Privy Council Appeal No. 50 of 1995

Nankissoon Boodram also called Dole Chadee *Appellant*

v.

(1) The Attorney General of Trinidad and Tobago and
(2) The Director of Public Prosecutions *Respondents*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

REASONS FOR DECISION OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, OF THE 13TH DECEMBER 1995, Delivered the 19th February 1996

Present at the hearing:-

Lord Goff of Chieveley
Lord Jauncey of Tullichettle
Lord Mustill
Lord Steyn
Lord Hoffmann

*[Delivered by **Lord Mustill**]*

On 13th December 1995 their Lordships dismissed with costs an appeal from a judgment of the Court of Appeal of Trinidad and Tobago given on 20th January 1995, for reasons to be given at a later date. These reasons now follow.

On 10th January 1994 four persons were killed in Williamsville in the County of Victoria. On 14th May 1994 the appellant Nankissoon Boodram (also called Dole Chadee) together with several others was charged with their murder. The preliminary enquiry in relation to these charges began before a Presiding Magistrate on 21st July 1994 and continued until 30th September 1994. At the conclusion of the enquiry the appellant was committed for trial, and he was subsequently indicted to stand trial on four counts of murder at Port of Spain Assizes on 4th November 1994.

Meanwhile, there had appeared in the press and other media a series of reports about the appellant and his impending trial. As will appear, their Lordships find it unnecessary to examine in detail the contents and possible impact of these reports. It is therefore convenient, for the purposes of the present appeal alone, to adopt the following summary of them contained in the appellant's printed case.

"During the course of the preliminary enquiry, the following articles were published:

(a) 'Turnkey trying to set up Dole' on page 8 of the Sunday Mirror for 4 September 1994 which said of the appellant that:

(i) He was a convicted drug dealer;

(ii) Telephone calls had been made from a cellular telephone in his cell to two notorious 'hit men' and to very senior police officers, and

(iii) By implication that he was a notorious drug dealer who had to be closely watched.

(b) 'Top US Diplomat in Coke scam' on the front page of the TNT Mirror for 9 September 1994 which said of the appellant that:

(i) He thought he was a major dealer of cocaine and part of the cocaine cartel referred to in paragraph 1 of the article;

(ii) The local drug mafia had put out a contract to kill a potential witness and expected to be able to do so notwithstanding that he was under the protection of the US Drug Enforcement Agency;

(iii) There were fears for the safety of witnesses in the appellant's own case.

On 21 October 1994 after the appellant was committed for trial, it was reported by the electronic media that one Clint Huggins (a witness who was called to testify by the Prosecution at the preliminary enquiry) had been killed. The report in the incident was linked photographic footage to the appellant.

On 21 October 1994 on its front page under the heading 'Witness killed under guards' noses', the Daily Express reported the killing of Huggins. The article contained the following prejudicial material:

(a) Huggins was the main Prosecution witness against the appellant in his forthcoming trial.

(b) In order to protect Huggins whilst he gave evidence during the preliminary enquiry he was air-lifted into Court, wearing a bullet-proof vest, contrary to the provisions of section 42 of the Indictable Offences (Preliminary Enquiry) Act Chapter 12:01.

In an accompanying article 'Tales of Dead Men and Women' on the front page of the Daily Express, it was reported that:

(a) The appellant had previously been charged with murder.

(b) The highest rate of witness mortality was in relation to trials of the appellant's family. An account was then given of various witness killings in cases involving members of the appellant's family.

(c) The killing of Huggins might sufficiently weaken the State's case against the appellant's brother that he would go free.

(d) Huggins was associated in the public mind with the appellant rather than his brother. The appellant's dealings with the law were associated with even more fatalities than his brother and an account was given of a witness killing and the suborning of another witness. It was reported that as a result the Crown's case had collapsed.

The clear implication of both articles in the Daily Express was that:

(a) The appellant was involved in the killing of Clint Huggins with a view to securing the collapse of the prosecution case in his forthcoming trial.

(b) The appellant had previously engaged in witness intimidation and killing in order to secure an acquittal on a previous murder charge.

(c) His brother was engaged in such activity.

(d) The appellant or his associates were such a threat to the security of Huggins that he had to be specially protected whilst giving evidence at the preliminary enquiry.

Reports were also carried in the Trinidad Guardian for 21 October 1994 relating to the killing of Clint Huggins. Reference is made to the special security measures taken to protect the appellant. A similar breach was committed by the publishers of Newsday for 21 October 1994 under the

heading 'Witness Poisoned' and under the heading 'Nervous and Tense Witness'. Newsday gave details of the way in which Clint Huggins gave evidence during the preliminary enquiry, its contents and stated in terms that Huggins' evidence was convincing enough for the Magistrate to commit the appellant for trial.

