence as constituted by the common law, lacking this requirement, did not impose a reasonable limitation to the right to freedom of expression. Houlden JA (the other member of the majority) went further and held that even if the offence were re-defined to include such a requirement of immediate danger, it would still be inconsistent with the Charter and he considered it was no longer of any force.

With respect, we think the majority view puts the threshold unduly high. In effect it means that scandalising contempt would be virtually impossible to establish, a fact

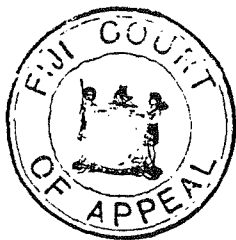
acknowledged by at least one Canadian commentator who said it was reasonable to assume that this form of contempt no longer exists in the light of R v Kopyto (Martin, Media Law in Canada (1997)). There have been no reported cases of scandalising contempt since then. In Fiji, s13(2)(b) of the Constitution affords explicit protection to laws aimed at maintaining the authority and independence of the courts, and the qualification about reasonable justification at the end must be interpreted with this in mind. We prefer the 'real risk' test accepted by the New Zealand Court of Appeal in Solicitor-General v Radio Avon Ltd. at p234. This accords with the general common-law view reflected in Attorney-General v Times Newspapers Ltd [1974] AC 273, and with the views of the minority in R v Kopyto.

With the adoption of this threshold to liability as an appropriate ingredient of the proportionality test enunciated by the Canadian Supreme Court, we are satisfied that the common-law offence of scandalising the court meets its requirements. In terms of the principles summarised in R v Chaulk it is not irrational, arbitrary or unfair (para 2(a)); and with the defences of fair comment and truth, it impairs freedom of speech 'as little as possible' (para 2(b)), and is proportional to the Constitutional objective of maintaining the authority and independence of the courts (para 2(c)). Accordingly it has not been 'shown not to be reasonably justifiable in a democratic society', thus satisfying the requirements s13(2)(b).

The 'real risk' test may exonerate angry outbursts by disappointed litigants or their counsel (as was evidently the situation in Kopyto) since reasonable people would understand them for what they were and would not treat them seriously; indeed this point was made by Judges in that case. There may also be room by analogy with the defence of fair comment for the voicing of genuine suspicions about judicial misconduct in the absence of hard evidence. This may be for the wider public benefit by signalling the need for open debate and enquiry, which are the hall-marks of a truly democratic society. In the long run it cannot be good for the administration of justice for such misgivings to be repressed, especially if they are felt by responsible citizens. However, Mr Chaudhary's statement went far beyond the voicing of mere suspicions. We are satisfied that his considered and unsubstantiated allegations of corruption were serious enough to constitute a real risk to the authority and independence of the Courts, and we agree with Fatiaki J that the charge against him was proved.

Result

The appeal is dismissed. As it raised an important Constitutional question, we do not think Mr Chaudhary should be required to pay costs in this Court and we make no order for them.



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The Rt Hon Sir Maurice Casey

Handwritten signature of Ian Barker in cursive script.

The Hon Sir Ian Barker

Handwritten signature of Ian R Thompson in cursive script.

The Hon Justice Ian R Thompson

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