SEEGUM J v THE STATE OF MAURITIUS

2021 SCJ 162

THE SUPREME COURT OF MAURITIUS

Record No. 8842

In the matter of:

Jugduth Seegum

Appellant

v

The State of Mauritius

Respondent

In the presence of:

The Honourable Attorney General

Co-Respondent

JUDGMENT

The appellant was prosecuted before the Intermediate Court on five counts of an information, 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"). Counts 3 and 4 were dismissed for want of prosecution so that the trial proceeded only on 3 counts of the information which read as follows-

"**COUNT 1**

That on or about the 19th of May 2012, at 09:47 pm, in Mauritius, one JUGDUTH SEEGUM, also called Vinod, 57 years, president of Government Teacher's Union, residing at Mon Désir, Vacoas, did wilfully and unlawfully use an information and communication service for the purpose of causing annoyance to another person, to wit: he used his email address and posted the following message on the webpage of GTU Mauritius Educators Forum through website facebook, "Dans dernier executive Oct 2011, jeeha ti p fer animation avec so lorcheste. How much was paid to jeeha? His sister Thaylamay had reaped the contract. Comier so ser ti paye li? Pli extra ou fine dza truv dan ene fete zis 2 dimun danser? Frere p chanter et ser p danser avec..beni. Dan gran midi .. Coller serrer.. ki zot rol?"

COUNT 2

That on or about the date and at the place aforesaid, at 10:01 pm, the said JUGDUTH SEEGUM, did wilfully and unlawfully use an information and communication service for the purpose of causing annoyance to another person, to wit: he used his email address and posted the following message on the webpage of GTU Mauritius Educators Forum through website facebook, " Jeeha so ser to gagne 80000rs pu organize sa fete la. Beni fine alwys tell me ki sa ene nenene sa.li pas kone ekrir ene mot.ki mo pas bizin kas latet r li.ki mo bzin vine dan comite et jouer mo rol.zordi li fine colle r sa nenene la".

COUNT 5

That on or about the date and at the place aforesaid, at 10:40 pm, the said JUGDUTH SEEGUM, did wilfully and unlawfully use an information and communication service for the purpose of causing annoyance to another person, to wit: he used his email address and posted the following message on the webpage of GTU Mauritius Educators Forum through website facebook, "Yaplz contact Beni at fed. He will do ndful. But u will have 2 invite beni as well, so that he can execute a hot item dance with jeeha sister. Cuma dir Saif et kareena."

The appellant who pleaded not guilty was found guilty under all three counts of the information and was sentenced to pay a fine of Rs 15,000 in respect of each count and to pay Rs 500 as costs. He appealed against the judgment of the learned Magistrate on 5 grounds of appeal. However, at the first sitting of the hearing of the appeal, Counsel for the appellant informed the Court that he was dropping grounds 1 and 2 and would only be proceeding with grounds 3, 4 and 5.

We propose first to deal with ground 5 which challenges the constitutionality of section 46(h)(ii) of the ICTA and which reads as follows:

5. In any event the conviction under counts I, II and V of the information cannot stand as section 46(h)(ii) of the Information and Communication Technologies Act is unconstitutional being inconsistent with and in breach of the principles of legality and legal certainty as entrenched under Part II of the Constitution."

Under this ground, it is the appellant's contention that section 46(h)(ii) of the ICTA breaches section 10(4) of the Constitution. It is to be noted that this point was not canvassed before the trial Court.

Section 10(4) of the Constitution provides:

> *"(4) 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."*

It is important to note 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:

> **"*46. Offences***
>
> ***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****."* [emphasis added].

It was argued by learned Senior Counsel for the appellant that *"causing annoyance"* suffers from 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). Counsel for the appellant referred to a number of cases which reaffirm the well established principle that criminal laws must be certain **(Douglas v DPP and Ors [2013] IEHC 343; R v Rimmington and R v Goldstein [2005] UKHL 63; Rajkoomar v The State** [2017 SCJ 100]**)**.