In the Trinidad Guardian for 22 October 1994, it was reported that Huggins' death had been faked by the authorities in order to catch a group of people plotting to kill Huggins for a payment of 950,000 Trinidad dollars. Similar reports were carried by other publications.

In the Sunday Express for 23 October 1994, it was reported that the payment for the contract killing of Huggins was US$200,000 and that he was the key witness against the appellant in his murder trial. The implication in the final two paragraphs of the article was that the plot to kill Huggins was instituted by a drug-related criminal organisation.

In the Sunday T & T Mirror for 23 October 1994, it was reported that the leaders of the Indian mafia were in shock after learning that the attempt to kill Clint Huggins had been thwarted and they had been duped. It was reported by underworld sources 'that with Huggins out of the way, they would now order hits on several police officers and members of the prosecution team who had been paid to prevent the murder case against reputed drug lord Dole Chadee and nine other men from reaching the High Court'.

In the T & T Mirror for 28 October 1994 under the heading 'Drug Mafia Hunts for Hitman with Deadly Weapon $18m dollars on Huggins' Head!', it was reported that the local drug mafia was seeking a professional killer to kill Huggins before the trial of the appellant began and referred to the appellant as a reputed drug lord and again emphasised that Huggins was the key witness against the appellant. The motive for killing Huggins was said to prevent the appellant from implicating others involved in the drugs trade. The clear implication of this paragraph in its context was that the appellant had information to give and that this was because he was involved in the local drugs mafia.

There were further reports detailing arrangements for changes to the venue of the appellant's trial and measures to ensure security, implying again that the appellant was a security risk (see also the announcement in the Attorney General)."

Not long after the conclusion of the preliminary hearing there were published a small number of further reports of a sensational nature, and still further press comments appeared during the nine months following the decision of the Court of Appeal. It is not necessary to describe these. The general flavour of all the publicity appears sufficiently from the summary already given.

Given the nature of these reports it is not surprising that when the first series appeared in the course of the preliminary hearing counsel for the appellant raised their publication with the Magistrate. An assurance was then given by counsel for the Director of Prosecutions (hereafter "the Director") that the appellant's concerns would be conveyed to him, and this was followed up after the conclusion of the committal proceedings (but before the publication of the later series of reports) by a letter from counsel for the appellant repeating the complaint. What is surprising, to say the least, is that the Director seems to have done nothing at all. It would certainly be understandable, if it were the case, that he might think it wiser to postpone proceedings for contempt of court until after the trial, for fear of making matters worse by giving fresh currency to the reports. This would not however be an objection to the issuing of direct reminders to the media both to avoid anything which might prejudice a fair trial and to take care not to expose themselves to the risk of subsequent proceedings for contempt of court. Whether the Director never thought of this expedient, or having thought of it decided on grounds which he considered sufficient not to adopt it, their Lordships cannot say; for although the Director is a respondent to this appeal he has given no account of his reasoning.

To continue the narrative, the appellant having been committed for trial and fearing, rightly as it transpired, that media comment would continue unabated, issued a notice of motion in the High Court claiming various items of relief, including declarations that his constitutional rights had been infringed and, more importantly, an order that the prosecution should be stayed either permanently or for a stated time. Underlying all the claims are two contentions based on the Constitution of Trinidad and Tobago, Act 4 of 1976. First, that the media comment and/or the failure of the Director to do anything about it were in themselves an infringement of his rights under the Constitution; and, second, that the comment has prejudiced his constitutional right to a fair trial. In the course of the proceedings in Trinidad and Tobago the appellant ceased to insist that his trial will never be capable of a fair resolution and should accordingly be brought to a complete halt. He does however maintain that a substantial time must elapse before it can safely be assumed that the injury will have healed.

The provisions of the Constitution on which the appellant relies are as follows:-

"4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist ... the following fundamental human rights and freedoms, namely -

(a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law;

(b) the right of the individual to equality before the law and the protection of the law;

...

5.(1) Except as is otherwise expressly provided in this Chapter and in section 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared.

(2) Without prejudice to subsection (1) ... Parliament may not -

...

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

(f) deprive a person charged with a criminal offence of the right-

...

(ii) to a fair and public hearing by an independent and impartial tribunal;

...

14.(1) For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion.

(2) The High Court shall have original jurisdiction -

(a) to hear and determine any application made by any person in pursuance of subsection (1);

...

