Seegum J v. The State of Mauritius 2021 SCJ 162

June 1, 2021

The appellant was prosecuted before the Intermediate Court for the offence of **"using an information and communication service for the purpose of causing annoyance"**, in breach of sections 46(h)(ii) and 47 of the Information and Communication Technologies Act (the **ICTA**). The appellant pleaded not guilty at trial but was found guilty and therefore appealed against the judgment of the learned Magistrate.

The appellant's contention was that section 46(h)(ii) of the ICTA breaches section 10(4) of the Constitution. Hence, the issue to be determined by the court was the constitutionality of section 46(h)(ii) of the ICTA, as it stood at the time of the commission of the present offences (but which has now been amended). The appellant submitted that section 46(h)(ii) offends the principle of legality, implied in section 10(4) of the Constitution, which requires that in criminal matters any law must be formulated with sufficient clarity and precision to enable a person to regulate his conduct.

Section 10(4) of the Constitution provides:

"No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed."

The Supreme Court noted that section 10(4) of the Constitution has been interpreted as impliedly providing for the **"requirement that in criminal matters any law must be formulated with sufficient precision to enable the citizen to regulate his conduct"** [vide *Ahnee v. Director of Public Prosecutions* [1999] 2 W.L.R. 1305]. In other words, for a criminal law to pass the test of constitutionality under section 10(4), it must be so worded that it allows the ordinary citizen to determine what constitutes an offence and what acts and omissions will render him liable to prosecution.
At the relevant time, section 46(h)(ii) of the ICTA, which has now been amended, read as follows:

"Any person who –
(…)
(h) uses an information and communication service, including telecommunication service, -
(ii) for the purpose of causing annoyance, inconvenience or needless anxiety to any person; (…)
shall commit an offence."

It was argued by learned senior counsel for the appellant that **"causing annoyance"** suffers from hopeless vagueness inasmuch as it is not defined in the ICTA and, as such, creates uncertainty. It does not allow the ordinary citizen to determine which conduct may be considered as causing annoyance and whether a particular conduct will fall within the purview of section 46(h)(ii).

Gunesh-Balaghee, Judge noted that the term **"causing annoyance"** used in section 46(h)(ii) is not defined in the

ICTA. Therefore, the court held that it should be given its ordinary meaning which is a derivative of the verb **“annoy”** and is defined in the Concise Oxford English Dictionary, Tenth Edition, as **“make a little angry”** or **“harm or attack repeatedly”**.

The court stated that the then section 46(h)(ii) was cast so widely that a wide array of communications, ranging from what are objectively clearly unacceptable communications (for example, child sexual abuse imagery) to evidently innocuous messages from the standpoint of the ordinary man, may arguably fall within its ambit (for example, a football fan who sends a message to another football fan for the purpose of “winding him up” which is legal in the offline world).

Furthermore, the court differentiated between the Mauritian provision and the English and Indian provisions. In the UK, there is the need to establish that an accused party has sent or caused to be sent a message which he knows to be false or, alternatively, that he has persistently made use of a public electronic communication network to send a message or to cause a message to be sent. In India as well, the elements of the offence include knowledge of the falsity of the message and, at the same time, the persistent use of a public electronic communications network to send the message. These additional elements in English and Indian law make the offence more objectively ascertainable by the courts and by the citizens.

The court added that, in Mauritius, a single message sent for the purpose of causing annoyance is caught by section 46(h)(ii), even if the content of the message is true. Additionally, the court highlighted that, in Mauritius, there are no guidelines regarding prosecutions under the old section 46(h)(ii) of the ICTA, unlike English and Indian law which provide for at least some clear and objective standards to determine whether an offence has been committed.

As a result, the court found that section 46(h)(ii), as it then was, has failed to define with sufficient clarity and certainty the conduct which falls within and that which falls outside the ordinary meaning of the expression **“causing annoyance”** for the purpose of determining whether a particular conduct is criminal. Therefore, it breaches the principle of legality and deprives a citizen of the protection of the law, and must be struck down as unconstitutional, being in breach of the principle of legality implied under section 10(4) of the Constitution. Hence, the court, accordingly, allowed the appeal and quashed the conviction and sentence of the appellant.

The appellant was represented by Mr **Manon Mardemootoo**, Senior Attorney from Dentons (Mauritius) LLP and Messrs. **Antoine Domingue**, Senior Counsel, together with Mr **Naveen Dookhit**, of Counsel.

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