We find it of interest to refer to the Indian case of **Shreya Singhal v Union of India - Writ Petition (Criminal) No. 167 of 2012, (2013) [12 S.C.C. 73]** referred to by learned Senior Counsel for the appellant, in which the petitioners challenged the constitutionality of section 66A of the Information Technology Act of 2000 which provides for offences similar to those in section 46 of the ICTA. Section 66A is reproduced below-

> *"66-A. Punishment for sending offensive messages through communication service, etc.*
>
> ***Any person who sends, by means of a computer resource or a communication device,-***
>
> *(a) any information that is grossly offensive or has menacing character; or*
>
> *(b)* ***any information which he knows to be false, but for the purpose of causing annoyance****, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will,* ***persistently by making use*** *of such computer resource or a communication device; or*
>
> *(c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages,*
>
> ***shall be punishable with imprisonment for a term which may extend to three years and with fine.***
>
> *Explanation- For the purposes of this section, terms "electronic mail" and "electronic mail message" means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message."* [emphasis added]

In **Singhal** (supra), it was the contention of the petitioners that "*in creating an offence, Section 66A suffers from the vice of vagueness because unlike the offence created by Section 66 of the same Act, none of the aforesaid terms are even attempted to be defined and cannot be defined, the result being that innocent persons are roped in as well as those who are not. Such persons are not told clearly*

on which side of the line they fall; and it would be open to the authorities to be as arbitrary and whimsical as they like in booking such persons under the said Section. In fact, a large number of innocent persons have been booked and many instances have been given in the form of a note to the Court."

It was argued by Counsel for the petitioners that the language used in section 66A is so vague that neither would an accused person be put on notice as to what exactly is the offence which has been committed nor would the authorities administering the section be clear as to on which side of a clearly drawn line a particular communication will fall. Counsel for the Union of India, on the other hand, argued that although expressions that are used in section 66A may be incapable of any precise definition, they are not constitutionally vulnerable for that reason.

We find it apposite to reproduce extensively the following extract where the Supreme Court of India addressed the issue of vagueness and referred specifically to the English cases of **DPP v. Collins [2006] UKHL 40** and **Chambers v. DPP [2013] 1 Cr. App. R. 1**, where the courts in England considered the issue of vagueness by reference to section 127 of the UK Communications Act which provides for offences similar to those under section 46(h) of the ICTA -

> *"79. In fact, two English judgments cited by the learned Additional Solicitor General would demonstrate how vague the words used in Section 66A are. In Director of Public Prosecutions v. Collins, (2006) 1 WLR 2223, the very expression "grossly offensive" is contained in Section 127(1)(1) of the U.K. Communications Act, 2003. A 61 year old man made a number of telephone calls over two years to the office of a Member of Parliament. In these telephone calls and recorded messages Mr. Collins who held strong views on immigration made a reference to "Wogs", "Pakis", "Black bastards" and "Niggers". Mr. Collins was charged with sending messages which were grossly offensive. The Leicestershire Justices dismissed the case against Mr. Collins on the ground that the telephone calls were offensive but not grossly offensive. A reasonable person would not so find the calls to be grossly offensive. The Queen's Bench agreed and dismissed the appeal filed by the Director of Public Prosecutions. The House of Lords reversed the Queen's Bench stating:*
>
> > *"9. The parties agreed with the rulings of the Divisional Court that it is for the Justices to determine as a question of fact whether a message is grossly offensive, that in making this determination the Justices must apply the standards of an open and just multi-racial society, and that the words must be judged taking account of their context and all relevant circumstances. I would agree also. Usages and sensitivities may change over time. Language otherwise insulting may be used in an unpejorative, even affectionate, way, or may be adopted as a*

> *badge of honour ("Old Contemptibles"). There can be no yardstick of gross offensiveness otherwise than by the application of reasonably enlightened, but not perfectionist, contemporary standards to the particular message sent in its particular context. The test is whether a message is couched in terms liable to cause gross offence to those to whom it relates."*
>
> *….*
>
> *….*

80. Similarly in Chambers v. Director of Public Prosecutions, [2013] 1 W.L.R. 1833, the Queen's Bench was faced with the following facts:

> *"Following an alert on the Internet social network, Twitter, the defendant became aware that, due to adverse weather conditions, an airport from which he was due to travel nine days later was closed. He responded by posting several "tweets" on Twitter in his own name, including the following: "Crap1 Robin Hood Airport is closed. You've got a week and a bit to get your shit together otherwise I am blowing the airport sky high1" None of the defendant's "followers" who read the posting was alarmed by it at the time. Some five days after its posting the defendant's tweet was read by the duty manager responsible for security at the airport on a general Internet search for tweets relating to the airport. Though not believed to be a credible threat the matter was reported to the police. In interview the defendant asserted that the tweet was a joke and not intended to be menacing. The defendant was charged with sending by a public electronic communications network a message of a menacing character contrary to section 127(1)(a) of the Communications Act 2003. He was convicted in a magistrates' court and, on appeal, the Crown Court upheld the conviction, being satisfied that the message was "menacing per se" and that the defendant was, at the very least, aware that his message was of a menacing character."*