> and may ... make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled.
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> ...
>
> (5) Any person aggrieved by any determination of the High Court under this section may appeal therefrom to the Court of Appeal ..."

The appellant's claims for constitutional relief based on these provisions were dismissed successively by Warner J. and the Court of Appeal in thoughtful and thorough judgments. At first instance Warner J., after discussing in detail the rival contentions, and the reported decisions on which they were based, summarised her conclusions in the following passages:-

> "The right to trial by jury has been described in England as a most 'venerated institution' and lauded as a 'bulwark against oppression and the common sense voice of twelve ordinary citizens'. While in Trinidad and Tobago there have been calls for the revision of the jury system, trial by jury continues to be an integral part of a legal system and daily in our Criminal Courts jurors carry out their duties under the Jury Act Ch. 6:53 ...
>
> [Counsel for the appellant] has commented on the failure of the Director of Public Prosecutions to file an affidavit in these proceedings. It must be borne in mind that the onus is on the applicant to establish the likelihood of an unfair trial. Parliament has under the Constitution imposed certain duties on the Director of Public Prosecutions and he has an unfettered discretion to act in any case in which he considers it proper so to do; that is not to say however that he is empowered to exercise them oppressively. I have found nothing in the dicta in [*Grant v. Director of Public Prosecutions* (1979) 29 W.I.R. 235, and [1982] A.C. 190] which suggests to me that the failure of the Director Public Prosecutions to institute proceedings for contempt is a breach of the applicant's fundamental rights.
>
> The Constitution guarantees a right to a fair trial, but is it to be assumed in advance that extensive pre-trial publicity is evidence that the applicant will be denied this right?
>
> While it is true that the Constitution must be construed generously in favour of rights and liberties, the applicant must point to some specific right which has been infringed

> ... I am persuaded to accept the arguments presented on behalf of the respondents that pre-trial publicity does not necessarily lead to an unfair trial.
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> ...
>
> I have been invited by the applicant to find that there has been contempt and to call certain newspapers before me to show cause. As much as this Court may find that some of the matters complained of may be potentially prejudicial, I do have to keep at the forefront of my mind that this is not a contempt action, where the lawfulness or unlawfulness of the publication depends on whether the publication is likely to interfere with the fair trial of the charge against the accused. This is a constitutional motion where redress is against the State or some other public authority endowed by the law with coercive power.
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> ...
>
> I therefore hold that there has been no infringement of the applicant's constitutional rights; the applicant has not discharged the heavy burden of proving that his right to a fair hearing has been, or is likely to be infringed, and it is for the trial judge to determine what remedial measures ought to be employed if these be necessary."

The leading judgment of the Court of Appeal, delivered by Sharma J.A., with which the other members of the court agreed, began with a discussion of the balance struck in various common law jurisdictions between freedom of the press and the demands of a fair trial, and continued with a rehearsal of the authorities relevant to the appellant's attack on the Director of Public Prosecutions. The learned judge's conclusions on this part of the appeal were as follows:-

> "... in deciding whether he should bring proceedings the D.P.P. has to consider all the circumstances. He may choose to bring it before the trial is actually heard, or even after, if he considers for instance that if it were brought before the trial, publicity attendant upon such proceedings may actually exacerbate the prejudice. If [counsel for the appellant] is correct then, it would clearly mean, that all proceedings for contempt must precede the trial, thereby creating an inflexible and rigid rule, and thus depriving the D.P.P. of an important discretion. This we cannot accept ...
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> Since the contempt invariably arises after the articles have been published, then it would logically mean, that the mischief of bias, has already seeped into the minds of potential jurors, therefore it is difficult to see how, the

> failure to take contempt proceedings has deemed the appellant the right to a fair trial. ... I am of the opinion, that, 'the protection of the law' that the appellant is entitled to receive in these circumstances, is his access to the Constitutional Court and the Criminal Courts where the judge will apply all the necessary procedural steps and substantive law to ensure a fair trial. ...
>
> Protection of the law was also discussed in *The Attorney General v. McLeod* (1984) 32 W.I.R. 450 at p.459. Applying the principles therein set out to the instant case it would appear that so long as the judicial system of Trinidad and Tobago affords a procedure by which the appellant as a person interested in establishing that he cannot get a fair trial can obtain from the courts a declaration to this effect then in these circumstances he cannot complain that he is deprived of the protection of the law. Access to the court for that purpose itself is protection of the law to which he is entitled and of course trial by the court itself would be 'due process' to which he is also entitled."