81. The Crown Court was satisfied that the message in question was "menacing" stating that an ordinary person seeing the tweet would be alarmed and, therefore, such message would be "menacing". The Queen's Bench Division reversed the Crown Court stating:

> *"31. Before concluding that a message is criminal on the basis that it represents a menace, its precise terms, and any inferences to be drawn from its precise terms, need to be examined in the context in and the means by which the message was sent. The Crown Court was understandably concerned that this message was sent at a time when, as we all know, there is public concern about acts of terrorism and the continuing threat to the security of the country from possible further terrorist attacks. That is plainly relevant to context, but the offence is not directed to the inconvenience which may be caused by the message. In any event, the more one reflects on it, the clearer it becomes that this message did not represent a terrorist threat, or indeed any other form of threat. It was posted*

> *on "Twitter" for widespread reading, a conversation piece for the defendant's followers, drawing attention to himself and his predicament. Much more significantly, although it purports to address "you", meaning those responsible for the airport, it was not sent to anyone at the airport or anyone responsible for airport security, or indeed any form of public security. The grievance addressed by the message is that the airport is closed when the writer wants it to be open. The language and punctuation are inconsistent with the writer intending it to be or it to be taken as a serious warning. Moreover, as Mr. Armson noted, it is unusual for a threat of a terrorist nature to invite the person making it to be readily identified, as this message did. Finally, although we are accustomed to very brief messages by terrorists to indicate that a bomb or explosive device has been put in place and will detonate shortly, it is difficult to imagine a serious threat in which warning of it is given to a large number of tweet "followers" in ample time for the threat to be reported and extinguished."*
>
> *82. These two cases illustrate how judicially trained minds would find a person guilty or not guilty depending upon the Judge's notion of what is "grossly offensive" or "menacing". In Collins' case, both the Leicestershire Justices and two Judges of the Queen's Bench would have acquitted Collins whereas the House of Lords convicted him. Similarly, in the Chambers case, the Crown Court would have convicted Chambers whereas the Queen's Bench acquitted him.* ***If judicially trained minds can come to diametrically opposite conclusions on the same set of facts it is obvious that expressions such as "grossly offensive" or "menacing" are so vague that there is no manageable standard by which a person can be said to have committed an offence or not to have committed an offence. Quite obviously, a prospective offender of Section 66A and the authorities who are to enforce Section 66A have absolutely no manageable standard by which to book a person for an offence under Section 66A. This being the case, having regard also to the two English precedents cited by the learned Additional Solicitor General, it is clear that Section 66A is unconstitutionally vague****."*
> [emphasis added]

Still in **Singhal** (supra), the court was of the view that information that may be "grossly offensive" or which "causes annoyance or inconvenience" are undefined terms which take into the net a very large amount of protected and innocent speech. The court stated –

> *"A person may discuss or even advocate by means of writing disseminated over the internet information that may be a view or point of view pertaining to governmental, literary, scientific or other matters which may be unpalatable to certain sections of society. It is obvious that an expression of a view on any matter may cause annoyance, inconvenience or may be grossly offensive to some. A few examples will suffice. A certain section of a particular community may be grossly offended or annoyed by communications over the internet by "liberal views" - such as the emancipation of women or the abolition of the*

caste system or whether certain members of a non proselytizing religion should be allowed to bring persons within their fold who are otherwise outside the fold. Each one of these things may be grossly offensive, annoying, inconvenient, insulting or injurious to large sections of particular communities and would fall within the net cast by Section 66A. In point of fact, Section 66A is cast so widely that virtually any opinion on any subject would be covered by it, as any serious opinion dissenting with the mores of the day would be caught within its net."

The court in **Singhal** found that section 66A of the Information Technology Act, 2000 was unconstitutionally vague and also struck down the section in its entirety as being violative of Article 19(1)(a) of the Indian Constitution which provides for the right to freedom of speech and expression and found that the section is not saved under Article 19(2) of the Constitution.

We must, before proceeding any further, observe that in the present case, it is not the contention of the appellant that section 46(h)(ii) of the ICTA breaches section 12 of the Constitution which provides for the right to freedom of expression. In addition, we note that although in the case of **Singhal**(supra), the Indian Supreme Court found that section 66A of the Information Technology Act, 2000 was unconstitutionally vague, it did not refer to the specific section of the Indian Constitution which provides that criminal laws have to be certain and, as stated above, it declared section 66A of the Information Technology Act, 2000 to be in breach of section 19 of the Indian Constitution which provides for the right to freedom of speech and expression.

Learned Counsel for the State for his part submitted that section 46(h)(ii) of the Act passes the test of legality and that of constitutionality.

He referred to the case of **D. Sabapathee v The State** [1999 MR 233], where the appellant questioned the vagueness of the term "trafficking" in the Dangerous Drugs Act 1986. It was the contention of the appellant that this expression violated the principle of legality. The Judicial Committee of the Privy Council set aside the appellant's contention.

We find it apposite to set out extensively the following extract from the case of **Sabapathee** (supra) –

“The principle of legality requires that an offence against the criminal law must be defined with sufficient clarity to enable a person to judge whether his acts or omissions will fall within it and render him liable to prosecution on the ground that they are criminal. But the jurisprudence of the European Court of Human Rights shows that the requirement for clarity must be seen in the light of what is practicable, and that it is permissible to take into account the way in which a statutory provision is being applied and interpreted in deciding whether or not the principle has been breached.

In ***The Sunday Times v. United Kingdom*** *[1979] 2 EHRR 245 the Court had occasion to consider the meaning of the expression "prescribed by law" in article 10(2) of the European Convention, which provides that the exercise of the right to freedom of expression in article 10(1) may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and necessary in a democratic society. At paragraph 49 of the judgment the Court said -*

> *In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. First, the law must be adequately accessible: the citizen must be able to have an indication that it is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows that this may be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.*
>
> *A similar approach has been taken by the Court to Article 7(1) of the European Convention, which contains provisions which are similar to those in section 10(4) of the Constitution of Mauritius. In Kokkinakis v. Greece [1993] 17 EHHR 397 the Court recognised in paragraph 40 of its judgment that the wording of many statutes is not absolutely precise and that the need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which are, to a greater or lesser extent, vague. In paragraph 52 of the judgment the Court said -*
>
> *Article 7(1) of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's*

> *detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the Courts' interpretation of it, what acts and omissions will make him liable.*
>
> *As the Board held in* ***Ahnee v. Director of Public Prosecutions*** *(1999) 2 W.L.R 1305 there is to be implied in section 10(4) the requirement that in criminal matters any law must be formulated with sufficient precision to enable the citizen to regulate his conduct. So the principle of legality applies, and legislation which is hopelessly vague must be struck down as unconstitutional. But the precision which is needed to avoid that result will necessarily vary according to the subject-matter. The fact that a law is expressed in broad terms does not mean that it must be held to have failed to reach the required standard. In an ideal world it ought to be possible to define a crime in terms which identified the precise dividing line between conduct which was, and that which was not, criminal. But some conduct which the law may quite properly wish to prescribe as criminal may best be described by reference to the nature of the activity rather than to particular methods of committing it. It may be impossible to predict all these methods with absolute certainty, or there may be good grounds for thinking that attempts to do so would lead to undesirable rigidity. In such situations a description of the nature of the activity which is to be penalised will provide sufficient notice to the individual that any conduct falling within that description is to be regarded as criminal. The application of that description to the various situations as they arise will then be a matter for the Courts to decide in the light of experience. In this way the law as explained by its operation in practice through case law will offer the citizen the guidance which he requires to avoid engaging in conduct which is likely to be held to be criminal."*

Learned Counsel for the respondent submitted that excessive rigidity in section 46(h)(ii) of the ICTA would render same nugatory. The test to be applied is an objective one, and the law passes the test of constitutionality. According to him, the question that should be posed is the following-

Would a reasonable man know or foresee the impugned messages to cause annoyance to the complainant? He submitted that that question has to be answered in the affirmative.