The learned judge then discussed and quoted at length from the judgments delivered by the Court of Appeal of Jamaica and the Judicial Committee in *Grant v. Director of Public Prosecutions* (1979) 29 W.I.R. 235 and [1982] A.C. 190 and by Lawton J. in *R. v. Kray* (1969) 53 Cr.App.R. 412. Finally, he expressed the conclusion of the court as follows:-

> "The trial judge has at his disposal the several common law options available to him on the application of the accused to ensure whether it would be proper to postpone the trial, or to carry on with it, if the accused has not established prejudice on the part of the potential jurors, or whatever he thinks necessary to ensure the accused gets a fair trial.
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> It seems to me, that in fact, the Criminal Court is by far the more suitable forum for the accused to pursue his application. The prospective jurors would actually be there, and he would have the ideal opportunity to demonstrate 'live' any alleged prejudice with some degree of certainty and not leave it to the cold and clinical Constitutional Court, to conjecture whether he is likely to get a fair trial or not.
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> It is not to say, he is being driven away from the Constitutional Court. His motion is simply stayed or dismissed if the judge is so satisfied and the more effective method can then be resorted to by the accused to ensure the fair trial which he so passionately craves."

It will be seen that the reasoning in these judgments had two strands. First there was a response to the appellant's complaint that the inaction of the Director was a breach of his constitutional rights sufficient in itself to require a postponement of the trial. On the appeal to the Board this contention opened up a discussion about the constitutional position of the Director, about the extent to which his acts and omissions are susceptible of review by the court in its constitutional or other jurisdictions, and about the implications of the Director's dual role as the person who initiates and pursues the prosecution and a person (although not necessarily the only person) who can take measures to forestall and punish misconduct by the media.

Their Lordships think it preferable not to enter into these important questions, for they are of no practical significance here. In a case such as this, the publications either will or will not prove to have been so harmful that when the time for the trial arrives the techniques available to the trial judge for neutralising them will be insufficient to prevent injustice. If the trial judge concludes that they still have a continuing and unacceptable prejudicial effect, and decides in the exercise of his or her discretion that the proper course is to postpone the trial, the ground for decision will be the risk of injustice arising from the fact of the publications, not the fault (if fault there has been) on the part of the Director in being insufficiently vigorous in the exercise of his powers. Conversely, if the measures available to the trial judge will be sufficient to overcome any harm which might otherwise be done by the publications the fact (if it is a fact) that the Director may have been at fault is no reason for the trial court, or the High Court in its constitutional role, to interfere with the ordinary progress of the criminal law. The appellant will receive the fair trial to which he is entitled, and the antecedent fault of the Director is no reason why it should not go ahead. On neither view will the complaint against the Director yield the appellant any relief to which he would not otherwise be entitled.

Their Lordships therefore consider it unnecessary and undesirable to express any opinion on the remedies, if any, to which the Director may be exposed if it transpires that he has done less than circumstances required to stifle any further objectionable publicity. In adopting this course their Lordships must not be understood to endorse the contention that because the appellant may himself have been able personally to take proceedings against the offending newspapers and broadcasters, the Director is necessarily exonerated from any obligations in this regard. This would be wrong. The primary responsibility rests upon the Director, who by virtue of his position both as a participant in the criminal process and as the officer of State with the authority and means to prosecute contemners owes a heavy

responsibility towards the court, the defendants brought before it, and the community at large to play his part in keeping (as Lord Diplock put it in *Grant v. Director of Public Prosecutions* [1982] A.C. 190, 200) "the springs of justice undefiled". This is not, of course, to say that he must act on every complaint, however trifling, and still less that immediate proceedings for contempt will always be the right option. Nevertheless alertness on his part to guard against any serious risk that trial by jury will develop into trial by media is an important function of his office.

Their Lordships now turn to the second and more substantial argument for the appellant, which stripped of elaboration comes to this. By its use of the expression "is likely to be contravened" section 14(1) contemplates both that the power of the High Court can and in suitable cases should be exercised to avert a threatened breach of constitutional rights, and also that the jurisdiction exists in cases short of absolute certainty that what is feared will come to pass. In the present case the impropriety was so gross that unless more time is allowed to elapse before the trial it must at the very least be likely that the minds of the jury will be poisoned, however hard the trial judge may try to put the damage right. Why wait for the trial, with all the stress for the appellant and uncertainty for those responsible for preparing the case which this will involve, when the High Court in its constitutional role can immediately nip the abuse in the bud?