We find that the following principles may be culled from the case of **Sabapathee** (supra)-

1. The principle of legality requires that an offence against the criminal law should be drafted with sufficient precision to enable the ordinary citizen to regulate his conduct and to foresee, to a degree that is reasonable, the consequences of his conduct.

2. In application of the principle of legality, any legislation which is hopelessly vague should be struck down as unconstitutional.

3. The precision that is required in the drafting of a criminal law to avoid it being declared unconstitutional for vagueness will vary according to the subject matter.

4. Although certainty is highly desirable, this may lead to excessive rigidity and many laws creating criminal offences are inevitably vague in order to avoid that excessive rigidity and to keep pace with changing circumstances.

5. Although a law creating a criminal offence may be drafted in vague terms, it must however define offences in such a manner that an ordinary citizen can determine from the wording of the law what acts and omissions will make him liable.

6. Where the law is drafted in vague/broad terms, in some instances, the criminal conduct may best be described by reference to the nature of the activity, e.g. drug trafficking, rather than to the particular methods of committing it.

7. In such instances, it will be for the Courts to decide in the light of experience, on a case to case basis, whether the particular conduct of an accused party is criminal.

Discussions and Conclusions

The issue to be determined is 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), in so far as it relates to the offence of using an information and communication service for the purpose of causing annoyance, for which the appellant was prosecuted.

It is the appellant's contention 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.

Under the then section 46(h)(ii), the appellant was charged with using an information and communication service for the purpose of causing annoyance to another person. We are of the view that this provision of the law was indeed drafted

in broad and wide terms.

We note that the term *"causing annoyance"* used in section 46(h)(ii) is not defined in the ICTA. However, not all words or expressions used in a statute are defined. Generally a word or expression used in a statute is defined if it is intended that the word or expression should have a particular meaning or a meaning different from its dictionary meaning. As stated in **Crabbe on legislative drafting 2nd Edition VRAC Crabbe** –

> *"To summarise,*
>
> *(a) definitions should be used only*
>
> *(i) in case where there is a deviation from the ordinary meaning of the word or expression defined;*
>
> *(ii) to avoid unnecessary repetition;*
>
> *(iii) to indicate the use of an unusual or novel word or expression."*

Since the word "*annoyance*" is not defined in the ICTA, it follows that it should be given its ordinary meaning. The word "annoyance" is a derivative of the verb "annoy" which is defined in the Concise Oxford English Dictionary, Tenth Edition, as "make a little angry" or "harm or attack repeatedly".

The expression "*causing annoyance*" may, therefore, be defined as meaning "*making a little angry*". Now, one can think of an infinite number of situations and ways in which a person may use an information and communication service for the purpose of making another person a little angry. For instance, a football fan may send a one-off uncomplimentary and irritating message on Facebook to another football fan regarding the latter's team in order to "wind him up", or in other words to annoy him. Prima facie, the elements of the offence under section 46(h)(ii) would have been established. However, would any person seriously and reasonably consider or foresee such a conduct as being criminal?

As pointed out above, any legislation which is hopelessly vague must be struck down as unconstitutional and the precision which is required in the drafting of a criminal law to avoid it being declared unconstitutional for vagueness will necessarily vary according to the subject matter.

Is the then section 46(h)(ii) of ICTA "*hopelessly vague*"? There can be no doubt that the language used in section 46(h)(ii) denotes an offence having a very broad and wide embracing scope. Moreover, the expression "*causing annoyance or inconvenience*" is not an expression which immediately or automatically conjures up the idea of a conduct tainted by immorality, illegality or unlawfulness.

With regard to the need to articulate clear and objective standards in the law, we find it important and appropriate to compare the then section 46(h)(ii) of the ICTA to similar provisions of the law in the UK and India, namely section 66A of the Information Technology Act 2000 of India and section 127(2) of the UK Communications Act, 2003.

At the material time, section 46(h)(ii) provided 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"

Section 66A lays down that –

"Any person who sends, by means of a computer resource or a communication device -

(b) ***any information which he knows to be false****,* ***but for the purpose of causing annoyance****, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will,* ***persistently by making use*** *of such computer resource or a communication device,* ***shall be punishable with imprisonment for a term which may extend to three years and with fine.*** [emphasis added]

Section 127(2) stipulates-

"*(2) A person is guilty of an offence if,* ***for the purpose of causing annoyance****, inconvenience or needless anxiety to another, he—*

*(a) sends by means of a public electronic communications network****, a message that he knows to be false;***

(b) causes such a message to be sent; or

(c) ***persistently makes use*** *of a public electronic communications network."* [emphasis added]

It is immediately apparent that, although all the above provisions are drafted in similar terms, there is a marked difference 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, while in India 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 the English and Indian law make the offence more objectively ascertainable by the Courts and by the citizens.

Thus, 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**, while in the UK, the offence is only committed where the offender knows that the message is false or persistently makes use of a public electronic network**.** Moreover, in India, the offence is committed where the message is false and is sent persistently.

It is significant that although sections 66A of the Information Technology Act 2000 of India and section 127(2) of the UK Communications Act, 2003 are narrower in scope than section 46(h)(ii) of the ICTA, concerns have been raised about the propriety of the terms in which those provisions have been drafted. We have already alluded to the criticism leveled against section 66A in the case of **Singhal** (supra) where the Supreme Court of India struck down the section as being unconstitutional. As regards section 127(2) of the UK Communications Act, 2003, paragraphs 13.14 to 13.18 of the report of the Law Commission of England and Wales (Law Commission No. 381, 2018) entitled "Abusive and Offensive Online Communications: A Scoping Report (Law Com No. 381) (the "Law Commission Report") are pertinent-

> *"13.14 The two main communication offences that we have considered in this Report – section 1 of the MCA 1988 and section 127 of the CA 2003 – are both very widely cast, with section 127 in particular potentially drawing in a huge range of conduct.*
>
> *13.15 From a prosecution perspective, there are some clear advantages to the current offences. As conduct crimes, which do not require proof of any particular harm having been caused, they create fewer evidential barriers to prosecution. For example, the evidence of a victim is usually not necessary to demonstrate that the offence has*

been committed. The broad, flexible wording of the offences also allows their use across a wide range of conduct and means they can adapt to changing forms of communication, as social media develop, and evolving forms of harm.

13.16 However, our analysis has also raised concerns that in certain contexts the threshold for criminal liability prescribed by the terms of these offences may be set too low.

13.17 In particular, as we note in Chapter 11, the offence of sending a "false" communication or "persistently [making] use of an electronics communication network" for the "purpose of causing annoyance, inconvenience or needless anxiety to another" under section 127(2) of the CA 2003 is very wide in scope.

13.18 This in effect leaves a huge degree of discretion to police and prosecutors, who have the unenviable task of determining the appropriate degree of offending at which prosecution is warranted. Further, as we note in Chapter 5, concepts such as "gross offensiveness" that are relied on in both the CA 2003 and MCA 1988 are ambiguous and subjective, making the law less certain and leading to inconsistent outcomes."

We also find it apposite to refer to the following paragraphs under the heading "**CPS Prosecution Guidance"** from the Law Commission Report (supra) where the Law Commission analyses guidelines issued by the DPP on prosecutions under, inter alia, section 127 of the Communications Act (Crown Prosecution Service, *Social Media - Guidelines on prosecuting cases involving communications sent via social media* (21 August 2018)) -

"4.143 In considering whether prosecutors should exercise the discretion to prosecute a communications offence, further guidance is provided.

4.144 First, in weighing whether prosecution is proportionate and justified in light of the right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR), CPS guidance states that the relevant communication should be more than:

- *offensive, shocking or disturbing; or*
- *satirical, iconoclastic or rude comment; or*
- *the expression of unpopular or unfashionable opinion about serious or trivial matters, or banter or humour, even if distasteful to some or painful to those subjected to it; or*
- *an uninhibited and ill thought out contribution to a casual conversation where participants expect a certain amount of repartee or "give and take".*

4.145 Then in considering whether a prosecution is in the public interest, CPS guidance lists the following as relevant factors for consideration:

- *the likelihood of re-offending;*
- *the suspect's age or maturity;*
- *the circumstances of and the harm caused to the victim, including whether they were serving the public, whether this was part of a coordinated attack ("virtual mobbing"), whether they were targeted because they reported a separate criminal offence, whether they were contacted by a person convicted of a crime against them, their friends or family;*
- *whether the suspect has expressed genuine remorse;*
- *whether swift and effective action has been taken by the suspect and/or others for example, service providers, to remove the communication in question or otherwise block access to it;*
- *whether the communication was or was not intended for a wide audience, or whether that was an obvious consequence of sending the communication; particularly where the intended audience did not include the victim or target of the communication in question;*
- *whether the offence constitutes a hate crime.*