Although this argument was made to seem very attractive their Lordships believe it to be misconceived, for the reasons already given by the courts in Trinidad and Tobago. The flaw can perhaps be seen most clearly in relation to section 5, and in particular to sections 5(2)(e) and (f) upon which the appellant based an important part of his argument. In the opinion of their Lordships those provisions have no bearing on the appeal. The purpose of sub-section (2) is to make clear that certain fundamental rights which would otherwise exist in law are not taken away. Here, neither Parliament nor any other body is seeking to take away the appellant's right to the fair trial which is part of the due process of law guaranteed by section 4(a). That right is undisputed, and the appellant has no need for recourse to the High Court in order to establish it. Properly analysed, the real gist of the appellant's complaint is that the adverse publicity will prejudice, not the existence of the right, but the exercise of it. Whether this complaint is well-founded is a matter for decision and if necessary remedy by the ordinary and well-established methods and principles of criminal procedure which exist independently of the Constitution, and which the newspapers and broadcasts could not even purport to abrogate. Provided that the safeguards remain in place, and are made

available to the appellant in the trial court, and if necessary on appeal, he has the benefit of the fair trial process to which he is entitled.

A similar flaw vitiates the arguments based on section 4. The "due process of law" guaranteed by this section has two elements relevant to the present case. First, and obviously, there is the fairness of the trial itself. Secondly, there is the availability of the mechanisms which enable the trial court to protect the fairness of the trial from invasion by outside influences. These mechanisms form part of the "protection of the law" which is guaranteed by section 4(b), as do the appeal procedures designed to ensure that if the mechanisms are incorrectly operated the matter is put right. It is only if it can be shown that the mechanisms themselves (as distinct from the way in which, in the individual case, they are put into practice) have been, are being or will be subverted that the complaint moves from the ordinary process of appeal into the realm of constitutional law. No such case is made out here. It is not even suggested that if an application to stay the trial is made, either at the commencement of the trial or in advance if a sufficient need is shown, the court will fail to receive it; or will not do its best to arrive at a solution which measures together the risk of prejudice, the steps which can be taken to ensure that the verdict is uninfluenced by improper comment, and the public interest in making sure that a case which has been committed for trial does in fact come to trial, and at a proper speed. Nobody could pretend that these are always easy decisions for the judge to make, but they are concerned with trial management within the context of a system whose fairness as a system has not been attacked. Thus, in the opinion of the Board, no constitutional question is invoked.

In expressing this conclusion their Lordships do not altogether foreclose the possibility of an application to the High Court for relief under the Constitution in a case of trial by media where the chance of a fair trial is obviously and totally destroyed, for there is no due process of law available in such a case to put the matter right. Thus in *R. v. Vermette* (No. 4) (1984) 15 D.L.R. (4th) 218 the majority of the Quebec Court of Appeal found that in a case described as "extreme" and "exceptional" and "unique", where the head of the Executive had by grossly extravagant comments in the National Assembly "destroyed for all practical purposes the only defence advanced by the accused" (page 225), the risk to the fair trial guaranteed by the Canadian Charter of Rights and Freedoms was so great that a permanent stay of the prosecution was the only appropriate remedy. That the High Court in Trinidad and Tobago would have jurisdiction to act in a similar way their Lordships see no reason to doubt, the more so since concurrent remedies are expressly preserved by section 14(1) of the

Constitution. The decision of the Board in *Harrikissoon v. Attorney General of Trinidad and Tobago* [1980] A.C. 265 does not stand in the way of this proposition, since that was a case where there was not even arguably an infringement of the appellant's rights. Equally, however, they have no doubt that it is only in a very rare case that an application to the High Court should be entertained. The proper forum for a complaint about publicity is the trial court, where the judge can assess the circumstances which exist when the defendant is about to be given in charge of the jury, and decide whether measures such as warnings and directions to the jury, peremptory challenge and challenge for cause will enable the jury to reach its verdict with an unclouded mind, or whether exceptionally a temporary or even permanent stay of the prosecution is the only solution.

It is for these reasons, which substantially accord with those of Warner J. and the Court of Appeal, that their Lordships have dismissed the appeal. In stating them their Lordships have not adverted to the robust and illuminating account by Sharma J.A. of the balance between the demands of a fair trial and a free press, as set in the context of social conditions in Trinidad and Tobago, or to the analysis of reported decisions on the question in various parts of the common law world. By this they intend no discourtesy, but since it will be for the trial judge to assess at the appropriate time what course best answers the interests of justice the expression by the Board of any opinion on the matter would be out of place.

In conclusion, their Lordships wish to acknowledge the assistance given by the economical and cogent arguments of counsel on both sides.