4.146 The effect of this guidance is that even where reported to law enforcement, not all conduct that might technically meet the broad terms of section 1 of the MCA 1988 or section 127 of the CA 2003 offences is actually prosecuted. For example, it may be judged that to do so would unreasonably infringe on freedom of expression; distasteful humour is a typical example. Alternatively, the circumstances of the offender may lead prosecutors to consider that the public interest would not be served by pursuing a criminal penalty; for example, where the offender is young and remorseful and their conduct did not cause substantial harm. [emphasis added]

4.147 However, in subsequent Chapters – in particular Chapter 5 on grossly offensive communications – we suggest that the guidelines may not be enough to resolve the interpretative challenges that are arising in the online context. As discussed further in Chapter 5, CPS guidelines do not of themselves have the force of law, but rather provide assistance with charging decisions. Where the underlying proscribed behaviour is broad, malleable, and ill-defined, CPS guidelines may simply not suffice, leaving too much to the charging discretion of prosecutors."

Thus, in the UK despite the fact that section 127 is narrower in scope than section 46(h)(ii), the CPS has issued guidelines given the challenges posed by the terms in which the law has been drafted. It is also noteworthy that, even where reported to law enforcement, not all conduct that might technically meet the broad terms of section 127 of the Communications Act 2003 is actually prosecuted. Further, as highlighted by the Law Commission, the guidelines may not be enough to resolve the interpretative challenges arising in the online context. In Mauritius not only are there no guidelines regarding prosecutions under the old section 46(h)(ii) of the ICTA but, in addition, unlike the English and Indian law which provide for at least some clear and objective standards to determine whether an offence has been committed (knowledge of falsity of the message or persistent use of a public electronic communication network), section 46(h)(ii) of ICTA is lacking in this respect.

Finally, we must also observe that it can be gleaned from the website of the Law Commission of England and Wales that in taking forward the recommendations made in the Law Commissions' Scoping Report, the Law Commission is working on the second phase of the project which will cover-

> *"1. Reform of the communications offences (in section 1 of the Malicious Communications Act 1988 and section 127 of the Communications Act 2003) to ensure that they are clear and understandable and provide greater certainty to online users and law enforcement agencies.*
>
> *…."*

We are fully alive to the fact that, with the advent of information and communication technology and its rapid growth, it has become a challenge to regulate communications on the internet and especially on social media platforms. The ease with which material may be published online, or shared via social networks has brought into sharp focus the abuse of the right to communicate freely on the internet and on social media platforms. Although our Constitution protects the right to freedom of expression, it does not mean that it gives carte blanche for the transmission of communications which contravene the basic standards of our society; a person may obviously exercise his right to communicate freely on the internet and on social media platforms, but in so doing he should ensure that he is in no way infringing the rights of others. Just as in the offline world a person cannot insult or defame others with impunity under the guise of exercising his right to freedom of expression, in the online context too there are certain parameters which

need to be respected. It is of utmost importance that those parameters be clearly defined, the more so when those parameters are meant to restrict freedom of expression.

It is undeniable that a number of challenges have been posed on the existing criminal law by the exponential growth of online communication and we certainly agree that it is imperative that those who make an abuse of their right to freedom of expression be taken to task by subjecting them to appropriate legislation enacted for that purpose. Although the legislator may, in enacting section 46(h)(ii), have been actuated by the laudable goal of addressing abusive and offensive online communications, he should have ensured that the said section which is a criminal provision has the quality of predictability and certainty, the more so when it limits the right to freedom of expression. Nor, dare we say, should the said provision have been drafted so as to criminalize online conduct when such conduct is perfectly legal in the offline world.

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”, a debt collector who sends a message to his creditor threatening recovery action, Counsel who sends an email to a Judge moving for a postponement for the tenth time of a longstanding case while apologising for any inconvenience caused, a colleague who makes a nasty remark on a comment made by another colleague on a Whatsapp group, a teacher who sends a message to his student scolding the latter for not having submitted his homework on time.

We must also point out that the above examples, apart from being perfectly innocuous in the eyes of the ordinary man, would also not constitute any offence if they were to take place in the offline world. However, in the online context they could potentially fall within the purview of section 46(h)(ii): the football fan, the debt collector, the colleague making comments on the Whatsapp group and the teacher could all potentially be charged for using an information and communication service for the purpose of causing annoyance, while Counsel could potentially be charged for using an information and communication service for the purpose of causing inconvenience.

In these circumstances, we are of the view that there is a risk that even an innocuous act can be held to be criminal under section 46(h)(ii). In view of that risk and of the resulting uncertainty, we believe that there was a need to define the offence under section 46(h)(ii) with sufficient precision by articulating clear and objective standards in the law so that a citizen could regulate his conduct and determine or foresee, to a reasonable degree, from the wording of the law, what acts and omissions would make him liable.

As was held in **Douglas v DPP** (supra), *"(it) must be here acknowledged, however, that in a common law system such as ours, absolute precision is not possible. One may therefore have perfectly general laws which can be adapted to new sets of facts within certain defined parameters, provided that the laws themselves articulate clear and objective standards. By analogy with what was stated by the Supreme Court in Cagney, it must also be clear that any judicial development in the sphere of criminal law must be largely incremental in nature, based on parameters which are obvious from earlier legal doctrine and jurisprudence."*

As rightly pointed out by learned Senior Counsel for the appellant, the ICTA does not provide any parameters within which the term "*annoyance*" should be interpreted.

As a result, we find 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.

Moreover, the Courts would be at pain to offer guidance to a citizen as to which conduct would constitute an offence under section 46(h)(ii) when the law is drafted in such wide terms, without any clear and objective criterion to render criminal a conduct which in some instances may be considered by most persons as innocuous. Section 46(h)(ii) certainly offers no clear distinction between a conduct which is innocuously annoying and one which is criminally reprehensible. It lacks precision and clarity and is "*hopelessly vague*". Leaving it up entirely to the Courts to determine which conduct is criminal on a case to case basis, with no discernible objective criteria, is giving a too wide discretion to the Courts and creating uncertainty in the law.

We may here aptly quote the following extract from **Rajkoomar v State** (supra)-

> *"We are of the view that the above principle of legality as authoritatively expounded by the Judicial Committee must be rigorously applied. It provides a compelling reason as to why the law must be couched in terms which convey with precision and clarity the conduct which it seeks to criminalise. Since no person may invoke ignorance of the law as an excuse, he is entitled to be informed beforehand by the clear and precise language of the law which act or omission on his part would render him liable to criminal sanction."*

Due to its lack of precision and clarity, section 46(h)(ii) breaches the principle of legality and deprives a citizen of the protection of the law, as secured under section 10 of the Constitution. In this context, learned Senior Counsel for the appellant referred us to the following extract in **R v Secretary of State for the Home Department, ex parte Simms (2000) 2 AC 115 at 131**, per Lord Hoffman:

> "*Fundamental rights cannot be overridden by general or ambiguous words (…) In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual".*

For the above reasons, we hold that section 46(h)(ii) of ICTA (as it stood at the time of the commission of the present offences), in so far as it relates to the offence of using an information and communication service for the purpose of causing annoyance, for which the appellant was prosecuted, must be struck down as unconstitutional, being in breach of the principle of legality implied under section 10(4) of the Constitution. We wish to add that we are not hereby making any pronouncement as to the constitutionality of the new redrafted section 46(h)(ii), as amended by Act No.14 of 2018.

In these circumstances, there is no need for us to consider the other grounds of appeal. We, accordingly, allow the appeal and we quash the conviction and sentence of the appellant under counts 1, 2 and 5.

D. Chan Kan Cheong
Judge

K.D. Gunesh-Balaghee
Judge

27 May 2021

Judgment delivered by Hon. K.D. Gunesh-Balaghee, Judge

For Appellant	**:**	**Mr M. Mardemootoo, Senior Attorney**
	:	**Mr A. Domingue Senior Counsel, together with Mr N. Dookhit, of Counsel**
For Respondent	**:**	**Ms K. Parson,State Attorney Mr M. Armoogum, Senior State Counsel together with Ms R. Segobin, State Counsel and Ms B. Bhagwan State Counsel**
For Co-Respondent	**:**	**Mrs B.G. Oogorah, State Attorney Mrs P.D.R. Goordyal Chittoo, Assistant Solicitor General together with Mrs D. Sewpal, Senior State Counsel**